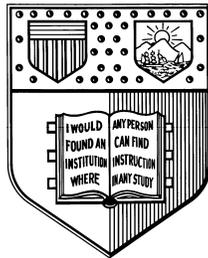


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### **The Political Economy of Education Federalism**

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## THE POLITICAL ECONOMY OF EDUCATION FEDERALISM

*Michael Heise\**

### ABSTRACT

The No Child Left Behind Act represents the federal government's most significant foray into the nation's elementary and secondary public school policy-making terrain. Although the Act undertakes unassailable policy goals, its critics argue that it represents an unwarranted federal intrusion into education policymaking, generates unintended policy consequences, and amounts to an unfunded federal mandate. Constitutionalists dwell on the Act's threat to structural federalism because it may strain Congress's conditional spending authority. The coercive force that federal education funds exert on local school districts and states attracts particular attention. The No Child Left Behind Act, however, safely navigates through an even more rigorous conception of the coercion prohibition as articulated by the Court in *South Dakota v. Dole*. The Act, while coercive, is not unconstitutionally coercive as it imposes only an opportunity cost on states willing to forego federal funding. Although the No Child Left Behind Act does not violate the conditional spending doctrine as presently understood, from a policy perspective the Act generates important coercive force. Such policy coercion arises due to the unusually close nexus among various education policies, including student achievement, curriculum, standards and assessments, and finance. Understanding this crucial subtlety about the political economy of education federalism is one key to understanding the full, ongoing debate surrounding intergovernmental squabbles over education policy among federal, state, and local officials.

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## INTRODUCTION

For better or worse (or, more accurately, for better *and* worse), the No Child Left Behind Act of 2001<sup>1</sup> (NCLB) represents a dramatic break from the federal government's traditional posture regarding policymaking for the nation's public elementary and secondary schools. NCLB's significance flows partly from its vast scope, which implicates every public K–12 school, regardless of whether a school receives Title I funding.<sup>2</sup> NCLB's cornerstone is an expansion of school accountability pivoting on determinations of adequate yearly progress for student academic achievement.<sup>3</sup> NCLB seeks the laudable goals of boosting student achievement generally and reducing, to the point of elimination, achievement gaps among various student subgroups.<sup>4</sup>

To remark upon NCLB's ambitiousness is to remark upon the obvious. To accomplish its broad statutory agenda, NCLB requires states to develop and self-impose challenging academic standards,<sup>5</sup> annually test students to assess progress toward state standards,<sup>6</sup> and gather and disseminate relevant information.<sup>7</sup> To facilitate progress toward these goals, NCLB also requires that states only permit "highly qualified" teachers to instruct in subjects they are qualified to teach,<sup>8</sup> and to verify qualifications of existing teachers.<sup>9</sup> To satisfy NCLB requirements, schools must demonstrate adequate yearly progress, or face increasingly onerous sanctions.<sup>10</sup> Finally, NCLB requires that all students demonstrate proficiency in various subject areas by 2014.<sup>11</sup> Although NCLB continues to generate both praise<sup>12</sup> and criticism,<sup>13</sup> all agree

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<sup>1</sup> Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

<sup>2</sup> NCLB involves every state, as all receive some level of Federal Title I funding. Not every individual school district within a state, however, receives Title I funds. Nevertheless, various parts (but not all) of NCLB apply even to districts that do not receive Title I funds. For a helpful summary of NCLB's key parts, see James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 944 (2004) (arguing that although NCLB pursues laudable goals, it generates important unexpected consequences).

<sup>3</sup> 20 U.S.C. § 6311(b)(2) (Supp. II 2002).

<sup>4</sup> § 6301(3)–(4).

<sup>5</sup> § 6301(1).

<sup>6</sup> § 6311(b)(2)(G).

<sup>7</sup> § 6311(h).

<sup>8</sup> § 6319(a)(1)–(2).

<sup>9</sup> § 6319(a)(3).

<sup>10</sup> § 6316(b)(5), (8).

<sup>11</sup> § 6311(b)(2)(F)–(G).

<sup>12</sup> See, e.g., 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, 184 (2003) (arguing that NCLB "raises the prospect of a broader redefinition of our very democracy").

<sup>13</sup> See, e.g., Ryan, *supra* note 2, at 934.

that it represents a significant—indeed, dramatic—departure from past federal engagement with K–12 education policy. Such a stark break inevitably places stress on current understandings of education federalism.

NCLB's abrupt departure from the prior allocation of education policy-making authority helps explain its increasingly strained reception by many governors and local school officials. Historically, the federal government's intersections with public K–12 schools focused on either specific types of schools, such as those predominately serving children from low-income households,<sup>14</sup> or discrete subpopulations of students, such as those with qualifying disabilities.<sup>15</sup> NCLB, by contrast, impacts all participating states and schools. By upsetting the education federalism status quo, NCLB generated substantial pushback on both the legal and political fronts. NCLB already has triggered at least two separate lawsuits challenging the Act on various grounds.<sup>16</sup> Thus far, neither lawsuit has succeeded.<sup>17</sup> On the political front, however, the prospects for challenging NCLB appear more promising. The Bush Administration, through its Department of Education, continues to find itself on the political defensive and is granting an ever-increasing number of waiver requests.<sup>18</sup>

Concurrent with (and, perhaps, related to) escalating intergovernmental jockeying for education policy authority among federal, state, and local officials, was the Rehnquist Court's "federalism revival."<sup>19</sup> A central

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<sup>14</sup> Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

<sup>15</sup> Individuals with Disabilities Education Act (IDEA), Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. §§ 1400–61 (2000)). In 1997 Congress reauthorized IDEA. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37.

<sup>16</sup> See *Sch. Dist. of Pontiac v. Spellings*, 2005 WL 3149545 (E.D. Mich. Nov. 23, 2005); Complaint, *Connecticut v. Spellings*, No. 305-CV-1330 (D. Conn. Aug. 22, 2005), available at <http://www.state.ct.us/sde/nclb/important-press/StateofCTv.SpellingsNCLBComplaint8-22-05.pdf>.

<sup>17</sup> In *School District of Pontiac v. Spellings*, for example, a federal district court recently granted Secretary Spellings's motion to dismiss the lawsuit. 2005 WL 3149545, at \*5. The court concluded that as a matter of law, even if NCLB required states to spend state funds to comply with NCLB, Congress (though not an "officer or employee of the Federal Government") possesses such authority under its conditional spending authority. *Id.* at \*4 (quoting 20 U.S.C. § 7907(a) (Supp. II 2002)). The Connecticut lawsuit is ongoing. Robert A. Frahm, *Commission Gets No-Child Earful*, HARTFORD COURANT, May 10, 2006, at B1.

<sup>18</sup> For one summary of state opposition to NCLB, see National Education Association, *Growing Chorus of Voices Calling for Changes in NCLB*, <http://www.nea.org/esea/chorus1.html> (last visited June 1, 2006). Many observers were surprised, however, by the NAACP's decision to side with the Bush Administration and against the State of Connecticut in its lawsuit challenging NCLB. See Avi Salzman, *N.A.A.C.P. Is Bush Ally in Connecticut School Case*, N.Y. TIMES, Feb. 1, 2006, at B1.

<sup>19</sup> Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 460 (2003).

component of former Chief Justice Rehnquist's judicial legacy, most observers agree, is the Court's imprint on federalism doctrine.<sup>20</sup> The Rehnquist Court is remembered partly for taking structural federalism seriously, in particular state authority. For the Rehnquist Court, respecting state power often meant, in practice, reducing or limiting federal power. The Rehnquist Court's impulse in the federalism context traversed numerous fronts, ranging from the Commerce Clause<sup>21</sup> to Section 5 of the Fourteenth Amendment.<sup>22</sup>

The combination of a growing federal commitment to K-12 education policy and an evolving federalism doctrine fueled intergovernmental jockeying over education policy and, as a consequence, generated important federalism questions. How to demark the boundaries of federal power and whether the political or judicial process should be entrusted to enforce federalism limits are questions that have occupied legal scholars for generations. The full panoply of such questions resides far beyond the scope of this Article. Rather, by focusing on one small subset of the many federalism questions that NCLB provokes, this Article considers NCLB as the catalyst for much of the present maneuvering for policy authority in the education setting and focuses on two distinct, though related, federalism issues.

First, this Article assesses NCLB from a standard constitutional perspective and concludes that it constitutes a permissible exercise of Congress's conditional spending authority under the Court's present interpretation of *South Dakota v. Dole*.<sup>23</sup> The conclusion assumes that NCLB does not impermissibly coerce states and local school districts because its conditional spending is more persuasively characterized as reimbursable rather than as regulatory.<sup>24</sup> Second, to conclude that NCLB represents a permissible exercise of congressional conditional spending is not conclusive of NCLB's potential to coerce. An analysis of the policy consequences stimulated by NCLB reveals important coercive dimensions better understood by a deeper appreciation for the political economy of education federalism. Specifically, recent and emerging changes by states and local districts involving standards and assessments, curriculum, and finance illustrate NCLB's consequential

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<sup>20</sup> See, e.g., Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477 (2001).

<sup>21</sup> See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>22</sup> See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

<sup>23</sup> 483 U.S. 203 (1987).

<sup>24</sup> For a discussion of the distinction between reimbursement and regulatory conditional spending, see *infra* Part II.

influence on state and local education policies. This influence arises due to NCLB's strategic focus on student achievement and the unusually tight nexus between student achievement and other critical education policies.

