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Federal Demand Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy

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FEDERAL DEMAND AND LOCAL CHOICE: SAFEGUARDING THE NOTION OF FEDERALISM IN EDUCATION LAW AND POLICY

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ABSTRACT

As the ESEA undergoes its next transformation under a new presidential administration, this article explores the appropriate federal and state roles in promoting and enforcing laws related to academic achievement, and the appropriate judicial role in interpreting them. Part I of this article provides an overview of how the modern federal role in education law and policy was shaped through politics and litigation. Part II explores the drastic changes that No Child Left Behind brought to education federalism through the lens of cooperation, coercion (enforcement), and competition. It then analyzes the appropriate role of the executive branch in enforcing educational access and achievement and the appropriate role of the courts in adjudicating issues of education law and policy. Finally, Part III provides recommendations that will result in a more workable model of accountability by sketching out clearer boundaries related to the federal and state roles in the effort to improve the nation's academic achievement. This new model of accountability uses national assessment and reporting requirements to shift much of the enforcement responsibility of the Elementary and Secondary Education Act to the states while allowing districts the flexibility to experiment with educational approaches. It also sets forth parameters that allow for general federal oversight of national education policy while respecting the boundaries integral to cooperative federalism.

INTRODUCTION

During the last decade, federal involvement in education law has made a drastic shift to academic achievement—a realm historically the domain of local education agencies. The modern school reform movement has been shaped by both a strong nationwide desire to ensure equitable access to education and a series of successful lawsuits that provoked increased state

involvement in issues of educational access and accountability. These issues of access and accountability were guiding principles behind the most recent iteration of the federal Elementary and Secondary Education Act of 1965(ESEA)—the No Child Left Behind (NCLB) Act.¹

Like most federal grant programs, NCLB followed the classic paradigm of cooperative federalism. Yet, in its implementation, the safeguards that exist to preserve local control were often poorly defined or inconsistent; in fact NCLB obfuscated the appropriate federal and state roles in enforcing federal education law and policy, and especially the role of federal government in legislating and enforcing policy that it does not fund entirely.

Educational achievement continues to be at the forefront of the nation's consciousness²; consequently, it is unlikely that the era of federal involvement in academic achievement and accountability that NCLB introduced will end soon. As the ESEA undergoes its next transformation

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¹ 20 U.S.C. §§6301 et. seq. (2001).

² Ronald F. Ferguson, *Commentary: What parents can do for their kids*, (July 20, 2009), <http://www.cnn.com/2009/LIVING/07/17/ferguson.education.parents/index.html?iref=newssearch> (observing that education receives a great deal of national attention and advocating that it should receive more).

under a new presidential administration, this article explores the appropriate federal and state roles in promoting and enforcing laws related to academic achievement, and the appropriate judicial role in interpreting them. Part I of this article looks at the evolution of the modern federal role in education law and policy through an overview of how the modern federal role in education law and policy was shaped through politics and litigation. Part II explores the drastic changes that No Child Left Behind brought to education federalism through the lens of cooperation, coercion (enforcement), and competition. It then analyzes both the role of the executive branch in enforcing educational access and achievement, and the appropriate role of the courts in adjudicating issues of education law and policy.

Finally, Part III provides recommendations that will result in a more workable model of accountability by suggesting clearer boundaries related to the federal and state roles in the effort to improve the nation's academic achievement. This new model of accountability uses national assessment and reporting requirements to shift much of the enforcement responsibility of the Elementary and Secondary Education Act to the states while leaving local districts room to experiment with educational approaches. It also sets forth parameters that allow for general federal oversight of national education policy while respecting the boundaries integral to cooperative federalism.

PART I: THE EXPANDING FEDERAL ROLE IN EDUCATION

The current federal role in education law and policy can be largely attributed to the last sixty years of education-related reform and litigation. The courts first addressed access to education as a civil rights issue in the 1950s, when *Brown v. Board of Education* and its progeny highlighted education as critical to opportunity.³ During the same decade, the space race with the Soviet Union raised national concerns about the United States' ability to compete internationally and highlighted the importance of education as critical to ensuring the country's continued ability to be a world power.⁴ Consequently, President Eisenhower and Congress supported the National Defense Education Act of 1958, which directed federal money to improve math and science programs in secondary schools.⁵ The Civil Rights Act of 1964 increased the federal commitment to providing the poor access to education,⁶ and led to President Johnson signing into law the Elementary and Secondary Education Act ("ESEA") of 1965.⁷ At the core of this Act was—and still is—Title I, a grant that provides supplemental federal aid to economically disadvantaged children, and provided the statutory basis for

³ *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

⁴ Thomas Rentschler, *No Child Left Behind: Admirable Goals, Disastrous Outcomes*, 12 WIDENER L. REV. 637, 639-40 (2006).

⁵ National Defense Education Act of 1958, Pub. L. No. 85-864 (originally codified at 20 U.S.C. § 401 (1958)).

⁶ U.S. Dep't of Educ., *The Federal Role in Education*, <http://www.ed.gov/about/overview/fed/role.html> (Last modified: May 6, 2009); JOHN J. GARGAN, *HANDBOOK OF LOCAL GOVERNMENT ADMINISTRATION* 447 (John J. Gargan ed., CRC Press 1996).

⁷ 20 U.S.C. § 70 (2002).

early special education funding.⁸

The increased federal funding did not affect the district control of education policy, then (and currently), the majority of ESEA appropriated funds are distributed by formula based on the number of poor students and the cost of education in a state.⁹ Instead it was school finance reform litigation that began the significant shift from district control to increased state involvement in education.¹⁰ School finance reform litigation is generally recognized as having three waves: challenges brought to school finance schemes based on the federal Equal Protection Clause, challenges brought under state constitutions and statutes based on inequitable district spending, and challenges under state constitutions based on whether state expenditures were sufficient to meet standards of minimal adequacy in academic achievement.¹¹

The first wave of school finance reform litigation is characterized by the 1971 Supreme Court case *Serrano v. Priest*, in which the California Supreme Court recognized education as a fundamental right and held that

⁸ 20 U.S.C. § 6301 (Supp. 2001).

⁹ U.S. Dep't of Educ., Improving Basic Programs Operated by Local Education Agencies (Title I, Part A), <http://www.ed.gov/programs/titleiparta/index.html> (last modified Apr. 10, 2009).

¹⁰ Education has historically been the realm of the local school districts. See Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1752 (2004); See also Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 130-31 [hereinafter *Political Economy of Education Federalism*] (noting this country's long history of local control of education policy).

¹¹ See generally JANE FOWLER MORSE, *A LEVEL PLAYING FIELD: SCHOOL FINANCE IN THE NORTHEAST 4* (State University of New York Press) (2007) (describing the three waves of school finance litigation).

California's funding scheme, which resulted in unequal treatment of students based on economic disparity, violated the federal Equal Protection Clause.¹² Two years after the Serrano decision, *San Antonio Independent School District v. Rodriguez* unequivocally established that when it came to addressing economic inequities with regard to access to quality education, the federal courts were unwilling to recognize education as a fundamental right.¹³ Since then, the federal role in education policy has been fairly limited to funding with regard to issues of equal access, and before NCLB, federal involvement in academic achievement was minimal.

Even as the Court limited the ability to bring a federal cause of action for the right to education, through the Elementary and Secondary Education Act the federal government continued to fund programs that attempted to expand educational access and opportunity while leaving education policy to school districts—and to a limited degree state—control.¹⁴ The funding was enough to make the notion of a cabinet-level agency tenable, and the combined efforts of the politically powerful National Education Association (the largest union in the United States) and prominent NEA member Senator

¹² *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977) (noting that its uniqueness among public activities clearly demonstrates that education must respond to the command of equal protection).

¹³ 411 U.S. 1 (1973) (holding that the negative impact that the Texas school finance system had on poor children enrolled in the public school system did not violate the Equal Protection Clause of the Fourteenth Amendment, and that education is not a fundamental right warranting protection under the U.S. Constitution).

¹⁴ Regina R. Umpstead, *The No Child Left Behind Act: Is it an Unfunded Mandate or a Promotion of Federal Educational Ideals?*, 37 J.L. & EDUC. 193, 197 (2008) [hereinafter *Unfunded Mandate*].

Abraham Ribicoff led President Carter to sign the Department of Education Organization Act into law on October 17, 1979.¹⁵

The newly-formed Department of Education allocated funds to federal educational grant programs while in the courtroom the focus of education reform shifted to the states. After the 1973 Rodriguez decision, school finance reform claims were based on assertions that the inequities in education expenditures violated state constitution education clauses.¹⁶ Though the level of protection varies, all fifty state constitutions have an education clause that supports a public right to education.¹⁷ During the second-wave, there were twenty-one high court decisions of which seven were in favor of plaintiffs.¹⁸ Despite mixed success, the second-wave resulted in more than twenty states modifying their education finance systems.¹⁹

As states began to take a more active role in education policy, President Reagan began his presidency in 1981 with a new federalism agenda

¹⁵ Shayla L. Mitchell, *An Historical Analysis of the Creation of a Cabinet-Level United States Department of Education* (Mar. 11, 2008) (unpublished Ph.D dissertation, Georgia State University) (on file with author), *available at* http://etd.gsu.edu/theses/available/etd-04242008-185846/unrestricted/mitchell_shayla_1_200801_phd.pdf.

¹⁶ The second wave of school finance litigation began with *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (holding that New Jersey's funding scheme was unconstitutional based on the state constitution).

¹⁷ See generally Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 B.Y.U. EDUC. & L.J. 1 (1997) (describing the ways in which plaintiffs rely on state constitution education clauses to advance school finance reform).

¹⁸ Deborah A. Verstegen, *Towards A Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems*, 23 ST. LOUIS U. PUB. L. REV. 499, 505 (2004).

¹⁹ Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569 (2004) (discussing the mixed results of the second wave of school finance litigation).

that aimed to reduce federal government, including the Department of Education.²⁰ In his 1982 state of the union address, President Reagan cited large federal grant programs as a means of silencing the voices of citizens in the political process by removing their ability to take part in basic decisions about essential government services.²¹ Consistent with this position, the Department of Education awarded block grants to states and allowed them to set their own educational priorities.²² In 1983, the release of *A Nation at Risk* brought the failures of the public education system to the nation's collective consciousness,²³ and any intention to dismantle the Department of Education became politically unfeasible.²⁴

The failure of the judiciary to solve problems in education through school finance reform litigation illustrated that equality in spending did not necessarily result in any discernible improvement in the quality of education.²⁵ The second-wave cases advocated equity in funding without

²⁰ D.T. Stallings, *A Brief History of the United States Department of Education: 1979-2002*, 83 PHI DELTA KAPPAN, 677-683 (2002) (The proposal to dismantle the Department of Education did briefly resurface as part of the Republican platform during the 1996 presidential election).

