

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

Abstract: The No Child Left Behind Act of 2001 ("NCLB") conditions the states' receipt of federal education funds on, among other things, the creation of testing schemes for elementary school students and the posting of test results. Although NCLB threatens the states' constitutional power to set education policy, two provisions of the law could potentially alleviate this threat: (1) an "unfunded mandates" provision prohibiting federal officers from requiring the states to spend funds not provided by NCLB, and (2) a provision allowing the U.S. Secretary of Education (the "Secretary") to waive provisions of NCLB at a state's request. These provisions, however, have not circumscribed the federal government's role to the satisfaction of some states, prompting Connecticut, a state whose own policies conflict with NCLB's testing requirements, to file the first state NCLB lawsuit against the federal government. This Note argues that Connecticut's claims that the Secretary's administration of these two provisions violates the Spending Clause are valid. This Note then focuses on the Spending Clause's prohibition of conditions that require a state to violate any other provision of the Constitution, arguing that NCLB, as it is currently administered by the Secretary, may force Connecticut and other states to violate the Equal Protection Clause.

INTRODUCTION

On January 8, 2002, President George W. Bush signed the No Child Left Behind Act of 2001 ("NCLB" or the "Act") into law at a high school in Hamilton, Ohio.¹ The President sat at a teacher's desk amongst a group of students and assured the audience that "the Federal Government will not micromanage how schools are run. We be-

¹ President's Remarks on Signing the No Child Left Behind Act of 2001 in Hamilton, Ohio, 1 PUB. PAPERS 23 (Jan. 8, 2002) [hereinafter Remarks]. See generally 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. (Supp. III 2003)). All references to individual provisions of the No Child Left Behind Act will be to the U.S. Code.

lieve strongly—we believe strongly the best path to education reform is to trust the local people.”²

The No Child Left Behind Act of 2001 was enacted pursuant to Congress’s Spending Clause power; it conditions the states’ receipt of federal education funds on compliance with certain mandates.³ Two of the most prominent mandates require states that accept the funds to develop and implement testing schemes, and to make those test results publicly available.⁴ The states and local schools are free to fashion their own curricula and to determine what academic content to include in their tests, but all such choices are made under the supervisory eye of the U.S. Department of Education (the “Department”).⁵

When NCLB became law, the President, Congress, and the U.S. Secretary of Education (the “Secretary”) all emphasized that the Act allows states the necessary flexibility to tailor local policies to local problems.⁶ Nevertheless, some states disagree.⁷ Although the Secretary may waive many of the Act’s requirements when states request exemptions, the Secretary is not required to honor those requests and has in fact denied many.⁸

² Remarks, *supra* note 1, at 25.

³ See OFFICE OF ELEMENTARY AND SECONDARY EDUC., U.S. DEP’T OF EDUC., NO CHILD LEFT BEHIND: A DESKTOP REFERENCE 3 (2002) [hereinafter ED, DESKTOP REFERENCE], available at <http://www.ed.gov/admins/lead/account/nclbreference/reference.pdf>; see also U.S. CONST. art. I, § 8, cl. 1.

⁴ See Avi Salzman, *A Fight over Ideas in Education Suit*, N.Y. TIMES, Aug. 28, 2005, § 14CN, at 5.

⁵ 20 U.S.C. § 6311 (Supp. III 2003). Subsection (a)(1) provides:

For any State desiring to receive a grant under this part, the State educational agency shall submit to the Secretary [of Education] a plan, developed by the State educational agency . . . that satisfies the requirements of this section and that is coordinated with other programs under this [Act and other education laws].

Id. § 6311(a)(1).

⁶ *Id.* § 6301 (“[The purpose of this title] can be accomplished by . . . providing greater decisionmaking authority and flexibility to schools and teachers in exchange for greater responsibility for student performance . . .”); Remarks, *supra* note 1, at 25 (“[S]chools not only have the responsibility to improve; they now have the freedom to improve.”); ED, DESKTOP REFERENCE, *supra* note 3, at 3 (“This historic reform gives states and school districts unprecedented flexibility in how they spend their education dollars, in return for setting standards for student achievement and holding students and educators accountable for results.”).

⁷ See *infra* notes 131–135 and accompanying text. See generally Caroline Hendrie, *NCLB Faces Hurdles in the Courts*, EDUC. WEEK, May 4, 2005, at 1 (discussing states that have considered suing the federal government over NCLB); Salzman, *supra* note 4.

⁸ See 20 U.S.C. § 7861(a); *infra* notes 148–160 and accompanying text.

NCLB erects a federal regulatory framework over education, despite a general understanding that the power to set education policy has traditionally been reserved to the states.⁹ Indeed, when the U.S. Supreme Court rejected an equal protection challenge to state school funding systems in the 1973 case of *San Antonio Independent School District v. Rodriguez*, the Court treaded cautiously in large part because it recognized the value of local control over public schools.¹⁰

Perhaps cognizant of the implications that NCLB could have on the balance of power between the federal government and the states, Congress included a so-called "unfunded mandates" provision in the Act.¹¹ Section 7907(a) provides that nothing in the Act shall be construed to authorize an officer of the federal government to mandate, direct, or control a state or a state's resources, or to mandate any state to spend funds not paid for under the Act.¹²

Despite this provision, Congress has not appropriated sufficient funds for states to comply fully with NCLB's requirements.¹³ Connecticut, for example, claims that it lacks the \$41.6 million necessary to comply with the Act's requirement that testing be conducted every year for elementary school students.¹⁴ Based largely on this lack of sufficient funding, in August 2005 Connecticut filed a lawsuit, *Con-*

⁹ See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (characterizing education as an aspect of the states' sovereign power); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 207–08 (1982) (interpreting a provision of the Education of the Handicapped Act so that the courts would not "overturn a State's choice of appropriate educational theories"). See generally 20 U.S.C. § 6301.

¹⁰ See 411 U.S. 1, 43–44, 49–53 (1973).

¹¹ See 20 U.S.C. § 7907(a) (Supp. III 2003).

¹² *Id.* The unfunded mandates provision was carried over from three earlier education statutes enacted during the 1990s. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 20, *Pontiac v. Spellings*, No. 05-CV-71535 (E.D. Mich. Aug. 5, 2005). The sponsor of the provision in the law in which it originally appeared, the Goals 2000: Educate America Act of 1993, explained that the provision was meant to "put to rest the concern that we are going to dictate from the Federal level that somewhere, some way, the local and State Governments will find money for our dictates." 139 CONG. REC. H7741 (1993) (statement of Rep. Goodling).

¹³ See NAT'L CONFERENCE OF STATE LEGISLATURES, TASK FORCE ON NO CHILD LEFT BEHIND FINAL REPORT, at ix–x (2005), available at http://www.ncsl.org/programs/educ/ncsl_report.htm (noting that at least a dozen studies have been conducted to estimate how much it costs the states to comply with NCLB's administrative requirements, and that in the best case scenario federal funding marginally covers these costs).

¹⁴ Salzman, *supra* note 4. See generally CONN. STATE DEP'T OF EDUC., COST OF IMPLEMENTING THE FEDERAL NO CHILD LEFT BEHIND ACT IN CONNECTICUT: LOCAL-LEVEL COSTS: PART II (2005), available at http://www.state.ct.us/sde/NCLB_Local_Level_Costs.pdf.

necticut v. Spellings, against the Secretary over the Secretary's refusal to waive the mandates that the state cannot afford to implement.¹⁵

It was not only lack of funding, however, that led Connecticut to challenge NCLB in court.¹⁶ The lawsuit also reveals a clash between two different approaches to education—the federal government's and Connecticut's—and questions the extent to which Congress can use its power under the Spending Clause to persuade the states to follow its policies by offering federal funds.¹⁷ Thus, in addition to challenging the Secretary's authority to withdraw Connecticut's education funding for noncompliance when the state does not receive sufficient funds to comply, Connecticut also alleges that the Secretary is unconstitutionally coercing Connecticut into following federal policy.¹⁸

This notion of "unconstitutional coercion" comes from the U.S. Supreme Court's Spending Clause jurisprudence, most clearly enunciated in the 1987 case of *South Dakota v. Dole*, under which the Court generally has upheld federal spending legislation so long as it complies with five relatively loose restrictions.¹⁹ First, Congress's exercise of the spending power must be in pursuit of the general welfare.²⁰ Second, Congress must condition the states' receipt of federal funds unambiguously.²¹ Third, the conditions imposed must be reasonably related to a national interest.²² Fourth, the conditions imposed must not violate any other constitutional provision.²³ And finally, Congress may not condition the states' receipt of federal funds in a coercive way.²⁴

Although challenges under *Dole* have almost always failed, in the 1997 case of *Virginia Department of Education v. Riley* the U.S. Court of Appeals for the Fourth Circuit struck down a funding condition on the grounds of *Dole*'s second ambiguity restriction, and suggested that the fifth coercion restriction might apply as well.²⁵ Significantly, *Riley*

¹⁵ See Complaint at 1, *Connecticut v. Spellings*, No. 3:05-cv-1330 (MRK) (D. Conn. Aug. 22, 2005).

¹⁶ Salzman, *supra* note 4. See generally Second Amended Complaint, *Spellings*, No. 3:05-cv-1330 (MRK) (D. Conn. June 6, 2006).

¹⁷ See Second Amended Complaint, *supra* note 16, at 42–43; Salzman, *supra* note 4.

¹⁸ Second Amended Complaint, *supra* note 16, at 42–43.

¹⁹ See *South Dakota v. Dole*, 483 U.S. 203, 207–12 (1987); *infra* notes 201–213 and accompanying text.

²⁰ *Dole*, 483 U.S. at 207.

²¹ *Id.*

²² *Id.* at 207–08.

²³ *Id.* at 208.

²⁴ *Id.* at 211.

²⁵ See 106 F.3d 559, 560–61, 569–72 (4th Cir. 1997) (en banc), *superseded by statute*, IDEA Amendments for 1997, Pub. L. No. 105-17, § 612, 111 Stat. 37, 60; *infra* note 281.

was an education case.²⁶ Connecticut's lawsuit presents an even more persuasive challenge to Congress's use of the Spending Clause, both generally and to advance education policy.²⁷ For decades before Congress seized the policy reins, education reformers worked toward education equity on the state level.²⁸ Although these reformers have had only limited success, *Rodriguez* implies that their ability to experiment with different approaches—in contrast to NCLB's one-size-fits-all approach—is imperative and, perhaps, constitutionally required.²⁹

This Note uses *Connecticut v. Spellings* in two respects: (1) as a vehicle for analyzing the constitutionality of NCLB under *Dole*, and (2) as an illustration of the extent to which the federal government—through the U.S. Department of Education—has become so entangled in state decision making on education that the local control celebrated in *Rodriguez* is slipping away.³⁰ Part I traces early education reforms, starting with the failed attempt to constitutionalize reform in *Rodriguez* and ending with state court and legislative efforts.³¹ Part II details the federal government's evolving role in education reform, culminating in the enactment of NCLB, and also recounts the major criticisms of the Act.³² Part III describes Connecticut's struggle to implement NCLB's requirements, including its lawsuit against the Secretary.³³ To set the stage for Connecticut's Spending Clause claims, Part IV traces the U.S. Supreme Court's Spending Clause jurisprudence over the last seventy years.³⁴ This Part also notes how the federal courts of appeals, and particularly the *Riley* court, have handled challenges to federal spending legislation.³⁵ Part V applies *Dole* to Connecticut's challenge.³⁶ Finally, Part VI focuses on the fourth *Dole* restriction.³⁷ This Part argues that, by refusing to waive the NCLB re-

²⁶ See *Riley*, 106 F.3d at 560–61. *Riley* involved a challenge to the Secretary's authority under the Individuals with Disabilities in Education Act. *Id.* at 560.

²⁷ See generally Second Amended Complaint, *supra* note 16.

²⁸ See *infra* notes 58–89 and accompanying text.

²⁹ See *Rodriguez*, 411 U.S. at 44, 49–50; see also *Lopez*, 514 U.S. at 565–66 (expressing concern that if Congress's power pursuant to the Commerce Clause were to become too broad, Congress would be able to intrude upon the states' education power by regulating each and every aspect of local schools).

³⁰ See *infra* notes 240–319 and accompanying text.

³¹ See *infra* notes 39–89 and accompanying text.

³² See *infra* notes 90–130 and accompanying text.

³³ See *infra* notes 131–170 and accompanying text.

³⁴ See *infra* notes 171–218, 231–239 and accompanying text.

³⁵ See *infra* notes 219–230 and accompanying text.

³⁶ See *infra* notes 240–279 and accompanying text.

³⁷ See *infra* notes 280–287 and accompanying text.

quirements, the Secretary is putting Connecticut at risk of violating the Equal Protection Clause as applied in *Rodriguez* because Connecticut does not have sufficient funds to implement the NCLB requirements and those requirements also clash with the state's policies.³⁸

I. EARLY ATTEMPTS AT EDUCATION REFORM: THE SUPREME COURT SENDS REFORMERS TO THE STATES

A. Reform Attempts in the Courts: School Funding Lawsuits

Almost thirty years before the No Child Left Behind Act of 2001 was signed into law, the U.S. Supreme Court turned education reformers away from the federal courts with its decision in *San Antonio Independent School District v. Rodriguez*, applauding local control over school districts for the diversity of approaches to education it allows.³⁹ Accordingly, reformers shifted to state courts with their school funding claims, where they were more favorably received.⁴⁰ Unfortunately, the courts' institutional structure as a non-political branch of government inhibited their efforts to effect significant change in education policy.⁴¹

1. *San Antonio Independent School District v. Rodriguez*: The Supreme Court (Almost) Shuts the Door Completely on Constitution-Based Education Reform

In 1973, the U.S. Supreme Court held in *Rodriguez* that Texas's school financing system, which had a disproportionate impact on public school students in low-property-wealth districts in the state, did not violate the Equal Protection Clause of the Fourteenth Amendment.⁴² The Court specifically found that wealth, in and of itself, is not a suspect classification entitled to strict scrutiny upon judicial review.⁴³ The Court further found that education is not a fundamental

³⁸ See *infra* notes 288–319 and accompanying text.

³⁹ See *infra* notes 42–54 and accompanying text. See generally 411 U.S. 1 (1973). Prior to the Court's decision in *Rodriguez*, many commentators had predicted an upheaval in public education similar to that following the Court's decision in *Brown v. Board of Education*. John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2361 (2004).

⁴⁰ See *infra* notes 58–63 and accompanying text.

⁴¹ See *infra* notes 64–78 and accompanying text.

⁴² 411 U.S. at 55.

⁴³ *Id.* at 22–25; see *infra* notes 46–50 and accompanying text.

right afforded explicit protection under the U.S. Constitution.⁴⁴ Thus, applying rational basis review to the state's school financing system, the Court held that the system did not violate the Equal Protection Clause because it reasonably furthered Texas's legitimate interest in retaining local control over the state's schools.⁴⁵

In analyzing whether wealth is a suspect classification under the Equal Protection Clause, the Court refused to accept the district court's reasoning for finding wealth to be a suspect classification—that because, under traditional school financing systems, some poorer students receive less expensive education than other more affluent students, these systems discriminate on the basis of wealth.⁴⁶ This finding, the Court reasoned, ignored two threshold questions: (1) whether it made a difference for purposes of consideration under the U.S. Constitution that the class of disadvantaged “poor” could not be identified or defined in customary equal protection terms; and (2) whether the relative—rather than absolute—nature of the deprivation asserted by the respondents was of significant consequence.⁴⁷ The Court answered both of these questions in the affirmative.⁴⁸

With regard to whether poor students living in low-property-wealth districts constituted a class cognizable in equal protection terms, the Court refused to extend strict scrutiny to such a large, diverse, and amorphous class with none of the traditional indicia of suspectness.⁴⁹

⁴⁴ See *Rodriguez*, 411 U.S. at 35. The Court rejected the respondents' argument that education is a fundamental right under the U.S. Constitution because, without an education, citizens cannot fully realize other, explicitly protected rights, such as the First Amendment freedoms. *Id.* at 35–36; cf. *id.* at 62–63 (Brennan, J., dissenting) (disagreeing with the Court's assertion that a right may only be deemed “fundamental” if it is explicitly or implicitly guaranteed by the Constitution, and arguing instead that the “fundamentality” of any given right is, “in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed”). A complete discussion of the Court's holding that education is not a fundamental right is beyond the scope of this Note. For further discussion, see Victoria J. Dodd, *A Critique of the Bush Education Proposal*, 53 ADMIN. L. REV. 851, 863–67 (2001) (arguing that history, precedent, and policy prescribe that the Supreme Court should overrule *Rodriguez* and establish a fundamental right to education).