Even if my central claim is correct—that NCLB is coercive from a policy but not a constitutional perspective—important federalism questions persist. NCLB approaches but ultimately dodges a critical federalism question: whether to decouple education policy authority and funding responsibility. More specifically, NCLB invites us to consider whether, from a policy perspective, it is prudent to permit the federal government to exercise critical education policy influence beyond the extent of its financial contribution to states and local school districts.

This Article proceeds in four Parts. Part I briefly sketches the contours of the relevant education federalism terrain. A cursory examination reveals that efforts to find unambiguous boundaries demarcating the policy spheres for federal, state, and local actors in the education sector will likely generate more questions than answers. Simply put, the relevant constitutional texts and legal doctrine do not provide clear answers to critical questions involving the allocation of education policy-making authority. Moreover, consensus about helpful boundaries from a policy perspective does not yet exist.

The absence of clear education policy-making boundaries does not mean, however, that the entire field is lawless. Part II considers the standard constitutional framework for analyzing congressional exercises of Article I conditional spending authority. The constitutional framework, shaped by the *Dole* decision and as applied to NCLB, places significant stress on what is meant by federal coercion. The line between permissible inducement and impermissible coercion is notoriously vague and, perhaps as a consequence, federal courts appear reluctant to articulate any such line.<sup>25</sup> As a result, NCLB appears to be a permissible exercise of federal authority.

Although NCLB is not unconstitutionally coercive in a conditional spending context, it nonetheless exerts important coercive force from a policy perspective. Part III illustrates this point by drawing on a few examples, including NCLB's impact on recent state and school district decisions concerning standards and assessments, curriculum, and finance issues. The coercive policy spillover from NCLB arises with particular force in the education sector due to the unusually close nexus among various critical policy

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<sup>25</sup> See *infra* Part II.

variables and NCLB's authors' astute decision to pivot the Act on student achievement. The key to understanding these policy interactions is to appreciate the political economy of education federalism.

Important normative questions arise if NCLB is coercive from a policy rather than a constitutional perspective. Part IV briefly considers whether it makes sense to permit the federal government to strategically exploit the political economy of education federalism in a manner that enables it to exert far more policy influence than the federal government's financial contribution to state and local school district budgets might traditionally warrant. I approach this question informed by the perspectives of institutional incentives and the political economy of education federalism. The conclusion includes some tentative observations about NCLB's potential efficaciousness as support for a new approach to federalism theory.

## I. AN OVERVIEW OF EDUCATION FEDERALISM

The general proposition that states bear principal responsibility for education policy provides initial form to the contours of education federalism in the United States. Constitutional texts inform and support this general proposition. Notably, the U.S. Constitution does not mention education. In contrast, all fifty state constitutions do, though in varying degrees.<sup>26</sup> Formal constitutional structure only begins the discussion, however, about how educational policy-making authority is allocated among federal, state, and local actors. Moreover, whatever consensus might exist at the general level breaks down quickly as one progresses toward policy questions at more detailed and operational levels.

### A. *An Illusion of Local Control*

Notions of "local control" over education policy occupy an exalted place in American lore and continue to exert significant sway over many citizens.<sup>27</sup> Owing to America's long tradition of funding local schools with local property tax revenues, such notions about local control are not without foundation.<sup>28</sup>

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<sup>26</sup> KEVIN CAREY, CTR. ON BUDGET & POLICY PRIORITIES, OVERVIEW OF K-12 EDUCATION FINANCE 13 (2002), <http://www.cbpp.org/11-7-02sfp2.pdf>.

<sup>27</sup> Mary Frase Williams, *American Education and Federalism*, in GOVERNMENT IN THE CLASSROOM: DOLLARS AND POWER IN EDUCATION 1, 1 (Mary Frase Williams ed., 1979).

<sup>28</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6-7 (1973) (discussing history of property-tax-funded schools in Texas).

Moreover, the education sector evidences a consistent desire to decentralize educational policy-making authority, especially as it relates to elementary and secondary education.<sup>29</sup> In all states but Hawaii, for example, legislatures have delegated substantial policy-making authority to local school districts, governed by local school boards.<sup>30</sup> The structural allocation of educational policy-making authority implies a belief that states and local school boards are comparatively better positioned to set education policy in a manner that reflects local conditions and preferences.<sup>31</sup> Finally, key federal actors and institutions have long understood that education—particularly elementary and secondary education—resides at the core of state and local, not national, responsibility.<sup>32</sup>

Part of the impulse for local (or, to a lesser but still significant degree, state) control over education policy no doubt resonates with Justice Brandeis's famous invocation of "laborator[ies]" of democracy as one functionalist argument supporting federalist constraints on pushes for centralized power.<sup>33</sup> Another part of this impulse ties the smaller, decentralized governmental units to a more robust vision of democratic accountability by which democratic ideals are more fully realized by keeping policy control closer to citizen control.<sup>34</sup>

However alluring, such notions of local control over America's school policy have not accurately described the reality of American education policy for decades.<sup>35</sup> The influence of local school authorities on school policy waned due to legislative assertions by states and the federal government. A desire for greater programming and funding uniformity across school districts prompted many states to regulate their schools more heavily.<sup>36</sup> Also, federal

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<sup>29</sup> For purposes of this Article, I focus on the K–12 education sector. The allocation of educational policymaking authority for pre-K and post-secondary educational institutions, while important, is more complicated and outside of the scope of my analysis.

<sup>30</sup> Hawaii Department of Education, About Us, <http://doe.k12.hi.us/about/index.htm> (last visited Sept. 2, 2006) (noting that Hawaii has "a single, statewide [school] district with 285 schools").

<sup>31</sup> See *Rodriguez*, 411 U.S. at 42–43.

<sup>32</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments.").

<sup>33</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>34</sup> See DAVID SHAPIRO, *FEDERALISM: A DIALOGUE* 91–92 (1995).

<sup>35</sup> See generally Denis P. Doyle & Chester E. Finn, Jr., *American Schools and the Future of Local Control*, 77 *PUB. INT.* 77 (1984).

<sup>36</sup> *Id.* at 80–87.

programs targeting specific policies increased in number.<sup>37</sup> Finally, judicial involvement—state and federal—with K–12 schools, particularly since the *Brown v. Board of Education*<sup>38</sup> and *Serrano v. Priest*<sup>39</sup> decisions, contributed to a gradual diminution of local control over schools. Concurrent with the gradual decrease of local control over education policy was a decrease in local revenues' relative share to school districts' budgets.<sup>40</sup>

### B. *Evolving State Authority and Responsibility*

The shift of educational policy-making authority to the states has been pronounced, especially since the 1980s. This shift coincided with two critical (and related) movements: one involving school finance litigation<sup>41</sup> and the other standards and assessments.<sup>42</sup> Both movements exerted considerable independent momentum for increased state control over education policy. Collectively, these two movements relocated significant education policy authority to the nation's statehouses.

School finance litigation contributed mightily to increased state control over school policy. The Supreme Court's ruling in *San Antonio Independent School District v. Rodriguez*<sup>43</sup> redirected school finance litigants from federal courts and the Fourteenth Amendment to state constitutions, state education clauses, and state courts, with mixed results. Since 1974, litigants challenged school finance schemes in over forty states, and almost twenty state supreme courts declared their respective school funding programs unconstitutional.<sup>44</sup> The initial wave of school finance lawsuits principally sought equalization of

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<sup>37</sup> See Michael Heise, Goals 2000: Educate America Act: *The Federalization and Legalization of Education Policy*, 63 *FORDHAM L. REV.* 345, 364–68 (1994).

<sup>38</sup> 347 U.S. 483 (1954).

<sup>39</sup> 487 P.2d 1241 (1971).

<sup>40</sup> See Joel D. Sherman, *Changing Patterns of School Finance*, in *GOVERNMENT IN THE CLASSROOM: DOLLARS AND POWER IN EDUCATION*, *supra* note 27, at 69, 69.

<sup>41</sup> The Campaign for Fiscal Equity, Inc., a New York-based organization that has sponsored the multi-decade litigation effort in New York reports that, as of February 2006, only five states have never faced school finance litigation. See MOLLY A. HUNTER, CAMPAIGN FOR FISCAL EQUITY, INC., *LITIGATIONS CHALLENGING CONSTITUTIONALITY OF K–12 FUNDING IN THE 50 STATES* (2006), <http://www.schoolfunding.info/litigation/In-Process%20Litigations-09-2004.pdf>.

<sup>42</sup> See generally DIANE RAVITCH, *LEFT BACK: A CENTURY OF FAILED SCHOOL REFORMS* (2000); DIANE RAVITCH, *NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN'S GUIDE* (1995).

<sup>43</sup> 411 U.S. 1 (1973).