²¹ Teresa Dahmus, *The Effects of the No Child Left Behind Act on the Balance of Power Among Local, State, and Federal Educational Authorities*, 16 LBJ JOURNAL OF PUB. AFFAIRS 20, 24-25 (2003).

²² See, e.g., Neal Devins, *Social Meaning and School Vouchers*, WM. & MARY L. REV. 919, 932 (2001); Otis B. Grant, *President Ronald Reagan and the African-American Community: Harmful Stereotyping and Games of Choice in Market-Oriented Policy Reform*, 25 T.M. COOLEY L. REV. 57, 75 (2008)

²³ U.S. DEP'T OF EDUC., NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983), available at http://datacenter.spps.org/sites/2259653e-ffb3-45ba-8fd604a024ecf7a4/uploads/SOTW_A_NATION_at_Risk_1983.pdf.

²⁴ Stallings, *supra* note 20.

²⁵ Aaron J. Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C.

meaningfully correlating expenditures to their impact on the level of educational quality guaranteed to students under state constitutions.²⁶ Not only was there little to no evidence that the suits promoted educational access or quality, the unwanted effect of the litigation was often lower per-pupil funding throughout the state.²⁷ Consequently, the judiciary began to deny claims based solely on disparities in educational expenditures. The moderate number of successful equity plaintiffs in the 1970s began to decline in the 1980s, and between 1981 and 1988 there was only one successful plaintiff in the eight cases decided by state supreme courts.²⁸

While the second-wave of litigation may not have brought about improvements in education, it did expand state involvement in education policy by making states potentially liable for inequities in educational spending.²⁹ In response, states began to provide to districts a greater percentage of education spending³⁰ and to develop a greater interest in education policy (which later led to an expanded federal role in education

L. REV. 857, 891-92 (2006) [hereinafter *Last Wave*]; Matt Brooker, comment, *Riding the Third Wave of School Finance Litigation: Navigating Troubled Waters*, 75 UMKC L. REV. 183, 187 (2006).

²⁶ *Last Wave*, *supra* note 25, at 891-95.

²⁷ Brooker *supra* note 25, at 187.

²⁸ *Id.*

²⁹ *Political Economy of Education Federalism*, *supra* note 10, at 133.

³⁰ Michael Heise, *Judicial Decision Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures*, 31 SEATTLE U. L. REV. 863, 872 (2008) [hereinafter *Equal Educational Opportunity*] (before 1930 districts were the primary funders of schools whereas by the mid-seventies state spending on schools was greater than that of the districts).

policy).³¹ Probably at least in part in response to the rise in litigation and failures of school governance, the number and scope of “state legislation and administrative rules governing school district activity exploded” during the 1980s.³² Prior to then, it was school districts and local governments that set the standard for what teachers taught in the classroom;³³ there was no uniform way by which to measure what students should know or to compare student progress toward achieving those goals.³⁴ As states responded to the fiscal demands of litigation and the accompanying political pressure for educational accountability, they began to set statewide measures of what children should know.³⁵ Thus, the standard-based reform movement was born, and by 2000 forty-nine states had adopted state standards.³⁶

Parallel to the rise of the standards-based reform movement, plaintiffs began to find more success in bringing claims based on funding inadequate to

³¹ 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, 208 (2003) (discussing the increased interests of the states within a few years of *A Nation at Risk*).

³² *Last Wave*, *supra* note 25, at 872.

³³ Ctr. for Pub. Educ., Practical Information and Analysis about Public Education: A Guide to Standard-Based Reform, http://www.centerforpubliceducation.org/site/c.kjJXJ5MPIwE/b.1505663/k.1F96/A_guide_to_standardsbased_reform.htm (last visited June 19, 2009).

³⁴ Brooker, *supra* note 25.

³⁵ *Political Economy of Education Federalism*, *supra* note 10, at 132 (“while the states varied in their approach to adopting and implementing standards, they all shared three key objectives: 1. High standards for what all students should know and do; 2. tests aligned to the standards that gauged student progress; 3. school accountability based on the results”).

³⁶ Versteegen, *supra* note 18, at 506; Liebman & Sabel, *supra* note 31, at 208 (noting that “[w]ithin a few years of *A Nation at Risk*, nearly all 50 states had adopted some version of comprehensive standards”).

meet states' minimal constitutional standards for the *quality* of education.³⁷ In 1989, the focus of school finance reform litigation shifted from equity to adequacy and represents the third, and current, wave of school finance litigation.³⁸ This wave incorporates both fiscal input and academic output and is based on the premises that: students are entitled to education of at least a certain quality under the education clause of the state constitution, that the state has violated the constitution by failing to provide that level of educational quality, and that states must provide enough money to bring the worst performing school districts up to the minimum level required by the state education clause.³⁹ By including adequacy as part of the analysis, courts have been able to use the third wave to avoid some of the non-justiciable questions that frequently arise in education cases. Whereas second-wave cases often required courts to reallocate resources, adequacy returns the determination of how to improve schools to the state legislature;

³⁷ See Michael A. Rebell, *Poverty, "Meaningful" Education Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1527 (2007) (During the third wave courts increasingly held in favor of plaintiffs, with "plaintiffs prevailing in almost 75% of education adequacy cases decided since 1989"); see also Verstegen, *supra* note 18, at 499 (discussing the success of adequacy cases).

³⁸ The advent of this third wave began with *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989) (holding that the state violated the Kentucky constitution's mandate that education and an efficient system of schools were fundamental); Professor Ryan suggests (and others have agreed) that we have entered into a fourth wave of school finance reform litigation in which economic integration is the focus. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 308 (1999); see also, e.g., Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. DAVIS L. REV. 1835, 1852 (2007) [hereinafter *Uniformity*]; Christopher E. Adams, comment, *Is Economic Integration the Fourth Wave in School Finance Litigation*, EMORY L.J. 1613 (2007).

³⁹ Brooker, *supra* note 25, at 187-88; see also Regina R. Umpstead, comment, *Determining Adequacy: How Courts Are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007 B.Y.U. EDUC. & L.J. 281, 286 (2007).

consequently, third-wave cases can potentially result in the loss of district control rather than increased funding.⁴⁰

As the standards reform movement gained momentum, states called for federal involvement in creating national standards.⁴¹ It was this call from the state governors that led President George H.W. Bush to organize the first national education summit in 1990.⁴² Though President Bush promised to limit the federal government's role in education, this collaborative effort between the President and the state governors led to the America 2000 plan in which the President set six national educational goals as part of a nationwide effort to achieve educational equality through six educational goals.⁴³ In 1994, President Clinton signed the Improving America's Schools Amendment (IASA) to the Elementary and Secondary Education Act of 1965.⁴⁴ Following

⁴⁰ *Last Wave*, *supra* note 25, at 913-916.

⁴¹ William S. Koski, *When Adequate Isn't: The Retreat From Equity In Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 577 (2006) [hereinafter *When Adequate Isn't*] (At the time, "federal and state policy supported the development of minimum competency exams for high school students, expansion of the movement to require basic skills tests, and a renewed attention to the math and science curriculums").

⁴² Paul Manna, *Conductor, Schoolmarm, or Struggling Substitute Teacher? Explaining the changing federal role in K-12 Education* 7 (June 1-4, 2006) (unpublished manuscripts presented at The Policy History Conference), *available at* <http://www.ed.gov/programs/readingfirst/index.html>.

⁴³ LAMAR ALEXANDER, *AMERICA 2000: AN EDUCATION STRATEGY* 35 (Diane Publishing) (1993) (America 2000 plan encompassed six goals: first, to ensure that every child starts school ready to learn; second, to raise the high school graduation rate to 90 percent; third, to ensure that each American student leaving the 4th, 8th, and 12th grades can demonstrate competence in core subjects; four, to make our students first in the world in math and science achievements; fifth, to ensure that every American adult is literate and has the skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship; and sixth, to liberate every American school from drugs and violence so that schools encourage learning).

⁴⁴ The Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as amended at 20 U.S.C. §§ 6301-7941) (2003).

Bush's America 2000 plan, the Clinton administration went a step further to encourage standard-based education by making Goals 2000 the centerpiece of elementary and secondary education.⁴⁵ The purpose of Goals 2000 was threefold: to promote the achievement of the national educational goals by the year 2000; to raise expectations of students, parents, and teachers of academic achievement; and to give state and local reform efforts greater flexibility and more support.⁴⁶ More significantly, the IASA required states receiving Title I funds to adopt state standards and assessments aligned to measure progress toward those standards.⁴⁷

Despite the additional measures that President Clinton added to the IASA, Title I remained a longstanding failure in closing the achievement gap;⁴⁸ moreover, there were no consequences for states for not meeting proficiency goals.⁴⁹ The national demand for demonstrated progress toward academic achievement set the stage for what would be unprecedented federal involvement in education policy.⁵⁰

⁴⁵ Stallings, *supra* note 20.

⁴⁶ *Goals 2000: Reforming Education to Improve Student Achievement*, April 30, 1998 <http://www.ed.gov/pubs/G2KReforming/g2exec.html> (last visited June 19, 2009).

⁴⁷ *Id.*

⁴⁸ James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937 (2004) [hereinafter *The Perverse Incentives of NCLB*].

⁴⁹ See Rentschler, *supra* note 4, at 639-40; see also Brandi Powell, comment, *Perspectives on the No Child Left Behind Act: Take the Money or Run? The Dilemma of the No Child Left Behind Act for State and Local Governments* 6 LOY. J. PUB. INT. L. 153, 160-63 (2005) (describing the leniency of IASA enforcement).

⁵⁰ "Before passage of the NCLB Act of 2002, the federal government's role in education generally was limited to providing supplemental resources to targeted groups of disadvantaged students, generally "Title I" students (with the most economic disadvantages, such as high poverty and homelessness) and special education students. By contrast, the ten

PART II: NO CHILD LEFT BEHIND USHERS IN A NEW ERA OF EDUCATION**FEDERALISM**

George W. Bush's administration was the first Republican administration to bolster the overall movement to support federal involvement in national education efforts.⁵¹ President Bush increased the federal budget for education established by President Clinton—which at the time had been the largest increase in federal education funding.⁵² As a federal statute, the Elementary and Secondary Education Act had done little to affect the national education landscape; it was merely a means of funneling funds to states to allow them to continue to do what they had already been doing, and enforcement was largely associated with improper spending.⁵³ The IASA took the first step towards a more active federal role by setting national academic objectives, and NCLB added disaggregated reporting and the enforcement “teeth” to the ESEA.

