REVIVING THE COERCION TEST: A PROPOSAL TO PREVENT FEDERAL CONDITIONAL SPENDING THAT LEAVES CHILDREN BEHIND

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INTRODUCTION

The federal government took its boldest action in the realm of public education in nearly forty years when President George W. Bush signed into law the No Child Left Behind Act[1] ("NCLB" or the "Act") on January 8, 2002.[2] With bipartisan support behind Bush's first enacted piece of legislation as president, NCLB displaced traditional, well-established local control educational systems and claimed a new, lead role for the federal government. The bill was a campaign priority for Bush.[3] The implementation of the 1,200 pages of new standards for schools, students, and teachers occurred just four months after the September 11, 2001, terrorist attacks and less than a year after the bill's ini-

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1. 20 U.S.C.S. §§ 6301–6578 (Law. Co-op. 2002).

2. The federal government first pledged money to support education in 1965 under the Elementary and Secondary Education Act. *See* Pub. L. No. 89-10, 79 Stat. 27 (1965). President Johnson enacted the program to provide every school with federal Title I money conditioned on the number of students that needed the assistance. David Nash, *Improving No Child Left Behind: Achieving Excellence and Equity in Partnership with the States*, 55 RUTGERS L. REV. 239, 244–45 (2002). The statute intended to "expand and improve these children's educational programs in an effort to give them an education equal to that of children from more financially fortunate areas of the nation." Dep't of Educ. v. Bell, 770 F.2d 1409, 1413 (9th Cir. 1985). However, the statute required that the money be spent on the Title I recipient students, not merely "be available to [them]." *Id.* at 1415.

3. Elementary and secondary education reform had been a primary concern of previous presidents. President Johnson, who initiated the "War on Poverty" during his term in office, provided the major impetus for the passage of Title I and the acceptance of it as an important education objective. Gary Natriello & Edward L. McDill, *Title I: From Funding Mechanism to Educational Program*, *in* HARD WORK FOR GOOD SCHOOLS: FACTS NOT FADS IN TITLE I REFORM 31 (Gary Orfield & Elizabeth H. DeBray eds., 1999). On the contrary, President Reagan curtailed federal involvement in elementary and secondary education allocations in the 1980s.

tial debate.[4] The political expediency with which the bill was enacted, in efforts to unite our country after the threat of insecurity,[5] suggests its flaws. In its haste to enact NCLB, Congress may have unconstitutionally extended its spending powers.

This comment argues that in light of NCLB, the Supreme Court should revive Spending Clause precedent that has lain dormant for almost seventy years in order to better define the limitations on Congress's power to offer financial incentives in exchange for state cooperation in implementing federal programs. NCLB is too aggressive a congressional spending measure given the rigorous standards it imposes on states and the insufficient allocation of federal funding. In order to achieve proficient levels for all students, states and school districts cannot reasonably afford to reject substantial federal Title I funds; thus, the Act economically, politically, and practically coerces them to both accept the money and agree to be held accountable for implementing its regulations. The friction created by schools' compliance with NCLB's demands provides the Court with the requisite facts to restore the coercion test, thereby strengthening the limitations of the current spending doctrine.

Part I of this comment introduces NCLB, its historical background in Title I, and the complexities of the statute. Part II outlines Congress's Spending Clause power as articulated by the Supreme Court. Specifically, this part reviews the Court's opinion in *South Dakota v. Dole*,[6] which examined and upheld a conditional spending program and enumerated four guidelines that limit Congress's spending power under Article I, Section 8 of the Constitution. This part also outlines the unconstitutional coercion test adopted in *Steward Machine Co. v. Davis*[7] and highlights the reasons why courts acknowledge the validity of the doctrine but avoid applying it.

Using the test established in *Dole*, Part III explains why the Court would uphold NCLB against a Spending Clause challenge despite some

4. NCLB was originally introduced as a House resolution on March 22, 2001. The Senate vote reflects overwhelming support for Pub. L. No. 107-110. Eighty-seven senators voted for the Act and only ten against it. 147 CONG. REC. S13,422 (daily ed. Dec. 18, 2001) (Vote Report No. 371, No Child Left Behind Act of 2001, 107th Congress, 1st Session, Dec. 18, 2001). Specifically, the Democratic senators voted 43–6 for the Act and the Republican senators voted 44–3 for the Act. *See id.*

5. *See* 150 CONG. REC. S9133 (daily ed. Sept. 13, 2004) (statement of Sen. Kennedy, referring to President Bush's signing the Act into law in January 2002: "At that time, Republicans and Democrats came together to recognize the need to create a strong education system where every child attends a good school with a good teacher. Together, we recognized the importance of achieving that goal for the future of our democracy, economy, and national defense.").