<sup>44</sup> See James E. Ryan, *Schools, Race, and Money*, 109 *YALE L.J.* 249, 266–69 (1999) (there were only seven wins in the second phase of litigation, but eleven wins in the third phase).

resources.<sup>45</sup> A second wave dwelled on state education clauses.<sup>46</sup> A third wave, launched in 1989, is moored in adequacy-based challenges.<sup>47</sup> Most litigants now contend not that all students are entitled to the same resources, but rather that all students should receive the funds necessary to finance an adequate education.<sup>48</sup> Although much has been written about these cases, one feature requires emphasis. As states increasingly became aware of potential (and actual) liability for school finance claims, most states' contributions to local school district budgets increased in both absolute and relative terms.<sup>49</sup> Unsurprisingly, as states' contribution to and responsibility for school funding increased, so too did state policy-making authority.<sup>50</sup>

In response to the *Nation at Risk* report of 1983<sup>51</sup> and the explosion of legislative responses that the report fueled,<sup>52</sup> many states began the task of reviewing and, in some instances, articulating for the first time goals for student education outcomes. Such efforts inevitably led to a greater concentration of policy authority at the state level. Paradoxically, state efforts to develop and implement standards and assessment regimes provided the policy platform that enabled the federal government to enter the field with greater force.<sup>53</sup>

### C. *Emerging Assertions of Federal Authority*

The Federal Constitution does not speak to education directly. Not surprisingly, until NCLB the federal government had comparatively little to do

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<sup>45</sup> See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 115–28 (1995) (reviewing the development of school finance cases); see also Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152–53 (1995).

<sup>46</sup> Heise, *supra* note 45, at 1157–62.

<sup>47</sup> *Id.* at 1162–66.

<sup>48</sup> See Ryan, *supra* note 44, at 268.

<sup>49</sup> See Sherman, *supra* note 40, at 69.

<sup>50</sup> See Doyle & Finn, *supra* note 35, at 79–87.

<sup>51</sup> See NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL EXCELLENCE* (1983); see also Karen MacPherson, *A Nation Still at Educational Risk: Two Decades Later Reports Still Focusing on the Mediocrity of U.S. Education*, PITTSBURGH POST-GAZETTE, Aug. 31, 2003, at A11 (discussing the *Nation at Risk* report).

<sup>52</sup> MacPherson, *supra* note 51.

<sup>53</sup> See R. Craig Wood & Bruce D. Baker, *An Examination and Analysis of the Equity and Adequacy Concepts of Constitutional Challenges to State Education Finance Distribution Formulas*, 27 U. ARK. LITTLE ROCK L. REV. 125, 158–60 (2004).

with most of the nation's K–12 schools.<sup>54</sup> The twin engines driving local school budgets were local property taxes and, increasingly, various state revenue streams.<sup>55</sup> Federal dollars typically accounted for less than ten percent of the average school district budget.<sup>56</sup> Consequently, the U.S. Department of Education had precious little concrete influence over most schools' operations and policies. Critical federal institutions—including the courts—reinforced the prevailing ethos that education in the United States was the principal dominion of state and local authority.<sup>57</sup>

In light of the constitutional framework and sources of school funds, the federal government's historic involvement with elementary and secondary schools, while persistent, was largely confined to the margins. Setting aside the higher education sector, where the federal government always played a far more important role, the federal government's involvement with the nation's public elementary and secondary school policy typically focused on insular and discrete subpopulations of the nation's students. Most prominently, of course, Title I of the Elementary and Secondary Education Act concentrates on the nation's poorest students.<sup>58</sup> The Federal Individuals with Disabilities Education Act serves disabled students.<sup>59</sup> These important federal programs—accompanied by significant levels of federal funding—did not come without a cost: Both programs trigger consequential reporting, compliance, and administrative costs for states and local districts.<sup>60</sup>

The persistent federal involvement with K–12 education policy, which increased palpably during the 1990s,<sup>61</sup> exploded in dramatic fashion with NCLB. At its core, NCLB leverages state-created standards and assessments, increases transparency by disseminating data on progress, and imposes

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<sup>54</sup> See Coulter M. Bump, Comment, *Reviving the Coercion Test: A Proposal to Prevent Federal Conditional Spending That Leaves Children Behind*, 76 U. COLO. L. REV. 521, 525 (2005).

<sup>55</sup> See NAT'L CTR. FOR EDUC. STATISTICS, *THE CONDITION OF EDUCATION 2005* app. 1, at 195 tbl.37-2 (2005), available at <http://nces.ed.gov/pubs2005/2005094.pdf>.

<sup>56</sup> For example, between the 1989–90 and 2001–02 school years, the percentage of the federal contribution to public elementary and secondary schools' revenue ranged from 6.1% to 7.9%. See *id.*

<sup>57</sup> See *United States v. Lopez*, 514 U.S. 549, 566 (1995) (“[Congress’s authority] does not include the authority to regulate each and every aspect of local schools.”); *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools.”).

<sup>58</sup> 20 U.S.C. § 6301(b) (2000) (amended 2001).

<sup>59</sup> § 1400.

<sup>60</sup> § 1414; § 6317 (amended 2001).

<sup>61</sup> See, e.g., *Goals 2000: Educate America Act*, Pub. L. No. 103-227, 108 Stat. 125 (1994) (codified as amended in scattered sections of 20 U.S.C.).

consequences on local districts and schools for insufficient progress. States desiring NCLB funds must establish school accountability systems that moor annual student proficiency on math and reading assessments for grades three through eight.<sup>62</sup> States must also gather, report, and disseminate results for all students as well as for various student subgroups that contain a minimum number of students.<sup>63</sup> Although state standards must be “challenging,”<sup>64</sup> NCLB essentially leaves it to the states to establish their own standards and assessments, as well as proficiency thresholds.<sup>65</sup> A sliding scale of consequences befalls schools that do not achieve adequate yearly progress.<sup>66</sup> Of course, states retain significant control over the mechanisms that determine whether their students and schools achieve adequate yearly progress. Indeed, the absence of a common testing metric and proficiency standard continues to frustrate comparisons between or among states.<sup>67</sup>

## II. *DOLE*, COERCION, AND BACKDOORS

As the present allocation of policy-making authority illustrates, education federalism boundaries remain in flux. Ambiguous lines of authority are partly a consequence of uncertain legal boundaries in the education policy-making setting.<sup>68</sup> That local, state, and federal interests in education policy are dynamic and ever-changing only complicates matters further. Intergovernmental squabbling over policy-making authority is one predictable result of evolving policy interests and appetites competing in a setting that lacks definitive boundaries.<sup>69</sup> The traditional mechanism for the resolution of such policy turf disputes—judicial enforcement of federalism boundaries—is noticeably absent where the federal government seeks to influence policy

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<sup>62</sup> 20 U.S.C. § 6311(b)(3)(C)(vii) (Supp. II 2002).

<sup>63</sup> § 6311(h).

<sup>64</sup> § 6311(b)(1).

<sup>65</sup> § 6311(b)(2). Although under NCLB states are not required to submit their standards to the Secretary of Education for review, states must submit plans that demonstrate a commitment to challenging academic standards. See § 6311(b)(1)(A).

<sup>66</sup> § 6316(b)(5), (8).

<sup>67</sup> See Paul E. Peterson & Frederick M. Hess, *Johnny Can Read . . . in Some States: Assessing the Rigor of State Assessment Systems*, EDUC. NEXT, Summer 2005, at 52–53.

<sup>68</sup> See generally James E. Ryan, *The Tenth Amendment and Other Paper Tigers: The Legal Boundaries of Education Governance*, in WHO’S IN CHARGE HERE? THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY 42 (Noel Epstein ed., 2004).

<sup>69</sup> See generally Daniel J. Elazar, *Federal and Intergovernmental Relations*, in COOPERATION AND CONFLICT: READINGS IN AMERICAN FEDERALISM 2 (Daniel J. Elazar et al. eds., 1969).

through Congress's conditional spending authority,<sup>70</sup> which better enables federal lawmakers to expand their influence into areas that they can not regulate directly.<sup>71</sup>

#### A. *Conditional Spending and Dole*

The theory behind conditional spending and its place in the federalism debate is well understood. The Supreme Court in *South Dakota v. Dole*<sup>72</sup> articulated the analytical framework for conditional spending challenges. In *Dole*, the Court concluded that a federal statute conditioning a state's receipt of certain federal highway funds on the state's adoption of a minimum drinking age of twenty-one years old was a constitutional exercise of Congress's conditional spending authority,<sup>73</sup> even if Article I does not permit Congress to regulate state drinking ages directly.<sup>74</sup> Moreover, the Court made clear elsewhere that Congress could endeavor to influence areas "not thought to be within Article I's 'enumerated legislative fields.'"<sup>75</sup> As applied to the states, the Court concluded that Congress's exercise of conditional spending did not impermissibly infringe upon state rights: "[T]he powers of the State are not invaded, since the statute [a conditional spending law] imposes no obligation but simply extends an option which the State is free to accept or reject."<sup>76</sup>

While approving the conditional spending provision at issue in *Dole*, the Court made clear, however, that "[t]he [conditional] spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases."<sup>77</sup> The Court's five general limitations on Congress's conditional spending power include curtailing Congress's ability to coerce states to act in ways that Congress could not mandate directly.<sup>78</sup> The Court went on to note that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns

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<sup>70</sup> See generally Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431 (2002).

<sup>71</sup> See Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 250 (2006).

<sup>72</sup> 483 U.S. 203 (1987).

<sup>73</sup> *Id.* at 207-09.

<sup>74</sup> *Id.* at 212.

<sup>75</sup> *Id.* at 207 (quoting *United States v. Butler*, 297 U.S. 1, 65 (1936)).

<sup>76</sup> *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923).

<sup>77</sup> 483 U.S. at 207 (citation omitted).