⁴⁵ See *Rodriguez*, 411 U.S. at 55.

⁴⁶ See *id.* at 19.

⁴⁷ *Id.*

⁴⁸ *Id.* at 25.

⁴⁹ *Id.* at 28 (“The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”). The respondents offered two other ways of defining the affected class: (1) the comparative personal wealth of the students' families, and (2) district wealth. *Id.* at

The Court was particularly reluctant to apply strict scrutiny because the respondents had not provided sufficient proof that the poorest families necessarily resided in the districts with the lowest levels of property wealth.⁵⁰ With regard to whether an absolute deprivation of education was required, the Court reasoned that the Equal Protection Clause does not require absolute equality; nor, in light of the infinite variables that affect the education process, could any financing system assure such equality except in the most relative sense.⁵¹ The Court also questioned whether quality of education could even be determined by the amount of money expended for it.⁵²

In holding that poor students were not a suspect class and that Texas's interest in retaining local control over school districts survived rational basis review, the Court stressed the value in local control.⁵³ Stating that pluralism allows schools to experiment more freely and citizens to participate more directly, the Court emphasized that no area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.⁵⁴

Since *Rodriguez*, the Supreme Court has not closed its doors to education equal protection cases completely.⁵⁵ In the 1982 case of *Plyler v. Doe*, for example, the Court held that Texas could not absolutely deny a public education to undocumented immigrants without violating the Equal Protection Clause.⁵⁶ Still, such decisions have gen-

25, 27. The Court rejected both of these alternative classifications. *Id.* at 27-28. With regard to comparative personal wealth, the Court held that even if the plaintiffs' proof supported the allegation that the less wealthy received less money for education, which it did not, the Court would still be reluctant to grant suspect class status to a class so large and diverse. *Id.* at 26. With regard to district wealth, the Court refused to extend strict scrutiny to a class defined merely by the common factor of residence in districts that happen to have less property wealth than other districts. *Id.* at 28.

⁵⁰ See *Rodriguez*, 411 U.S. at 23.

⁵¹ *Id.* at 23-24.

⁵² *Id.* at 23, 24 & n.56.

⁵³ See *id.* at 49-53. For example, the Court noted: "[T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *Id.* at 43. Acknowledging that almost every other state used a school financing system similar to Texas's system, the Court further explained that "it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State." *Id.* at 44.

⁵⁴ *Id.* at 50.

⁵⁵ See *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

⁵⁶ See *id.*

erally been limited to absolute denials of education; they have not been extended to educational inequity.⁵⁷

2. State Courts: Reformers Find New Hope with State Constitutions and Statutes

With the federal courts largely closed off to educational inequity claims, parents, students, and community groups turned to the state courts and other theories to challenge school funding schemes and state education legislation having a disparate impact on minority and low-income populations.⁵⁸ The highest courts of most states have decided at least one school funding challenge, with many state supreme courts hearing protracted serial litigation.⁵⁹

Unlike the *Rodriguez* Court, most state courts generally have been receptive to such cases.⁶⁰ Courts have interpreted state constitutional guarantees of public education as guarantees of educational opportunity, not of equal dollar amounts per student.⁶¹ Still, many plaintiffs have successfully argued that disparities in property value among local school districts have resulted in inequitable funding levels, and thus inequitable distribution of resources, among districts.⁶² Plaintiffs have alleged state constitution equal protection violations, state constitution education article violations, violations of Title VI of the Civil

⁵⁷ See *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 461–62 (1988) (holding that denying an indigent student school transportation for failure to pay school bus fees did not violate the Equal Protection Clause); *Martinez v. Bynum*, 461 U.S. 321, 333 (1983) (holding that denying tuition-free education to students who live apart from their parents and reside in the district for the primary purpose of attending the free public schools did not violate the Equal Protection Clause).

⁵⁸ See *Dayton & Dupre*, *supra* note 39, at 2364.

⁵⁹ See generally *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Sec'y of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist (Levittown)*, 439 N.E.2d 359 (N.Y. 1982); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979).

⁶⁰ See, e.g., *McDaniel v. Thomas*, 285 S.E.2d 156, 157 (Ga. 1981); *Rose*, 790 S.W.2d at 209; *McDuffy*, 615 N.E.2d at 519.

⁶¹ See *Rodriguez*, 411 U.S. at 24 & n.56; *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 939 (Cal. 1976); *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1018 (Colo. 1982).

⁶² See *McDaniel*, 285 S.E.2d at 157 (“[W]e know of no sister State which has refused merits treatment to such issues, and we would regard our own refusal to adjudicate plaintiffs’ claim of constitutional infringement an abdication of our constitutional duties.” (quoting *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 443 N.Y.S.2d 843, 854 (App. Div. 1981), *modified*, 439 N.E.2d 359 (N.Y. 1982))); *Dayton & Dupre*, *supra* note 39, at 2377. *But see Ex parte James*, 836 So. 2d 813, 819 (Ala. 2002) (“[W]e now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature.”).

Rights Act of 1964, and "accountability" violations under recent state legislative reform efforts.⁶³

The decisions handed down by the courts have had sweeping consequences for children, parents, schools, and taxpayers.⁶⁴ School funding litigation has prompted major funding changes, including tax increases and the redirection of resources throughout decades of serial litigation.⁶⁵ Although courts often have granted broad deference to legislative policies on taxation and school funding, many courts have nonetheless seen it as their duty to interpret provisions of state constitutions and adjudicate the constitutionality of school finance systems.⁶⁶

Despite these sweeping consequences, however, plaintiffs' victories in the state courts have not led to widespread—or even limited—changes in educational inequities.⁶⁷ Mere declarations that school funding systems are unconstitutional have not substantially furthered education reform; instead, such declarations have been followed by little progress.⁶⁸ After several decades of continuous court involve-

⁶³ See *Serrano II*, 557 P.2d at 930 (equal protection); *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 745 (N.H. 2002) (accountability standards); *Robinson v. Cahill*, 303 A.2d 273, 287 (N.J. 1973) (state constitution education article); *Campaign for Fiscal Equity v. State (CFE)*, 655 N.E.2d 661, 669 (N.Y. 1995) (Title VI).

⁶⁴ *Dayton & Dupre*, *supra* note 39, at 2397.

⁶⁵ *Id.* at 2398. For example, the Kentucky Supreme Court made this declaration in *Rose v. Council for Better Education*:

This decision applies to the entire sweep of the system—all parts and parcels. This decision applies to the statutes creating, implementing, and financing the system and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification—the whole gamut of the common school system in Kentucky.

790 S.W.2d at 215.

⁶⁶ Compare *Lujan*, 649 P.2d at 1018 (recognizing the need for judicial deference to the legislature), and *McDaniel*, 285 S.E.2d at 165 (same), with *Rose*, 790 S.W.2d at 209 (recognizing a judicial duty to adjudicate education funding disputes), and *McDuffy*, 615 N.E.2d at 519 (same).

⁶⁷ See *Dayton & Dupre*, *supra* note 39, at 2405–06; John Dayton et al., *Education Finance Litigation: A Review of Recent State High Court Decisions and Their Likely Impact on Future Litigation*, 186 EDUC. L. REP. 1, 1 (2004) (noting that of the thirty-six states that have issued decisions on the merits of school funding suits, nineteen have upheld the funding system while seventeen have declared them unconstitutional).

⁶⁸ *Dayton & Dupre*, *supra* note 39, at 2406 (observing that many states are closer to fiscal equity in education funding without litigation than those states whose courts have been involved in serial funding litigation).

ment in education "reform," funding cases demonstrate that reform is difficult to achieve without political will.⁶⁹

The courts' institutional structure prevents them from determining—much less implementing—effective solutions to school funding challenges.⁷⁰ One critic has commented that judicial restraint limits state courts in several ways.⁷¹ First, it prevents the courts from "inventing" rights that do not appear explicitly in state constitutions.⁷² Although all state constitutions contain an education clause mandating some level of free public education, the level of duty imposed on the legislative and executive branches varies from state to state and is rarely clear.⁷³ Moreover, when state constitutions do, either explicitly or implicitly, require the state to provide a quality education, judicial restraint causes courts to pause before defining and enforcing that standard.⁷⁴ Whether the courts view themselves as lacking the expertise necessary to develop a standard, or view themselves as incapable of enforcing a standard, they typically have deferred to the political branches in this area.⁷⁵ Even where courts determined some standard and found that the state school finance system violated it, they have been reluctant to order anything other than limited remedies.⁷⁶

⁶⁹ See *id.*; see also James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 185 (2003) (noting that rather than leading to equalization in funding among school districts, school funding lawsuits have often led to reduced overall spending on schools, as well as acrimony between legislatures and courts).

⁷⁰ See William E. Thro, *An Essay: The School Finance Paradox: How the Constitutional Values of Decentralization and Judicial Restraint Inhibit the Achievement of Quality Education*, 197 EDUC. L. REP. 477, 482 (2005).

⁷¹ See *id.* at 482–84.

⁷² See *id.* at 482.

⁷³ Compare MASS. CONST. pt. 2, ch. 5, § 2 (mandating that a public education system be established), and N.Y. CONST. art. XI, § 1 (same), with KY. CONST. § 183 (mandating a level of quality for public education), and N.J. CONST. art. VIII, § 4 (same).

⁷⁴ See Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996) ("What constitutes a 'high quality' of education, and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards.").

⁷⁵ See *id.*; Skeen v. State, 505 N.W.2d 299, 315 (Minn. 1993) (holding that the state constitution required a minimum quality of education, but defining the quality standard as the minimum standard for accreditation already used by the state board of education); see also George D. Brown, *Binding Advisory Opinions: A Federal Court's Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 546 (1994) (arguing that state judicial decisions in the education reform arena resemble a set of guidelines for the next, legislative step in the process, unlike federal judicial decisions, which issue judgments designed to affect the rights and duties of the litigants before them).

⁷⁶ Thro, *supra* note 70, at 483–84; see Brown, *supra* note 75, at 549.

Because courts continue to defer to the legislative and executive branches, it is unlikely that school funding litigation in state courts could ever lead to meaningful and lasting education reform; indeed, the U.S. Supreme Court in *Rodriguez* questioned whether school funding is even related to student achievement at all.⁷⁷ Nevertheless, this type of litigation continues to wend its way through the courts, while high-property-wealth districts retain or even increase their quality of education and low-property-wealth districts fail to generate the popular and legislative support they need to overcome the political influence of high-property-wealth districts.⁷⁸

B. *Reform Attempts in the State Legislatures: Education Reform Laws*

In the meantime, some scholars have argued that the key to a lasting resolution to the school funding problem is to persuade the voting public that making the goal of adequate education for all children a reality is consistent with their own self-interest.⁷⁹ In fact, rather than continuing to bring school funding lawsuits, they argue, plaintiffs' resources would be better spent on lobbying the electorate and the legislatures to eliminate educational disparities among districts—not because a court finds them unconstitutional, but because such disparities are harmful to the whole community.⁸⁰ School funding litigation can be a useful tool for bringing reform issues to the public's attention, but

⁷⁷ See *Rodriguez*, 411 U.S. at 24 n.56, 47 n.101; *Edgar*, 672 N.E.2d at 1191 (deferring to the state legislature); *Skeen*, 505 N.W.2d at 318 (deferring to the state board of education); Thro, *supra* note 70, at 484 (arguing that judicial restraint prevents meaningful education reform). One scholar has argued, however, that courts recently have been crafting a new and potentially effective role for themselves in education reform cases, by fashioning legal standards that allow them to keep an eye on the political branches and to intervene by exercising the "veto" of judicial review when they choose to do so. William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1230 (2004).

⁷⁸ See Dayton & Dupre, *supra* note 39, at 2409–10. See generally *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (revisiting the court's decision in *McDuffy*); *Abbott*, 575 A.2d 359 (striking down education funding legislation passed after the court's decision in *Robinson*); *CFE*, 655 N.E.2d 661 (deciding state constitutional challenge to school financing system against the backdrop of the court's decision upholding the system challenged in *Levitown*); *Complaint, Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, No. CV-05-4019406-S (Conn. Super. Ct. Nov. 21, 2005) (alleging that Connecticut's school financing system violates the education article and equal protection provisions of the Connecticut constitution).

⁷⁹ Dayton & Dupre, *supra* note 39, at 2410.

⁸⁰ See *id.* Emerging education reforms such as vouchers and charter schools may impede efforts to persuade the public, however, if these reforms reduce the public's stake in improving the state of public education. See *id.* at 2411.

litigation alone is insufficient to bring about substantive, lasting change.⁸¹ In order to achieve a long-term leveling of resources across districts and an adequate level of education for all students, these scholars argue, plaintiffs must shift from the courts to the political process, and attempt to build a coalition for school funding reform.⁸²

Indeed, some education reformers have done just that, and many state legislatures have responded by mounting large-scale reforms of their school finance systems.⁸³ Some state legislatures have assumed a larger role not only in regulating and contributing to local school budgets, but also in articulating clear policy goals for public education, a task that previously had been left to the local districts.⁸⁴ To leave some measure of local control intact, states have linked policy areas like teacher education, teacher evaluation, academic standards and testing, and other accountability measures to incentives and sanctions, rather than mandating such policy choices.⁸⁵ Nonetheless, accountability reforms have somewhat reduced the discretionary decision-making authority of local school boards and administrators.⁸⁶

Unfortunately, these recent attempts at school reform by state legislatures have not substantially affected educational inequities.⁸⁷ Some scholars have argued that state reform efforts have failed in this respect because they do not affect power relationships or fundamentally change schools' accustomed practices and organization.⁸⁸ Nevertheless, the *Rodriguez* Court implied that the opportunities for experimentation and diversity of approaches that local control provides outweigh such negatives.⁸⁹

⁸¹ See *id.*

⁸² See *id.*

⁸³ See DAVID T. CONLEY, WHO GOVERNS OUR SCHOOLS? CHANGING ROLES AND RESPONSIBILITIES 3-5 (2003).

⁸⁴ See *id.* at 5.

⁸⁵ See *id.*; Kenneth H. Bacon, *Report Cards: Connecticut Grades Its Schools and Holds Officials Responsible—Statewide Tests That Focus on the Three R's Add Element of Accountability—Writing: Theory and Practice*, WALL ST. J., Apr. 24, 1990, at A1 (describing the state's Connecticut Mastery Test system and how the system had been implemented).

⁸⁶ See Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL'Y REV. 99, 101 (1996); Bacon, *supra* note 85, at A1 (discussing the state's increased presence under the Connecticut Mastery Test system).

⁸⁷ See Rebell & Hughes, *supra* note 86, at 103.

⁸⁸ *Id.* at 104.

⁸⁹ See 411 U.S. at 49-53.

II. RECENT EDUCATION REFORMS: THE FEDERAL GOVERNMENT'S EVOLVING ROLE

In the face of only somewhat successful state attempts to achieve educational equity, Congress has increasingly asserted itself in the education policy arena in recent decades.⁹⁰ More than thirty-five years before the federal government extended its reach into the depths of state and local education policy with NCLB, Congress passed the Elementary and Secondary Education Act of 1965 ("ESEA").⁹¹ With Title I of the ESEA, Congress intended to support the states in educating impoverished, underachieving students.⁹² Over the following years, as the courts heard school funding litigation and the state legislatures fashioned education reform legislation, the federal government's supportive role evolved into a more dominant one.⁹³ Ultimately, NCLB was enacted in January 2002.⁹⁴ The President touted the Act as a bargain of "flexibility for accountability" between the federal government and the states.⁹⁵ Nonetheless, by enacting a comprehensive regulatory scheme, Congress and the President have sent a message to the states that the federal policy is the right policy, to which state policies will take a back seat.⁹⁶ Education reformers, scholars, teachers, and parents disagree, however, about whether NCLB is *the* path to educational equity.⁹⁷

A. Early Federal Reforms: Title I of the Elementary and Secondary Education Act of 1965

The federal government's role in education policy largely began with Title I of the Elementary and Secondary Education Act of 1965.⁹⁸

⁹⁰ See CONLEY, *supra* note 83, at 26-30.

⁹¹ See *infra* notes 98-107 and accompanying text. See generally Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (current version at 20 U.S.C. § 6301 (Supp. III 2003)).

⁹² See *infra* notes 98-102 and accompanying text.

⁹³ See *infra* notes 102-107 and accompanying text.

⁹⁴ See *infra* notes 108-110 and accompanying text.

⁹⁵ U.S. DEP'T OF EDUC., THE NO CHILD LEFT BEHIND ACT OF 2001 EXECUTIVE SUMMARY 2 (2002), available at <http://www.ed.gov/nclb/overview/intro/execsumm.pdf>.