6. 483 U.S. 203 (1987).

7. 301 U.S. 548, 590 (1937).

persuasive arguments that could be made against the program. Given that NCLB survives scrutiny under the current Spending Clause doctrine, Part IV advocates the need for the Court to revive its coercion analysis as described in *Steward Machine* in order to create effective limits on congressional spending authority. Part IV analyzes evidence of NCLB's coercive effects that has been collected during the three years since the statute's enactment and argues that this evidence is sufficient to provoke the Court to reinstate an analysis it devised in the past that remains applicable to our contemporary legal system.

I. UNDERSTANDING THE HISTORY AND IMPACT OF NO CHILD LEFT BEHIND

NCLB amends the 1965 Elementary and Secondary Education Act ("ESEA"). Title I of the ESEA pledges federal funds to assist state and local educational systems in addressing the needs of low-income and socially disadvantaged students.[8] The ESEA originated with the civil rights movement and the Johnson administration's War on Poverty because education had become one solution in the struggle for social, political, and economic equality.[9] ESEA targeted only "Title I schools," defined as low-income student-populated schools.[10] Title I monies are not intended to replace local sources of revenue for education. Rather, these federal funds supplement local fundraising.[11] Congress annually allocates the funds, and every five to six years reauthorizes the ESEA.[12]

The government pledges Title I funds to provide instruction and support to disadvantaged students in order to bridge the achievement gap between them and their peers.[13] According to the Department of Educa-

8. *See generally* 20 U.S.C.S. §§ 6301–6578 (Law. Co-op. 2002).

9. Natriello & McDill, *supra* note 3, at 31.

10. *See generally* Nat'l Educ. Ass'n, *Elementary and Secondary Education Act (ESEA) Q & A* (Jan. 2003), *at* http://www.nea.org/esea/images/eseaqa.doc [hereinafter *ESEA Q & A*] (describing the historical background of Title I schools). Title I eligibility was determined either by the school's percentage of students eligible for free lunch or the percentage of students living within the school's attendance boundary who received public assistance. The NCLB reauthorization provides for a "targeted assistance" school to use the money only to assist students with individual educational needs. However, a school that has greater than forty percent enrollment of eligible students can use the money to benefit all of the school's students. Before NCLB, schools could only operate "school-wide" programs if the poverty rate was at least fifty percent. *Id.*

11. *Id. See* 20 U.S.C.S. § 6613(f); *see also* Stephen D. Sugarman, *Two School-Finance Roles for the Federal Government: Promoting Equity and Choice*, 17 ST. LOUIS U. PUB. L. REV. 79 (1997).

12. *ESEA Q & A*, *supra* note 10, at 2, *at* http://www.nea.org/esea/images/eseaqa.doc.

13. Title I of the ESEA is comprised of several parts. Part A, the part significantly amended by NCLB, dedicates funds to schools in high-poverty areas to help disadvantaged

tion, NCLB differs from the eight reauthorizations in the past thirty years[14] in that it increases accountability for states, school districts, and schools; gives parents and students greater breadth of education programs to chose from; allows states and local educational agencies more flexibility in the spending of the federal funds; and puts a stronger emphasis on reading.[15] The Department of Education gives several examples of ways in which Title I funds are commonly used. These funds provide support to extended-day kindergarten programs; learning laboratories in math, science, and computers; additional teachers or paraprofessionals; and special after-school and summer programs that extend the regular school curriculum.[16] NCLB also differs from previous ESEA reauthorizations in that it sets the 2013–2014 school year as a deadline by which the national education plan will have all students performing at equally proficient levels in math and reading.[17] Consequently, while