Cooperation, Coercion, and Competition: How the three Cs of Collaborative Federalism in No Child Left Behind Blurred The Intergovernmental Safeguards of Education Federalism

titles of the 670-page NCLB Act affect *all* students in the nation's public schools, not only special education students or those in public schools that qualify for and receive Title I funding. The NCLB Act greatly expands federal involvement in the traditionally State-dominated realm of education.” State's Opposition to the Secretary's Motion to Dismiss at 3, *Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006), *available at* http://www.ct.gov/ag/lib/ag/hot_topics/nclb/nclb_pl_opp_to_def_mottodismiss_12232005.pdf.

⁵¹ Stallings, *supra* note 20.

⁵² *Id.* at 9-12.

⁵³ See Rentschler, *supra* note 4, at 639-40; *see also* Powell, *supra* note 49, at 160-63.

At its inception, No Child Left Behind showed promise as a bipartisan effort to pair federal education grants with quantifiable expectations of accountability and student achievement. On the one hand, the provisions surrounding the implementation and enforcement of the Act introduced a paradigm of collaborative federalism that had not been included in earlier versions of the ESEA. On the other hand, NCLB represented a sweeping change from the traditional roles of the various levels of government in education policy in that the federal role in educational achievement went from extreme deference to the states and districts to a much more prescriptive role.

A. The First C: Cooperation as the DNA of No Child Left Behind

Cooperative federalism is certainly not a new concept; it is a label that describes a symbiotic relationship amongst the various levels of government to implement federal programs that has ostensibly existed since the New Deal, but in practice dates back to the nineteenth century.⁵⁴ In order to effectively implement federal programs, officials at the federal and state level must necessarily cooperate to some degree. Federal grant programs (often

⁵⁴ See, e.g., Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 284 (2005) (noting that cooperative federalism describes an interactive relationship between the state and national governments that goes back to the New Deal or earlier); see also Richard B. Stewart, *Federalism: Allocating Responsibility between the Federal and State Courts*, 19 GA. L. REV. 917, 957 (1985) (the use of conditional federal grants under the banner of ‘cooperative federalism’ first became widespread during the New Deal); Daniel J. Elazar, *Federal-State Collaboration in the Nineteenth Century United States*, in COOPERATION AND CONFLICT READINGS IN AMERICAN FEDERALISM 94-108 [hereinafter *Federal-State Collaboration*] (The cooperative intergovernmental relationship in education extends just as far. In the 19th century the federal government assisted public schools through reimbursement and through land grants for education).

described as grant-in-aid programs) are the foremost examples of cooperative federalism;⁵⁵ in fact, theorist Morton Grodzins specifically cited grant-in-aid programs as central to his marble cake theory of government cooperation between national and state administrative agencies.⁵⁶ Congress exercises its conditional spending powers by controlling the scope of the grant program and setting forth statutory and/or regulatory parameters.⁵⁷ Once Congress passes a conditional grant program, that program's successful implementation is dependent on state and district officials. Moreover, federal officials charged with overseeing state grant programs often cultivate cooperative relationships with the state administrators with whom they work, thereby theoretically increasing the likelihood that they will work with minimal conflict to implement program goals and objectives.⁵⁸

Theoretically, federalist interests are protected by the combination of structure and discretion that the cooperative federalism relationship

⁵⁵ Daniel J. Elazar, *Federalism and Intergovernmental Relations*, in COOPERATION AND CONFLICT READINGS IN AMERICAN FEDERALISM 2, 12 (1969) [hereinafter *Federalism and Intergovernmental Relations*]; DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 69 (1966) [hereinafter *American Federalism*] (describing grants-in-aid as of the utmost importance among methods of intergovernmental cooperation).

⁵⁶ U.S. PRESIDENT'S COMM'N ON NAT'L GOALS, GOALS FOR AMERICANS 165-82 (Amer. Assembly) (1960) (positing that instead of functioning within separate spheres as a "three-layer cake", the branches of the American government interact as a "marble cake"); MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES 31, 60 (Daniel J. Elazar ed., Transaction Publishers 1966) (1984); see also *Last Wave*, supra note 25, at 870-871 (discussing the traditional role of districts as the largely independent controllers of American education and likens the system to that of dual or "layer cake" federalism in which "multiple, hierarchically organized governments share sovereignty over a given area, but in which each operates within its own, well-defined sphere").

⁵⁷ *American Federalism*, supra note 55, at 148.

⁵⁸ *Id.* at 149 (describing how federalist interests are preserved through complex cooperative relationships at all levels of government in which authority and power are shared).

cultivates,⁵⁹ and the role of the executive branch is one that unifies local, state and federal interests through these national programs.⁶⁰ The state and districts have the financial incentive to implement the program, and because the programs are usually generated by a nationwide public need or want, all levels of government are politically motivated to implement it.⁶¹ Moreover, the federal government is in a better position than local governments politically and economically to address issues of “equality and redistribution”, so these federal grants afford local governments the fiscal support necessary to promote social agendas that they would not otherwise be able to promote.⁶² Instead of weakening the state and local roles in education policy, the cooperative relationship of grants-in-aid may actually strengthen those roles by assigning states and districts essential roles in implementing national policy.⁶³ Additionally, state agencies are allowed considerable flexibility in supplementing and tailoring the law and policies to which they will be subject

⁵⁹ *American Federalism*, *supra* note 55, at 64 (Despite the reservations of some about grants resulting in increased government centralization, grants create a positive intergovernmental relationship by combining direction at the federal level and discretion at the local level).

⁶⁰ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 552 (1954) (looking to the role of the president-and by extension the executive branch as one of presenting programs that “reflect the needs of the entire nation” and that create coalitions between dueling state and national interests).

⁶¹ *Federalism and Intergovernmental Relations*, *supra* note 55, at 6 (the motivation for harmony is a nationwide consensus).

⁶² PAUL E. PETERSON, *CITY LIMITS* 69-74 (University of Chicago Press) (1981) (asserting that the difficulty in ascertaining the beneficiaries of services combined with local means of raising revenue through property taxes result in districts being less able to be egalitarian in its distribution of local funds).

⁶³ Grodzins, *supra* note 56, at 320.

based on local needs and conditions.⁶⁴

The federal statute includes language that restricts the authority of the federal agency, and the federal rules to which the states must subscribe are shaped by national associations that serve constituents and interests at all levels of government.⁶⁵ Although the federal government influences national policy through grant conditions, its control is lessened through the public nature of the administrative regulatory process, the research and standards of interested professional associations, and the intergovernmental interaction that occurs through technical assistance and program monitoring.⁶⁶ Additionally, the congressional check on administrative agencies, “is constant, effective, and institutionalized; and it is almost uniformly exercised in behalf of local interests, individual, group, and governmental.”⁶⁷ Indeed, one of the common characteristics of cooperative federalism is that the federal enforcement role is typically unobtrusive.⁶⁸ The symbiotic nature of the relationship often has an inhibitive effect on the federal agency’s enforcement ability; if states and districts do not meet federal statutory requirements feds are “hesitant” to

⁶⁴ Paul J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1696 (2001); *Federalism and Intergovernmental Relations*, *supra* note 55, at 19.

⁶⁵ *American Federalism*, *supra* note 55, at 151 (specifically citing the National Education Association and the American Association of State Universities as being key players in shaping the regulations critical in implementing federal education grant programs).

⁶⁶ *Federalism and Intergovernmental Relations*, *supra* note 55, at 16-18.

⁶⁷ Grodzins, *supra* note 56, at 260.

⁶⁸ *Id.* (observing that because of the “American commitment to non-centralization” federal programs are non-intrusive, thereby raising state willingness to enter into the cooperative relationship).

enforce it using means that would ultimately harm the program that it authorized.⁶⁹

Before the enactment of the NCLB amendment to the ESEA, the cooperative relationship among the U.S. Department of Education and state and local educational agencies was not significantly different from any other grant-in-aid program. The Department allocated the funds to support broad academic objectives and the states provided assurances that they would facilitate the proper implementation of the program's statutory requirements.⁷⁰ There were no consequences resulting from a failure to meet academic objectives,⁷¹ and federal enforcement measures were typically reserved for grantees that misappropriated funds or used funds for expenditures other than those under the authorizing statute.⁷² No Child Left Behind was borne of the growing nation-wide recognition that the rhetoric of the ESEA and education clauses of state constitutions did not do enough to address differences in student achievement—particularly the academic achievement gap based on race and economic disparities.⁷³

⁶⁹ *American Federalism*, *supra* note 55, at 182.

⁷⁰ *See generally* 20 U.S.C. §§ 6301-7941 (Supp. 2001) (this basic allocation is more applicable to formula grants. The Department primarily allocates federal funds through formula or competition grants. Formula grants are distributed based on the number of poor children per state/district. Then states award subgrants to eligible local educational agencies on a competitive basis, funding the grant proposals that showed the most promise for raising student achievement and for successful implementation of education requirements).

⁷¹ Powell, *supra* note 49, at 160-163 (describing the leniency of IASA enforcement).

⁷² *See generally* Education Department General Administrative Regulations, Title 34, Code of Federal Regulations (CFR), Parts 74-86 and 97-99 (December 2008).

⁷³ H.R. 1939, 110th Cong. (2001) (“States, [LEAs], and schools [are] accountable for

Like most of the programs implemented through cooperative federalism, NCLB was the result of collaboration by state and federal leaders. It was the states that issued the call for the federal government to get involved in setting national policy in education,⁷⁴ and NCLB was structured so that both federal and state oversight were critical to the implementation and enforcement of its provisions.⁷⁵ Yet NCLB's enforcement provisions were in stark contrast to the cooperative federalism reflected in prior iterations of the Elementary and Secondary Education Act.⁷⁶ The increased role in the oversight and implementation of education policy was a new role at both the state and federal levels of government; the federal government had never before been involved with academic achievement, and the enhanced state role in academic achievement was largely a result of the relatively recent standards-based reform movement of the late eighties.⁷⁷ Applying Grodzin's marble cake metaphor of cooperative federalism, Professor Saiger suggests that NCLB "marbled" the functions of the layer cake in "chaotic" fashion.⁷⁸ The implementation of these accountability provisions was wrought with tension, and most state and local education officers would assert that NCLB is far

ensuring that all students, including disadvantaged students, meet high academic standards").

⁷⁴ *When Adequate Isn't*, *supra* note 41; Manna, *supra* note 42.

⁷⁵ *See generally* 20 U.S.C. §§ 6301-7941 (Supp. 2001).

⁷⁶ Manna, *supra* note 42, at 9.