<sup>78</sup> *Id.* "[C]onditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Id.* at 207-08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

into compulsion.”<sup>79</sup> Thus, whether a state is, in fact, functionally “free” to accept or reject a conditional spending offer from Congress remains contentious in various cases.

For decades courts have struggled to develop an analytically coherent test to differentiate between acceptable federal pressure and impermissible coercion. Courts and commentators repeatedly voiced concern over the difficulty of legally distinguishing between permissible inducement and impermissible coercion.<sup>80</sup> Even more telling than judicial and academic carping, perhaps, is the failure of federal courts to invalidate any congressional conditional spending due to coercion concerns for several decades.<sup>81</sup> Lately, courts appear to have all but given up the effort.<sup>82</sup> Recent scholarship echoes this theme and argues for increased reliance on political institutions for the preservation and enforcement of federalism boundaries.<sup>83</sup>

The virtual judicial abandonment of coercion analysis frames assessments of NCLB’s likelihood of success. Despite illustrating some of the difficulties inherent in analyzing whether conditional spending amounts to unconstitutional coercion, an application of *Dole*’s coercion prong to NCLB suggests that it would comfortably survive a judicial challenge on this ground. NCLB conditions Title I funding upon a state’s willingness to comply with NCLB requirements. More specifically, in exchange for more than \$12.7 billion in funds,<sup>84</sup> the federal government now demands that, among other tasks, states annually test all students in grades three through eight in reading and math and demonstrate adequate progress each year.<sup>85</sup> If not, a series of escalating sanctions attach.<sup>86</sup> States that find NCLB unpalatable are, of course, free to decline to participate and forego federal education funds.

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<sup>79</sup> *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937)).

<sup>80</sup> See *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000) (“The boundary between incentive and coercion has never been made clear . . . .”); Baker & Berman, *supra* note 19, at 460.

<sup>81</sup> See, e.g., *West Virginia v. U.S. Dep’t of Health & Human Servs.*, 289 F.3d 281, 289 (4th Cir. 2002) (noting the Supreme Court has not struck down a single congressional exercise of the conditional spending powers since 1937).

<sup>82</sup> *Id.* at 290 (observing that most federal courts have “effectively abandoned any real effort to apply the coercion theory” to Congressional conditional spending (citing *Kansas v. United States*, 214 F.3d at 1202)).

<sup>83</sup> See, e.g., Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 *IND. L.J.* 47, 51–52 (2003); see generally Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *COLUM. L. REV.* 215 (2000).

<sup>84</sup> See National Center for Education Statistics, Fast Facts, <http://nces.ed.gov/fastfacts/display.asp?id=158> (last visited June 1, 2006); see also Martin R. West & Paul E. Peterson, Commentary, *Sue First, Teach Later*, *WALL ST. J.*, Apr. 28, 2005, at A18.

<sup>85</sup> 20 U.S.C. §§ 6311(b)(2), (b)(3)(C)(vii) (Supp. II 2002).

<sup>86</sup> § 1116.

Courts have permitted conditional spending programs where the federal funding at issue is so large that a state had “no choice” but to submit to federal policy.<sup>87</sup> In contrast, the burden of the condition imposed by NCLB pales by comparison. To be sure, \$12.7 billion is a lot of money and, not surprisingly, Title I funding is important to all states and most school districts. But state and local—not federal—agencies shoulder the overwhelming bulk of the school finance load.<sup>88</sup>

Title I is one part of the federal government’s financial contribution to the nation’s elementary and secondary schools. Changes over time in the federal government’s investment in education have influenced its relative share of total per pupil spending.<sup>89</sup> One key point is that while the federal investment increased in real dollars over time, the federal government’s proportional contribution to elementary and secondary school revenue, while also increasing slowly over time, always remained below eight percent.<sup>90</sup> This is so because state and local revenue increases maintained a similar pace.<sup>91</sup> For example, in just over three decades, between the 1969–70 and 2000–01 school years, total per pupil spending (in constant dollars) for public elementary and secondary students nationwide surged from \$3,544 to \$7,507.<sup>92</sup> Contributing to this real, steady increase in total spending has been a hike in federal spending on elementary and secondary schools. Between fiscal years 1980 and 2003, federal spending increased by 76.2% in constant dollars.<sup>93</sup> Despite a steady (perhaps dramatic) rise in real federal education spending, as a percentage of overall education revenues, the federal contribution ranged from 6.1% in 1989–90 to 7.9% in 2001–02.<sup>94</sup>

Regardless of how one characterizes the size and importance of federal education spending in general, and Title I funding in particular, for courts

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<sup>87</sup> *Kansas v. United States*, 214 F.3d 1196, 1201–02 (10th Cir. 2000) (upholding a program that placed conditions on a state’s receipt of welfare funds where the state would be ineligible for \$130 million in funds if it did not comply); *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981) (upholding a spending program that placed conditions on a state’s receipt of Medicaid funds where the loss of the funds would severely hamper the state’s medical system).

<sup>88</sup> See *supra* Part I.C.

<sup>89</sup> NAT’L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATIONAL STATISTICS 2003, at 191 tbl.156 (2004).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 204 tbl.166.

<sup>93</sup> In real, constant dollars, federal spending increased from \$33.9 billion in 1980 to \$59.7 billion in 2003. See NAT’L CTR. FOR EDUC. STATISTICS, FEDERAL SUPPORT FOR EDUCATION: FY 1980 TO FY 2003, at 6 tbl.2 (2004).

<sup>94</sup> NATIONAL CENTER FOR EDUCATION STATISTICS, *supra* note 55, app. 1, at 195 tbl.37-2.

assessing possible coercion under *Dole*, “It is not the size of the stake that controls, but the rules of the game.”<sup>95</sup> Presumably, every state would prefer greater federal funding for education. States would prefer all federal funds to arrive without conditions. That NCLB frustrates such preferences, however, does not make it unconstitutionally coercive.

Although most commentators and judges conclude that *Dole*’s coercion prong is no longer viable (if it ever was),<sup>96</sup> in an effort to supply substantive teeth, Professor Lynn Baker proposes to distinguish between “reimbursement” and “regulatory” conditional spending, permitting the former but not the latter.<sup>97</sup> To the extent that NCLB clearly specifies the purposes for which states can spend Title I dollars and provides states with the funds necessary to discharge NCLB’s specific statutory obligations, the conditional spending would appear to satisfy Baker’s definition of reimbursement spending. Another way to assess this is to consider what would happen to a state that declined to participate in NCLB, and as a consequence, gave up Title I funds. Although clearly such a decision would impose an opportunity cost (federal Title I funds), equally clear is that education—perhaps a less robust program—would still be provided in that state.

#### B. Reverse Federalism

NCLB’s education policy reordering, and the reaction to it, implicate important issues involving relations among federal, state, and local actors and their roles in developing and implementing education policy. Importantly, NCLB was developed and implemented at the same time federalism doctrine underwent critical changes. As noted by many others, however, the Rehnquist Court’s work in the conditional spending area stands in marked contrast to the Court’s work in other federalism areas.<sup>98</sup> Notwithstanding important contrary developments in other related fronts, the Rehnquist Court granted Congress extraordinary latitude to exercise its conditional spending power.<sup>99</sup> Indeed, the discrepancy between the Court’s work in the federalism context and

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<sup>95</sup> *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981) (quoting *N.H. Dep’t of Employment Sec. v. Marshall*, 616 F.2d 240, 246 (1980)).

<sup>96</sup> *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000) (“The coercion theory is unclear, suspect, and has little precedent to support its application.”). See generally Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001).

<sup>97</sup> See Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1962–78 (1995); see also Baker & Berman, *supra* note 19, at 527–33. For a critique, see Berman, *supra* note 96.

<sup>98</sup> See, e.g., Baker & Berman, *supra* note 19, at 460.

<sup>99</sup> See *South Dakota v. Dole*, 483 U.S. 203 (1987); see also Baker & Berman, *supra* note 19, at 460.

conditional spending is so stark that it prompted many observers to implore Congress to exercise its conditional spending power robustly as a way to offset the diminution in federal power elsewhere.<sup>100</sup>

Indeed, NCLB holds an unflattering mirror to the face of the so-called “federalism revival.”<sup>101</sup> If the Rehnquist revolution was taken to its logical conclusion, NCLB would not be possible. Despite tilting toward state sovereignty in many areas that span the federalism horizon, the significant federal indulgence of conditional spending authority serves as a consequential “backdoor” for Congress to achieve federal policy and goals. After all, it is difficult to find a better example of an activity—education—long assumed to reside at the core of local control.<sup>102</sup> Thus, to the extent that one takes seriously the Rehnquist Court-led federalism revival, federal trenching into education terrain might strike many as unlikely to be permitted. NCLB stands in stark opposition to this intuition.

One consequence (or, to some, a benefit) of a judicial surrender in enforcing limits to congressional conditional spending authority is that any enforcement must come from political sources. For some scholars, including those influenced by Professor Herbert Wechsler,<sup>103</sup> such a consequence—relying on the legislative process to guard against federalism boundaries—is acceptable and, indeed, desirable.<sup>104</sup>

For those partial to relying on the legislative process to safeguard federalism structure, calls to reinvigorate judicial enforcement of conditional spending limits in ways that might preclude NCLB are not without risk. As Professor James Ryan notes, were courts to suddenly find “teeth” in *Dole*, the effect essentially would be to substitute the political process—warts and all—for the federal judiciary—warts and all—as the firewall against federal encroachment into state authority.<sup>105</sup> To be sure, reasonable minds differ on the relative strengths and weaknesses of the two institutions—political and judicial—as guardians of our federal structure.<sup>106</sup> It is not immediately clear,

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<sup>100</sup> See, e.g., Tushnet, *supra* note 83, at 51–52.