⁹⁶ See Press Release, U.S. Dep't of Educ., Statement by Secretary Spellings on Recent Legislative Action in Utah (Apr. 20, 2005), available at <http://www.ed.gov/news/pressreleases/2005/04/04202005a.html> (stating in response to anti-NCLB legislative action in Utah that "[t]urning back the clock and returning to the pre-NCLB days of fuzzy accountability and hiding children in averages will do nothing to help the students who are currently enrolled in Utah's schools").

⁹⁷ See *infra* notes 119-130 and accompanying text.

⁹⁸ See Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, tit. 1, §§ 201-212, 79 Stat. 27, 27-36 (current version at 20 U.S.C. § 6301 (Supp. III 2003)).

Title I provided federal funds to local school districts with high concentrations of children from low-income families.⁹⁹ The law operated narrowly to support the states in paying the extra costs of educating "educationally disadvantaged" students.¹⁰⁰ Congress later revised ESEA with the Improving America's Schools Act of 1994.¹⁰¹ With this revision, Congress shifted its focus, requiring the states to hold disadvantaged students benefiting from Title I programs to the same standards as all other students.¹⁰²

In recent years, federal influence over education policy has grown.¹⁰³ After the National Commission on Excellence in Education examined the quality of education at the Secretary's direction and released its report, *A Nation at Risk*, in 1983, the federal government focused its attention more sharply on the discouraging state of public education across the country.¹⁰⁴ As better research data regarding the state of education became available, there were more opportunities for national pronouncements of education policy.¹⁰⁵ Presidential administrations and Congresses have seized upon these opportunities

⁹⁹ See Elementary and Secondary Education Act § 201; INDEP. REVIEW PANEL, IMPROVING THE ODDS: A REPORT ON TITLE I FROM THE INDEPENDENT REVIEW PANEL 2 (2001) [hereinafter IRP], available at http://www.cep-dc.org/pubs/improvingoddsreporttitlei_irp/improvingoddsreporttitleipanel.pdf.

¹⁰⁰ IRP, *supra* note 99, at 2; see 146 CONG. REC. S3232-33 (2000) (statement of Sen. Gregg) (describing how Title I has operated in the past, and how NCLB improves Title I).

¹⁰¹ See generally Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (current version at 20 U.S.C. § 6301 (Supp. III 2003)).

¹⁰² IRP, *supra* note 99, at 3. States could either devise their own standards by state law, or use standards devised by Congress in the Goals 2000: Educate America Act ("Goals 2000"). *Id.*; see S. REP. NO. 103-292, at 7 (1993) (finding that there was a need for a framework that supports state and local efforts to prepare all students to meet rigorous academic standards). See generally Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994) (codified as amended in scattered sections of 20 U.S.C.). Goals 2000 attempted, among other things, to prescribe a proper federal role in education policy. See § 2, 108 Stat. at 128-29; S. REP. NO. 103-292, at 57.

¹⁰³ See CONLEY, *supra* note 83, at 26-30.

¹⁰⁴ See NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM 5-6 (1983), available at <http://www.ed.gov/pubs/NatAtRisk/risk.html> (concluding that educational performance was declining, in large part because of disturbing inadequacies in the way the educational process is controlled); T.H. Bell, *Renaissance in American Education: The New Role of the Federal Government*, 16 ST. MARY'S L.J. 771, 772 (1985) (describing the release of *A Nation at Risk* as a key turning point in education reform); see also Debra Viadero, *Race Report's Influence Felt 40 Years Later*, EDUC. WEEK, June 21, 2006, at 1 (discussing a report commissioned by the then-U.S. Office of Education and released in July 1966, entitled "Equality of Educational Opportunity" but better known as the "Coleman Report," that called attention to disparities in education).

¹⁰⁵ See CONLEY, *supra* note 83, at 26.

enthusiastically.¹⁰⁶ This more emphatic federal role is reflected in the reauthorized Elementary and Secondary Education Act of 1965, known as the No Child Left Behind Act of 2001.¹⁰⁷

B. *A More Comprehensive Role: The No Child Left Behind Act of 2001*

The No Child Left Behind Act of 2001 was initiated by President George W. Bush and passed with overwhelming bipartisan support in Congress.¹⁰⁸ The Act embodies four key principles: stronger accountability for results, greater flexibility for school districts and schools in the use of federal funds, more choices for parents of children from disadvantaged backgrounds, and an emphasis on teaching methods that have been demonstrated to work.¹⁰⁹ Unlike prior versions of Title I of ESEA, NCLB applies to all public school students, not only the disadvantaged.¹¹⁰

1. Overview of NCLB

NCLB conditions the receipt of certain education funds on the states' compliance with federal mandates.¹¹¹ These mandates particularly emphasize state, district, and school accountability for the education of their children.¹¹² For example, each state must develop state-wide standards for reading, mathematics, and science of challenging academic content and achievement that apply to all children.¹¹³ In order to measure students' achievement of these standards, the states must design and implement annual tests.¹¹⁴ States must make the test results available to the public annually, disaggregated within every state, district, and school by gender, major racial and ethnic groups, English proficiency, migrant status, disability, and status as economically disadvantaged, so that interested parties can compare results among these groups.¹¹⁵ By the end of the 2013–2014 school year, all

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 27–29. See generally 20 U.S.C. § 6301 (Supp. III 2003).

¹⁰⁸ See ED, DESKTOP REFERENCE, *supra* note 3, at 9.

¹⁰⁹ See 20 U.S.C. § 6301; ED, DESKTOP REFERENCE, *supra* note 3, at 9–11. This Note focuses on the flexibility and accountability principles.

¹¹⁰ Second Amended Complaint, *supra* note 16, at 8–9.

¹¹¹ See ED, DESKTOP REFERENCE, *supra* note 3, at 9–10.

¹¹² See *id.* at 9.

¹¹³ 20 U.S.C. § 6311(b)(3)(C)(i)–(ii) (Supp. III 2003).

¹¹⁴ *Id.*

¹¹⁵ *Id.* § 6311(b)(3)(C)(xiii), (h)(1)(C)(i)–(ii).

students in each group must meet proficiency as defined by the state's standards and measured by performance on its tests.¹¹⁶

The Act grants the Secretary the authority to waive its statutory and regulatory requirements.¹¹⁷ A state educational agency requesting a waiver must, among other things, describe how the waiving of a requirement will (1) increase the quality of instruction for students, and (2) improve the academic achievement of students.¹¹⁸

2. Criticisms of NCLB

NCLB's stated purpose is to raise expectations for low-income students and to achieve educational equity.¹¹⁹ Opinions are mixed, however, as to whether NCLB achieves a substantial step toward this goal.¹²⁰ Education advocates and members of Congress have attacked NCLB's focus on testing as the method for measuring schools' progress, claiming that testing narrows the curriculum by prompting teachers to "teach to the test," taking time away from other valuable academic and social activities.¹²¹ NCLB also provides incentives for states to create

¹¹⁶ See *id.* § 6311(b)(2)(F).

¹¹⁷ *Id.* § 7861(a).

¹¹⁸ 20 U.S.C. § 7861(b)(1) (Supp. III 2003).

¹¹⁹ *Id.* § 6301 ("[The purpose of this Act can be accomplished by] ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement . . ."); see 149 CONG. REC. S194 (2003) (statement of Sen. Gregg) ("[T]he purpose of this bill is to make sure kids learn. These people who put these plans together are excited about the fact that they now have a law they can follow which allows them to make sure that kids do learn.").

¹²⁰ See *infra* notes 121–124 and accompanying text. See generally Pascal D. Forgione, Jr., *One Language: With Standards Comes a Requirement to Reduce Variability in the Quality of Instruction*, QUALITY COUNTS AT 10: A DECADE OF STANDARDS-BASED EDUC., Jan. 2006, at 62, available at <http://www.edweek.org/ew/articles/2006/01/05/17forgione.h25.html> (arguing that standards of the type encompassed in NCLB are a necessary first step to closing the achievement gap); Amy M. Reichbach, Note, *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*, 45 B.C. L. REV. 667 (2004) (arguing that although the federal government has failed to enforce NCLB adequately and the states have failed to comply fully with the Act's requirements, educational advocates should try to enforce the Act's policies by bringing private lawsuits under third-party beneficiary theory). For example, NCLB has divided leading national civil rights groups: many groups support the Act's efforts to close achievement gaps and to hold schools accountable for student progress, but some groups argue that the Act's sanctions stigmatize struggling districts without providing them with the necessary resources to improve. Karla Scoon Reid, *Civil Rights Groups Split over NCLB*, EDUC. WEEK, Aug. 31, 2005, at 1.

¹²¹ See, e.g., H.R. REP. NO. 107-063, pt. 1, at 1240 (2001) ("[W]e remain concerned that the bill goes too far in its reliance on standardized testing."); 147 CONG. REC. H137 (2001) (statement of Rep. Underwood) ("I am concerned about the overreliance of test-

lower standards and easier tests so that it is easier to show progress, and for states to allow underachieving students simply to drop out of school.¹²² Moreover, although better student performance in core education areas is desirable, comparisons between states are difficult because NCLB allows states to develop and use their own testing instruments.¹²³ Finally, some commentators argue that the federal government must commit more money to implementing NCLB if the law is to be successful.¹²⁴

Although NCLB advances many of the same policy goals as the states' education reform legislation, state and local governments nec-

ing as the only measure of educational successes. . . . [W]e must think about other ways to measure the school environment than simple reliance on testing, just that alone."); PUB. AGENDA, REALITY CHECK 2006: ARE PARENTS AND STUDENTS READY FOR MORE MATH AND SCIENCE? 7 (2006), available at <http://www.publicagenda.org/research/pdfs/rc0601.pdf> (relaying results of a recent poll, where 57% percent of parents thought their children were already learning enough math and science); Michael Winerip, *On Education: Teachers, and a Law That Distrusts Them*, N.Y. TIMES, July 12, 2006, at B8 (expressing concern that, because they must spend so much time preparing for tests, students are not given the chance to explore subjects they will really enjoy). See generally James P. Comer, *Our Mission: It Takes More Than Tests to Prepare the Young for Success in Life*, QUALITY COUNTS AT 10: A DECADE OF STANDARDS-BASED EDUC., Jan. 2006, at 59, available at <http://www.edweek.org/ew/articles/2006/01/05/17comer.h25.html> (arguing that standards-based laws such as NCLB focus too much on academic learning and not enough on students' personal, moral, and social development); Ronald A. Wolk, *A Second Front: Betting Everything on Standards-Based Reform Is Neither Wise nor Necessary*, QUALITY COUNTS AT 10: A DECADE OF STANDARDS-BASED EDUC., Jan. 2006, at 49, available at <http://www.edweek.org/ew/articles/2006/01/05/17wolk.h25.html> (arguing that focusing entirely on academic and accountability standards is unwise in case this policy fails, and that policymakers should consider building new schools to replace poorly-performing schools). For example, Connecticut Commissioner of Education Betty J. Sternberg has argued that some of the federal money earmarked for testing would be better spent on programs like early childhood education, because these programs have shown results in the past. Salzman, *supra* note 4.

¹²² See *No Child Left Behind?*, NEA TODAY, May 2003, at 20, 22 (arguing that NCLB provides schools with little incentive to prevent at-risk students from leaving school altogether); Press Release, Comm. on Educ. & the Workforce, Boehner Backs Secretary Paige's Strong Stand on State Education Standards (Oct. 23, 2002), available at <http://edworkforce.house.gov/press/press107/paigeletter102302.htm> (praising then-U.S. Secretary of Education Rod Paige for taking a hard stance against those states that had lowered their standards to hide low achievement levels in their schools); see also THOMAS TOCH, MARGINS OF ERROR: THE EDUCATION TESTING INDUSTRY IN THE NO CHILD LEFT BEHIND ERA 20 (2006), available at http://www.educationsector.org/usr_doc/Margins_of_Error.pdf (suggesting that the federal government should, among other things, support research on testing and create an independent national testing oversight agency).

¹²³ See Dodd, *supra* note 44, at 857. See generally Diane Ravitch, *National Standards: "50 Standards for 50 States" Is a Formula for Incoherence and Obfuscation*, QUALITY COUNTS AT 10: A DECADE OF STANDARDS-BASED EDUC., Jan. 2006, at 54, available at <http://www.edweek.org/ew/articles/2006/01/05/17ravitch.h25.html> (arguing that Congress should adopt national standards, rather than allowing the states to set their own standards).

¹²⁴ See, e.g., Dodd, *supra* note 44, at 853; *No Child Left Behind?*, *supra* note 122, at 22.

essarily give up some control over their own public education systems under the Act.¹²⁵ This loss of control, combined with insufficient funding of the Act, has led some to complain that the federal government is violating NCLB's own "unfunded mandates" provision.¹²⁶ The states must, among other things, develop testing systems and academic standards, but the federal government has not provided the states with sufficient funds to do so.¹²⁷ The federal government has rebuked such claims, but complaints have not abated.¹²⁸

Ultimately, scholars, educators, and legislators disagree over what policies and approaches will best lead to educational equity through-

¹²⁵ See CONLEY, *supra* note 83, at 28–29.

¹²⁶ See 20 U.S.C. § 7907(a) (Supp. III 2003); 149 CONG. REC. S100 (2003) (statement of Sen. Durbin) ("When it comes down to it, you have the Bush administration on the one hand posing for pictures and shaking hands with school principals across America and with the other hand reaching into their pockets and pulling out their State funds to fund his unfunded mandate under No Child Left Behind."). See generally Brief for the American Ass'n of School Administrators as Amici Curiae Supporting Petitioners, Sch. Dist. of the City of Pontiac v. Spellings, No. 05–2708 (6th Cir. Mar. 31, 2006) (urging the court to interpret NCLB's unfunded mandates provision to mean that the federal government may not require the states to spend their own funds to comply with NCLB); Brief for Joe Baca, Jr., California State Assemblyman et al. as Amici Curiae Supporting Petitioners, *Pontiac*, No. 05–2708 (6th Cir. Mar. 31, 2006) (same); Brief for Connecticut et al. as Amici Curiae Supporting Petitioners, *Pontiac*, No. 05–2708 (6th Cir. Mar. 31, 2006) (same); Brief for Edward G. Rendell, Governor of Pennsylvania as Amicus Curiae Supporting Petitioners, No. 05–2708 (6th Cir. Mar. 31, 2006) (same); *infra* note 135. The unfunded mandates provision states:

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

§ 7907(a).

¹²⁷ See 147 CONG. REC. E1143 (2001) (statement of Rep. Rodriguez) ("In the name of accountability, more testing will be mandated with little financial support from the federal government."); *supra* notes 13–14 and accompanying text.

¹²⁸ See COLO. ASS'N OF SCH. EXECUTIVES ET AL., NO CHILD LEFT BEHIND POSITION PAPER 8 (2005), available at <http://www.co-case.org/associations/779/files/White%20Paper%20on%20NCLB%204.5.05.pdf> (arguing that schools should not be required to comply with NCLB's requirements until the Act is fully funded); *No Child Left Behind?*, *supra* note 122, at 22 (noting that NCLB funding for 2003 fell \$8 billion short of authorized levels); *What's a Promise Worth?*, AM. TEACHER, Dec. 2003/Jan. 2004, at 6 (arguing that by setting expectations high but keeping funding low, the federal government is practically asking the states to fail to comply with NCLB's mandates); Press Release, U.S. Dep't of Educ., New GAO Report Finds that *No Child Left Behind* Is Not an "Unfunded Mandate" (May 25, 2004) (citing U.S. GEN. ACCOUNTING OFFICE, UNFUNDED MANDATES: ANALYSIS OF REFORM ACT COVERAGE (2004)), available at <http://www.ed.gov/news/pressreleases/2004/05/05252004a.html>.

out the nation.¹²⁹ Despite this disagreement, NCLB mandates that states comply with certain policies chosen by Congress, thereby constraining the states' and local districts' abilities to experiment with other options.¹³⁰

III. CONNECTICUT CHALLENGES THE NO CHILD LEFT BEHIND ACT

Amidst scholarly and other criticism of NCLB, some states have begun to resist the Act.¹³¹ Last year, Utah's legislature passed a resolution giving state education law preference over federal mandates.¹³² Colorado now protects districts in the state that opt out of the Act's requirements from sanctions threatened by the U.S. Department of Education and the state board of education.¹³³ Some states, though not joining or filing lawsuits themselves, are supporting other states' and districts' challenges to NCLB.¹³⁴

On August 22, 2005, Connecticut became the first state to file suit against the federal government over NCLB.¹³⁵ Connecticut's lawsuit,

¹²⁹ See *supra* notes 119–124 and accompanying text.

¹³⁰ See generally 20 U.S.C. § 6301 (Supp. III 2003).