⁷⁷ CTR. ON EDUC. POL'Y, EDUCATIONAL ARCHITECTS: DO STATE EDUCATION AGENCIES HAVE THE TOOLS NECESSARY TO IMPLEMENT THE NCLB? 9 (May 2007) [hereinafter Educational Architects] (discussing the tensions resulting from the shifted intergovernmental power dynamic caused by NCLB).

⁷⁸ *Last Wave*, *supra* note 25, at 870-71.

more coercive than it is collaborative.⁷⁹

B. The Second C: The Coercive Impact of NCLB

The coercive enforcement provisions of NCLB created an intergovernmental impasse in implementing and enforcing its curricular and accountability requirements. Three of the greatest threats to federalism are: first, that rigorous enforcement at the federal level will violate principles of federalism and move the country towards a national curriculum; second, that the accountability requirements of NCLB are unfunded mandates through which the federal government unfairly burdens state governments; and third, that judiciary activism in school finance lawsuits muddles the role of the levels and branches of government.

1. Navigating The Prohibition Against The Federal Direction of Curricula

The language of the Department of Education's Organization Act—which established the Department and its legal parameters—reads as follows:

[t]he establishment of the Department of Education shall not increase the authority of the Federal Government over education, which is reserved to the States and the local schools systems and other instrumentalities of the States.⁸⁰

The subsection that follows adds:

No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary

⁷⁹ Stewart, *supra* note 54, at 957 (describing conditional grants in general as being more coercive than cooperative).

⁸⁰ 20 U.S.C. §3403(a) (2000).

or any such officer to exercise any direction, supervision, or control over the curriculum, program or instruction, administration, or personnel of any educational institution, school, or school systems . . . over the selection or content of . . . textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.⁸¹

The Elementary and Secondary Education Acts affirms that language:

Notwithstanding any other prohibition of Federal law and except as provided in subsection (b) of this section, no funds provided to the Department under this Act may be used by the Department to endorse, approve, or sanction any curriculum designed to be used in an elementary school or secondary school.⁸²

The prohibitory language of the statute serves as a congressional check on the federal ability to intrude on policies that are traditionally implemented at the district or state level. This longstanding safeguard is a staple of the ESEA, but it contradicts NCLB provisions and regulations that require the Department to enforce provisions that require that teaching methods and curricula be grounded in scientifically based research.⁸³ In enacting No Child Left Behind, Congress assigned to the Department an unprecedented role in enforcing provisions related to state and local curricular choice, yet it provided the U.S. Department with no real guidance about how to effectively enforce those provisions.⁸⁴

The Reading First program is a glaring example of the political

⁸¹ §3403(b); (Subsection (a) of the same provision reads “The establishment of the Department of Education shall not increase the authority of the Federal Government over education, which is reserved to the States and the local schools systems and other instrumentalities of the States” *Id.* at § 3403(a)).

⁸² §7909(a).

⁸³ §6316(b)(3)(A)(i).

⁸⁴ 20 U.S.C. § 6301 (Supp. 2001).

quagmire the Department faces when it follows a congressional and White House mandate to aggressively enforce curricular requirements.⁸⁵ Reading First was one of the most high-profile programs of the NCLB Act, and Department officials received the message from the White House and Congress to strictly enforce provisions requiring that districts receiving Reading First funds implement reading programs based in scientifically-based reading research.⁸⁶ Department officials aggressively pursued this directive, and the result was that in September 2006, the Department's Office of the Inspector General (OIG) released a damning report on the federal Reading First program alleging among other things, that the Department improperly influenced state and district selection of reading programs in violation of federal law.⁸⁷

The report and its political aftermath left the Department with conflicting messages of how to meet its obligation to enforce the prescriptive curricular requirements of scientifically based research within the parameters of the statutory prohibitions that prohibit the federal government from influencing or directing state and local curricula.⁸⁸ Neither Congress nor the

⁸⁵ Kamina A. Pinder, *Using Federal Law to Prescribe Pedagogy: Lessons Learned from the Scientifically Based Requirements of No Child Left Behind*, 6 GEO. J. OF L. AND PUB. POL'Y 47 (2008).

⁸⁶ Pinder, *supra* note 85, at 74-75.

⁸⁷ OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF EDUC., *THE READING FIRST PROGRAM'S GRANT APPLICATION PROCESS 6-26* (2006) (summarizing the official findings of Reading First's grant process).

⁸⁸ 20 U.S.C. § 6301 (Supp. 2001); *see also* 20 U.S.C. § 3403(b) (2000); *see also* 20 U.S.C. § 7907(b) (Supp. 2001) (stating that Department officials are prohibited from

Department seem to be able to resolve how to demand accountability for student performance in light of statutory prohibitions and the accompanying apprehension of federal encroachment on state decisions about education policy.

Through its insistence on the adoption of programs based in scientific research and its expectation that the Department will enforce those requirements, Congress has come dangerously close to directing curricular choice. It has never been the role of the federal government to advocate a curricular approach; instead, its role is to encourage successful educational practices through incentives and through publishing best practices.⁸⁹

2. No Child Left Behind: A Federal Directive for which States Pay the Price

Most scholars agree that *South Dakota v. Dole* has definitively established that the prescriptive provisions of No Child Left Behind serve as a constitutionally acceptable exercise of congressional conditional spending authority.⁹⁰ Despite their constitutionality, the accountability provisions of

exercising any direction, supervision or control over the curriculum or program of instruction of any educational institution, school or system).

⁸⁹ U.S. Dep't of Educ., Interagency Education Research Initiative (2002), <http://www.ed.gov/offices/OERI/IERI/index.html> (last updated July 18, 2002) (IERI describing its own goals).

⁹⁰ *South Dakota v. Dole*, 483 U.S. 203 (1987) (asserting that Congress had the power to "further broad policy objectives" through the Spending Clause of Article I, Section 8, Clause 1 of the Constitution); see *Political Economy of Education Federalism*, *supra* note 10, at 136-39 (noting that NCLB is constitutional under *Dole*); see *Unfunded Mandate*, *supra* note 14, at

NCLB have led to litigation based on the contention that Congress has not appropriated enough money for states to be able to meet the requirements of NCLB.⁹¹ The amount of money NCLB provides to the states versus the actual cost of implementing its provisions is the largest gap of all federally-funded programs.⁹² Many states do not have the capacity to implement the supplemental services requirements for schools identified as “failing”, the highly-qualified teacher provisions or the standards and assessments required under Adequate Yearly Progress (AYP); moreover, there is a dearth of receiving schools for AYP transfers and insufficient guidance from the Department. Additionally, countervailing state policies, insufficient technological capacity and unrealistic timeframes hamper NCLB implementation.⁹³

The Unfunded Mandate Reform Act of 1995 is intended to safeguard federalism interests and protect states by prohibiting Congress from requiring states to fund federal programs without providing the necessary funds.⁹⁴ This statute is designed to prevent legislators from establishing politically popular

219 (also asserting that NCLB is constitutional under Dole).

⁹¹ Most notable of which are *Connecticut v. Spellings*, 549 F. Supp. 2d 161, (D. Conn. 2008) (Connecticut was the first state to bring an action based on the contention that NCLB was an unfunded mandate. Ultimately, the federal district court of Connecticut dismissed three of four plaintiffs and did not rule on the unfunded mandate provision) and *Sch. Dist. of City of Pontiac v. Spellings*, No. 05-2708 (6th Cir. Jan. 7, 2008).

⁹² Anita F. Hill, *A History of Hollow Promises: How Choice Jurisprudence Fails To Achieve Educational Equity*, 12 MICH. J. RACE & L. 107, 142-43 (2006).

⁹³ See generally *Educational Architects*, *supra* note 77; Hill, *supra* note 92, at 140-43.

⁹⁴ Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified as amended in scattered sections of 2 U.S.C.)

federal programs while evading responsibility for funding them.⁹⁵ The ESEA includes specific language that addresses the applicability of the unfunded mandate:

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 a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.⁹⁶

The Sixth Circuit recently reversed dismissal of a lawsuit based in part on claims that NCLB's accountability provisions are unfunded mandates.⁹⁷ It held that the plaintiffs' claim that they should not be liable for the costs of complying with mandates of NCLB merited further review, rejecting the Department's arguments that state participation is voluntary and that the definition of mandate in the Unfunded Mandate Act excludes voluntary participation in federal programs.⁹⁸ The Court's response was that NCLB

⁹⁵ See generally Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1134 (1997) ("Unfunded mandates force other officials to raise taxes or make cuts in government services. This ability to engage in 'liability-shifting' may lead members of Congress to impose more mandates on states and localities than they think is consistent with a robust federal system."); Makram B. Jaber, *Unfunded Federal Mandates: An Issue of Federalism or a "Brilliant Sound Bite"?*, 45 EMORY L.J. 281, 284 (1996); John C. Eastman, *Re-entering the Arena: Restoring a Judicial Role for Enforcing Limits on Federal Mandates*, 25 HARVARD J.L. & PUB. POL'Y 931 (2002); Thomas McGarity, *Regulation and Litigation: Complementary Tools for Environmental Protection*, 30 COLUM. J. ENVTL. L. 371 (2005).

⁹⁶ 20 U.S.C. § 7907(a) (Supp. 2001).

⁹⁷ *Pontiac v. U.S. Department of Education*, 512 F.3d 252 (6th Cir. 2008); see also *Connecticut v. Spellings*, 549 F.Supp.2d 161 (D.Conn. 2008) (this case also included unfunded mandates as one of its four challenges, but the case was ultimately dismissed without a final decision on the unfunded mandate challenge)

⁹⁸ *Id.* at 266-67 (also of note to the court was that the Department did not provide States with notice that they were to incur additional costs to meet the Act's requirements).

does not refer to the language of the UMA,⁹⁹ that the word mandate is also used to describe the obligations that states voluntarily incur in order to qualify for federal funds, and that the language of the ESEA does not release federal officials of their obligations “where federal funding falls short—after the States have agreed to participate (whether voluntarily or by coercion or otherwise).”¹⁰⁰

Using the federal law as a benchmark for adequacy litigation raises unfunded mandate problems, yet recent challenges may create pressure on both the federal government and states to find funding sources to make meeting those benchmarks possible.¹⁰¹ The next iteration of the ESEA should minimize the federal role in enforcing state benchmarks, and to the extent feasible, states should adopt accountability measures that return the political aspects of education reform to legislative control.

3. Education Reform and the Role of the Judiciary

NCLB kept the standards and assessments of the preceding amendment to the ESEA, and added requirements that states create at least three levels of student competencies, that students be tested annually in grades three to eight, and that students be tested at least once in grades nine to

⁹⁹ *Id.* at 268.