<sup>101</sup> Baker & Berman, *supra* note 19, at 460.

<sup>102</sup> See *supra* note 57 and accompanying text.

<sup>103</sup> See 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 (1954).

<sup>104</sup> See, e.g., Kramer, *supra* note 83.

<sup>105</sup> See generally Ryan, *supra* note 68, at 42.

<sup>106</sup> Edward B. Foley, *Rodriguez Revisited: Constitutional Theory and School Finance*, 32 GA. L. REV. 475, 498–99 (1998).

however, which institution would function as a more efficacious guardian of education federalism.<sup>107</sup>

### III. LEAVING FEDERALISM BEHIND: THE COERCIVE EFFECT OF POLICY LEVERAGE

Although NCLB appears to comfortably navigate through the *Dole* test, federal lawmakers were careful not to overreach. For example, NCLB does not impose a single, uniform federal student assessment measure upon states. Rather, NCLB requires the states themselves to develop such assessments<sup>108</sup> and submit them for approval to the U.S. Department of Education.<sup>109</sup> The one aspect that comes closest to an imposition of a federal test, the requirement for participation in the National Assessment of Educational Progress (NAEP) testing program,<sup>110</sup> notably does not trigger any statutory consequences for states or districts. Regardless of the reasons and motivations for Congress's decisions, even NCLB's harshest critics must applaud the strategic genius it embodies: an elegant use of political-economic leverage that generates policy coercion upon states that extends far beyond the reach of NCLB funds. By astutely targeting one critical link (student assessment) in the tightly woven education policy chain and understanding the inexorable tether that binds the student achievement variable to a host of other distinct, though related, policy variables, NCLB vividly illustrates the high art of policy leverage. Because NCLB triggers numerous and consequential policy changes for many schools and districts, the secondary and tertiary financial consequences are similarly vast. It is certainly plausible that the inevitable (although not necessary) practical consequence of NCLB is to shift critical policy-making authority to the federal government and redirect state and local educational resources in ways consistent with NCLB objectives. Thus, through NCLB the federal government can achieve its policy goals on the proverbial financial backs of states and local school districts.

Building on the state-launched "standards and assessments" movement that has defined much of education policy since the mid-1980s,<sup>111</sup> NCLB solidifies

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<sup>107</sup> Ryan, *supra* note 68, at 67 (arguing that the default position should favor the political process).

<sup>108</sup> 20 U.S.C. § 6311(b)(3) (Supp. II 2002).

<sup>109</sup> § 6311(a)(1).

<sup>110</sup> § 6311(c)(2).

<sup>111</sup> See generally Michael Heise, *Equal Educational Opportunity and Constitutional Theory: Preliminary Thoughts on the Role of School Choice and the Autonomy Principle*, 14 J.L. & Pol. 411, 428–29 (1998).

standardized test outcomes as the basic metric in assessing student and school performance.<sup>112</sup> Although the desirability of this development remains hotly contested, testing's salience for policy purposes is generally acknowledged.<sup>113</sup> As a consequence, much of education policy now pivots around standardized test results.<sup>114</sup> Germane to test results, the variables amenable to manipulation by education policymakers include assessment thresholds, curriculum, and staffing decisions. The latter two variables—curriculum and staffing—pose immediate budgetary consequences. As a result, pressure to manage test results now informs how schools and districts allocate their resources to a greater degree than before.

Consequences flow to states and schools from the federal government in the form of NCLB sanctions<sup>115</sup> as well as from an array of key public school constituencies all vested with various stakes in a school district's success. These numerous and varied constituencies include educators, students, parents, and policymakers. Other notable constituencies include politicians who feel vicariously liable for successful schools; homeowners, especially affluent suburban homeowners, where public school reputations (real or perceived) influence home values; and businesses with critical skilled-labor requirements. The constituencies' varied political, economic, and individual interests—combined with public school systems' democratic accountability systems—help ensure the salience of political economy for education policy.

Of course, other plausible characterizations of the unusually tight nexus linking various education policies exist. Some scholars view NCLB as an illustration of “cooperative federalism” where the federal government uses funds as the carrot to induce states and local schools to implement national policies.<sup>116</sup> Because Professors James Liebman and Charles Sabel conclude that under NCLB states and local districts maintain “substantial flexibility,”<sup>117</sup> federalism goals remain intact despite the federal directive.

Notably, under NCLB, relevant achievement standards and proficiency thresholds are state created.<sup>118</sup> It does not *necessarily* follow that changes in

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<sup>112</sup> Liebman & Sabel, *supra* note 12, at 284–85.

<sup>113</sup> See Ryan, *supra* note 2, at 936 (“testing is ubiquitous and likely to continue for some time”).

<sup>114</sup> *Id.* at 944.

<sup>115</sup> 20 U.S.C. § 6316(b)(5), (8) (Supp. II 2002).

<sup>116</sup> See generally Liebman & Sabel, *supra* note 12; Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

<sup>117</sup> Liebman & Sabel, *supra* note 12, at 285.

<sup>118</sup> 20 U.S.C. § 6311(b)(2) (Supp. II 2002).

other education policy areas *must* accompany state participation in NCLB. My smaller point, however, is not only that such changes will occur but that they *are* occurring, although not because they are federally mandated. Indeed, the political dynamics surrounding education policy virtually guarantee as much. This outcome flows principally from the close interactions among such variables as student achievement, proficiency thresholds, and curriculum. Many of these variables and the policies they reflect cost money.

A. *State Proficiency Thresholds: Defining Proficiency Downward*

One of NCLB's hallmarks is that states retain the ability to set their own thresholds for student achievement, which interact with federal requirements for academic progress.<sup>119</sup> Granting states authority to define student proficiency thresholds serves as one important source of NCLB's political strength, as it fuels variation and experimentation and conveys federal humility. In addition, permitting states to set their academic thresholds may have been important to even NCLB's staunchest supporters, who may have been wary of the potential for the federal overreach that a federal testing regime might imply. Moreover, from a political perspective, permitting states to define for themselves their own achievement standards may have been a necessary political price for NCLB's passage. Finally, if nothing else, state-defined standards make the imposition of federal sanctions somewhat more palatable as states potentially run afoul of their own standards.

Although NCLB's respect for state autonomy regarding state proficiency thresholds possesses important virtues, its interactions with NCLB's sanctions for failure to achieve adequate yearly progress<sup>120</sup> and the states' ability to define student proficiency thresholds create important incentives for states to dilute their academic proficiency standards. Such a result would, of course, undermine NCLB's larger policy objectives.

When many states initiated efforts to articulate desired student academic proficiency in the early- and mid-1980s, they did so in a policy setting that lacked the specter of federal liability under NCLB (or, in a separate though increasingly related context, exposure to school finance adequacy lawsuits<sup>121</sup>).

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<sup>119</sup> *Id.*

<sup>120</sup> § 6316(b)(5), (8).

<sup>121</sup> See generally Michael Heise, *Educational Adequacy as Legal Theory: Implications from Equal Educational Opportunity Doctrine* (Cornell Legal Studies Research Paper No. 05-028, 2005), available at <http://ssrn.com/abstract=815665>.

Prior to 1989, many states engaged in something resembling a “race to the top” in terms of developing and implementing rigorous student achievement standards and goals.<sup>122</sup> Building upon the successes of some states, NCLB’s structural integrity as a policy lies in its emphasis on rigorous academic standards.

Under NCLB, however, states now confront a starkly different education terrain. Today, the prospect of NCLB liability, the experience of districts failing to achieve adequate yearly progress, and attendant parental, homeowner, and voter expressions of concern disquiet many state policymakers and assuredly influence standards setting and tinkering. Although we do not know with absolute certainty what states would have done absent NCLB, what we do know is that, at best, NCLB generates a dilemma for states; at worst it creates a palpable incentive for states to dilute their academic standards and proficiency thresholds.<sup>123</sup>

States with rigorous proficiency standards are more likely to fail to achieve adequate yearly progress and trigger NCLB sanctions.<sup>124</sup> Conversely, states with comparatively weak proficiency standards stand a better chance of successfully navigating through NCLB requirements and avoiding sanctions and the associated stigma. The prospect of adverse consequences to states and local school districts flowing from NCLB induced some states to roll back their student standards.<sup>125</sup> In light of the ever-increasing NCLB performance requirements, states adhere to high achievement standards at ever-increasing political risk. For risk-averse policymakers (and governors), the policy path of least resistance becomes increasingly attractive over time.<sup>126</sup> Furthermore, in states where suburban districts recoil at the prospect—however remote—of their students not achieving state proficiency standards, a decision to dilute academic standards becomes even easier to make.<sup>127</sup> Thus, ironically, NCLB risks transforming a “race to the top” into a “race to the bottom.”<sup>128</sup>

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<sup>122</sup> See Molly O’Brien, *Free at Last? Charter Schools and the “Deregulated” Curriculum*, 34 AKRON L. REV. 137, 159 (2000).

<sup>123</sup> Ryan, *supra* note 2, at 944.

<sup>124</sup> *Id.* at 948.