¹³¹ See Jeff Archer, *Connecticut Files Court Challenge to NCLB*, EDUC. WEEK, Aug. 31, 2005, at 23.

¹³² H.J.R. Res. 3, 56th Leg., Gen. Sess. (Utah 2005); see Archer, *supra* note 131.

¹³³ 2005 Colo. Sess. Laws 487; see Archer, *supra* note 131. Colorado has also resisted on a smaller scale: in December 2005, taxpayers in the Kit Carson school district voted by referendum to replace the federal funds the district will lose by dropping out of NCLB with a property-tax levy. David J. Hoff, *Colo. Town Raises Taxes to Finance NCLB Withdrawal*, EDUC. WEEK, Jan. 4, 2006, at 3.

¹³⁴ See Archer, *supra* note 131; Letter from Peggy A. Lautenschlager, Wis. Attorney Gen., to State Senator Fred Risser (May 12, 2004), available at <http://www.doj.state.wi.us/ag/5%2D10%2D04risserletter.pdf> (analyzing whether Wisconsin could viably join litigation challenging NCLB, in response to a request from State Senator Risser). See generally Brief for Joe Baca, Jr., California State Assemblyman et al. as Amici Curiae Supporting Petitioners, *supra* note 126; Brief for Connecticut et al. as Amici Curiae Supporting Petitioners, *supra* note 126; Brief for Edward G. Rendell, Governor of Pennsylvania as Amicus Curiae Supporting Petitioners, *supra* note 126.

¹³⁵ See Second Amended Complaint, *supra* note 16, at 1; Archer, *supra* note 131. Connecticut attempted to persuade other states to join the lawsuit, but these efforts were unsuccessful. Sam Dillon, *U.S. Is Sued by Connecticut over Mandates on School Tests*, N.Y. TIMES, Aug. 23, 2005, at B1.

The National Education Association ("NEA"), joined by a handful of individual school districts from several states, filed a similar lawsuit in April of last year, premised largely on NCLB's "unfunded mandates" provision. 20 U.S.C. § 7907(a) (Supp. III 2003); Complaint at 1, *Sch. Dist. of the City of Pontiac v. Spellings*, No. 05-cv-71535-DT (E.D. Mich. Apr. 20, 2005); see Hendrie, *supra* note 7; *infra* note 162. On November 23, 2005, a federal district court judge granted the Secretary's motion to dismiss the lawsuit. *Pontiac*, No. 05-cv-71535-DT, 2005 WL 3149545, at *5 (E.D. Mich. Nov. 23, 2005); see Michael Janofsky, *Judge Rejects Challenge to Bush Education Law*, N.Y. TIMES, Nov. 24, 2005, at A22. The trial judge found

Connecticut v. Spellings, focuses on a provision in the Act prohibiting Congress from requiring any state or school district to spend any funds or incur any costs not paid for under the Act—the so-called “unfunded mandates” provision.¹³⁶ The state alleges that the federal government is not providing enough funds to carry out its obligations under the Act, effectively violating NCLB’s unfunded mandates provision.¹³⁷ Connecticut also claims that the federal government is unconstitutionally coercing the state to comply with NCLB’s mandates.¹³⁸

A. *Connecticut and the Secretary Clash over No Child Left Behind’s Mandates*

Connecticut’s lawsuit stems from a clash between the state’s testing scheme and NCLB’s testing requirements.¹³⁹ For over twenty years, Connecticut has implemented assessment and accountability measures for its local school districts through its Connecticut Mastery Test (“CMT”) statutory scheme.¹⁴⁰ Connecticut alleges that CMT has been successful, as the state’s students rank among the highest achievers in the nation.¹⁴¹ Indeed, NCLB adopts some of the principles and elements of the CMT scheme.¹⁴²

that NCLB’s “unfunded mandates” provision simply meant that no federal officer or employee could require a state to spend its own funds; the provision did not prohibit Congress from doing so. *Pontiac*, 2005 WL 3149545, at *4; see *infra* note 162. He reasoned that if Congress had meant to fund all of NCLB’s requirements 100%, it would have said so clearly and unambiguously. *Pontiac*, 2005 WL 3149545, at *4. The NEA has appealed that ruling. See Brief for Petitioners, *Pontiac*, No. 05–2708 (6th Cir. Mar. 22, 2006).

¹³⁶ 20 U.S.C. § 7907(a); see Hendrie, *supra* note 7.

¹³⁷ Second Amended Complaint, *supra* note 16, at 40–41; see Archer, *supra* note 131.

¹³⁸ Second Amended Complaint, *supra* note 16, at 42–43.

¹³⁹ See Press Release, Conn. Dep’t of Educ., Commissioner Betty J. Steinberg’s Statement on Department’s Response to Connecticut’s Requests for NCLB Adjustments (June 22, 2005), available at <http://www.state.ct.us/sde/nclb/important-press/BJS%20re%20June%2022%20USDOE%20letter.pdf>.

¹⁴⁰ Second Amended Complaint, *supra* note 16, at 1.

¹⁴¹ *Id.* According to one recent study, Connecticut’s students, as a whole, consistently scored above the national average on the National Assessment of Educational Progress from 1992 to 2005. See *State Highlights 2006: Connecticut, QUALITY COUNTS AT 10: A DECADE OF STANDARDS-BASED EDUC.*, Jan. 2006, at 6, <http://www.edweek.org/media/ew/qc/2006/17shr.clh25.pdf>. Connecticut does not rank as well, however, when its students’ scores are disaggregated by race and wealth (measured by school lunch eligibility). See *id.*; see also Letter from Margaret Spellings, U.S. Sec’y of Educ., to Betty J. Sternberg, Conn. Comm’r of Educ. (Feb. 28, 2005), available at <http://www.state.ct.us/sde/nclb/correspondence/Letter2.pdf> (noting that Connecticut’s achievement gap is wider than the national average).

¹⁴² Second Amended Complaint, *supra* note 16, at 2; see Bacon, *supra* note 85 (describing the CMT scheme and noting that, already in 1990, national policymakers had begun to follow Connecticut’s lead); Letter from Betty J. Sternberg, Conn. Comm’r of Educ., to Raymond Simon, U.S. Assistant Sec’y of Educ. (Mar. 31, 2005), available at http://www.state.ct.us/sde/nclb/correspondence/Simon_letter.pdf (describing the CMT scheme).

There are three substantial differences between the CMT scheme and NCLB that have led Connecticut to struggle with implementing NCLB. First, Connecticut requires public school students in fourth, sixth, and eighth grades to take the CMT in reading, writing, and mathematics; NCLB requires that students be tested in math and reading or writing every year from third grade through eighth grade and at least once in tenth through twelfth grade.¹⁴³ Second, Connecticut grants special education students the option of taking the CMT at the student's instructional level rather than his or her grade level; NCLB largely requires testing at a student's grade level.¹⁴⁴ Finally, Connecticut's CMT testing is only offered in English, though the state allows English language learner ("ELL") students three years in the U.S. school system before requiring them to take the CMT; NCLB requires that ELL students be tested, in either English or their native language, after one year in a U.S. school.¹⁴⁵ Connecticut's amended CMT testing statutes conform to NCLB's testing requirements, but only to the extent that state funds are not used for NCLB mandates.¹⁴⁶

Connecticut cannot comply with both its state education statutes and NCLB's mandates as they are currently funded.¹⁴⁷ Accordingly, the state has requested several times that the U.S. Secretary of Education waive specific provisions of the Act.¹⁴⁸

On January 14, 2005, Connecticut's Commissioner of Education (the "Commissioner") requested certain waivers from the U.S. Department of Education's interpretations of NCLB's mandates in order to maintain the state's own CMT scheme, including allowances for annual testing to take place in alternate grades rather than every grade, for

¹⁴³ 20 U.S.C. § 6311(b)(3)(C)(v), (vii) (Supp. III 2003); Second Amended Complaint, *supra* note 16, at 20.

¹⁴⁴ 20 U.S.C. § 6311(b)(3)(C)(ix)(11); Second Amended Complaint, *supra* note 16, at 21.

¹⁴⁵ 20 U.S.C. § 6311(b)(3)(C)(x); Second Amended Complaint, *supra* note 16, at 21-22.

¹⁴⁶ CONN. GEN. STAT. § 10-14n(g) (2005). Subsection (g) provides:

[M]astery testing pursuant to this section shall be in conformance with the testing requirements of the No Child Left Behind Act provided (1) any costs of such conformance to the state and local or regional boards of education that are attributable to additional federal requirements of the No Child Left Behind Act shall be paid exclusively from federal funds

Id. (internal citations omitted).

¹⁴⁷ Second Amended Complaint, *supra* note 16, at 4.

¹⁴⁸ *Id.* at 23-24; see *supra* notes 117-118 and accompanying text.

assessment of special education students at instructional level rather than grade level, and for testing of ELL students after three years in the U.S. school system rather than after one year.¹⁴⁹ Connecticut's claimed grounds for the waiver were the success of its CMT scheme and the lack of sufficient federal education funding to comply with NCLB.¹⁵⁰ On February 28, 2005, the Secretary denied the waiver request for alternate year testing and the three-year phase-in for ELL students, and she took the special education waiver request under consideration.¹⁵¹

On April 7, 2005, the Secretary announced a new policy for the granting of waivers of the Act's special education testing requirements.¹⁵² The new policy permits up to 2% of students to be tested using modified or alternative assessments.¹⁵³ States that do not have annual testing in every grade, however, are not eligible for the waiver.¹⁵⁴

Even if Connecticut were eligible for the waiver, the cost of developing and administering these alternative assessments would prevent the state from taking advantage of the new policy.¹⁵⁵ Thus, on April 18, 2005, the Commissioner met with the Secretary and U.S. Deputy Secretary of Education (the "Deputy Secretary") to discuss the

¹⁴⁹ Second Amended Complaint, *supra* note 16, at 24. Connecticut also requested an allowance to conduct "cohort analysis," which measures student progress by tracking the same group of students from year to year, rather than comparing one year's grade with the same grade of the preceding year. *Id.* Connecticut had made similar requests as early as April 2004, though as requests to amend the state's NCLB accountability plan rather than as waiver requests. See Letter from Betty J. Sternberg, Conn. Comm'r of Educ., to Raymond Simon, U.S. Assistant Sec'y of Educ. (Apr. 1, 2004), available at <http://www.state.ct.us/sde/nclb/correspondence/Letter4.pdf>.

Although the state requests to be relieved of its obligations under NCLB to administer standardized tests and report the results in the third, fifth, and seventh grades, Connecticut has claimed that it would instead use formative assessments in those grades. See Letter from Betty J. Sternberg, Conn. Comm'r of Educ., to Margaret Spellings, U.S. Sec'y of Educ. (Apr. 11, 2005), available at <http://www.state.ct.us/sde/nclb/correspondence/Spellings.pdf>.

¹⁵⁰ See Second Amended Complaint, *supra* note 16, at 24–25.

¹⁵¹ *Id.* at 27; see Letter from Margaret Spellings to Betty J. Sternberg, *supra* note 141 ("[W]e will not waiver [sic] in the implementation of the NCLB testing provisions").

¹⁵² Press Release, U.S. Dep't of Educ., Secretary Spellings Announces More Workable, "Common Sense" Approach to Implement *No Child Left Behind Law* (Apr. 7, 2005) [hereinafter ED, Common Sense Approach], available at <http://www.ed.gov/news/pressreleases/2005/04/04072005.html>.

¹⁵³ *Id.*

¹⁵⁴ Second Amended Complaint, *supra* note 16, at 29; see ED, Common Sense Approach, *supra* note 152.

¹⁵⁵ See Second Amended Complaint, *supra* note 16, at 29. At the end of July 2005, Connecticut received permission from the Secretary to test up to 2% of its special education students under "alternative assessments." *Id.* at 34. Connecticut's policy of testing special education students at instructional level rather than grade level, however, does not qualify as an "alternative assessment" under the Secretary's policy. *Id.*

State's waiver requests.¹⁵⁶ In response, the Deputy Secretary suggested that Connecticut offer testing in every grade, but eliminate written response testing in the third, fifth, and seventh grades.¹⁵⁷ The Commissioner found this "lower-quality" testing option unworkable.¹⁵⁸

In the following months, the Commissioner repeatedly renewed Connecticut's waiver requests.¹⁵⁹ Ultimately, on June 20, 2005, the Secretary formally denied those requests.¹⁶⁰

¹⁵⁶ *Id.* at 30. The Commissioner had written to the Secretary on March 31, 2005, renewing the State's original waiver requests. *Id.* at 28; Letter from Betty J. Sternberg to Raymond Simon, *supra* note 142.

¹⁵⁷ Second Amended Complaint, *supra* note 16, at 31; see Letter from Betty J. Sternberg, Conn. Comm'r of Educ., to Margaret Spellings, U.S. Sec'y of Educ. (Apr. 22, 2005), available at <http://www.state.ct.us/sde/nclb/correspondence/LetterSpellings4-22-05.pdf>.

¹⁵⁸ Complaint, *supra* note 15, at 19; see Letter from Betty J. Sternberg to Margaret Spellings, *supra* note 157.

¹⁵⁹ Second Amended Complaint, *supra* note 16, at 32-34. For example, on May 18, 2005, the Commissioner wrote to the Secretary, noting that extensive scientific research supported Connecticut's testing scheme, and that no research supported the position that testing in every grade is more effective than alternate grade testing. Letter from Betty J. Sternberg, Conn. Comm'r of Educ., to Margaret Spellings, U.S. Sec'y of Educ. (May 18, 2005), available at <http://www.state.ct.us/sde/nclb/correspondence/LetterSpellings05-18-attach.pdf>; see Letter from Betty J. Sternberg, Conn. Comm'r of Educ., to Raymond Simon, U.S. Assistant Sec'y of Educ. (May 27, 2005), available at http://www.state.ct.us/sde/nclb/correspondence/Simon_Letter527.pdf.

¹⁶⁰ Second Amended Complaint, *supra* note 16, at 34; see Letter from Raymond Simon, U.S. Assistant Sec'y of Educ., to Betty J. Sternberg, Conn. Comm'r of Educ. (June 20, 2005), available at http://www.state.ct.us/sde/nclb/correspondence/Simon_Letter620.pdf. In an earlier letter, the Secretary had made clear that she would not waive NCLB's provisions requiring Connecticut to test students in the third, fifth, and seventh grades. See Letter from Margaret Spellings, U.S. Sec'y of Educ., to Betty J. Sternberg, Conn. Comm'r of Educ. (May 3, 2005), available at <http://www.state.ct.us/sde/nclb/correspondence/SpellingsLettertoBetty5-3-05.pdf>.

At one point, the clash between the Secretary and the Commissioner became quite heated, when the Secretary challenged Connecticut's commitment to educating all of the state's students. See Robert A. Frahm, *Reform Flap Redefines State's Education Chief*, HARTFORD COURANT, Nov. 28, 2005, at A1. Using the mainstream media, the Secretary suggested that Connecticut does not expect success from urban black children, characterizing Connecticut's alleged attitude as the "soft bigotry of low expectations." *NewsHour with Jim Lehrer: Newsmaker: Margaret Spellings* (PBS television broadcast Apr. 7, 2005); see Margaret Spellings, *Op-Ed, Testing Serves Students*, HARTFORD COURANT, Mar. 20, 2005, available at <http://www.ed.gov/news/opeds/edit/2005/03202005.html>. The Commissioner demanded an apology from the Secretary (which she never received). Frahm, *supra*; Letter from Betty J. Sternberg to Margaret Spellings, *supra* note 149. Connecticut's governor wrote to the Secretary to express her offense at the Secretary's comments and to defend Connecticut's policies. Letter from M. Jodi Rell, Governor of Conn., to Margaret Spellings, U.S. Sec'y of Educ. (Mar. 31, 2005), available at <http://www.state.ct.us/sde/nclb/correspondence/Letter1.pdf>. Even when not outright insulting Connecticut, the Secretary has accused the state of shirking accountability under NCLB and ignoring its achievement gap. See Press Release, U.S. Dep't of Educ., Department of Education Issues Statement Regarding Connecticut Lawsuit (Apr. 5, 2005), available at <http://www.ed.gov/news/pressreleases/2005/04/04052005.html>.