¹⁰⁰ *Id.* at 267.

¹⁰¹ William S. Koski, *Ensuring an Adequate Education for Our Nation's Youth: How Can We Overcome the Barriers?* 27 B.C. THIRD WORLD L.J. 13, 23 (2007) [hereinafter *Ensuring an Adequate Education*].

twelve.¹⁰² The states set annual goals for the percentage of students who must meet the level of proficiency on annual assessments, and that level determines Adequate Yearly Progress (“AYP”).¹⁰³ AYP is the center of NCLB’s accountability provisions, and the failure to meet AYP triggers NCLB’s most punitive enforcement provisions.

Schools receiving Title I funds must test at least ninety-five percent of all students, including ninety-five percent of students within each subgroup.¹⁰⁴ Testing less than ninety-five percent of students overall or within one of the subgroups automatically designates a school as “failing”; if any subgroup fails to meet AYP, then the entire school could be labeled failing.¹⁰⁵ According to the statute, the standards that states set for AYP cannot be altered for these subgroups nor may states substitute progress in one area as a way to be granted flexibility in AYP in another area.¹⁰⁶ There is no room for rewarding partial progress or experimentation in innovative programs that may lead to success in bringing up the scores in one group if a school or district does not

¹⁰² 20 U.S.C. § 6311 (b)(1)(D)(ii)(II-III) (Supp. 2001) (describing the three levels of competency); § 6311 (b)(3)(C)(vii) (explaining that students must be tested annually in grades three through eight); § 6311 (b)(3)(C)(V)(I)(cc) (requiring students to be tested once from grades nine through twelve).

¹⁰³ § 6311(b)(2)(B).

¹⁰⁴ §6311(b)(2)(C)(v)(II)(aa-dd) (non-aggregated subgroups include those with disabilities, minorities, and English language learners).

¹⁰⁵ § 6311(b)(2)(I)(ii); *but see* Evan Stephenson, *Evading the No Child Left Behind Act: State Strategies and Federal Complicity*, 2006 B.Y.U. EDUC. & L.J. 157, 159 (discussing how states maneuver around this requirement by raising the minimum number of students that must belong to a subgroup in order to count it under the AYP accountability provisions).

¹⁰⁶ § 6311(b)(1)(B) (the academic standards set by the state apply to all schools and all children in the state).

bring all subgroups to AYP levels of proficiency.¹⁰⁷

After a school fails to meet AYP for two years it is “identified for corrective action”,¹⁰⁸ the parents of students in the school have a right to transfer the students to another public school served by the local educational agency, which may include a public charter school that has not been identified for school improvement.¹⁰⁹ In the third year, the school must make tutoring and other supplemental instructional services available to students; and in the fourth year the district must take certain measures, which may include replacing the school staff, instituting a new curriculum, and appointing an outside expert to advise the school on its progress toward making AYP.¹¹⁰ In the fifth year, penalties include reopening the school as a public charter school, replacing all or most of the school staff, and/or entering into a contract with a private management company to take over the public school’s operation.¹¹¹

Even before NCLB, courts deciding school finance reform cases undertook a role that expanded beyond the traditional.¹¹² The quality of education to which students are entitled continues to evolve, and there is still

¹⁰⁷ Aaron Saiger, *Legislating Accountability: Standards, Sanctions, and School District Reform*, 46 WM. & MARY L. REV. 1655, 1723 (2005) [hereinafter *Legislating Accountability*].

¹⁰⁸ § 6316(b)(7)(C)(iv).

¹⁰⁹ § 6316(b)(1)(E)(i).

¹¹⁰ § 6316(b)(5)(A-C).

¹¹¹ § 6316(b)(8)(B)(i-v).

¹¹² John Dayton & Anne Dupre, *School Funding Litigation: Who’s Winning the War? 57 VAND. L. REV.* 2351, 2399-2401 (Nov. 2004) (discussing the difficulties and differences courts have in their approaches to school finance litigation).

a need for state courts as “normative mechanisms of interpretation and governance”.¹¹³ For example, in adequacy lawsuits courts have looked at “research-based educational interventions designed to raise educational achievement.”¹¹⁴ Professor Rebell asserts that courts play a critical role in education policy by working with the other branches of government to promote equal access to meaningful education opportunity where the other branches of government have failed.¹¹⁵ Part of the value of the judicial role in education policy is that the judicial branch is more insulated from the political influences that lead legislators “to create education finance systems that strongly disfavor poor urban and rural school systems.”¹¹⁶

As compelling as Professor Rebell’s argument may be, the heightened insulation from political influence (if indeed there is such insulation) is the very reason that some courts are reluctant to actively insert themselves in directing educational policy,¹¹⁷ and why some scholars argue that the increased activism of the judiciary in matters of educational policy is precisely what we should be working to avoid.¹¹⁸ Judicial decision-making

¹¹³ Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343 (February 2005).

¹¹⁴ *Ensuring an Adequate Education*, *supra* note 101, at 23.

¹¹⁵ Rebell, *supra* note 37, at 1527, 1532.

¹¹⁶ *Id.* at 1538.

¹¹⁷ Laurie Reynolds, *Full State Funding of Education as a State Constitutional Imperative*, 60 HASTINGS L.J. 749, 761-67 (noting state courts’ increasing reluctance to involve themselves in school finance litigation cases and discussing the manners in which that reluctance manifests itself).

¹¹⁸ See Brooker, *supra* note 25, at 183 (asserting that an “overreaching judiciary” should not substitute its will for that of the will of the people as exercised through elected

about affirmative rights to social services, such as education are more likely to be affected by “changing fiscal, administrative, and social conditions.”¹¹⁹ Courts are not in a position to adequately assess appropriate tradeoffs between state social obligations and their budgetary constraints; accordingly, courts often limit judgment to declaratory relief and provide broad, nebulous recommendations that the state legislature modify its school finance policy within state constitutional guidelines.¹²⁰ Moreover, some courts exceeded the parameters of their branch, and without any basis in state constitutional language, substitute their own values for the will of the legislature.¹²¹

Professor Stewart specifically points to the regulatory process as a threat to federalism values—especially with regard to affirmative services like education—because the legal issues surrounding such services often require judicial involvement in the less consistent, less clear arenas of politics and policy rather than law.¹²² Indeed, although Professor Weschler and Dean Kramer convincingly asserted respectively that the senatorial response to states’ rights and the two-party political process protect federalist interests (thereby making active judicial review unnecessary), the structure of the national government nor the political process serve to protect federalist

representatives).

¹¹⁹ Stewart, *supra* note 54, at 940 (noting that through their involvement in advocating for the provision of social services, judges are exceeding their appropriate roles and entering the arena of local political debate).

¹²⁰ William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1101 (2004).

¹²¹ Obhof, *supra* note 19, at 594.

¹²² Stewart, *supra* note 54, at 919-921.

interests in the realm of education law and policy.¹²³ To the contrary, the political process seems to have both the intended and unintended effect of obfuscating which level of government should be held accountable for the failures of the ESEA. Stewart cites conditional grants in general as a threat to federalism because they allow the legislatures to pass broad statutes and the executive agency to promulgate nebulous regulation in order to avoid political backlash.¹²⁴ The result then is that the little discretion states and districts have is limited to the difficult political and fiscal decisions of how to implement and fund the demanding statutory requirements.¹²⁵ The fear of political backlash often leads state legislators to rely on judges to dictate reforms rather than be held accountable for the ramifications of reforms that they might legislate.¹²⁶ That reliance on the judiciary removes legislative branches at all levels of government from their obligation to be responsive to the needs and desires of its constituents. Specifically, Stewart cites conditional grants as the source of extensive litigation that leaves much of the ultimate decision-making to federal judges “without the correlative political or operational

¹²³ Wechsler, *supra* note 60 (asserting that the composition of the national government and the Congressional role serve to safeguard federalist interests); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (political parties and their desire for re-election serve as safeguards of states’ rights).

¹²⁴ *Id.* at 940-42 (describing judicially-determined rights to such services as appearing arbitrary and inconsistent with the traditional judicial role).

¹²⁵ *Id.* at 962-63 (suggesting that federal administrators may avoid political repercussions by adopting vague regulations and then leaving the difficult decisions about how to implement those regulations to state and local governments).

¹²⁶ Brooker, *supra* note 25, at 223.

responsibility.”¹²⁷

Even though states set the standards for AYP, as a federal law that evaluates state responsibility in educational achievement, NCLB invites increased federal court involvement in matters of education law and policy.¹²⁸ When federal judges interpret state standards it adds to the dangers of inconsistency.¹²⁹ Moreover, since states set their own levels of proficiency under NCLB, the accountability provisions of NCLB strengthen plaintiffs’ claims that states are failing to provide adequate education as required under state constitutions.¹³⁰ Before NCLB, third-wave adequacy suits required states to demonstrate that state funding was adequate to meet requirements under the state constitution’s education clause, and for the most part the state was limited in liability to per-pupil expenditures.¹³¹ Courts can now look to state standards and performance benchmarks under NCLB as a measure for what constitutes adequate education for the purposes of school finance

¹²⁷ *Equal Educational Opportunity*, *supra* note 30, at 963. Federal Courts are particularly deferential to federal agencies. Even the Rehnquist court—famous for its curbing of federal authority in a return to traditional federalism values—afforded deference to the conditional spending of federal agencies. *See Political Economy of Education Federalism*, *supra* note 10, at 127 (describing the Rehnquist Court’s return to federalism as concurrent with “escalating intergovernmental jockeying for education policy authority among federal, state, and local officials”).

¹²⁸ Benjamin M. Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 *CARDOZO L. REV.* 779, 840 (Nov. 2006) (exploring in depth lawsuits based on the legal ramifications of implementing No Child Left Behind); *The Perverse Incentives of NCLB*, *supra* note 48, at 943, 959-960.

¹²⁹ Schapiro, *supra* note 54, at 310-15.

¹³⁰ Michael Heise, *The 2006 Winthrop and Frances Lane Lecture: The Unintended Legal and Policy Consequences of the No Child Left Behind Act*, 86 *NEB. L. REV.* 119, 125-26 (2007).

¹³¹ Dayton & Dupre, *supra* note 112, at 2397.

litigation.¹³² Accordingly, there is no limit on per-pupil expenditures, and the decisions increase state vulnerability to claims of inadequate funding.¹³³ Additionally, while third-wave adequacy suits are more likely to result in judicial deference to state determination of the appropriate remedial steps to address educational inequities, third-wave litigation threatens local control because states can use that decision as a basis to remove decision-making power from the districts.¹³⁴ Despite the important role school finance litigation has played in education reform, legislatures should not be encouraged to rely on activist judges to achieve their political objectives.