<sup>125</sup> See generally *id.* at 946–48.

<sup>126</sup> *Id.* at 948.

<sup>127</sup> See, e.g., Paul T. O’Neill, *High Stakes Testing Law and Litigation*, 2003 BYU EDUC. & L.J. 623, 657–59 (discussing suburban backlashes against standardized testing).

<sup>128</sup> *But see* Liebman & Sabel, *supra* note 12, at 294 (arguing that NCLB “may launch a race to the top”).

Connecticut's experience illustrates this trend. Prior to NCLB, the Connecticut State Board of Education defined "Level 4" of its statewide tests as the threshold for "at or above the goal level."<sup>129</sup> In June 2002, however, the Connecticut Board adopted the less onerous "Level 3" as "proficient" for purposes of NCLB reporting.<sup>130</sup> Board minutes reveal that its decision to adopt "Level 3," which, by definition, falls below its own definition of "goal level," directly responded to NCLB requirements and consequences.<sup>131</sup>

NCLB drafters may have anticipated such a reaction and endeavored to blunt it. To guard against triggering a "race to the bottom" in terms of state's academic performance standards (and, perhaps, cynically anticipating as much), NCLB made mandatory what was once an option for states: participation in the NAEP testing regime. Specifically, under NCLB participating states must administer national NAEP tests in reading and math to a sample of fourth and eighth graders on a biannual basis.<sup>132</sup> NAEP tests are national in scope and, consequently, permit comparisons of student proficiency across states.<sup>133</sup> Notably, however, while states are required to submit to NAEP testing, NAEP test results generate no independent consequence for states under NCLB. Rather, NAEP test results are designed to supply a comparative reference point for state test results.

The logic behind NCLB's requirement of state participation in NAEP testing is to generate political pressure on states that proclaim robust student proficiency on the basis of state test results, yet have students who do not fare well on the national NAEP test. Whether NCLB's desire to generate inferential shaming will succeed and, if it does, whether it will exert any coercive force, remains unclear.<sup>134</sup> Early evidence is not encouraging. A comparison of state-defined proficiency levels of achievement and corresponding NAEP test results reveals that while some proficiency level thresholds in some states comport with NAEP standards, dramatic differences

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<sup>129</sup> *Revision of Standards: Connecticut Academic Performance Test (CAPT) Connecticut Mastery Test (CMT) and Connecticut Academic Performance Test (CAPT)*, BOARD REPORT (Conn. State Bd. of Educ., Hartford, CT), June 2002, at 1, 1, available at <http://www.state.ct.us/sde/board/June02.pdf>.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 2. For further discussion, see Ryan, *supra* note 2, at 948 n.77; David J. Hoff, *States Revise the Meaning of 'Proficient'*, EDUC. WEEK, Oct. 9, 2002, at 1; Diana Jean Schemo, *Sidestepping of New School Standards Is Seen*, N.Y. TIMES, Oct. 15, 2002, at A21.

<sup>132</sup> 20 U.S.C. § 6311(c)(2) (Supp. II 2002).

<sup>133</sup> National Center for Education Statistics, NAEP Overview, <http://nces.ed.gov/nationsreportcard/about/> (last visited Sep. 2, 2006).

<sup>134</sup> See generally Schemo, *supra* note 131.

exist in many states.<sup>135</sup> Such evidence, if it persists over time, would suggest that compelled participation in the NAEP program under NCLB is insufficient to blunt state efforts to dilute their student assessment standards.

If NCLB's effort to blunt a state's race to the bottom in the standards and assessment context continues to unfold as current trends imply,<sup>136</sup> this would support efforts to develop and implement a single, uniform set of national academic standards and assessments mechanisms. To those accustomed to this country's tradition (mythical or real) of local control over school policy, such a proposal may come across as radical. Upon reflection, however, the proposal for national academic standards and assessments is less radical and more plausible than it might appear on the surface. As Professor Ryan notes, at the upper end of the education continuum—high-performing students seeking admission into selective colleges and universities—an informal system of national tests already exists.<sup>137</sup> This admittedly small subset of the nation's students navigates through the SAT (or ACT) exam, the SAT II exams, and AP exams.

What do these exams imply for the standards and assessment movement? First, they imply that a national set of exams is a possibility. Although these exams are not without controversy (especially the SAT),<sup>138</sup> their existence helps rebut claims that such tests are impossible to develop or implement. Second, the subject-specific exams (SAT II and AP) further demonstrate that a sufficient consensus exists about what students need to know in a wide range of subject areas. Notably, the list of subjects tested includes the more objective subjects, including physics and mathematics, as well as the more subjective subjects, including English literature.<sup>139</sup> Thus, arguments against considering national standards and assessments on the grounds of difficulty must either

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<sup>135</sup> See Peterson & Hess, *supra* note 67, at 53.

<sup>136</sup> See, e.g., Ben Feller, *Students' Scores, State Tests Questioned*, SUN HERALD (Biloxi, MS), Mar. 5, 2006, at A9.

<sup>137</sup> James E. Ryan, Comments at the 2006 Thrower Symposium: Interactive Federalism: Filling the Gaps? (Feb. 16, 2006).

<sup>138</sup> See Anthony Bertelli, *Marketing Racism: The Imperialism of Rationality, Critical Race Theory, and Some Interdisciplinary Lessons for Neoclassical Economics and Antidiscrimination Law*, 5 VA. J. SOC. POL'Y & L. 97, 143 (1997) (arguing that SAT scores break along racial lines); Andrea L. Silverstein, Note, *Standardized Tests: The Continuation of Gender Bias in Higher Education*, 29 HOFSTRA L. REV. 669, 680 (2000) (arguing that SAT scores break along gender lines); Evelyn Nieves, *Civil Rights Groups Suing Berkeley over Admissions Policy*, N.Y. TIMES, Feb. 3, 1999, at A9 (access to, and preparation for, AP tests advantage school districts serving white and wealthy families).

<sup>139</sup> The College Board, About the SAT Subject Tests, <http://www.collegeboard.com/student/testing/sat/about/SATII.html> (last visited June 1, 2006).

account for or distinguish the development and implementation of SAT II and AP exams.

The threat that states might reverse course and begin racing to the bottom with respect to their student assessment standards is certainly one to be taken seriously. The threat, however, is not of the type that provides the strongest justification for an increased assertion of federal power. Professors Samuel Issacharoff and Catherine Sharkey point to the potential of state activity that creates spillover effects for other states as increasingly and especially deserving of federal standards and forums.<sup>140</sup> That is, federalism is particularly needed to coordinate state activity where states act to externalize policy costs. For example, in the pollution context, obvious coordination problems exist where State A relaxes emission standards knowing, *ex ante*, that the consequences will be largely borne by State B, located downwind. In such a scenario, it is easy to predict that State A would act strategically and in a manner that strives to internalize benefits and externalizes costs. In the education setting, however, the direct harm flowing from a state that dilutes its assessment standards flows most directly to students and citizens in that state. While it is perhaps not difficult to imagine spillover effects from standards dilution in State A adversely affecting residents in State B, such an outcome is neither direct nor sufficiently predictable that it would likely prompt strategic behavior.

### B. Curriculum

Given NCLB's focus on standardized testing<sup>141</sup> and consequences for those failing to achieve adequate yearly progress, a tug on school curriculum was inevitable. To the extent that states and school districts can influence student achievement through curriculum policy, by directly addressing the former, NCLB indirectly addresses the latter. School districts may feel compelled to restructure their curriculum in a manner that blunts adverse consequences from NCLB. Numerous districts, teachers, and parents increasingly complain, however, of a growing "obsession" with standardized tests and of how these tests distort curriculum decisions.<sup>142</sup> Indeed, according to its critics, NCLB places many districts in something of a curriculum dilemma. On the one hand,

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<sup>140</sup> See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalism*, 53 UCLA L. REV. 1353 (2006).

<sup>141</sup> Ryan, *supra* note 2, at 940 ("Test scores are the fuel that makes the NCLBA run.").

<sup>142</sup> See generally Richard Rothstein, *A Rebellion Is Growing Against Required Tests*, N.Y. TIMES, May 30, 2001, at B9.

given the primacy of test results under NCLB, to ignore them invites consequential risk. On the other hand, curricular alignment to the NCLB-inspired tests risks a curriculum that, to some degree, amounts to little more than “teaching to the test.” Clearly, for some (possibly many), a curriculum that “teaches to the test” is not a curriculum that they would prefer.<sup>143</sup> To be sure, it is important to emphasize that such a result—however likely—is not a necessary result of NCLB. That is, states and districts are not required to adopt an assessment-oriented curriculum under NCLB. Rather, the coercive force from NCLB on curriculums is far more subtle, but no less real.

NCLB-prompted curriculum changes will assuredly vary across districts and states. Some high-performing districts, comfortable with the likelihood of their continued academic success, may decide to simply forge ahead with curriculum policy decisions reached wholly independent of NCLB considerations. In other districts, however, especially those not performing well, or those more averse to even a slight possibility of triggering NCLB consequences, curriculum policy decisions will be made with an eye towards the relevant assessments which define success under NCLB. Whether such curriculum developments should be welcomed, of course, is a separate matter. For purposes of this Article, however, the critical point is that such developments are plausible outcomes.