B. Connecticut Files the First State Lawsuit Challenging No Child Left Behind

On August 22, 2005, Connecticut filed its lawsuit against the Secretary in federal district court.¹⁶¹ In its complaint, the state alleges that the Secretary is violating § 7907(a) of NCLB, the so-called "unfunded mandates" provision, by mandating, directing, and controlling the allocation of state resources.¹⁶² The federal funds the state receives are insufficient to pay for compliance with the Act, and the Secretary has the authority to waive those mandates.¹⁶³ Nonetheless, the

Despite these comments, the Secretary has adopted some of the policies for which Connecticut has requested waivers. See, e.g., OFFICE OF ELEMENTARY AND SECONDARY EDUC., U.S. DEP'T OF EDUC., PEER REVIEW GUIDANCE FOR THE NCLB GROWTH MODEL PILOT APPLICATIONS 1 (2006) [hereinafter ED, GROWTH MODEL], available at <http://www.ed.gov/policy/elsec/guid/growthmodelguidance.pdf>. For example, on November 18, 2005, the Secretary announced a pilot program under which up to ten states could apply to measure achievement by student growth, similar to the "cohort analysis" that Connecticut had proposed. See Press Release, U.S. Dep't of Educ., Secretary Spellings Announces Growth Model Pilot, Addresses Chief State School Officers' Annual Policy Forum in Richmond (Nov. 18, 2005), available at <http://www.ed.gov/news/pressreleases/2005/11/11182005.html>; *supra* note 149. On January 27, 2006, the Secretary released further guidance on the program, and twenty states have requested to participate. Lynn Olson, *States Vie to Be Part of NCLB's "Growth" Pilot*, EDUC. WEEK, Feb. 1, 2006, at 24; Diana Jean Schemo, *20 States Ask for Flexibility in School Law*, N.Y. TIMES, Feb. 22, 2006, at B5. See generally ED, GROWTH MODEL, *supra*.

¹⁶¹ Complaint, *supra* note 15, at 1. At the same time that Connecticut asks a federal district court to order the Secretary to, effectively, respect the state's policy choices, Connecticut also faces litigation brought by its own residents challenging those choices. See William Yardley, *School Financing Is Focus of Lawsuit in Connecticut*, N.Y. TIMES, Nov. 23, 2005, at B6. On November 21, 2005, fifteen students attending schools in eight Connecticut districts filed a lawsuit in state superior court against Connecticut's governor, Connecticut's education commissioner, and other top state officials. Complaint at 1-2, Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, No. CV-05-4019406-S (Conn. Super. Ct. Nov. 21, 2005). In anticipation of the lawsuit, Connecticut's governor appointed a commission to study the funding inequities alleged therein. Press Release, Conn. Governor M. Jodi Rell, Governor Rell's Statement on ECS Lawsuit (Nov. 22, 2005), available at <http://www.ct.gov/governorrell/cwp/view.asp?A=1761&Q=306920>.

¹⁶² 20 U.S.C. § 7907(a) (Supp. III 2003); Second Amended Complaint, *supra* note 16, at 40-41. The NEA's lawsuit, which was also brought under the unfunded mandates provision, was dismissed by a federal district court in November 2005. *Pontiac*, 2005 WL 3149545, at *5; see *supra* note 135. Connecticut's Attorney General, who initiated the state's lawsuit, publicly stated that he finds the *Pontiac* ruling wrong and in no way legally binding on Connecticut's lawsuit. Janofsky, *supra* note 135.

¹⁶³ 20 U.S.C. § 7861 (Supp. III 2003); Second Amended Complaint, *supra* note 16, at 41. Connecticut claims that it needs more than \$41 million in additional federal funds to comply fully with NCLB's requirements. Salzman, *supra* note 4. The Secretary, however, has disputed this estimate. See Spellings, *supra* note 160. She contends that the testing scheme Connecticut plans to implement under the Act is "entirely optional," because the state could satisfy its obligations by administering less rigorous—and thus less expensive—tests. Memorandum of Law in Support of Defendant's Motion to Dismiss at 23-24, Connecticut v. Spellings, No. 3:05-cv-01330 (MRK) (D. Conn. Dec. 2, 2005); see Letter from Margaret Spellings to Betty J. Sternberg, *supra* note 160 ("[T]he system designed by the

Secretary has refused to grant Connecticut's waiver requests, instead requiring the state and its school districts to comply fully with the Department of Education's allegedly rigid interpretation of the NCLB mandates.¹⁶⁴

Connecticut also claims a violation of the Spending Clause and Tenth Amendment of the U.S. Constitution.¹⁶⁵ The state argues that the Secretary is exceeding her powers under the Spending Clause and violating the Tenth Amendment of the Constitution in two ways: (1) by coercing the state to take actions that Congress could not otherwise compel it to take; and (2) by changing one of the conditions pursuant to which the state accepted federal funds under NCLB, thereby precluding the state from exercising its choice to participate in the Act knowingly.¹⁶⁶

Connecticut makes several requests for relief.¹⁶⁷ First, the state asks the court to declare that Connecticut's failure to comply with the Secretary's interpretations of NCLB's mandates does not provide a basis for withholding any federal funds to which the state and its

Connecticut State Department of Education goes beyond what is required by NCLB, and thus some of the costs of the system are attributable to state decisions in these areas." In reply to this argument, the Commissioner has stated that even if Connecticut were to "dumb down" its tests, the state would still be short of federal funds. Letter from Betty J. Sternberg to Margaret Spellings, *supra* note 159.

¹⁶⁴ See Second Amended Complaint, *supra* note 16, at 41-42.

¹⁶⁵ U.S. CONST. art. I, § 8, cl. 1; *id.* amend. X; Second Amended Complaint, *supra* note 16, at 42-43.

¹⁶⁶ *Id.* at 42-43. Connecticut also alleges that the Secretary's decision to deny the State its requested waivers is arbitrary and capricious, contrary to constitutional right, power or privilege, and unsupported by the record, in violation of the Administrative Procedure Act. *Id.* at 43-45; see 5 U.S.C. § 706(2) (2000).

On January 30, 2006, the Connecticut NAACP and three other civil rights groups, on behalf of three minority students in high-poverty districts, filed a motion to intervene in the lawsuit on the side of the Secretary. Jeff Archer, *Civil Rights Groups Back NCLB Law in Suit*, EDUC. WEEK, Feb. 8, 2006, at 15; Press Release, Lawyer's Comm. for Civil Rights Under Law, State NAACP Seeks to Intervene in No Child Left Behind Suit (Jan. 30, 2006), available at <http://www.lawyerscommittee.org/2005website/publications/press/press13006.html>. The group's president said the filing should not be read as an endorsement of the Department's handling of NCLB; rather, the group fears that allowing Connecticut to opt out of the Act's testing provisions will set a dangerous precedent for other states. Archer, *supra*. Moreover, the group believes that by bringing the lawsuit, Connecticut is wasting resources the state could use to reduce its achievement gaps. Avi Salzman, *N.A.A.C.P. Contests Connecticut Lawsuit*, N.Y. TIMES, Jan. 31, 2006, at B3. The judge has agreed to hear arguments from the NAACP, though he has not formally allowed the group to intervene. Matt Apuzzo, *Judge: NAACP Can Argue Against No Child Left Behind Lawsuit*, BOSTON.COM, Apr. 17, 2006, http://www.boston.com/news/local/connecticut/articles/2006/04/17/judge_naacp_can_argue_a_gainst_no_child_left_behind_lawsuit/.

¹⁶⁷ Second Amended Complaint, *supra* note 16, at 46-49.

school districts are entitled under the Act.¹⁶⁸ Second, the state asks the court to enjoin the Secretary from withholding federal funds, from withholding approval of Connecticut's plans, and from denying any waiver because of Connecticut's refusal to expend its own funds to achieve compliance with the Secretary's assessment requirements.¹⁶⁹ Finally, the state asks the court to order the Secretary to grant Connecticut's waiver requests.¹⁷⁰

IV. SOUTH DAKOTA V. DOLE AND THE SUPREME COURT'S SPENDING CLAUSE JURISPRUDENCE

After reformers worked for decades in the states by filing new lawsuits and developing new policies, Congress seized control of the education reform arena by enacting NCLB pursuant to its power to condition the states' receipt of federal funds under the Spending Clause.¹⁷¹ Not satisfied that federal policy is the right policy, Connecticut alleges that the Secretary has, among other things, exceeded her Spending Clause authority under the Act.¹⁷² Unfortunately for the state, Connecticut faces an uphill battle: since as far back as the 1930s, the U.S. Supreme Court has generally upheld spending legislation, with few limitations.¹⁷³

¹⁶⁸ See *id.* at 46–47.

¹⁶⁹ See *id.* at 47–48.

¹⁷⁰ See *id.* at 46. As of August 2006, the Secretary has filed a motion to dismiss the lawsuit and the court continues to consider arguments for and against the motion. See *Connecticut v. Spellings*, No. 3:05-cv-1330 (MRK) (D. Conn. July 31, 2006) (order granting motion for leave to file second amended complaint). Many of these arguments involve disagreement over whether Connecticut's claims are ripe for review and whether the court has jurisdiction over those claims under the Administrative Procedure Act. See Reply in Support of Defendant's Motion to Dismiss at 2–8, *Spellings*, No. 3:05-cv-1330 (MRK) (Jan. 13, 2006); Plaintiff's Opposition to Defendant's Motion to Dismiss at 10–27, *Spellings*, No. 3:05-cv-1330 (MRK) (Dec. 23, 2005); Memorandum of Law in Support of Defendant's Motion to Dismiss at 14–23, *Spellings*, No. 3:05-cv-1330 (MRK) (Dec. 2, 2005).

¹⁷¹ See U.S. CONST. art. I, § 8, cl. 1; ED, DESKTOP REFERENCE, *supra* note 3, at 3. The Spending Clause provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . ." U.S. CONST. art. I, § 8, cl. 1.

¹⁷² Second Amended Complaint, *supra* note 16, at 42–43. Although Connecticut also alleges that the Secretary has violated NCLB's unfunded mandates provision directly, as well as the Administrative Procedure Act, this Note focuses on the state's Spending Clause claim.

¹⁷³ See Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 24 (2003) ("At first blush, it is difficult to discern any limits or bounds to a power to 'provide for' or 'promote the general Welfare' of the Nation."); *infra* notes 174–213 and accompanying text; see also Michele Landis Dauber, *Judicial Review and the Power of the Purse*, 23 LAW & HIST. REV. 451, 452–53 (2005) (arguing that the Supreme

A. The Early Spending Clause Cases

The U.S. Supreme Court struck down a Spending Clause statute for the first and only time in 1935 in *United States v. Butler*.¹⁷⁴ In *Butler*, the Court held that the Agricultural Adjustment Act, authorizing the Secretary of Agriculture to impose taxes on farmers, was unconstitutional.¹⁷⁵ The Court stated that Congress's power to authorize the expenditure of federal funds for public purposes is not limited by the direct grants of power in Article I, Section 8 of the U.S. Constitution.¹⁷⁶ The Court found, however, that the tax unconstitutionally invaded the powers of the states by regulating agricultural production within the states.¹⁷⁷ Thus, because the tax violated the Tenth Amendment, it was not a valid exercise of the taxing and spending power.¹⁷⁸ As discussed below, the Court later abandoned *Butler's* Tenth Amendment reasoning.¹⁷⁹

In fact, only two years later, the Supreme Court reined in the Tenth Amendment implications of *Butler* in *Steward Machine Co. v. Davis*.¹⁸⁰ In that case, the Court upheld provisions of the Social Security Act that imposed a tax on employers with eight or more employees.¹⁸¹ The petitioner had argued that the tax coercively invaded the states' autonomy in violation of the Tenth Amendment, because the provisions allowed employers a credit for up to 90% of the tax if they made contributions to their states' unemployment funds.¹⁸² This credit

Court began practicing extreme deference to congressional spending legislation even earlier than the New Deal era, particularly in the 1896 case of *United States v. Realty Co.*.

¹⁷⁴ 297 U.S. 1, 72-75 (1935); see *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 569 (4th Cir. 1997) (Luttig, J.) (noting that the Supreme Court has not invalidated an Act of Congress under the Spending Clause since *Butler*), *superseded by statute*, IDEA Amendments for 1997, Pub. L. No. 105-17, § 612, 111 Stat. 37, 60. Although the Court has not struck down a law in its entirety since *Butler*, the Court has occasionally refused to extend a law's reach on Spending Clause grounds. See, e.g., *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2461 (2006); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

¹⁷⁵ See 297 U.S. at 72-75.

¹⁷⁶ See *id.* at 65-67.

¹⁷⁷ See *id.* at 68.

¹⁷⁸ See *id.* at 74-78.

¹⁷⁹ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 180 (2001); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5b, at 836 (3d ed. 2000); see *infra* notes 180-218 and accompanying text. But see *South Dakota v. Dole*, 483 U.S. 203, 215-17 (1987) (O'Connor, J., dissenting); *Riley*, 106 F.3d at 569-72 (Luttig, J.); *infra* notes 228-230 and accompanying text.

¹⁸⁰ See 301 U.S. 548, 589-90 (1937).

¹⁸¹ See *id.* at 592-93.

¹⁸² See *id.* at 585-86.

effectively led the states, most of which did not have unemployment programs prior to the Social Security Act, to establish such programs.¹⁸³

In responding to the petitioner's contention, the Court noted the "national" dimensions of the unemployment problem at the time the Social Security Act was passed, as well as the states' inability to address this problem sufficiently because of their poor economic positions.¹⁸⁴ The provision allowing for the tax credit did not coerce the states into developing unemployment funds, the Court reasoned; rather, it gave the states a motive for doing so, which was not inconsistent with the Tenth Amendment.¹⁸⁵ The Court did not, however, completely rule out the possibility that a state might be unconstitutionally coerced by some future exercise of the spending power.¹⁸⁶

B. The Court Considers Conditions on Grants to the States

In the years following *Butler* and *Steward Machine Co.*, the Court largely deferred to Congress when reviewing challenges to exercises of the spending power.¹⁸⁷ This was the case even as Congress began to impose conditions on grants to state and local governments.¹⁸⁸ In 1947 in *Oklahoma v. Civil Service Commission*, for example, the Supreme Court upheld a provision of the Hatch Act, which granted federal funds to state governments on the condition that the states adopt civil service systems and limit the political activities of some government workers.¹⁸⁹ The Court reasoned that Congress's power to set conditions for the receipt of federal funds is broad, extending even to areas

¹⁸³ *Id.* at 587-88.

¹⁸⁴ *See id.* at 586-88.

¹⁸⁵ *Steward Mach. Co.*, 301 U.S. at 589-90.

¹⁸⁶ *See id.* at 590. The Court stated:

Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact.

Id.

¹⁸⁷ *See Helvering v. Davis*, 301 U.S. 619, 640 (1937) ("The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment."); *see also Steward Machine Co.*, 301 U.S. at 583 ("We find no basis for a holding that the power [of taxation] which belongs by accepted practice to the Legislatures of the states, has been denied by the Constitution to the Congress of the nation.").

¹⁸⁸ *See generally Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127 (1947).

¹⁸⁹ *See id.* at 143-44.

that Congress might not otherwise have the power to regulate.¹⁹⁰ The Tenth Amendment does not bar exercises of such power, the Court stated, because the states can simply refuse to comply by declining the conditioned federal funds.¹⁹¹

In 1981 in *Pennhurst State School & Hospital v. Halderman*, however, the Court limited this power somewhat when it held that conditions on grants to states and local governments must be expressly stated.¹⁹² In *Pennhurst*, the Court held that Pennsylvania, which operated the petitioner-hospital, could not be liable in a civil suit brought by a patient for violating a bill of patients' rights included in the Developmentally Disabled and Bill of Rights Act because Congress had not expressly required the states to follow the bill of rights as a condition for grants under the statute.¹⁹³ The Court reasoned that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."¹⁹⁴ Thus, the constitutionality of Congress's exercise of the spending power depended on whether the state voluntarily and knowingly accepted the terms of the contract, and the Court found that Pennsylvania had not so accepted the bill of rights.¹⁹⁵

C. *The Modern Rule: South Dakota v. Dole*

In 1987 in *South Dakota v. Dole*, the Supreme Court tied together its earlier spending cases.¹⁹⁶ In *Dole*, the Court upheld a federal statute that conditioned the receipt of federal highway funds on the states' implementation of a minimum drinking age of twenty-one.¹⁹⁷ The Court reiterated that, incident to the Spending Clause, Congress may attain objectives that are otherwise not considered within its enumerated powers by conditioning federal grants.¹⁹⁸ Still, the spending power is not unlimited.¹⁹⁹ Accordingly, the Court listed five gen-

¹⁹⁰ *Id.* at 143 ("While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.").

¹⁹¹ *See id.*

¹⁹² *See* 451 U.S. at 17.

¹⁹³ *See id.* at 18-19.

¹⁹⁴ *Id.* at 17.

¹⁹⁵ *See id.* at 17-18.

¹⁹⁶ *See* 483 U.S. at 207-12.

¹⁹⁷ *See id.* at 208-10.

¹⁹⁸ *Id.* at 207.