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children reach high academic standards; Part B consists of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400–1487 (2000). This Act was reauthorized in 2004 as the Individuals with Disabilities Education Improvement Act ("IDEIA"). Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647. Other Titles of ESEA include: Title II, improving teacher quality; Title III, aiding English language learners; and Title IV, providing impact aid to assure safe and drug-free schools and communities. Also, a mandatory education program exists for vocational programs (skills training). *See* Department of Education, *Did You Know?: Most Federal Funds Are Sent Directly to States and Local School Districts for Their Use in Schools*, EXTRA CREDIT (July 19, 2004), *at* http://www.ed.gov/news/newsletters/extracredit/2004/07/0719.html; Michael A. Resnick, *Calculating the Cost of NCLB: Does your School District have the Resources it Needs?*, NCLB ACTION ALERT (Spring 2004), *at* http://www.nsba.org/site/docs/33800/33767.pdf. In order to achieve these objectives, Congress has frequently expanded its control over Title I. Natriello & McDill, *supra* note 3, at 33. In 1988, the Hawkins-Stafford Amendment revised Title I to provide schools with greater flexibility with programming and increased accountability for achieving higher student performance. *Id.* at 34. This amendment spurred from more than twenty years of unsuccessful reform aimed at closing the gap between disadvantaged students and their peers. *Id.*

14. *See* Natriello & McDill, *supra* note 3, at 32. The chronology of Title I: 1965, Congress enacted ESEA, including Title I; 1981, Title I was renamed "Chapter 1" and stripped of many regulatory safeguards; 1988, Hawkins-Stafford amendments were made to Chapter 1, introducing accountability and student achievement concepts; 1994, Improving America's Schools Act ("IASA") reauthorized the Act with amendments to Chapter 1 (now again Title I) and called for higher accountability and achievement attainment; and 2002, Congress enacted NCLB, reauthorizing ESEA. DIANNE M. PICHÉ ET AL., TITLE I IN MIDSTREAM: THE FIGHT TO IMPROVE SCHOOLS FOR POOR KIDS 11 (Corrine M. Yu & William L. Taylor eds., 1999).

15. Department of Education, *Executive Summary* (Jan. 7, 2002), *at* http://www.ed.gov/nclb/overview/intro/execsumm.html?exp=0. *See also ESEA Q & A*, *supra* note 10, at 4, *at* http://www.nea.org/esea/images/eseaqa.doc.

16. National Center for Education Statistics, *The Allocation Process for Title I Grants*, *at* http://nces.ed.gov/surveys/AnnualReports/pdf/titlei20030428.pdf (last visited Oct. 8, 2004).

17. Department of Education, *supra* note 15, *at* http://www.ed.gov/nclb/overview/intro/execsumm.html?exp=0.

funding is still based on the number of disadvantaged students, federal performance requirements apply to *all* children.

Traditionally, the ultimate responsibility for providing education programs for students belonged to the states. With the advent of NCLB, however, the federal government supplanted local, particularized, regulatory structures with a nationally focused, uniform plan. The resulting program makes states accountable for school performance, but denies them the discretionary power to decide how to achieve that task. Most importantly, states are responsible for seeing that their schools meet their proscribed Adequate Yearly Progress ("AYP"), a formula each public school calculates according to the United States Department of Education guidelines.[18] Many of these guidelines, which set high goals for uniform national education standards, are unattainable by some schools. These guidelines, which are outlined for every grade and applicable to both reading and math, are extremely inflexible.[19] In Colorado, for example, in order to meet AYP targets, individual schools and school districts must achieve a ninety-five percent participation rate in state assessments, a proficiency or non-proficiency target, an advanced level of performance for elementary and middle schools, and a higher graduation rate for high schools.[20] The proficiency targets are similar in other

18. Colorado Department of Education, *The ABCs of AYP: FAQs: Title I Adequate Yearly Progress* (Aug. 12, 2003), *at* http://www.cde.state.co.us/cdeunified/download/NCLB_word_ABCsofAYP.pdf [hereinafter *ABCs*] (describing how Colorado determined its performance targets). A state's AYP formula derives from its 2001–2002 test scores that are used as a baseline from which the state will set numerical targets in every subject and grade to be reached by a percentage of students in the following twelve years. *ESEA Q & A, supra* note 10, at 3, *at* http://www.nea.org/esea/images/eseaqa.doc; *see also* discussion *infra* Part III.A. Beyond student performance, NCLB also demands higher teacher achievement and compliance. NCLB mandates that schools use Title I money to hire only teachers who are "highly qualified" in the subjects they teach by the 2005–2006 school year. *ESEA Q & A, supra* note 10, at 5, *at* http://www.nea.org/esea/images/eseaqa.doc. Teacher qualifications include: having full state certification or passing a state teacher licensing examination; holding a license to teach in the state; and possessing a teaching record void of a certificate or license requirement waived on an emergency, temporary or provisional basis. *Id.* Teachers must hold at least a bachelor's degree and demonstrate a high level of competency by their second year of classroom teaching. *Id.* Paraprofessionals who assist classes that receive Title I funds must also satisfy performance credentials. The Act gives teaching assistants until January 2006 to either complete two years of post-secondary education or demonstrate, in addition to receipt of a high school diploma, the necessary skills to aid in the classroom. *Id.* at 7. Paraprofessionals hired after January 8, 2002, must also meet these new standards. *Id.* at 8.