### C. *Financial*

The initial legal challenges to NCLB dwell on its financial consequences to states and local districts. NCLB includes an unfunded mandate provision that precludes the Act from imposing costs for state and local districts in excess of federal education funding.<sup>144</sup> Even though federal education spending has increased steadily over the years in real dollars,<sup>145</sup> some states and districts argue that NCLB costs exceed Federal Title I revenues.<sup>146</sup>

A precise accounting of the direct and indirect costs imposed by NCLB—indeed, a common understanding of what is meant or suggested by the term

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<sup>143</sup> See Kate Zernike, *In High-Scoring Scarsdale, A Revolt Against State Tests*, N.Y. TIMES, Apr. 13, 2001, at A1 (describing high-achieving districts’ resistance to standardized tests).

<sup>144</sup> 20 U.S.C. § 7907(a) (Supp. II 2002).

<sup>145</sup> See West & Peterson, *supra* note 84 (reporting that in 2005, federal education spending reached a historic high of \$12.7 billion).

<sup>146</sup> See Complaint at 14, *Sch. Dist. of Pontiac v. Spellings*, 2005 WL 3149545 (E.D. Mich. Nov. 23, 2005); Complaint at 12–13, *Connecticut v. Spellings*, No. 305-CV-1330 (D. Conn. Aug. 22, 2005), available at <http://www.state.ct.us/sde/nclb/important-press/StateofCTv.SpellingsNCLBComplaint8-22-05.pdf>.

“cost”—does not exist. For example, for purposes of cost accounting, it is not clear whether the assessment costs involve, most narrowly, the actual test instrument for each student tested in each subject for each year or, by contrast, whether the costs include such items as the wages (and benefits) paid to teachers (or others) necessary to grade the student tests. Given NCLB’s scope, the financial differences can be sizeable. This definitional vacuum has been filled by various assertions and estimates of NCLB’s costs. Predictably, these assertions vary, often tremendously.<sup>147</sup> Additional factors also contribute to the financial imprecision, notably a lack of consensus on exactly what NCLB requires for participating states and districts.

Despite obvious uncertainty and sometimes wildly conflicting cost estimates, at least two points appear reasonably clear. First, NCLB is not, on its face anyway, a federal “mandate.” That is, states retain the unambiguous legal option of deciding whether they wish to participate in NCLB. If a state does not wish to submit to NCLB, for whatever reason, it can decline to participate and, as a consequence, forego Federal Title I funding. A second point flows from the first. Notwithstanding grumbling, thus far every state decided, for whatever reason, to participate in NCLB.<sup>148</sup> What can one plausibly infer from this second point? At some point the 100% participation level in a voluntary program begins to erode confidence in assertions that NCLB costs states millions—if not billions—of dollars. If, in fact, it is true that 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.

Although the point remains contested, I assume for the purposes of this discussion that Title I funding covers direct costs to states and districts for the specific obligations triggered by NCLB participation.<sup>149</sup> Indeed, if one construes NCLB’s statutory requirements narrowly, it is hard to imagine that

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<sup>147</sup> See Complaint at 16, *Connecticut v. Spellings*, No. 305-CV-1330 (costs include “creating, administering and grading Connecticut tests for every grade,” as well as “developing alternative assessments for special education students and . . . assessments in foreign languages”). The litigants in the Michigan case awkwardly argued that the “cost” of NCLB borne by states and districts is best measured by the difference separating Title I’s authorized and actual funding levels. Complaint at 18, *Sch. Dist. of Pontiac*, 2005 WL 3149545. This difference is estimated to range from more than \$2 billion in FY 2002 to more than \$9 billion in FY 2006. *Id.*; see also *id.* at 22–52 (discussing varying cost estimates of different states); West & Peterson, *supra* note 84.

<sup>148</sup> Sam Dillon, *States Are Relaxing Education Standards to Avoid Sanctions from Federal Law*, N.Y. TIMES, May 22, 2003, at A29.

<sup>149</sup> See West & Peterson, *supra* note 84.

NCLB's aggregate costs to states exceeded \$12.7 billion in 2005.<sup>150</sup> If my central claim about the policy implications triggered by the NCLB is correct, NCLB participation *functionally* compels policy changes in states that extend beyond the statutorily required policy. This result follows, inexorably, due to the tight nexus between student academic achievement and other aspects of schooling, including curriculum decisions. If so, it is understandable that states and districts feel greater financial pressure.

#### IV. CHECKBOOK FEDERALISM AND "GETTING OFF THE EDUCATION FEDERALISM FENCE"

As Professor Robert Schapiro notes, the increased federal legislative activity in the public elementary and secondary education sector evidences a broad and perhaps growing consensus that "education should be a central concern of the national government."<sup>151</sup> At the same time, however, Schapiro also notes that "no one argues that (state and local) school administrators and teachers should become federal officers."<sup>152</sup> Moreover, Professors Liebman, Dorf, and Sabel argue that NCLB illustrates how we can redefine our representative democracy.<sup>153</sup> Thus, perhaps NCLB is best viewed as a "joint state-federal effort to improve education"<sup>154</sup> and should be accommodated with less awkwardness under a new theory of federalism.

Whether NCLB can efficaciously help legal theorists construct a new theory of federalism is far from clear. It would be nothing if not unusual to draw on a federal statute focusing on education to help usher in a new theory of federalism. After all, elementary and secondary education is a veritable poster child of a traditional state and local interest. A more fundamental challenge, however, flows from the flawed structural integrity of NCLB itself. At bottom, NCLB seeks to push the federalism envelope yet at the same time finesse the existing *Dole* test for conditional spending. From a policy perspective, by placing one foot in the federal camp, and another in the state and local camp, NCLB endeavors to straddle the federalism divide. NCLB

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<sup>150</sup> See *id.* ("[A]s the GAO and other outside observers have also shown, testing is one of the best bargains in education.").

<sup>151</sup> Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 257 (2005) (citing GAIL L. SUNDERMAN ET AL., NCLB MEETS SCHOOL REALITIES: LESSONS FROM THE FIELD xxix, 36–38 (2005)).

<sup>152</sup> *Id.*

<sup>153</sup> See generally Liebman & Sabel, *supra* note 12; Dorf & Sabel, *supra* note 116.

<sup>154</sup> Schapiro, *supra* note 151, at 293.

greatly expands federal education policy-making authority and influence, but does so in a manner that requires *states* to define and impose their own standards and assessment regimes.

In trying to have it both ways, NCLB speaks to two distinct audiences, one moored in law, the other in policy. Legally, NCLB safely navigates through existing constitutional requirements. From a policy perspective, however, NCLB plants its own seeds of potential inefficaciousness, which arise if states cannot be trusted to withstand structural political economic pressures and self-impose student academic standards with the necessary rigor. Tentative evidence suggests that too many states cannot withstand such political economic pressures and act in a strategic manner that undermines NCLB's aspirations. Finally, NCLB assiduously dodges a fundamental question residing at the heart of education federalism: whether the federal government can assert education policy-making authority without assuming financial responsibility.

#### A. *Getting Off the Federalism Fence*

Even Professor Schapiro acknowledges that his analysis rests uneasily on an "optimistic account" of NCLB.<sup>155</sup> Other analyses are far less optimistic. Professor Ryan, for example, has criticized NCLB as a muddled enterprise expressly structured to finesse federalism concerns in a way that stimulates the creation of significant unintended policy consequences.<sup>156</sup> What Ryan finds particularly troublesome is that NCLB assigns to the federal government enforcement authority, yet assigns to states the ability to define student assessment thresholds.<sup>157</sup> Ryan goes on to note that his critique of NCLB suggests that the federal government needs to "get off the federalism fence."<sup>158</sup> For Ryan, NCLB's defects illustrate that the federal government first needs to determine, if at all possible, whether states, given their "competition and internal political dynamics," are able to "establish[, implement,] and enforce rigorous academic standards over a reasonable period of time."<sup>159</sup> Second, should it be determined that states cannot be trusted, for Ryan, "[T]here is no good substitute for federal control of standards and tests."<sup>160</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> See Ryan, *supra* note 2.

<sup>157</sup> *Id.* at 944.

<sup>158</sup> *Id.* at 987.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 988.

Ryan's call obtains considerable purchase, especially because combating a race to the bottom is a classic justification for federal action. To be fair, however, Ryan makes clear that federal activity in the standards and assessment area should be considered only after it is clear that "state competition and internal political dynamics" stimulate a dilution or degradation of state-developed standards and assessments.<sup>161</sup> In 2004, Ryan concluded that "there is not yet enough empirical evidence to make a conclusion one way or the other."<sup>162</sup> While the intervening two years do not supply conclusive evidence, emerging trends hint at the need for a federal response.

*B. Splitting the Education Policy Atom: Policy Authority and Funding Responsibility*

The necessary factual foundation upon which the federal government could conclude that enough states have effectively defaulted in their duty, violated their trust, and squandered an initial presumption of policy control in their favor is not entirely clear. All that is clear at this point, perhaps, is that such a factual foundation is possible. Critical to (and embedded within) Professor Ryan's suggestion, however, is the equally important proposition that the federal government could assume control over standards and assessment policy *without* assuming full financial responsibility for school funding. Ryan, then, appears comfortable with the possibility of decoupling policy control over standards and assessments from financial responsibility for schools.