¹⁹⁹ *Id.*

eral restrictions on Congress's power to impose conditions on the states in exchange for the receipt of federal funds.²⁰⁰

First, Congress must exercise the spending power in pursuit of the general welfare.²⁰¹ Courts, however, should substantially defer to Congress in determining whether a particular expenditure is intended to serve a public purpose.²⁰² Second, when Congress conditions the states' receipt of federal funds, it must do so unambiguously.²⁰³ Third, the conditions imposed must be reasonably related to a federal interest in particular national programs.²⁰⁴ Fourth, the conditions must not violate any other constitutional provision.²⁰⁵ The Tenth Amendment alone does not act as a constitutional bar; rather, the Court described this last restriction as the unexceptionable proposition that the power may not be used to induce the states to engage in activities that would themselves be unconstitutional.²⁰⁶

²⁰⁰ *Id.* at 207–12.

²⁰¹ *Dole*, 483 U.S. at 207; see *Butler*, 297 U.S. at 65.

²⁰² *Dole*, 483 U.S. at 207; see *Helvering*, 301 U.S. at 640–41.

²⁰³ *Dole*, 483 U.S. at 207; see *Pennhurst*, 451 U.S. at 17.

²⁰⁴ *Dole*, 483 U.S. at 207–08. *But see id.* at 213–17 (O'Connor, J., dissenting) (arguing that the condition must not only be related to a federal interest, but also more narrowly to the federal spending itself); *infra* notes 216–218 and accompanying text.

²⁰⁵ *Dole*, 483 U.S. at 208.

²⁰⁶ See *id.* at 210; see also *Oklahoma*, 330 U.S. at 143. As examples of the type of condition that would violate this fourth restriction, the Court offered a grant of federal funds conditioned on invidiously discriminatory state action, or on the infliction of cruel and unusual punishment. *Dole*, 483 U.S. at 210–11; cf. *United States v. Am. Library Ass'n*, 539 U.S. 194, 214 (2003) (upholding condition on public libraries' receipt of federal funds requiring them to use filtering software on their computers to block access to obscene material on the Internet, because libraries' use of the software did not violate patrons' First Amendment rights, and thus the condition did not induce the libraries to violate the Constitution).

In applying these four restrictions to the case before it, the Supreme Court held that the minimum drinking age condition was not problematic. *Dole*, 483 U.S. at 208. The Court easily concluded that the condition served the general welfare because the incentive for young people to drink and drive created by differing drinking ages amongst the states was an interstate problem requiring a national solution. *Id.* Moreover, the condition could not have been more clearly stated, and was related to a national concern: safe interstate travel. *Id.* at 208–09. Finally, the Twenty-first Amendment did not constitute an independent constitutional bar to Congress's power to impose the condition upon the states under the Spending Clause. *Id.* at 209–10. Although it acknowledged that the Twenty-first Amendment prohibits direct regulation of drinking ages by Congress, the Court, citing *Butler*, reasoned that the constitutional limitations on conditions imposed by Congress on the states pursuant to the Spending Clause are less exacting than those limitations at play when Congress directly regulates the states under any of its other powers. *Id.* at 209. *But see Am. Library Ass'n*, 539 U.S. at 226–27 (Stevens, J., dissenting) (arguing that a federal statute penalizing a library for failing to install filtering software on its computers would unques-

The Court's fifth restriction was more elusive, and was described in later cases by the lower courts as the coercion theory.²⁰⁷ Citing *Steward Machine Co.*, the Court noted that its previous decisions had recognized that Congress's conditioning of federal funds might be so coercive in some situations as to pass the point at which "pressure turns into compulsion."²⁰⁸ In such situations, the condition would violate the Tenth Amendment.²⁰⁹ In the case before it, however, the Court found the coercion theory to be "more rhetoric than fact."²¹⁰ That most of the states had complied with the minimum drinking age condition in order to receive federal highway funds was not evidence of coercion, the Court reasoned.²¹¹ Rather, the minimum drinking age condition was "relatively mild encouragement."²¹² The Court reached this conclusion particularly because any state refusing to establish a minimum drinking age of twenty-one would stand to lose only a relatively small percentage—five percent—of federal highway funds.²¹³

Justice O'Connor dissented in *Dole*, finding the minimum drinking age condition an unconstitutional attempt to regulate the sale of liquor, rather than a condition on spending reasonably related to the expenditure of federal funds as the majority held.²¹⁴ She agreed with the majority's articulation of the general restrictions on Congress's spending power, and that the minimum drinking age condition did not violate the "general welfare" and "unambiguous" restrictions.²¹⁵

tionably violate the First Amendment, and that threatening to deny benefits can be just as pernicious an abridgement of speech as direct regulation).

²⁰⁷ *Dole*, 483 U.S. at 211; see *West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d 281, 288 (4th Cir. 2002); *Kansas v. United States*, 214 F.3d 1196, 1201 (10th Cir. 2000); *Nevada v. Skinner*, 884 F.2d 445, 447 (9th Cir. 1989); see also *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999) (noting that "in cases involving conditions attached to federal funding, [the Court has] acknowledged that the 'financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion'" (quoting *Dole*, 483 U.S. at 211)).

²⁰⁸ *Dole*, 483 U.S. at 211 (citing *Steward Mach. Co.*, 301 U.S. at 590).

²⁰⁹ See *id.*

²¹⁰ *Id.*; see *Steward Mach. Co.*, 301 U.S. at 589–90.

²¹¹ See *Dole*, 483 U.S. at 211.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 212 (O'Connor, J., dissenting). Justice Brennan also dissented, arguing that the power to regulate the purchase of liquor was clearly reserved to the states, and that the Twenty-first Amendment itself strikes the proper balance between federal and state authority. *Id.* (Brennan, J., dissenting).

²¹⁵ *Id.* at 213 (O'Connor, J., dissenting). Justice O'Connor also stated that she was willing to assume that the Twenty-first Amendment did not constitute an independent constitutional bar to the minimum drinking age condition. *Id.*

Still, Justice O'Connor found the majority's application of the "reasonable relation" condition unconvincing.²¹⁶

Although the majority held that Congress's interest in safe interstate travel was sufficiently related to the minimum drinking age condition, Justice O'Connor argued that the condition was too over- and under-inclusive.²¹⁷ Justice O'Connor warned that if Congress is able to regulate activity within the states that has only an attenuated relationship to a federal interest, then Congress would have the power to effectively regulate almost any area of a state's social, political, and economic life.²¹⁸

D. *Virginia Department of Education v. Riley: The Fourth Circuit Strikes Down a Spending Condition and Hints at Reviving the Coercion Test*

Despite Justice O'Connor's warning, not only has the Supreme Court repeatedly upheld Congress's spending power legislation, but the lower federal courts have also been reluctant to find such legislation unconstitutional.²¹⁹ The federal courts of appeals have been particularly wary of challenges to Spending Clause legislation brought under the coercion theory.²²⁰

²¹⁶ *Dole*, 483 U.S. at 213 (O'Connor, J., dissenting).

²¹⁷ *Id.* at 214-15. The condition was over-inclusive, she reasoned, because a minimum drinking age of twenty-one would stop persons younger than twenty-one from drinking even when they were not driving on the interstate highways; the condition was under-inclusive because persons younger than twenty-one pose only a fraction of the national drunken driving problem. *Id.*

²¹⁸ *Id.* at 215. Justice O'Connor further warned:

If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."

Id. at 217 (quoting *Butler*, 297 U.S. at 78).

²¹⁹ See *Kansas*, 214 F.3d at 1200 ("Although there may be some limit to the terms Congress may impose, we have been unable to uncover any instance in which a court has invalidated a funding condition." (quoting *Oklahoma v. Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981))). But see *Riley*, 106 F.3d at 561 (en banc) (striking down condition because the language of the Individuals with Disabilities Education Act only implicitly, at best, required the states to provide a free appropriate public education to disabled students expelled for reasons unrelated to their disabilities). The Tenth Circuit noted in *Kansas v. United States*, however, that the D.C. Circuit had overlooked *United States v. Butler*. *Kansas*, 214 F.3d at 1200 n.6.

²²⁰ *West Virginia*, 289 F.3d at 288 (listing cases in which the circuits have expressed strong doubts about the viability of the coercion theory); see *Kansas*, 214 F.3d at 1201; *Skinner*, 884 F.2d at 448.

The U.S. Court of Appeals for the Fourth Circuit's en banc decision in 1997 in *Virginia Department of Education v. Riley* represents the rare case in which a court struck down a spending condition.²²¹ In *Riley*, the en banc court reversed the decision of a panel of the circuit, striking down a condition imposed on Virginia by the Secretary for

For example, in 2000 in *Kansas*, the U.S. Court of Appeals for the Tenth Circuit upheld provisions of the Personal Responsibility and Work Opportunity Reconciliation Act, which conditioned the receipt of federal funds on the states' compliance with federal child enforcement policy. See 214 F.3d at 1203. There, *Kansas* argued that it did not wish to comply with the requirements because they were too onerous and expensive, but that the state was effectively being coerced into doing so because of the amount of money at stake. *Id.* at 1198. The court noted that the boundary between offering an incentive to the states and coercing the states to comply with federal policy had never been made clear, despite the Supreme Court's articulation of the coercion theory in cases like *Steward Machine Co.* and *Dole*. *Id.* at 1202. Moreover, the Tenth Circuit reasoned, the lower courts have refused to strike down federal legislation in cases where similarly large amounts of money were at stake. *Id.*; see *Schweiker*, 655 F.2d at 414 (upholding Congress's conditioning of Medicaid funds on state implementation of a provision in the Supplemental Security Income program, even though Oklahoma stood to lose all of its Medicaid funding and risked the collapse of its entire medical system if it failed to comply). Thus, the court declined to hold that unconstitutional coercion exists when Congress conditions federal funds in such a way that it creates a powerful incentive for states to comply with its conditions; rather, at least in the context of the case before it, "a difficult choice remains a choice, and a tempting offer is still but an offer." *Kansas*, 214 F.3d at 1203.

Similarly, in 2002 in *West Virginia v. U.S. Department of Health & Human Services*, the U.S. Court of Appeals for the Fourth Circuit upheld amendments to the Medicaid Act requiring the states to adopt a program to recover certain expenditures from the estates of deceased Medicaid beneficiaries in exchange for Medicaid funds. See 289 F.3d at 297. There, West Virginia believed that the estate recovery program was bad public policy, but argued that it had no choice but to comply with the program because the state was more dependent on Medicaid funds than most other states. *Id.* at 287. The Fourth Circuit noted that the Supreme Court has provided so little guidance for determining when the line between encouragement and coercion is crossed that some courts have concluded that the coercion theory essentially raises political questions that cannot be resolved by the courts. *Id.* at 289; see *Skinner*, 884 F.2d at 448 ("The difficulty, if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments."). The court conceded, however, that several judges on the Fourth Circuit had endorsed the coercion theory only a few years earlier in *Virginia Department of Education v. Riley*. *West Virginia*, 289 F.3d at 290; see *infra* notes 227-230 and accompanying text. Still, the court declined to strike down the condition in the current case because the Medicaid Act granted the U.S. Secretary of Health and Human Services the discretion to withhold funds only from categories of the Medicaid program that were affected by a state's failure to comply with one of the Medicaid Act's requirements. *Id.* at 292-93. Thus, although the Fourth Circuit recognized that a particular sanction imposed by the Secretary may be constitutionally suspect in certain cases, such was not the case for West Virginia, because the state had only been warned that noncompliance *could* result in the loss of all or part of its Medicaid funds. See *id.* at 285-86, 292-93. The court reasoned that the "or part" qualification saved the condition. *Id.* at 292-93.

²²¹ 106 F.3d at 560-61 (per curiam).

receipt of its funding under the Individuals with Disabilities Education Act ("IDEA").²²² A provision of IDEA requires the states to provide disabled students with a free appropriate public education.²²³ Virginia adopted a policy under which it ceased providing such education to disabled students expelled or suspended for reasons unrelated to their disabilities.²²⁴ The Secretary responded by threatening to withhold Virginia's entire \$60 million IDEA grant if it did not amend its policy.²²⁵ The Fourth Circuit held that the plain language of IDEA did not even implicitly condition the receipt of IDEA funds on the provision of education to expelled and suspended students; thus, the Secretary violated *Dole's* second restriction that conditions on federal funding be unambiguous when he threatened to withhold Virginia's funds.²²⁶

Although the court did not hold on *Dole's* coercion theory, six judges adopted the dissenting panel opinion of Judge Luttig, which discussed the Tenth Amendment implications of the condition imposed by the Secretary.²²⁷ Judge Luttig argued that, if the coercion theory has any reach at all, "a Tenth Amendment claim of the highest order" exists where the federal government withholds the entirety of a substantial federal grant on the basis that a state refuses to fulfill its federal obligation in some insubstantial respect.²²⁸ That Virginia faced such a penalty because it refused to acquiesce in federal policy for school discipline was particularly troubling.²²⁹ Citing Justice O'Connor's dissent in *Dole*, Judge Luttig suggested that the condition in this case might not only be impermissible coercion, but also unconstitutional regulation in the guise of a spending condition.²³⁰

²²² *Id.* at 561.

²²³ 20 U.S.C. § 1412(1) (2000).

²²⁴ *Riley*, 106 F.3d at 560 (per curiam).

²²⁵ *Id.*

²²⁶ *Id.* at 561; see *Dole*, 483 U.S. at 207; see also *Pennhurst*, 451 U.S. at 17.

²²⁷ See *Riley*, 106 F.3d at 561, 569-72 (Luttig, J.).

²²⁸ *Id.* at 570; see *West Virginia*, 289 F.3d at 291 (stating that, after *Riley*, the coercion theory remains viable in the Fourth Circuit, so that federal statutes that threaten the loss of an entire block of federal funds upon a relatively minor failing by a state are constitutionally suspect).

²²⁹ *Riley*, 106 F.3d at 569 (Luttig, J.) (noting that the Department of Education was withholding funds based on Virginia's refusal to surrender control over "one of its most effective tools for maintaining order" and that Congress was thus sharply curtailing the state's local autonomy over student discipline).

²³⁰ *Id.*; see *Dole*, 483 U.S. at 215-18 (O'Connor, J., dissenting). *Contra* *Jim C. v. United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc) (reversing the judgment of a panel of the circuit and holding that the Rehabilitation Act of 1973 does not unconstitutionally coerce the states into waiving their Eleventh Amendment sovereign immunity,

E. Arlington Central School District Board of Education v. Murphy:
Toward a More Rigorous Interpretation of the Spending Clause

In June 2006, the Supreme Court issued a significant decision indicating that the Court may begin to interpret the reach of Congress's Spending Clause laws more narrowly.²³¹ In *Arlington Central School District Board of Education v. Murphy*, the Court held that parents prevailing in actions brought against school districts under IDEA may not recover the costs of experts used for litigation purposes.²³² Noting that its decision was "guided by" the fact that IDEA had been enacted pursuant to the Spending Clause, the Court focused on whether IDEA provided "clear notice" to the states that they would be required to compensate parents for the cost of experts as a condition to receiving IDEA funds.²³³ The Court decided that IDEA did not provide such notice, because the text of the statute indicated that the costs of experts were not recoverable, and because the Court had so interpreted similar provisions in prior cases.²³⁴ The respondents argued that a statement in a congressional conference committee report proved that Congress intended the states to compensate prevailing parents for expert costs, but the Court reasoned that this legislative history was not sufficient to provide the notice required by the Spending Clause.²³⁵

The Court's decision in *Murphy* indicates a turn, because, as Justice Ginsburg pointed out in her concurrence, the majority could have reached the same result without considering the Spending Clause question.²³⁶ Moreover, Justice Breyer argued in his dissent that the Court has not, under *Pennhurst's* (and later *Dole's*) clear statement rule, required Congress to identify specifically each and every condition in a Spending Clause statute.²³⁷ To Justice Breyer, the proper question was not whether IDEA provided clear notice to the states, but rather

because "[t]he sacrifice of all federal education funds . . . would be politically painful, but we cannot say that it compels Arkansas's choice").

²³¹ See *Murphy*, 126 S. Ct. at 2458–59, 2463; Posting of Marty Lederman to SCOTUSblog, <http://www.scotusblog.com/movabletype/archives/2006/06/25-week/> (June 28, 2006, 09:22 EST) [hereinafter Posting of Marty Lederman].

²³² *Murphy*, 126 S. Ct. at 2461.

²³³ *Id.* at 2458–59. The Court's clear notice requirement came from *Pennhurst*, where the Court had stated that because "legislation enacted pursuant to the spending power is much in the nature of a contract," recipients of federal funds must accept federally imposed conditions "voluntarily and knowingly." See *id.* at 2459 (quoting *Pennhurst*, 451 U.S. at 17).