19. *ABCs, supra* note 18, *at* http://www.cde.state.co.us/cdeunified/download/NCLB_word_ABCsofAYP.pdf.

20. *Id.* The participation rate is a national requirement and in some cases the most difficult requirement to satisfy. In Georgia, for example, 536 of the 846 schools that did not make adequate progress in 2003 failed because fewer than ninety-five percent of students in one or more subgroups took the tests. Erik W. Robelen, *State Reports on Progress Vary Widely*, EDUC. WKLY, Sept. 3, 2003, at 37.

states, depending on the levels from student test scores in 2001–2002, the base year.[21] Although Title I money for NCLB only applies to low-income students, the Act sets uniform proficiency levels for all students in every state, school district, school, and subgroup within each grade.[22]

Student performance levels, for the purposes of determining AYP, are measured each year by state standardized testing. Prior to having federal AYP targets, states employed similar testing programs. The federal regulations now require more frequent testing of a larger segment of students.[23] Further, under the new regime, states must strategically design these tests so that the results are comparable year-to-year and can be used by teachers to diagnose students' academic needs.[24]

To ensure that schools heed AYP levels, NCLB creates a series of sanctions that are triggered when a school fails for two consecutive years.[25] The first of these sanctions will be imposed during the 2005–2006 school year. Sanctions will include anything from notifying parents of a two-year improvement plan, to using ten percent of the Title I funds for professional development, to providing five to fifteen percent of funds for the transportation of students to the schools of their choice among those that are performing well.[26] This sanction scheme diverts school funds, forcing schools to improve performance with less money.

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21. *See ESEA Q & A, supra* note 10, at 2–3, *at* http://www.nea.org/esea/images/eseaqa.doc. Proficiency target charts for all school districts in reading and math for the next twelve years are posted on the Colorado Department of Education's Web site. *See* Colorado Department of Education, *AYP Proficiency Targets and Safe Harbor*, *at* http://www.cde.state.co.us/ayp/prof.asp#table (last modified Nov. 19, 2003).

22. *ABCs, supra* note 18, at 8, *at* www.cde.state.co.us/cdeunified/download/NCLB_word_ABCsofAYP.pdf.

23. JACK JENNINGS ET AL., CTR. ON EDUC. POLICY, A NEW FEDERAL ROLE IN EDUCATION 1 (2002), *available at* http://www.cep-dc.org/fededprograms/newfedroleed feb2002.htm. Subgroups are determined by disaggregating the school test data into categories defined by such characteristics as gender, race or ethnic group, disabled status, limited English proficient status, economically disadvantaged status, and migrant status. *ESEA Q & A, supra* note 10, at 3–4, *at* http://www.nea.org/esea/images/eseaqa.doc. Students may qualify for more than one group. *Id.* Each subgroup must meet proscribed AYP levels, which are the same for all student subgroups.

24. *Id.* Tests are taken and numbers are compared from within these subgroupings of students. *ESEA Q & A, supra* note 10, at 3–4, *at* http://www.nea.org/esea/images/eseaqa.doc.

25. *ABCs, supra* note 18, at 4, *at* www.cde.state.co.us/cdeunified/download/NCLB_word_ABCsofAYP.pdf.