C. The Third C: Competition as a Byproduct of the Collaborative

Federalism Approach

Professors Sabel and Liebman note that education policy is headed in two directions: one in the “direction of increased centralization, even nationalization”; while the other is a “new localism” that includes a shift towards the creation of new schools and the right of parents to school choice.¹³⁵ Certainly the heightened federal role in education policy that NCLB introduced is illustrative of the former, while the latter is captured in the voucher and charter school movements. One argument for the

¹³² Superfine, *supra* note 128, at 840.

¹³³ Dayton & Dupre, *supra* note 112, at 2397 (If states are legally responsible for student achievement as measured by tests, they will be subject to open-ended financial liability).

¹³⁴ *Last Wave*, *supra* note 25, at 913-16.

¹³⁵ Liebman & Sabel, *supra* note 31, at 187-88.

privatization of education is that market-driven education is customer-responsive without being subject to bureaucratic incentives or politics.¹³⁶ NCLB's effect on the voucher and charter school movement enriched the discussion surrounding the "choice, competition, and innovation" so critical to education federalism analysis,¹³⁷ and demonstrates that market-driven education—whether private or public—is not insulated from political pressure, nor is it necessarily consistent with traditional notions of federalism.

In 2002—the same year that NCLB was enacted—supporters of the voucher movement experienced major victory in the Supreme Court decision *Zelman v. Simmons-Harris* in which the Supreme Court upheld the constitutionality of vouchers for religious schools.¹³⁸ Although *Zelman* was more about expanding academic options than religious ones, the decision was monumental for religious conservative supporters of vouchers who wanted to be able to use their tax dollars to educate their children outside of the secular public school system.¹³⁹ However, because NCLB accountability provisions increased the likelihood that private schools would be subject to increased government involvement, conservative religious groups (who comprised the largest constituency of voucher supporters) lost interest, and voucher

¹³⁶ *Legislating Accountability*, *supra* note 107, at 1671-72.

¹³⁷ Schapiro, *supra* note 54, at 266 (asserting that "choice, competition, and innovation" are central to economic arguments about federalism).

¹³⁸ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that an Ohio school voucher program that allowed students to use vouchers at religiously-affiliated private schools did not violate the Establishment Clause of the First Amendment).

¹³⁹ *Id.*

programs ultimately lost support from constituents of all political persuasions.¹⁴⁰

No Child Left Behind may have cooled the fervor of the voucher movement, but its efforts to improve the academic performance of the nation's public schools revitalized the school choice movement with regard to public charter schools.¹⁴¹ The AYP provisions of NCLB specifically include charter schools as alternatives to "failing" schools, thereby promoting a more market-based approach to school choice. The provisions require that a school that fails to make AYP for two years be identified as one in need of improvement, and that students who are in schools that are in need of improvement be able to transfer to another public school, *which may include a public charter school within the same school district.*¹⁴² After the fifth year that a school fails to meet AYP options include: *reopening as a public charter school*; replacing school staff connected to the failure; hiring a private company to run the school, or turning the school over to the state government.¹⁴³

The proliferation of charter schools throughout this country supports the notion that there is widespread support for local innovation in

¹⁴⁰ James Forman, Jr., *The Rise and Fall of School Voucher: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 549-50 (2007) (vouchers have been widely rejected in states led by either party—Republican or Democrat).

¹⁴¹ Danielle Holley-Walker, *The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools*, 40 CONN. L. REV. 125 at 140-47 (2007) (discussing the rise of charter schools as the primary alternative to failing public schools).

¹⁴² 20 U.S.C. § 6316(b)(1)(E)(i) (Supp. 2001) (emphasis added)

¹⁴³ §6316(b)(8)(B)(i-v) (emphasis added).

education.¹⁴⁴ Charter schools are chartered and funded by the state; in exchange for exempting charter schools from certain state laws and regulations, the state requires that the charter school be nonprofit and imposes specific rules including that it meets goals specified in the charter.¹⁴⁵ Often charter schools have more flexibility in hiring staff, allocating resources and implementing innovative educational strategies; yet unlike private schools, charter schools are subject to significant oversight and the accountability provisions of NCLB.¹⁴⁶ The appeal of public charter schools crosses political lines by uniting its conservative supporters with liberals who are also seeking alternatives to traditional public school options; they provide parents with alternatives and often involve the community by focusing on local student and parental needs and wants.¹⁴⁷

On the one hand, the competition amongst traditional public schools and public charter schools seems to be in accordance with federalism values by being responsive to the market-based needs of local school districts, and in particular the local needs and preferences of parents. Supporters hoped that

¹⁴⁴ See Holley-Walker *supra* note 141, at 140-47 (discussing the popularity of charter schools).

¹⁴⁵ Joseph O. Oluwole & Preston C. Green, III, *Charter Schools Under the NCLB: Choice and Equal Educational Opportunity*, 22 ST. JOHN'S JOURNAL OF LEGAL COMMENTARY 165, 177-78 (2007); James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, 843 (2007) [hereinafter *Do Charter Schools Threaten Public Education?*].

¹⁴⁶ *Id.* at 844.

¹⁴⁷ Jim Ryan, *School Choice and the Suburbs*, 14 J.L. & POL. 459 at 468 (1998) (asserting that charter schools provide hope to both conservatives and liberals for an alternative to grossly inadequate public schools).

the competition would serve as incentive to public schools by allowing poor and minority children access to better schools.¹⁴⁸ On the other hand, the rise of charter schools threatens district control by forcing districts to comply with state implementation of federal policy and by diminishing the ability of local districts to attract residents with better quality schools.¹⁴⁹ Choice has also raised the possibility that districts are expendable as demonstrated by the numerous states in which governors and legislators have transferred control from districts to mayors.¹⁵⁰ Moreover, because of their public funding and extensive regulation, charter schools are not purely market based; furthermore, they are subject to many of the same challenges and accountability under the federal law as public schools.¹⁵¹ While charter schools provide important opportunities for local educational experiments, they do not reverse the trend of waning local input in educational policy.

PART III: POLITICALLY SAFEGUARDING EDUCATIONAL FEDERALISM THROUGH NATIONAL TESTING AND REPORTING

Justice Brennan recognized that education is not “merely some government ‘benefit’ indistinguishable from other forms of social welfare

¹⁴⁸ *The Perverse Incentives of NCLB*, *supra* note 48, at 967.

¹⁴⁹ Dahmus, *supra* note 21, at 22-23.

¹⁵⁰ *Last Wave*, *supra* note 25, at 884-85.

¹⁵¹ See ANDREW J. COULSON, SOC. PHILOSOPHY & POL’Y CTR., *MARKET EDUCATION: THE UNKNOWN HISTORY* (Transaction Publishers) (1999); see also *Do Charter Schools Threaten Public Education?*, *supra* note 145, at 844 (Coulson points out that the charter school market is so highly regulated that he considers it a “quasi-market” in education”).

legislation.”¹⁵² Education will remain a national priority for the foreseeable future, and the majority of the public supports high-quality public education as a government priority.¹⁵³ Indeed, few would argue against the objectives of NCLB: equitable access to quality education, closing the achievement gap between minority and nonminority children, and accurate reporting of district and school performance.¹⁵⁴ Yet, despite public support for the idea that there should be some measure of federal oversight to ensure that states use federal funds to promote academic achievement, there is no clear directive on the appropriate extent of the federal role in education policy.¹⁵⁵

Professor Heise suggests that control of educational policy should go to the level of government that pays the associated costs and asserts that by decoupling funding and policy NCLB dilutes voting citizens’ influence.¹⁵⁶ Connecting policy to funding may serve to protect federalist interests in most instances, but as states and the federal government increasingly fund education there is a danger in connecting funding to control. Poor districts do not have the fiscal resources necessary to provide basic educational needs,

¹⁵² Plyler v. Doe, 457 U.S. 202, 221 (1982).

¹⁵³ See *Uniformity*, *supra* note 38, at 1837; see also Obhof, *supra* note 19, at 573 (noting that it is “obvious” that “policymakers and voters recognize education as one of the most important functions of state and local governments”).

¹⁵⁴ See *Last Wave*, *supra* note 25, at 923 (“To many, it is a cardinal virtue of the NCLB[A] that it demands high performance, not only overall, but for individual subgroups that otherwise are ‘basically invisible’”).

¹⁵⁵ See, e.g., *Political Economy of Education Federalism*, *supra* note 10, at 129 (noting that there is yet no consensus about what the boundaries should be); see also *The Perverse Incentives of NCLB*, *supra* note 48, at 987 (noting the federal government’s inability to take a strong, consistent stance on its enforcement of NCLB).

¹⁵⁶ *Political Economy of Education Federalism*, *supra* note 10, at 153-54.

much less innovative educational programs.¹⁵⁷ Yet there is value in allowing the local voter to have input in local education policy rather than imposing it from the federal level. There is evidence to support that the less input parents have on their children's educational choices the less successful the educational experience.¹⁵⁸ Interestingly, at least part of that input may be attributable to spending; parents who are disconnected from school spending are less likely to be interested in assessing schools' educational value.¹⁵⁹

One way to politically safeguard federalist interests in education policy is through the politics surrounding strong reporting requirements. The political impact of public perception is powerful, particularly in the realm of education. This is best illustrated by the fact that all states accepted NCLB funds despite the reluctance of some to do so.¹⁶⁰ Of course, there is no use in reporting information when the means of evaluating the information are unclear and inconsistent. There should be a national test (or a small number

¹⁵⁷ *Uniformity*, *supra* note 38, at 1889 (arguing that total statewide funding will reduce the inequities resulting from school funding through district property tax).

¹⁵⁸ Coulson, *supra* note 151, at 297, 332 (also noting that parent apathy is the number one reason teachers list as their reason for leaving the profession).

¹⁵⁹ *Id.*

¹⁶⁰ See *Political Economy of Education Federalism*, *supra* note 10, at 149 ("If...states feel compelled to participate in a voluntary federal program that imposes financial costs, then the coercive force of NCLB is even more significant than imagined"); see also Kristina P. Doan, *No Child Left Behind Waivers: A Lesson in Federal Flexibility or Regulatory Failure?*, 60 Admin. L. Rev. 211, 212 (2008) (detailing that more than twenty states have introduced bills or resolutions seeking to amend the Act's implementation, yet no state has refused funds by opting out of NCLB requirements); see also Michael D. Barolsky, *High Schools are no Highways: How Dole Frees States from the Unconstitutional Coercion of No Child Left Behind*, 76 Geo. Wash. L. Rev. 725, 749 (2008) (noting that the Secretary of Education responded to Utah, Virginia and Connecticut's consideration of opting out of NCLB by threatening to withhold all Title I and related funds irrespective of the amount of noncompliance).

of national tests), and the federal government should enforce accurate reporting requirements in order to connect the local constituents to the political process and to minimize “gaming”¹⁶¹ the system with inconsistent reports of academic progress. Assessment should not be tied to high stakes imposed at the federal level but as a starting point for identifying the strengths and deficiencies of a school or district.