²³⁴ *Id.* at 2460–63.

²³⁵ *Id.* at 2463.

²³⁶ *Id.* at 2464 (Ginsburg, J., concurring in part and concurring in the judgment).

²³⁷ See *Murphy*, 126 S. Ct. at 2470–71 (Breyer, J., dissenting).

whether the states would have accepted IDEA funds *had they only known* about the condition—here, to compensate prevailing parents for expert costs.²³⁸ Thus, the Justices disagreed over how rigorously the Spending Clause doctrine should be applied, and the Justices who favored a more rigorous interpretation prevailed in this case.²³⁹

V. CONNECTICUT V. SPELLINGS UNDER SOUTH DAKOTA V. DOLE: THE NO CHILD LEFT BEHIND ACT SHOULD NOT (BUT MOST LIKELY WILL) SURVIVE SPENDING CLAUSE SCRUTINY

Because Connecticut challenges the Secretary's denial of its waiver requests under the Spending Clause, a reviewing court would apply the U.S. Supreme Court's *South Dakota v. Dole* test.²⁴⁰ Although the courts have generally upheld federal spending legislation (with the exception of the U.S. Court of Appeals for the Fourth Circuit in *Virginia Department of Education v. Riley*), Connecticut's claims should

²³⁸ *Id.* at 2471. In any event, Justice Breyer believed that the legislative history, held insufficient to provide clear notice by the majority, made Congress's purpose, and thus the meaning of the IDEA provision at issue, sufficiently clear to hold the states responsible for compensating prevailing parents. *See id.* at 2474–75.

²³⁹ *See* Posting of Marty Lederman, *supra* note 231. The Connecticut Attorney General has filed a notice with the court in the state's litigation, noting that *Murphy* supports the state's position that Connecticut cannot be obligated to spend its own funds to comply with NCLB because the unfunded mandates provision is ambiguous at best. *See* Mark Walsh, *Conn. Sees Legal Boost for Its NCLB Suit*, EDUC. WEEK, July 12, 2006, at 34; Press Release, Conn. Attorney General's Office, Attorney General Says U.S. Supreme Court Decision Significantly Supports State's NCLB Lawsuit (July 13, 2006), available at <http://www.ct.gov/ag/cwp/view.asp?Q=317586&A=2426>.

²⁴⁰ *See* 483 U.S. 203, 207–11 (1987); Second Amended Complaint, *supra* note 16, at 42–43. Any court deciding a Spending Clause challenge, especially with respect to federal legislation as comprehensive as NCLB, would likely be mindful of the wide-reaching implications of striking down such legislation. *See generally* *West Virginia v. Dep't of Health & Human Servs.*, 289 F.3d 281 (4th Cir. 2002); *Kansas v. United States*, 214 F.3d 1196 (10th Cir. 2000). In light of recent limitations on Congress's power to enact legislation under the Commerce Clause, Congress may increasingly rely on its power to impose conditions on the states in exchange for federal funds to implement policies it otherwise would not have the authority to enact, but courts may hesitate to affect further the federalism balance. *See* Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 510–11 (2003). *See generally* *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992). Still, no matter how creatively a court may apply it, *Dole* is nonetheless the law in spending cases. *See* *West Virginia*, 289 F.3d at 289; *Kansas*, 214 F.3d at 1198; *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997) (en banc), *superseded by statute*, IDEA Amendments for 1997, Pub. L. No. 105-17, § 612, 111 Stat. 37, 60.

persuade a court to apply the *Dole* test more aggressively.²⁴¹ Not only has the federal government intruded upon the states' traditional education power, but NCLB also threatens local control over public schools, which the Supreme Court in *San Antonio Independent School District v. Rodriguez* insisted is essential to maintaining a valuable diversity of approaches to education policy.²⁴²

In *Dole*, the Court listed five general restrictions on Congress's power to impose conditions on the states in exchange for the receipt of federal funds: (1) Congress's exercise of the spending power must be in pursuit of the general welfare, (2) Congress must condition the states' receipt of federal funds unambiguously, (3) the conditions imposed must be reasonably related to a national interest, (4) the conditions imposed must not violate any other constitutional provision, and (5) Congress may not condition the states' receipt of federal funds in a coercive way.²⁴³ Connecticut specifically challenges the Secretary's denials of its waiver requests, which a court may be more likely to sustain than a facial challenge because of courts' general reluctance to disturb spending legislation.²⁴⁴ Nevertheless, a reviewing court might uphold NCLB, even in the face of Connecticut's more limited claims, though this Note argues that such a holding would be wrong under a careful application of *Dole*.²⁴⁵

First, NCLB would survive *Dole*'s first restriction requiring that the Act be passed in pursuit of the general welfare.²⁴⁶ The Supreme Court and the lower courts have all generally deferred to Congress on this issue.²⁴⁷ Moreover, although critics disagree about whether NCLB achieves its goals, the Act is plainly aimed at the very same public purpose that education reformers have been working toward for decades: equal opportunity and quality education for all students.²⁴⁸

Whether NCLB would survive *Dole*'s second restriction, however, which requires that all conditions imposed on the states' receipt of

²⁴¹ See Second Amended Complaint, *supra* note 16, at 42-43; *supra* notes 219-221 and accompanying text.

²⁴² See 411 U.S. 1, 49-53 (1973).

²⁴³ *Dole*, 483 U.S. at 207-11.

²⁴⁴ See *West Virginia*, 289 F.3d at 292 (noting that West Virginia was effectively mounting a facial challenge to the challenged Medicaid provisions, so that the state bore the "very heavy burden" of showing that the provisions could not operate constitutionally under any circumstances).

²⁴⁵ See *infra* notes 246-277 and accompanying text.

²⁴⁶ See *Dole*, 483 U.S. at 207.

²⁴⁷ See *id.*; *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127, 143-44 (1947). See generally *West Virginia*, 289 F.3d 281; *Kansas*, 214 F.3d 1196.

²⁴⁸ 20 U.S.C. § 6301 (Supp. III 2003).

federal funds provide states with clear notice, is less obvious.²⁴⁹ Any claim Connecticut could make that its obligation to comply generally with the Act's requirements was unclear would be dubious at best.²⁵⁰ Unlike in the 1981 case of *Pennhurst State School & Hospital v. Halderman*, where the Supreme Court struck down a condition because it found Pennsylvania and the other states had not knowingly and voluntarily accepted the condition, Connecticut and the other states are clearly aware that they must comply with specific conditions to receive funds under NCLB.²⁵¹ Still, Connecticut's argument is more subtle and complex than this.²⁵² One of the state's basic allegations with respect to *Dole's* second restriction is that Connecticut believed that, under the "unfunded mandates" provision, it would not be forced to comply with NCLB's mandates unless Congress provided the state with sufficient funds to do so.²⁵³

Excluding *Arlington Central School District Board of Education v. Murphy*, the only recent case striking down a condition based on *Dole's* second restriction is the 1997 case of *Virginia Department of Education v. Riley*.²⁵⁴ In *Riley*, the U.S. Court of Appeals for the Fourth Circuit struck down a condition the Department had imposed on Virginia, requiring the state to provide public education under IDEA to disabled students expelled for reasons unrelated to their disabilities, where Virginia had a policy denying such students public education.²⁵⁵ The basis for the court's opinion in *Riley* was that IDEA neither implied that states were required to provide public education in such circumstances, nor clearly stated this condition.²⁵⁶

Unlike the condition at issue in *Riley*, NCLB's unfunded mandates provision is expressly included in the Act.²⁵⁷ The question thus becomes whether the language of the provision is so ambiguous that Connecticut must be granted its own understanding of the provi-

²⁴⁹ See *Dole*, 483 U.S. at 207; *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); see also *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459 (2006) (stating the clear notice requirement).

²⁵⁰ See generally 20 U.S.C. § 6301.

²⁵¹ See 451 U.S. at 18–19.

²⁵² See Second Amended Complaint, *supra* note 16, at 42–43.

²⁵³ *Id.*

²⁵⁴ *Riley*, 106 F.3d at 561 (per curiam); see *Murphy*, 126 S. Ct. at 2461 (holding that the terms of the IDEA statute failed to provide the state clear notice that prevailing parents may recover the costs of experts or consultants); *supra* notes 231–239 and accompanying text.

²⁵⁵ *Riley*, 106 F.3d at 561.

²⁵⁶ *Id.*

²⁵⁷ See 20 U.S.C. § 7907(a) (Supp. III 2003); cf. *Pennhurst*, 451 U.S. at 17.

sion.²⁵⁸ Still, even if the language of the unfunded mandates provision is somewhat ambiguous, accepting Connecticut's interpretation that the federal government must provide all funds necessary for implementing NCLB's mandates would effectively enable the reviewing court to saddle Congress with a burden it may not have intended.²⁵⁹

Connecticut also argues, alternatively, that the state accepted federal funds under NCLB based on the state's understanding that the Secretary would waive any provision of the Act that conflicted with substantiated state policy.²⁶⁰ This argument presents an even more difficult question than the unfunded mandates argument, because the Act does not *require* the Secretary to grant any state's waiver request, and thus her discretion is very wide.²⁶¹ Any ambiguity in the Secretary's waiver authority should be resolved in favor of Connecticut under *Dole*, but the Secretary could easily argue that the state knew that her waiver authority was both broad and discretionary, and that there was no guarantee that she would make exceptions for any particular state policy.²⁶² Of course, such an argument is an affront to federalism.²⁶³ The Supreme

²⁵⁸ See 20 U.S.C. § 7907(a). At least one scholar has argued that Connecticut's claim is legally strong, because the unfunded mandates provision's language is explicit and because Connecticut is one of the country's highest-achieving states and thus would make a "sympathetic plaintiff." Dillon, *supra* note 135. But see Sch. Dist. of the City of Pontiac v. Spellings, No. 05-cv-71535-DT, 2005 WL 3149545, at *4 (E.D. Mich. Nov. 23, 2005) (finding that the unfunded mandates provision prohibits federal officials from requiring the states to spend their own funds, but that Congress is not prohibited from doing so); Michael Heise, *No Lawsuit Left Behind: Chief Justice Roberts, the Schoolmaster?*, EDUC. NEXT, Winter 2006, at 7, 7 (predicting that Connecticut's lawsuit will probably fail in court, but arguing that both Connecticut's and the NEA's lawsuits may be politically effective in diluting NCLB's requirements).

²⁵⁹ See *Pontiac*, 2005 WL 3149545, at *4 (finding that if Congress had meant to fund all of NCLB's requirements fully, it would have said so clearly and unambiguously); Reply in Support of Defendant's Motion to Dismiss at 12-13, *Connecticut v. Spellings*, No. 3:05-cv-01330 (MRK) (D. Conn. Jan. 13, 2006) (arguing that Connecticut's interpretation of the unfunded mandates provision assumes that the federal government took on a primary role of fiscal responsibility for education under NCLB, which is contrary to congressional intent).

²⁶⁰ See 20 U.S.C. § 7861(a); Second Amended Complaint, *supra* note 16, at 42-43; *supra* notes 117-118 and accompanying text.

²⁶¹ See 20 U.S.C. § 7861. In fact, although a full discussion of the Secretary's argument on this point is beyond the scope of this Note, the Secretary contends that her discretion to grant waivers under NCLB is not subject to judicial review. See Memorandum of Law in Support of Defendant's Motion to Dismiss at 51-55, *Spellings*, No. 3:05-cv-01330 (MRK) (Dec. 2, 2005).

²⁶² See *Dole*, 483 U.S. at 207.

²⁶³ See *Lopez*, 514 U.S. at 564-66 (characterizing education power as within state sovereignty and expressing concern about Congress's ability to intrude on that power by regulating local schools).

Court indicated in *Murphy* that it may be more likely to strike down federal funding conditions, but the condition at issue in that case was more discrete than NCLB's waiver provision.²⁶⁴

Third, NCLB would most likely survive *Dole's* third restriction requiring that the Act be rationally related to a federal interest.²⁶⁵ The federal government believes that testing and the subsequent availability of test scores to the public is the key to boosting the quality of education for all students.²⁶⁶ Under Justice O'Connor's over-inclusive/under-inclusive analysis, articulated in her dissent in *Dole*, the NCLB provisions challenged by Connecticut might be considered over-broad.²⁶⁷ For instance, NCLB requires that all students be tested, even though only some categories of students have historically suffered from poor education.²⁶⁸ The federal government might respond, however, that all students must be tested so that lower scores can be compared with higher scores.²⁶⁹ In any event, Connecticut does not challenge the rational relationship of the provisions it seeks to have waived.²⁷⁰

Finally, NCLB should not survive *Dole's* last restriction, which requires that the Act not so coerce Connecticut into complying with its mandates that pressure turns into compulsion.²⁷¹ Should a court follow the U.S. Court of Appeals for the Fourth Circuit's lead in *Riley* and actually apply the restriction, the court would probably find the Secretary's refusal to grant Connecticut's waiver requests here to be unconstitutionally coercive.²⁷² Nevertheless, courts generally hesitate to delve into this uncertain area of Spending Clause law.²⁷³

²⁶⁴ See 20 U.S.C. § 7861; *Murphy*, 126 S. Ct. at 2461.

²⁶⁵ See 483 U.S. at 207-08.

²⁶⁶ 20 U.S.C. § 6301 (Supp. III 2003) ("[The purpose of this Act can be accomplished by] ensuring that high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials are aligned with challenging State academic standards so that students, teachers, parents, and administrators can measure progress against common expectations for student academic achievement . . .").

²⁶⁷ See *Dole*, 483 U.S. at 214-15 (O'Connor, J., dissenting).

²⁶⁸ See 20 U.S.C. § 6311(b)(3).

²⁶⁹ See *id.* § 6301.

²⁷⁰ See Second Amended Complaint, *supra* note 16, at 42-43.

²⁷¹ See 483 U.S. at 211; *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937). The Department of Education has stressed that states that do not wish to comply with NCLB's requirements are free to avoid those requirements by turning down the funding. Hendrie, *supra* note 7.

²⁷² See *Riley*, 106 F.3d at 569-72 (Luttig, J.); see also *West Virginia*, 289 F.3d at 290. See generally Coulter M. Bump, Note, *Reviving the Coercion Test: A Proposal to Prevent Federal Conditional Spending That Leaves Children Behind*, 76 U. COLO. L. REV. 521 (2005) (arguing that, particularly in the context of NCLB, the Supreme Court should revive the coercion analy-

Again, the only recent case to apply the coercion restriction is *Riley*, although the holding did not concern the restriction.²⁷⁴ Judge Luttig, joined by five other judges in an en banc decision, stated that "a Tenth Amendment claim of the highest order" exists where the federal government withholds the entirety of a substantial federal grant on the basis that a state refuses to fulfill its federal obligation in some insubstantial respect, as the government had threatened to do in that case.²⁷⁵ The requirements Connecticut seeks to have waived here are more substantial than the requirement the Fourth Circuit took issue with in *Riley*: there, Virginia withheld public education from only a relatively small number of expelled students, while Connecticut has asked to be relieved of its obligations under key provisions of NCLB.²⁷⁶ Nevertheless, as with most of *Dole*'s restrictions, the coercion restriction is flexible enough to accommodate either result.²⁷⁷

Ultimately, if the states' ability to experiment with education policy is to survive, a reviewing court should find NCLB as currently administered to be unconstitutionally coercive under *Dole*.²⁷⁸ The federal government's role in education has only increased since it first enacted the Elementary and Secondary Education Act in 1965, and this role shows signs of further expansion.²⁷⁹

sis from *Steward Machine Co.* to create effective limits on the reach of congressional spending power).

²⁷⁵ See *Kansas*, 214 F.3d at 1202-03; *Nevada v. Skinner*, 884 F.2d 445, 447-48 (9th Cir. 1989); *Oklahoma v. Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981); Jesse H. Choper, *The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 CORNELL J.L. & PUB. POL'Y 460, 464 (1995) (arguing that the Supreme Court has failed to strike down federal spending legislation even when coercion has "stared the Court in the face").

²⁷⁶ See *Riley*, 214 F.3d at 569-72 (Luttig, J.).

²⁷⁷ See *id.* at 570.

²⁷⁸ See *id.*; Letter from Margaret Spellings to Betty J. Sternberg, *supra* note 141 ("The significance of the[] assessments [required under NCLB] cannot be understated."). The importance of administering standardized tests in every grade has been a key point of contention between the Secretary and the Commissioner. Compare Spellings, *supra* note 160 ("Teachers cannot remedy weaknesses they don't see. The whole point of assessing students regularly is to catch problems early so they can be fixed before it's too late."), with Letter from Betty J. Sternberg to Margaret Spellings, *supra* note 157 ("The U.S. Department of Education sees every-year testing as a 'principle,' while Connecticut sees it as a 'practice'—one that, in our state, will actually be detrimental to the goal of leaving no child behind.").