26. *ESEA Q & A, supra* note 10, at 3, *at* http://www.nea.org/esea/images/eseaqa.doc (describing the AYP requirements that measure student improvement). By 2005–2006, states must have selected and administered their own assessment tests in reading and math. By 2007–2008, states are required to develop science content standards and begin administering the science assessment tests. The federal law suggests a series of consequences for failure at the various levels of AYP assessments. Each year, schools must have ninety-five percent of their students assessed on proficiency tests. *See also* Nat'l Educ. Ass'n, *School Improvement*, *at* http://www.nea.org/esea/eseaschools.html (last modified Nov. 2, 2004).

Ultimately, schools that continue to fail may have all their NCLB funds withheld.[27]

These sanctions amount to mandates conditioned on the receipt of federal funds because schools can neither execute the program with the money allocated to them nor pay the consequences for failing to make the expected progress. A school that has failed for two years cannot be removed from "School Improvement" status until it has achieved two years of increased progress.[28] Being on a "School Improvement" list will presumably have a downward spiraling effect on schools. By spending more money on sanctions, schools will have less money to devote to the program's demands. Achieving AYP targets will be schools' primary focus and, no doubt, a reason for their demise.

Moreover, NCLB is seriously underfunded. The announcement of schools' AYP reports in fall 2003 confirmed states' and school districts' fears that the NCLB program is truly financially flawed. More than a quarter of the schools in the United States failed to reach AYP levels that year and many blame the deficiency on the lack of funding.[29] Utah and Virginia statehouses in 2004, for example, proposed joint resolutions that prohibit schools from accepting Title I money in order to avoid mandatory compliance with NCLB.[30]

Despite the obvious discrepancy between the cost of implementing NCLB and the inadequate federal funding allocation to this program, ninety-four percent of all the nation's school districts participated in Title I in 2004.[31] This data suggests that states are being compelled both to accept Title I funds and to attempt to reach the burdensome proficiency targets. The choice to opt out and forego their commitment to implement the program in order to retain local control of education forces schools to also abandon federal funds and local political support.[32] Essentially, by

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27. *ABCs*, *supra* note 18, *at* http://www.cde.state.co.us/cdeunified/download/NCLB_word_ABCsofAYP.pdf.

28. *Id.* (explaining that schools that fail are placed on a "School Improvement" list, meaning the school must work with state officials to develop an improvement plan that delineates the school's responsibilities to correct the reasons for insufficient progress).

29. *School Reform Left Behind*, N.Y. TIMES, Jan. 10, 2004, at A12, LEXIS, News Library, NYT File. *See also* discussion *infra* Part IV.

30. *See infra* note 32 and discussion *infra* Part IV.B.

31. THOMAS W. FAGAN & NANCY L. KOBER, CTR. ON EDUC. POLICY, TITLE I FUNDS: WHO'S GAINING, WHO'S LOSING & WHY 1 (2004), *available at* http://www.cep-dc.org/pubs/Title1_Funds_15June2004/Title_1_Funds_15June2004.pdf. Even though poverty is a factor in the formula for determining whether a school district qualifies for Title I funding, most school districts are eligible to receive the funds. Resnick, *supra* note 13, at 3, *at* http://www.nsba.org/site/docs/33800/33767.pdf.

32. *See* Sam Dillon, *Some School Districts Challenge Bush's Signature Education Law*, N.Y. TIMES, Jan. 2, 2004, at A1, LEXIS, News Library, NYT File [hereinafter Dillon, *Some School Districts*]. In fact, two states, Virginia and Utah, approved motions and resolutions,

imposing regulations on schools and ultimately on states in exchange for their pledging money they do not have toward achieving the designated educational programs, states are coerced into compliance. This effect is incompatible with the Spending Clause doctrine.

II. DEVELOPMENT OF THE SPENDING CLAUSE DOCTRINE

Since the adoption of the Constitution, the Spending Clause has been interpreted both broadly, giving Congress powers other than those expressly enumerated, and narrowly, conferring to Congress only the powers enumerated in Article I, Section 8.[33] During the New Deal era, the Court expanded the powers of Congress so that it could take action to improve the economic situation of the country through legislation.[34] Since that time, the modern Court has played a passive role in review of Congress's use of its conditional spending power, relying instead on the precedent established during the New Deal.[35] The recent limitations on Congress's commerce power have also triggered increased congressional reliance on the spending power to justify policies that Congress otherwise lacks express authority to enact.[36]

The Court first articulated the Spending Clause doctrine in *United States v. Butler*.[37] In *Butler*, the Court predicted that Congress could use its taxing and spending authority to subvert the power reserved to the states.[38] Since *Butler*, the Court has acknowledged that the spending