National Testing as a Consistent Measure

The idea of national standards or a national curriculum has been suggested as a means of providing educational uniform quality,¹⁶² but it is an idea that is politically untenable and not necessarily effective.¹⁶³ In a study that examined the academic performance of students from countries with national standards, there was no evidence that national standards had any correlation to higher academic performance.¹⁶⁴ Additionally, the prohibition against the U.S. Department of Education directing curricula is firmly grounded in both the ESEA and the law that authorizes its very existence.¹⁶⁵

¹⁶¹ See Maurice R. Dyson, *Playing Games With Equality: A Game-Theoretic Critique of Educational Sanctions, Remedies and Strategic Noncompliance*, 77 TEMP. L. REV. 577 (2004) (discussing the use of shame as one of several gaming strategies to advocate educational equity).

¹⁶² See, e.g., Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2105-2113 (2006) (advocating national standards); see also Liebman & Sabel, *supra* note 31.

¹⁶³ David Nather, *Education: High Expectations, Limited Means*, 58 CONG. Q. WKLY 2394 (2000) (discussing President Clinton’s plans to implement national standards and tests as a result of fear by Republicans and conservative groups that it would open the door to a national curriculum).

¹⁶⁴ Coulson, *supra* note 151, at 356 (citing a study by Columbia University researcher Richard M. Wolf).

¹⁶⁵ 20 U.S.C. § 3403(b) (2000) (stating that Department officials are prohibited from

Congress may attempt to legislate a national curriculum, but the reluctance to disconnect districts from curricular control is so firmly a part of American culture that it is unlikely to do so. Certainly, after its experience with NCLB, the Department is no longer willing to push curricular boundaries without an explicit directive.

A large part of creating a common understanding of adequacy in education is providing some national measure of basic skills. A national standardized test may summon fears of a national curriculum, but there is a greater interest in ensuring that minimal academic expectations are consistent from state to state.¹⁶⁶ One of the major criticisms of NCLB's enforcement provisions is that states are able to "game" the system by lowering the difficulty of the assessment and the score necessary to determine adequate yearly progress.¹⁶⁷ Because AYP does not mean the same thing in every state, the designation loses significance. Additionally, the high-stakes assessments effectively limit district control in selecting curricula and experimentation and academic objectives because they must engage test-driven behaviors.¹⁶⁸ Unfortunately, the backlash against federal enforcement of NCLB's

exercising any direction, supervision or control over the curriculum or program of instruction of any educational institution, school or system); *see also* 20 U.S.C. § 7907(b) (Supp. 2001) (explaining that no funds may be used to endorse, approve or sanction any curriculum for an elementary or secondary classroom).

¹⁶⁶ *The Perverse Incentives of NCLB*, *supra* note 48, at 988 (suggesting that despite the political aversion to them, national standards and tests "are the only real solution if states, left to their own devices would set academic standards too low").

¹⁶⁷ *See generally The Perverse Incentives of NCLB*, *supra* note 48.

¹⁶⁸ *Last Wave*, *supra* note 25, at 876 -877.

accountability measures has been so strong that Congress responded by restricting the U.S. Department of Education's ("Department") ability to effectively enforce the rigorous requirements of the Act. This expanded federal role not only failed to bring about discernible successful academic results, it weakened the very qualities that held much of the Act's potential for success.

In fact, what began as a drive to heighten accountability and achievement actually may have increased disparities across the states.¹⁶⁹ Since states are responsible for setting their own standards and assessment, many states succumbed to the temptation to create less rigorous assessments or to modify the scoring (requiring a lower score to meet the definition of "proficient") so that more students are likely to meet adequate yearly progress.¹⁷⁰ In 2006, twenty states requested waivers from the Department that would allow them to alter their definition of proficiency for the purpose of determining AYP,¹⁷¹ and of the twenty-five million students tested, nearly two million students' test scores were not being counted, with minority

¹⁶⁹ Liu, *supra* note 162 (proposing to reduce the inequalities among state achievement through national standards and state assessments).

¹⁷⁰ *The Perverse Incentives of NCLB*, *supra* note 48 (discussing the race to the bottom that states have created in response to the AYP provisions); *see also* Rentschler, *supra* note 4, at 637, 642 (claiming that after a significant number of schools have failed to reach the goals of NCLB, some states have "re-adjusted the required scores in order to reduce the number of failing schools"); *see generally* Stephenson, *supra* note 105 (explaining that the Education Department's implementation of three devices that allow states to evade a part of NCLB's aims lessens the states' incentive to accomplish the Act's goals by lowering educational standards).

¹⁷¹ Robert A. Garda, Jr., *Coming Full Circle: The Journey From Separate But Equal to Separate and Unequal Schools*, 2 DUKE J. CONST. L. & PUB. POL'Y 1, 69, 70 (2007).

subgroups much more likely to have their scores excluded than whites.¹⁷²

Along with encouraging gaming, the carrots and sticks approach rewards high-performing districts (which are often wealthier) and punishes low-performing districts (which are often poorer), by stripping them of already scarce resources.¹⁷³ It is contrary to the public interest to lower expectations for poorer districts, yet the punitive measures of NCLB fail to allow for causes not attributable to the failures at the district or school level. These measures do not take into account: lack of resources, effect of socio-economics within the home, English as a second language, learning and cultural differences.¹⁷⁴ Instead, inherent in NCLB is the assumption that schools in wealthier areas are simply better and those in poorer areas are worse, reinforcing what “policymakers and affluent parents want to believe; higher test scores are a clear indication of a better school.”¹⁷⁵

National assessment of basic skills is necessary to accurately compare school performance on the local and national level. While no standardized test is a perfect indicator of what students learn and can do, it is a helpful starting point of comparison. Just as colleges, universities and graduate

¹⁷² Frank Bass, Nicole Ziegler Dizon, & Ben Feller, *AP: States Omit Minorities' School Scores; No Child Left Behind Leaves Kids Behind*, April 18, 2006, available at <http://www.eschoolnews.com/news/topnews/index.cfm?i=36948&CFID=19798743&CFTOKEN=91186132> (last visited Aug. 3, 2009).

¹⁷³ *The Perverse Incentives of NCLB*, *supra* note 48, at 935.

¹⁷⁴ See generally Alex Duran, *Factors to Consider When Evaluating School Accountability Results*, 34 J.L. & EDUC. 73 (2005).

¹⁷⁵ *Id.* at 88 (noting that this “confirmation bias” is attributable at least in part to the political power of affluent parents).

schools use common assessments to compare students across the nation, so should the elementary and secondary schools that are preparing students for such institutions. There is nothing in the ESEA that prohibits national testing; in fact, the ESEA already uses the results of a national test in part as a standard measure to compare state performance. NCLB requires that states receiving Title I funds participate in the National Assessment of Educational Progress (NAEP).¹⁷⁶ Funded at the federal level, since 1969 NAEP has been the only national assessment of American students; its main assessment is administered every two years and tests a sample of students in grades 4, 8, and 12 on subject matter achievement in mathematics, reading, science, writing, the arts, civics, economics, geography and U.S. history.¹⁷⁷ Every subject tested is reported at the national level; mathematics, reading, writing and science are also reported at the state level.¹⁷⁸ Unfortunately, NAEP's ability to inform is limited; it reports state and not school level performance, it tests a random sample of students, and the scores are not reported for individual students or individual schools.¹⁷⁹

Although the ESEA prohibits the use of NAEP as an accountability measure, it serves as a standard measure by which state performance on state

¹⁷⁶ 20 U.S.C. §6311(c)(2) (Supp. II 2002).

¹⁷⁷ Nat'l Ctr. For Educ. Statistics, *The Nation's Report Card: The NAEP Research e-Center*, <http://nces.ed.gov/nationsreportcard/researchcenter/statemapping.asp>

¹⁷⁸ Nat'l Ctr. for Educ. Statistics, *The Nation's Report Card: Overview*, <http://nces.ed.gov/nationsreportcard/about/> (The NAEP can report results by selected large urban districts).

¹⁷⁹ *The Perverse Incentives of NCLB*, *supra* note 48, at 959-960.

test results can be compared to a standard national measure of assessment.¹⁸⁰ This standard was to serve a political “shaming” function for those states that tout high test results but score comparatively low on NAEP.¹⁸¹ Unfortunately, the NAEP comparisons did not shame states enough to prevent them from lowering standards to meet adequate performance; its impact is limited because of the limited grades and number of students who take it, limited reporting and because it does not have the high stakes connected to it that state assessments do.¹⁸² I remain agnostic with regard to the content and the number of national tests, but if there is more than one national assessment, there should be some way of standardizing the results so that they can be accurately compared in the same way that SAT and ACT scores can be converted.¹⁸³ Certainly, states that want to create additional standards and assess skills beyond those tested in the national test could and certainly should be encouraged to do so. While they would have access to federal technical assistance, states and districts would be expected to set forth their own set of core curricular requirements measured—at least to a degree—by performance on a national assessment.

¹⁸⁰ See 20 U.S.C. 9622 (b)(2)(A-H) (Supp. 2002).

¹⁸¹ *The Perverse Incentives of NCLB*, *supra* note 48, at 959-60 (citing the reasons that NAEP comparisons are not enough to shame states into raising their standards for academic achievement).

¹⁸² *Id.*

¹⁸³ See College Board, *SAT-ACT Concordance Tables*, <http://professionals.collegeboard.com/data-reports-research/sat/sat-act> (converting ACT and SAT scores); see also Nat'l Ctr. For Educ. Statistics, *Comparison Between NAEP and State Reading Assessment Results: 2003*, http://nces.ed.gov/pubs2008/2008474_1.pdf (comparing NAEP scores to state assessments).