²⁷⁹ See *Dole*, 483 U.S. at 211-12.

²⁷⁸ See *id.*

²⁷⁹ See Address at the National Newspaper Association Government Affairs Conference, 42 WEEKLY COMP. PRES. DOC. 434 (Mar. 10, 2006) (stating that the President would like to extend math assessments to the higher grades). See generally OFFICE OF THE SEC'Y, U.S. DEP'T OF EDUC., MEETING THE CHALLENGE OF A CHANGING WORLD: STRENGTHENING EDUCATION FOR THE 21ST CENTURY (2006), available at <http://www.ed.gov/about/inits/ed/>

VI. THE FOURTEENTH AMENDMENT AND *SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ* UNDER *DOLE*'S FOURTH RESTRICTION: A POSSIBLE INDEPENDENT CONSTITUTIONAL BAR TO CONGRESS'S CONDITIONING FEDERAL FUNDS ON STATE COMPLIANCE WITH THE NO CHILD LEFT BEHIND ACT

As discussed in Part V, any court reviewing Connecticut's claims under *South Dakota v. Dole* would likely uphold the Secretary's denial of Connecticut's waiver requests.²⁸⁰ Even if Connecticut were to succeed on its claim that the Secretary is violating *Dole*'s second restriction, Congress could easily rectify a court ruling striking down the relevant provisions of NCLB on these grounds by amending the Act.²⁸¹ A reviewing court should, however, apply the *Dole* test more aggressively in Connecticut's case and find another ground on which to strike down the provisions of NCLB that Connecticut challenges, at least as they are currently administered by the Secretary.²⁸² *Dole*'s fourth independent constitutional bar restriction should provide such a ground.²⁸³

In *Dole*, the Court listed five general restrictions on Congress's power to impose conditions on the states in exchange for the receipt of federal funds.²⁸⁴ The fourth restriction provides that conditions imposed must not violate any other constitutional provision.²⁸⁵ The Court stated that the Tenth Amendment alone does not act as a constitutional bar; rather, the Court described the restriction as the unex-

competitiveness/strengthening/strengthening.pdf (setting forth President George W. Bush's 2006 education agenda, including plans to improve math, science, and foreign language in public high schools).

²⁸⁰ See *supra* notes 246–279 and accompanying text. See generally *South Dakota v. Dole*, 483 U.S. 203 (1987). This analysis assumes, however, that the Supreme Court's recent federalism decisions with respect to the Commerce Clause do not foreshadow a similar shift in its Spending Clause jurisprudence. See Baker & Berman, *supra* note 240, at 510–11 (arguing that if Congress attempts to evade the Court's federalism decisions by exploiting *Dole* in order to legislate in areas of traditional state concern, the Court will tighten the *Dole* standard or abandon it entirely); Choper, *supra* note 273, at 465 (arguing that if the Court chooses to become active in the Spending Clause area, there is room for it to expand its authority to review spending legislation that imposes unconstitutional conditions on the states); *supra* note 240.

²⁸¹ See IDEA Amendments for 1997, Pub. L. No. 105-17, § 612, 111 Stat. 37, 60 (superceding the U.S. Court of Appeals for the Fourth Circuit's decision in *Virginia Department of Education v. Riley*, which struck down a condition the Department had imposed on the states in exchange for receipt of IDEA funds, almost immediately after that case was decided).

²⁸² See *Dole*, 483 U.S. at 208–10.

²⁸³ See *id.*

²⁸⁴ *Id.* at 207–11.

²⁸⁵ *Id.* at 208.

ceptionable proposition that the power may not be used to induce the states to engage in activities that would themselves be unconstitutional.²⁸⁶ As examples of the type of conditions that would violate this fourth restriction, the Court offered a grant of federal funds conditioned on invidiously discriminatory state action, or the infliction of cruel and unusual punishment.²⁸⁷

In Connecticut's case, the potential for liability to its public school students under the Fourteenth Amendment's Equal Protection Clause should serve as an independent constitutional bar to NCLB as it is currently administered.²⁸⁸ If the Secretary prevails in Connecticut's lawsuit, Connecticut may ultimately lose its education funds under Title I.²⁸⁹ A Connecticut statute effectively prohibits the state from using any of its own funds to implement NCLB's requirements; thus, faced with insufficient federal funding, Connecticut will not be able to comply with NCLB as currently mandated.²⁹⁰ Not only would Connecticut lose federal funds it had been using to comply with NCLB,

²⁸⁶ *Id.* at 210.

²⁸⁷ *Dole*, 483 U.S. at 210–11; *cf.* *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 214 (2003) (upholding condition on public libraries' receipt of federal funds requiring them to use filtering software on their computers to block access to obscene material on the Internet, because libraries' use of the software did not violate patrons' First Amendment rights, and thus the condition did not induce the libraries to violate the Constitution).

²⁸⁸ See U.S. CONST. amend. XIV, § 1. Section 1 of the Fourteenth Amendment provides, in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

²⁸⁹ Second Amended Complaint, *supra* note 16, at 16. In its complaint, Connecticut states that the state of Utah formally asked the Secretary about the consequences of opting out of NCLB's requirements. *Id.* The Secretary responded that Utah would lose not only its Title I funds, but also any other funds allotted according to the Title I formula. *Id.*; see NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 13, at 49 (noting the same, and characterizing the Secretary's response as "raising the stakes for nonparticipation" in NCLB as compared to previous versions of Title I).

Since NCLB was enacted, at least three states have been fined for failing to comply with some of the Act's mandates. Rob Hotakainen, *No State Left Untouched by Education Law*, STAR TRIB., May 9, 2005, at 1A. In April 2005, Texas was fined \$444,282—the second-largest fine ever imposed by the Department—for allowing 9% of its disabled students to use alternative tests, in violation of the then-federal limit of 1%. *Id.* In 2003, Minnesota was fined \$113,000 when it substituted graduation rates and attendance records for test scores to show progress, and Georgia was fined \$783,327 for failing to establish its state testing scheme. *Id.*

Moreover, the Department recently released its designations of the states for complying with NCLB's testing provisions. Lynn Olson, *Department Raps States on Testing*, EDUC. WEEK, July 12, 2006, at 1. Four states were designated as "full approval"; eleven states received designations such that some federal funds will be redirected to local districts. See *id.* Connecticut was designated as "approval expected." *Id.*

²⁹⁰ See CONN. GEN. STAT. § 10-14n(g) (2005).

but it could also lose funds it has relied on since the original enactment of the Title I program more than forty years ago to maintain its own education policies.²⁹¹

Consider this scenario: several years from now, if NCLB is even somewhat successful in moving toward its goal of equal educational opportunity and quality education for all students, the children in most states will have substantially similar levels of education measurable by similar standards.²⁹² In contrast, children from any state that has not participated in NCLB—either because of insufficient funding or simply by the state's choice—will probably not have that same level of education, because those states will be struggling to recover from the loss of Title I funds they had received for over forty years.²⁹³ If those children decide to file a lawsuit against their states because they have not received the same level of education as all of the other children in the nation, due in large part to the fact that their states have not received the federal funds that other states have, will those children substantiate a valid equal protection claim?²⁹⁴

This Note argues that they would, and thus that the Fourteenth Amendment should stand as an independent constitutional bar to NCLB as it is currently administered.²⁹⁵ Admittedly, the Court in *San Antonio Independent School District v. Rodriguez*, based on the state of education in 1973, would probably say no.²⁹⁶ In *Rodriguez*, the Supreme Court held that Texas's school financing system, which had a disproportionate impact on public school students in low-property-wealth districts in the state, did not violate the Equal Protection Clause of the Fourteenth Amendment.²⁹⁷ The Court determined that wealth, in and of itself, is not a suspect classification entitled to strict scrutiny upon judicial review.²⁹⁸ Thus, applying rational basis review to the state's school financing system, the Court held that the system did not violate the Equal Protection Clause because it reasonably fur-

²⁹¹ See 46 CONN. S. PROC., pt. 9, 2003 Sess. 2626, 2635 (May 21, 2003) (statement of Sen. Gaffey) ("How the heck is Connecticut going to turn around and say, oh, we don't want to comply and you can keep the \$200 million you give us in Title I monies. Everybody around this circle knows that we can't afford to refuse \$200 million in Title I monies that our school children are entitled to."); Second Amended Complaint, *supra* note 16, at 16.

²⁹² Cf. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19, 24 (1973).

²⁹³ Cf. *id.*

²⁹⁴ Cf. *id.* at 19, 24, 28.

²⁹⁵ U.S. CONST. amend. XIV; see *Dole*, 483 U.S. at 208–10.

²⁹⁶ See *Rodriguez*, 411 U.S. at 54–55.

²⁹⁷ *Id.*

²⁹⁸ See *id.* at 22–25. The Court also held that education is not a fundamental right afforded explicit protection under the U.S. Constitution. *Id.* at 35.

thered Texas's legitimate interest in maintaining local control over the state's schools.²⁹⁹

At the time of the *Rodriguez* decision, however, the states and local districts controlled education policy.³⁰⁰ Moreover, the U.S. Supreme Court was largely concerned with two issues in that case: (1) the *Rodriguez* plaintiffs could not articulate a discrete class in equal protection terms; and (2) the plaintiffs had not been absolutely deprived of education, and any other difference in quality of education was not measurable.³⁰¹

Although "students in Connecticut" may not be a classification "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"—the classifications the Court typically subjects to strict scrutiny—"students in Connecticut" is certainly a discrete class.³⁰² More significantly, with NCLB's standards and rankings, an absolute denial of education perhaps may not be necessary to find an Equal Protection Clause violation, because a certain, measurable level of quality education may begin to emerge.³⁰³

The question becomes whether Connecticut's rationale for failing to comply with NCLB—namely, that its state law prohibited the use of state funds for NCLB's mandates and that it disagreed with federal policy choices—would stand up to strict scrutiny.³⁰⁴ Connecticut has an interest in developing its own education policies pursuant to the power reserved to the states under the Tenth Amendment, but it is not clear whether this interest is compelling enough to survive strict scrutiny.³⁰⁵ Furthermore, even if a reviewing court refused to

²⁹⁹ *Id.* at 55.

³⁰⁰ *See id.* at 49–53.

³⁰¹ *Rodriguez*, 411 U.S. at 19.

³⁰² *Id.* at 28; *cf. id.* at 22–28.

³⁰³ *See* Dayton et al., *supra* note 67, at 10–11 (arguing that future school funding plaintiffs will assert that the states have a constitutional duty of accountability, as defined in NCLB and state accountability legislation, as part of their duty to provide an adequate education for all of the states' students); Heise, *supra* note 258, at 7 (noting that school funding disputes are increasingly cast in a way to implicate NCLB); Bill Scanlon, *Educators: State at Risk to School-Funding Lawsuits*, ROCKY MOUNTAIN NEWS, July 22, 2005, at 26A (quoting a school finance expert as saying that although states have defended themselves against school funding lawsuits in the past by demonstrating that they had equalized spending among districts, courts have recently started to insist that states provide adequate funding to move closer to NCLB's goals). *See generally* 20 U.S.C. § 6311 (Supp. III 2003).

³⁰⁴ *Cf. Rodriguez*, 411 U.S. at 16–17 (noting that the state had conceded that its financing system would not stand up to strict scrutiny).

³⁰⁵ *See* U.S. CONST. amend. X.

apply strict scrutiny, there would still be the question of whether Connecticut's rationale would stand up to rational basis review.³⁰⁶ The answer could be yes, because, in light of widespread criticism of NCLB's policies, it might be reasonable for Connecticut to believe that it can do better.³⁰⁷ The Secretary might argue, however, that Connecticut's achievement gap is quite large, and thus that such a belief would not be reasonable.³⁰⁸ In any event, this Note argues that the viability of this type of equal protection claim demonstrates that Congress and the Secretary are compelling Connecticut, albeit indirectly, to violate its public school students' Fourteenth Amendment rights.³⁰⁹

The argument that NCLB would lead Connecticut to violate its students' Fourteenth Amendment rights if the Secretary does not waive the requirements the state lacks funds for and disagrees with deviates somewhat from the independent constitutional bar restriction as the Supreme Court envisioned it in *Dole*.³¹⁰ One could argue that unlike the expenditures envisioned by *Dole*, such as funds conditioned on infliction of cruel and unusual punishment, here it is only if Connecticut does *not* comply with the conditions that it would violate the Constitution.³¹¹ But in reality, the damage has already been done. Not only have all forty-nine other states created academic standards in accordance with NCLB (all approved by the Secretary) so that Connecticut's students could use them against the state in an equal protection lawsuit, but even Connecticut itself has already created similar standards.³¹² At the time, of course, it was operating under the belief that the unfunded mandates provision meant what it says, and that the Secretary would use his or her waiver authority thoughtfully.³¹³ It is NCLB, by suddenly and forcibly conditioning the states' receipt of Title I funds that they had received for decades on

³⁰⁶ Cf. *Rodriguez*, 411 U.S. at 55. At least two scholars argue that NCLB's accountability standards will enable plaintiffs to prove intentional discrimination for the purposes of Equal Protection Clause claims, simply by producing information that the states themselves have generated as required under the Act. Liebman & Sabel, *supra* note 69, at 297. Thus, these scholars argue, the burden will be on the schools to explain to the courts why they have not been able to meet their own targets, particularly when other schools in the state have met those targets. See *id.*

³⁰⁷ See *supra* notes 119–130 and accompanying text.

³⁰⁸ See *supra* notes 141, 160 and accompanying text.

³⁰⁹ See *Dole*, 483 U.S. at 210–11.

³¹⁰ Cf. *id.* at 208–10.

³¹¹ Cf. *id.*

³¹² See 20 U.S.C. § 6311(b)(3)(C)(i)–(ii) (Supp. III 2003).

³¹³ See Olson, *supra* note 289.

the creation of new academic standards, without actually providing funding adequate to meet those very standards, that causes states like Connecticut to run afoul of the Fourteenth Amendment.³¹⁴

Moreover, this Fourteenth Amendment question is a step removed from Connecticut's claims in the lawsuit, but it nevertheless demonstrates the extent to which federal policy, in the form of NCLB, could continue to dominate the education reform arena not only legislatively, but also in the courts.³¹⁵ Although an Equal Protection Clause analysis under *Rodriguez* involves anticipating the future effects of a loss for Connecticut in its lawsuit, the repercussions of Connecticut submitting to federal coercion to follow federal policy, and thus giving up local control of its schools, are potentially great.³¹⁶

Ultimately, Connecticut's challenge to NCLB illustrates the extent to which the federal government, through the Secretary, has preempted the states' ability to make policy choices about education.³¹⁷ The clash between Connecticut and the Secretary has landed in court, yet school funding lawsuits demonstrate that the courts are unable to contribute significantly to education reform when there is no political will to reform.³¹⁸ A more cooperative, and less combative, relationship between the Secretary and states like Connecticut could allow NCLB to flourish as one approach to education policy, rather than as *the only* approach, because the states would not waste energy and resources resisting the Act.³¹⁹

CONCLUSION

Thirty years after the U.S. Supreme Court sent education reformers away to resolve inequity concerns at the state level, the federal court system—and potentially the Supreme Court itself—faces a doubly troubling challenge. Not only has the federal government reached into the states and local school districts in an unprecedented way, but this step also threatens Connecticut and other states with a

³¹⁴ See *id.*; see also § 6311(b)(3)(C)(i)–(ii).

³¹⁵ See generally Second Amended Complaint, *supra* note 16.

³¹⁶ See *Rodriguez*, 411 U.S. at 49–53.

³¹⁷ See Second Amended Complaint, *supra* note 16, at 1–16.

³¹⁸ See Dayton & Dupre, *supra* note 39, at 2410–11; Rebell & Hughes, *supra* note 86, at 101–13; Thro, *supra* note 70, at 482–84; see also Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 208 (1982) ("We have previously cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" (quoting *Rodriguez*, 411 U.S. at 42)).

³¹⁹ See Salzman, *supra* note 166.

hard choice: either subject themselves to coercion and accept the federal government's funds, or risk equal protection liability should their students challenge their decisions to follow their own policies and thereby forego federal funds.

Even if Congress has taken a step in the right direction toward effective education reform with the No Child Left Behind Act, the Act cannot be the *only* possible right step—education reformers have been working toward the same goal for decades, and even they have not achieved much success. The Secretary should use her power to waive provisions of NCLB more respectfully so that the states can continue to experiment with a diversity of approaches to education reform. Likewise, Congress should fund NCLB more fully so that the states can comply with the Act's requirements, but reserve their own funds for expenditure on their own policy choices.

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