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respectively, prohibiting schools from accepting federal money from Title I. *Id.* Further, a survey conducted by Public Agenda, an opinion research organization, found that nine out of ten superintendents considered NCLB mandates to require extensive work and inadequate money to help accomplish the tasks. *Id.* On the contrary, President Bush and Secretary of Education Rod Paige maintain that funding for the Act has been adequate. Paige said, "We have calibrated the money necessary to implement the law and provided it." FAGAN & KOBER, *supra* note 31, at 8, *available at* http://www.cep-dc.org/pubs/Title1_Funds_15June2004/Title_1_Funds_15June2004.pdf.

33. Kimberly Sayers-Fay, *Conditional Federal Spending: A Back Door to Enhanced Free Exercise Protection*, 88 CAL. L. REV. 1281, 1294 (2000) (referring to United States v. Butler, 297 U.S. 1, 65–66 (1936)).

34. "The Roosevelt Court 'expanded the commerce power and the taxing and spending power so greatly that it soon became evident that there was almost no statute for social welfare or the regulation of business that the Court would not invalidate.'" Lynn A. Baker, *The Spending Power and the Federalist Revival*, CHAP. L. REV., Spring 2001, at 195, 227 n.103 (quoting WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 154 (1995)).

35. *Id.* at 227 (suggesting also that the Court believes the federal appropriations process "does not readily lend itself to traditional judicial review").

36. *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995); New York v. United States, 505 U.S. 144 (1992).

37. 297 U.S. 1 (1936).

38. *Id.* at 75.

power is not unrestricted.[39] But, showing judicial deference to Congress's exercise of its spending authority, the Court has not invalidated a federal spending program since 1935.[40] The Court has interpreted the constitutional provision as giving Congress more than those powers enumerated in Article I, Section 8.[41]

A contemporary analysis of a Spending Clause issue involves considering its four formal limitations developed in *South Dakota v. Dole*, described in Section A. Although the *Dole* analysis refers to the coercion test defined in *Steward Machine Co. v. Davis*, that test has not been formally incorporated into the Spending Clause doctrine.[42] In fact, the Supreme Court has not revisited the concept of coercion since it articulated the principle of law in *Steward Machine*, described in Section B. Moreover, as Section B illustrates, lower appellate and district courts faced with a Spending Clause challenge have avoided invoking the coercion test, declaring that they lack the direction or evidence to issue any rational judgment.[43] These courts further refrain from engaging in a coercion analysis because the Court in *Steward Machine* warned them not to "becom[e] entangled in ascertaining the point at which federal inducement to comply with a condition becomes compulsion."[44] Without much judicial interference, Congress has succeeded in extending its spending power beyond the doctrinal limitations defined in *Dole*.

A. Current Limitations on the Spending Clause Doctrine as Articulated in Dole

In *South Dakota v. Dole*, Congress conditioned the receipt of federal highway money on the states implementing a minimum drinking age of

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39. *See* South Dakota v. Dole, 483 U.S. 203 (1987); Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937).

40. Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1204 (1997). In *Butler*, the first Spending Clause case, discussed *infra* Part II.B, the Court held, "Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the fundamental law. Courts are reluctant to adjudge any statute in contravention of them." 297 U.S. at 67.

41. Article I, Section 8 reads: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1. *See* Angel D. Mitchell, Comment, *Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions*, 48 U. KAN. L. REV. 161 (1999) (interpreting Article I, Section 8 within the realm of the conditional spending power).

42. *Dole*, 483 U.S. at 211.

43. Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989).

44. Oklahoma v. Schweiker, 655 F.2d 401, 413 (D.C. Cir. 1981).

twenty-one.[45] The Court determined that the purpose of the federal funds, to maintain highways, was reasonably related to the condition imposed on the funding, raising the minimum drinking age.[46] The financial incentive to enact legislation was legitimate in light of the goals to achieve uniformity among the states and to improve highway safety.[47] The Court articulated the following spending power limitations and found the law consistent with its criteria.