To be sure, such an argument possesses important force. After all, dispossessing states and districts of standards and assessment policy-making authority does not disable their revenue-raising capability. Moreover, the "federal education funds" ultimately come from tax payments from citizens of various states. Finally, if the education crisis is truly national in scope and nature, a federal solution would be warranted. And if a federal solution is warranted, it does not necessarily follow that federal financial responsibility attaches.

Although the critical assumption underneath Ryan's call for the federal government forging into the standards setting business<sup>163</sup> is both sound and persuasive, at bottom he is more comfortable with decoupling policy control

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<sup>161</sup> *Id.* at 987.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 987–88.

and fiscal responsibility than I. As a positive matter, in the education policy sector, as I discuss above, current constitutional doctrine does not prohibit NCLB.<sup>164</sup> From a normative perspective, however, what should pivot federal involvement is less the states' trustworthiness and abilities and more the federal government's willingness to fund to the full extent of its policy reach. That is, if the federal government is willing to fully fund the costs imposed by NCLB, then legal doctrine should not (and, under *Dole*, clearly does not) prohibit it. If federalism doctrine possesses any traction at all, however, what it should guard against are strategic efforts by the federal government to regulate in ways that generate policy control disproportionate to the federal government's financial contribution. To put the point more crassly, in the world of education policy (again, a world in which federalism doctrine provides no clear answers), control should presumptively fall to the level of government willing to shoulder the relevant costs.

Three broad factors support an instinct to resist separating control over school policy and fiscal responsibility. First, state and local school officials generally endeavor to couple control over education policy and school funding.<sup>165</sup> To the extent that the nation's "cherished ideal" of local control over schools and school policy was ever accurate, it was accurate in the early-American common school movement when, critically, local revenue bases—principally local property tax receipts—supplied the bulk of school revenue.<sup>166</sup> Moreover, since the mid-1980s, when states began asserting greater education policy-making authority, state revenue began to displace local revenue as the principal source of school revenue.<sup>167</sup>

Second, at the federal level, decoupling policy authority and financial responsibility is formally frowned upon by, among other things, the ban against unfunded mandates. In an effort to guard against self-interested congressional behavior, Congress itself managed to pass the Unfunded Mandates Reform Act of 1995,<sup>168</sup> which came about largely because governors and mayors across the country grew frustrated by federal impositions which directed locally raised revenues toward national priorities. The Unfunded

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<sup>164</sup> See *supra* Part II.

<sup>165</sup> See, e.g., Sch. Dist. of Pontiac v. Spellings, 2005 WL 3149545 (E.D. Mich. Nov. 23, 2005).

<sup>166</sup> See NATIONAL CENTER FOR EDUCATION STATISTICS, *supra* note 55, app. 1, at 195 tbl.37-2.

<sup>167</sup> See, e.g., UNIV. OF THE STATE OF N.Y., THE STATE EDUC. DEP'T, STATE AID TO SCHOOLS: A PRIMER (2002), <http://www.oms.nysed.gov/faru/Primer/primer02-03.htm> (discussing this shift in New York).

<sup>168</sup> Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.). For a discussion, see George A. Krause & Ann O'M. Bowman, *Adverse Selection, Political Parties, and Policy Delegation in the American Federal System*, 21 J.L. ECON. & ORG. 359, 364 (2005).

Mandates Reform Act is designed to minimize what NCLB achieves, albeit indirectly.

Third, coupling policy-making control and fiscal responsibility better aligns political accountability and responsibility. As John Chubb and Terry Moe note, democratic authority and public administration govern public schools.<sup>169</sup> Not only are public schools exposed to various political and economic pressures, but such exposure is specifically designed into the institutional setting that nests public schools. Given the amount of annual public spending on public elementary and secondary schools, more than \$419 billion for the 2001–02 school year,<sup>170</sup> and in light of education policy's broader political, social, and economic import, citizens' influence on education policy should be facilitated.

Decoupling policy-making control and responsibility for funding public schools dilutes citizens' influence on education policy. One important way to express education policy preferences is to engage in the democratic process. Every year, public school boards across the country turn to their residents for approval of school budgets. By definition, budgets incorporate and, therefore, reflect policy decisions and preferences. To the extent that local school (or state-level) budgets incorporate policy decisions imposed by the U.S. Department of Education, a critical link is severed between voters and policy. Severing this link creates the risk of losing information about policy preferences and control over the direction of public resources. It also further removes education policymakers from electoral discipline.

Even if education policy was decoupled and federal statutes such as NCLB could greatly inform policy while state and local revenues provide the bulk of elementary and secondary schools funding, some level of democratic access would exist. After all, citizens could still endeavor to express policy preferences through national elections. Indeed, as the succession of self-styled "Education Presidents" increases, it appears as though federal officers are making electoral appeals along these very lines. Unlike local school board elections, annual school budget votes, and, to a lesser extent, state-level elections, federal elections involve many more issues than education policy. At the federal electoral level, nuanced information about citizens' education policy preferences can quickly become muddled.

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<sup>169</sup> JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 28–29 (1990).

<sup>170</sup> NATIONAL CENTER FOR EDUCATION STATISTICS, *supra* note 55, app. 1, at 194 tbl.37-1. The \$419.8 billion spent for public elementary and secondary represents 4.1% of GDP. *Id.* at 199 tbl.39-2.

My suggestion to resist severing the link between education policy-making authority and school funding responsibility in no way precludes federal activity. First, the federal government could simply deem education policy enough of a federal interest that it decides it wants to exert policy influence and wants to do so badly enough that it is willing to pay for its policy preferences. Second, even if the federal government wants to exert policy influence but feels it can not (or does not want to) fund its policy preferences, it could still articulate *national* rather than federal policies. This way, the principal funders of elementary and secondary education—currently states and local governments—while benefiting from the federal government’s expertise and preferences could decide independently whether to adopt such policy preferences.

Finally, my suggestion to resist severing education policy-making authority and school funding responsibility does not foreclose nettlesome questions. Precluding the federal government from imposing upon states a national set of standards and assessments, without fully funding the costs flowing from an annual assessment requirement, such as what NCLB requires (and assuming that the costs could be reasonably estimated), might prompt federal officials to offset the costs attributable to assessments with federal financial contributions to education programs. A more dramatic response would be for the federal government to more aggressively characterize indirect payments to state and local budgets.

To take but one example, federal law permits taxpayers to deduct mortgage interest payments from federal tax liabilities.<sup>171</sup> The mortgage interest deduction cost the federal government approximately \$60 billion in fiscal year 2004.<sup>172</sup> Various administrations have floated proposals to scale back the mortgage interest deduction rule, albeit with trepidation and, in any event, without success.<sup>173</sup> Perhaps a more modest effort would involve federal officials construing the \$60 billion as a “payment” to states and local homeowners and allocating this federal “payment” to relevant NCLB costs.

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<sup>171</sup> I.R.C. § 163(h) (2000).

<sup>172</sup> See U.S. GEN. ACCOUNTING OFFICE, GOVERNMENT PERFORMANCE AND ACCOUNTABILITY: TAX EXPENDITURES REPRESENT A SUBSTANTIAL FEDERAL COMMITMENT AND NEED TO BE REEXAMINED 102 (2005), available at <http://www.gao.gov/new.items/d05690.pdf> (comparing U.S. Treasury Department and Joint Committee on Taxation estimates).

<sup>173</sup> See, e.g., Edmund L. Andrews, *Bush Expected to Postpone Tax Overhaul Until 2007*, N.Y. TIMES, Dec. 6, 2005, at C3 (President Bush’s advisory panel proposed reducing the mortgage interest deduction, but the idea was attacked by members of both political parties.).

Whether federal officials would ever undertake such an effort remains far from clear. My smaller points are, first, that from an economic perspective, such a position would not be entirely specious. Second, and more generally, efforts by states and local school districts to require the federal government to more fully account for NCLB costs could trigger unanticipated consequences.

#### CONCLUSION

Under today's understanding of *Dole*, a constitutional challenge to NCLB based on Congress's conditional spending authority will most assuredly fail. This analysis assumes, however, that courts will look only to the statute's plain language rather than the more subtle policy interactions that NCLB sets into motion. A closer, policy-oriented analysis of NCLB reveals a strategic effort by the federal government to influence policy on one variable of interest—student achievement—presumably understanding well that, in so doing, it was inevitably influencing other related policy variables of interest. Thus, while NCLB does not coerce from a constitutional perspective, it achieves policy coercion.

NCLB critics are better served by engaging NCLB on policy rather than constitutional grounds. The key policy questions—whether NCLB reflects a positive development—I sidestep and leave to others. If nothing else, however, perhaps NCLB will accelerate attention to the long-simmering question about whether policy control and funding responsibility should be linked or separated. That is, at some point the federal government can no longer avoid deciding whether American education policy is better served by state- or federal-led standards enforcement. If we can trust the states to avoid racing to the bottom in an effort to gain a comparative advantage, then they are better positioned to set and enforce their education standards. In contrast, if the goal of improved student achievement and school reform requires a federal approach, then the federal government should both set and enforce educational standards. The current approach—the federal government enforcing state-defined standards—which partly reflects uncertainty surrounding the federalism question, is poised to ill-serve all involved. NCLB's efforts at finessing constitutional niceties come with the price of policy problems. At some point, policy coherence will require a resolution to the critical question that, thus far, policymakers appear (understandably) anxious to avoid. A resolution to the critical underlying federalism question raised by NCLB will

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surely interest constitutional theorists and perhaps provide some insight into new federalism models and theory.