States are in a better position to determine what incentives and disincentives will most effectively lead to improved academic achievement in the districts, and should be responsible for accurately and completely reporting to the federal government the steps they are taking to cure deficiencies. Underperforming districts can provide explanations and supplements to explain their performance, and states can use that documentation to inform their decisions to take future action against underperforming districts (i.e. technical assistance, incentives or punitive enforcement). In this way, test results can lead to more effective educational reform research, more accurate identification of shortcomings and best practices across the nation.¹⁸⁴

The High Stakes of Reporting

“High stakes” are not dirty words; evidence supports that in order to motivate education reform, there must be an instrument connecting high stakes to achievement and high-quality education.¹⁸⁵ Compare, for example, the public response to the SAT versus NAEP. Despite the fact that SAT scores are widely acknowledged as poor indicators of educational quality,¹⁸⁶

¹⁸⁴ See, e.g., Liu, *supra* note 162, at 2078-79 (in identifying the NAEP’s potential as a national test, he discusses a RAND study that tied NAEP results to a number of factors including: pupil-teacher ratio, resources for teachers and family socioeconomic status).

¹⁸⁵ See generally Albert Shanker, *The Case for High Stakes and Real Consequences* in DEBATING THE FUTURE OF AMERICAN EDUCATION: DO WE NEED NATIONAL STANDARDS AND ASSESSMENTS? (Diane Ravitch ed.) (The Brookings Institution 1995) pp 145 – 53, 152 (asserting that high stakes must necessarily be attached to testing for education reform).

¹⁸⁶ See generally David W. Grissmer, “*The Continuing Use and Misuse of SAT Scores*”, 6 PSYCHOL. PUB. POL’Y & L. 223 (2000); see also Liu, *supra* note 162, 2073 (noting that school

polls taken since 1985 indicate that SAT scores have a tremendous influence on the public's impression of schools; "education is the single largest public expenditure at the local and state level, and indicators such as the SAT can potentially influence elections, appointments of educational policymakers from school principals to boards of education and educational policy."¹⁸⁷ Parent taxpayers often use scores to select neighborhoods and school districts.¹⁸⁸ NAEP, a statistically accurate test, has no such impact.¹⁸⁹

High stakes may serve an important purpose, but imposing high stakes from the top down, is not the best way to incentivize change. NCLB's enforcement measures are based on district performance,¹⁹⁰ and the high stakes of testing associated with that performance backfired. NCLB provides inadequate incentive for compliance, and offers no protection against the gaming strategies that states employ to avoid its sanctions.¹⁹¹ Additionally, the choice that AYP provisions provide students at failing schools is offered too late to stimulate reform.¹⁹² If the NCLB accountability provisions were

SAT averages do not necessarily reflect a school's educational quality).

¹⁸⁷ Grissmer, *supra* note 186, at 228.

¹⁸⁸ *When Adequate Isn't*, *supra* note 41, at 586 (Noting that realtors and homebuyers rely most heavily on school accountability data and that those who have the means chose homes in school zones with higher test scores, which are usually majority white. Even those parents who seek diverse school settings are likely to choose school performance over diversity, thereby creating "a deeper gulf between the high-performing wealthy schools and the low-performing poor and minority schools"); Grissmer, *supra* note 186, at 227; *The Perverse Incentives of NCLB*, *supra* note 48, at 951.

¹⁸⁹ Grissmer, *supra* note 186, at 228 (although he does assert that NAEP scores are increasingly receiving publicity).

¹⁹⁰ 20 U.S.C. § 6311 (b)(3)(A) (Supp. 2001).

¹⁹¹ Dyson, *supra* note 161, at 590.

¹⁹² 20 U.S.C. § 6312(b)(1)(E)(i) (Supp. 2001).

effective, perhaps they would be worth the political backlash, but there is no evidence that supports that they are.

High stakes are most effective when they are generated by the political pressure of local constituents.¹⁹³ As a political safeguard of federalist interests in the quest for heightened academic achievement, testing must go hand-in-hand with reporting. One of the major strengths of NCLB (at least in theory) is that it lessens the ability of states to bury the test scores of underserved and lower performing students by burying their scores amongst the mainstream.¹⁹⁴ Accordingly, NCLB reporting requirements are designed to empower parents and policymakers to make informed decisions.¹⁹⁵ A national test will impose upon districts and states the high stakes from the local level that the local governments resent coming from the federal government. Additionally, the accountability that a national test and accurate reporting impose makes it more difficult to shift the burden of educational reform to the courts.

Professor Saiger notes that school districts are complex organizations, some districts respond productively to the pressure, while others are “incapable of responding rationally to disestablishment threats” and do so by

¹⁹³ See, e.g., Jerome T. Murphy, *Title I of ESEA: The Politics of Implementing Federal Education Reform* in EDUCATION POLICY IMPLEMENTATION 13, 36 (Allan R. Odden ed., State University of New York Press 1991) (discussing the need for pressure from the local constituents and organizations to put political pressure on states and the federal government for accountability in addressing the educational needs of the poor).

¹⁹⁴ *Legislating Accountability*, *supra* note 107, at 1725.

¹⁹⁵ 20 U.S.C. § 6318(a)(2) (Supp. 2001) (requiring that schools thoroughly integrate parents in school policy).

responding counterproductively; accordingly, the district is likely to act in its own self interest even when that interest may be inconsistent with state objectives or mandates.¹⁹⁶ Districts do, however, respond to political influence of constituents, and the suburban influence is critical to local education policy.¹⁹⁷ The public perception of tests as a gauge for school quality is central to that suburban influence, and the public has a longstanding reliance on tests as indicators of school quality.¹⁹⁸ In fact, evidence supports that it is not the general public but political groups and organizations with contrary commercial interests that make the prospect of national testing a difficult one to successfully legislate.¹⁹⁹ It is because the public relies so heavily on testing for its perception that high stakes testing such as that required under NCLB motivate state and local officials to do whatever it takes to generate results that will make a more positive public impression about school quality.²⁰⁰

The gaming that high stakes instigated is part of a long-existing pattern in education reform. In the 1970s, thirty-six states adopted Minimum

¹⁹⁶ *Legislating Accountability*, *supra* note 107, at 1658.

¹⁹⁷ Dyson, *supra* note 161, at 638 (asserting that the suburban influence is usually a critical part of education policy and implementation).

¹⁹⁸ Chester E. Finn, Jr., *Who's Afraid of the Big Bad Test?* in *DEBATING THE FUTURE OF THE AMERICAN EDUCATION: DO WE NEED NATIONAL STANDARDS AND ASSESSMENTS?* Diane Ravich Editor (The Brookings Institution 1995) pp. 120-44, 127 (citing a 1993 Gallup poll that indicated that the majority of the public supported a national test to: determine whether students were promoted; to rank local schools; and to identify student deficiencies.)

¹⁹⁹ Finn, *supra* note 198, at 137-38 (listing "the traditional anti-testing crowd", conservatives fearful of federal control, commercial testing services, "ill-informed policymakers", and testing experts as those who defeated the prospect of national testing).

²⁰⁰ See generally *The Perverse Incentives of NCLB*, *supra* note 48, at 952.

Competency Testing (MCT) to evaluate students' basic skills, and of the thirty-six, eighteen states conditioned graduation on passing exams. In response to the political pressure that accompanied this high-stakes testing, "passing rates were boosted by making exams easier, setting the bar low for passage, giving multiple chances to pass exams, and exempting categories of low performing students."²⁰¹ The state-initiated standards reform movement of the 1990s followed similar patterns of score manipulation,²⁰² and of course many states have used loopholes and waivers to dilute the impact of NCLB's accountability provisions.²⁰³

There is an appropriate role for the federal government in education reform that extends beyond funding, but it should be exercised with greater restraint and deference to states and districts as experts of their own local needs. Studies indicate that a combination of both federal funds and district buy-in from the time of initial operation are essential to the long-term success of the local implementation of federal programs.²⁰⁴ Although the federal role in local education policy should be limited, the federal government plays a critical role in its attempt to equalize education opportunity. Continued

²⁰¹ Garda, *supra* note 171, at (discussing how during the pre-NCLB standards reform movement states that adopted high standards ultimately lowered them and that, by 2000, one third of states that adopted high stakes testing reduced their efforts).

²⁰² *Id.*

²⁰³ See generally Stephenson, *supra* note 105 (discussing how states manipulate AYP testing requirements).

²⁰⁴ Milbrey W. McLaughlin, *The Rand Change Agent Study: Ten Years Later in EDUCATION POLICY IMPLEMENTATION* 143, 145 (Allan R. Odden ed., State University of New York Press 1991).

federal involvement in education policy is necessitated by “the inability of property-poor school districts to achieve meaningful local control over curricular and other matters in the absence of adequate resources”.²⁰⁵ Additionally, federal oversight is critical to the success of high-stakes testing, because it is only level of government capable of implementing national measures to ensure that states accurately report and disaggregate test scores. It is a role that, if undertaken with care, will minimize gaming while still respecting traditional boundaries of federalism.

The ESEA reauthorization is an opportunity to truly make academic achievement a national discussion. National testing and accurate reporting will result in meaningful disaggregated assessment scores that will politically incentivize education policymakers to raise scores at both the district and the state levels. In this way, the ESEA would recognize the important function federalism serves by creating a system in which the local public and small scale civic organizations stay plugged into the political process by maintaining the ability to influence curricula and local educational policy.²⁰⁶

CONCLUSION

No single tradition in public education is more deeply rooted than

²⁰⁵ Christopher P. Lu, *Liberator or Captor: Defining the Role of the Federal Government in School Finance Reform*, 28 HARV. J. LEGIS. 543, 550 (1991).

²⁰⁶ See generally Jason Mazzone, *The Social Capital Argument for Federalism*, 11 SOUTHERN CALIFORNIA INTERDISCIPLINARY L. J. 27 (2001) (discussing the importance of the ability of local constituents to have an influence on the political process).

local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.²⁰⁷

—Justice Warren Burger

As Congress debates the future of the Elementary and Secondary Education Act of 1965, No Child Left Behind provides valuable information about the effectiveness of accountability in nationwide efforts to provide students with equal access to educational opportunity. The politics surrounding American schools pose unique challenges to federal involvement. NCLB is a critical chapter in the ongoing story of the appropriate role of the states and the federal government in a collaborative federalism paradigm.

Some of the strengths of the accountability provisions in NCLB are likely to fall victim to political rhetoric rather than serve as a starting point for thoughtful analysis of how to keep what worked and modify what did not. Instead, lawmakers should take advantage of this opportunity to strengthen the model of collaborative federalism in education that No Child Left Behind introduced by maintaining the strong federal role in oversight, while maintaining the metaphor of states as laboratories for novel social and economic experiments that Justice Brandeis so vividly captured²⁰⁸ by

²⁰⁷ *See* *Milliken v. Bradley*, 418 U.S. 717 at 741-42 (1974).

²⁰⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Justice Brandeis dissented from the majority opinion and argued that the need to eliminate destructive competition was primarily a matter for legislative determination. He maintained that federal and state governments must have the power “to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs”).

respecting the insight that states and districts can bring to addressing issues of educational quality and inequity.