1. The Majority's Definition of the Limitations[48]

First, the spending power must be "in pursuit of 'the general welfare.'"[49] In determining what is for the general welfare, substantial deference is given to Congress's judgment.[50] Congress determined that a national problem existed because, in varying their minimum drinking age, states had encouraged young people to drink and drive by enticing them across state lines to purchase and consume alcohol. The means chosen to address this situation, conditioning federal highway money, were thus reasonably calculated to advance the general welfare.[51] Second, if Congress imposes conditions on the receipt of funding, it must do so in such a way that states unambiguously understand their choice to comply and the consequences of participation.[52] In *Dole*, the Court found that Congress explicitly articulated the regulations on which the money was conditioned.[53] Third, conditions on the grant must be related to the federal interest.[54] The Court determined that increasing the drinking age in South Dakota directly served the federal purpose of increasing national travel safety.[55] Fourth, the condition may not conflict with other constitutional provisions.[56] Declaring that a condition would affect

45. *Dole*, 483 U.S. at 205.
46. *Id.* at 211–12.
47. *Id.* at 210.
48. The Court upheld the spending scheme 7–2. Justices O'Connor and Brennan dissented.
49. *Dole*, 483 U.S. at 207.
50. *Id.*
51. *Id.* at 208.
52. *Id.* at 207.
53. *Id.* at 208.
54. *Id.* at 207. This prong of the test has been denoted as the "germaneness" inquiry. *See* Ronald D. Wenkart, *The No Child Left Behind Act and Congress' Power to Regulate Under the Spending Clause*, 174 EDUC. L. REP. 589, 595 (2003), *available at* WL 174 WELR 589. *See generally* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 91 (2001); Mitchell, *supra* note 41, at 176.
55. *Dole*, 483 U.S. at 208–09. *But see* Justice O'Connor's dissent as discussed *infra* Part II.A.2.
56. *Id.* at 207–08.

other constitutional rights only if it induced states to participate in activities that would be unconstitutional, the Court decided that changing the drinking age did not violate anyone's constitutional rights and, therefore, met the final requirement.[57]

2. Justice O'Connor's Dissent: Conditions or Regulations?

Justice O'Connor, dissenting in *Dole*, proposed narrowing the spending doctrine[58] and tightening Congress's authority to act upon its judgment of what constitutes permissible conditions. [59] O'Connor criticized the majority for its analysis of the relatedness prong of the test. [60] Since *Dole*, the Court has neither revisited the issue nor clarified the relevant standard.

O'Connor questioned whether there was a relationship between federal spending and Congress's justifications for states changing the minimum drinking age. She hypothesized that, using the reasonable relationship test, almost any regulation could be found to have a close nexus to its federal funding grant. She said, "Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced."[61] In other words, a federal program may be implemented under the Spending Clause powers when the Constitution has not otherwise delegated to Congress the authority to achieve such action.

O'Connor also questioned in her dissent in *Dole* what would happen if Congress moved too far by imposing conditions that were actually regulations:

> Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not

57. *Id.* at 210–11.

58. *Id.* at 208 n.3 ("Our cases have not required that we define the outer bounds of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power.").

59. 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 (2003) (recommending a tightening of the *Dole* doctrine—particularly the germaneness test, the interpretation of "general welfare," and the adoption of Justice O'Connor's "regulatory spending" distinction).

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

61. *Id.* at 215.

> a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.[62]

The practical effect of states making changes in accordance with the conditions Congress imposed is ultimately the same as if Congress had directly implemented the regulations itself. Whether or not Congress is in fact regulating states in an area primarily reserved to their own legislatures or executive officials depends on viewing the program mandates as either conditions on the grant or de facto regulations.[63] Presumably, a regulation would describe how the money awarded on a grant should be spent, whereas a condition would not.[64] O'Connor agreed that the Spending Clause expands Congress's power beyond what the Constitution provides, but she concluded that "[t]he immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a Government of enumerated powers."[65]

Constitutionally valid laws can roam somewhere between what the Constitution authorizes Congress to spend for the general welfare and what the Supreme Court has interpreted as permissible under the *Dole* limitations. Although the *Dole* Court articulated four express limitations, it also acknowledged that the *Steward Machine* unconstitutionally coercive test may be an appropriate analysis in other contexts.[66] In *Dole*, South Dakota failed to persuade the Court that the federal spending program at issue was unconstitutional because it successfully achieved its congressional objective.[67]

B. Limiting Congress's Reach with the Spending Clause

Prior to *Dole*, the Supreme Court first considered the coercive nature of a spending measure in *United States v. Butler*. In this case, the Court had to determine whether the Agricultural Adjustment Act ("AAA") was within Congress's powers enumerated in the Spending Clause of Article I, Section 8.[68] The AAA authorized the Secretary of Agriculture to enter into adjustment agreements with farmers for the reduction of acreage or production of "basic agricultural commodities;"

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62. *Id.* at 216 (quoting from the Brief for the National Conference of State Legislatures et al.).

63. Wenkart, *supra* note 54, at 596.

64. *Id.* (analyzing this theory contemplated by O'Connor in *Dole* and in the context of NCLB).

65. *Dole*, 483 U.S. at 218 (O'Connor, J., dissenting).

66. *Id.* at 211.

67. *Id.*

68. United States v. Butler, 297 U.S. 1 (1936).

impose a processing tax on processors of such commodities; and appropriate proceeds of such exaction to payments of benefits and rentals under the adjustment contracts.[69] Deciding that Congress possessed authority "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States," the Court agreed that providing for the "general welfare" merely expanded the ability "to lay and collect taxes."[70] Congress's ability to impose its own policies on the states through the spending power has been restricted to federal programs that serve the general welfare.[71] According to the Supreme Court, the "general welfare" includes anything Congress decides is within its permitted discretion.[72] But the Court investigated further, finding that the processing tax, as a practical matter, coerced the farmers to comply with an acreage reduction scheme.[73] A farmer could refuse to comply, but such refusal resulted in the loss of benefits.[74] These benefits amounted to a significant sum, convincing the Court that the program was not voluntary but rather was intended to "exert pressure on [the farmer] to agree to the proposed regulation."[75] Calling the program "coercion by economic pressure," the Court warned that Congress may not heighten the risks of unlimited benefits to a degree that an individual's choice whether or not to comply is illusory.[76] Although Congress can spend for any purpose necessary and proper to promote the general welfare, the Court declared that in enacting the AAA, Congress had attempted to "effectuate an end which is not legitimate, not within the scope of the Constitution."[77] Instead of determining the boundaries of promotion of the "general welfare," the Court decided that coercing the states to abide by the scheme violated the Constitution under a separation of powers analysis. The Court articulated the practical phenomenon of coercing states to abide by the laws through spending receipts.[78] The exaction could not be collected because Congress did not have the power initially to enact the statute.[79] This was the last time that a conditional spending program was declared

69. *Id.* at 53–58.
70. *Id.* at 64.
71. *Id.* at 63.
72. *See* Helvering v. Davis, 301 U.S. 619, 641 (1937) ("[W]e naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.").
73. *Butler*, 297 U.S. at 69-73.
74. *Id.* at 70.
75. *Id.* at 70–71.
76. *Id.* at 71.
77. *Id.* at 69.
78. *Id.* at 68.
79. *Id.* at 78.

unconstitutionally coercive, and federal incentives were viewed as unsurpassable offers that induced states' to acceptance.

1. Origins of the *Steward Machine* Coercion Test

In *Steward Machine Co. v. Davis*, the Supreme Court elaborated on *United States v. Butler*, explaining that legislation enacted pursuant to the Spending Clause may be coercive.[80] In *Steward Machine*, the Court upheld a provision of the Social Security Act ("SSA") that granted a credit against federal payroll taxes for payments employers made to state unemployment compensation funds, so long as the states complied with minimal federal requirements.[81] The petitioner argued that the statute aimed to "drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government."[82] The federal government claimed that the statute did not constrain but rather created a "larger freedom, [with] the states and the nation joining in a cooperative endeavor to avert [unemployment as] a common evil."[83] The SSA aimed to purge that evil by supplanting local laws with the reward of federal funds from "the Treasury of the nation" in the form of credit to a taxpayer's account.[84] Recognizing that the federal spending program under the SSA only "lightened and encouraged" performance under the local laws, the Court found the spending program was not coercive to the states or the individual taxpayers.[85] The Court distinguished the law at issue from basic contract law. It explained that while a contract creates affirmative duties, the SSA merely provided states with the opportunity to "consent" to the program in furtherance of the administration of their own laws.[86] The Court found this tax rebate constitutional because, among other reasons, it neither coerced states nor forced them to surrender the powers essential to their "quasi-sovereign" existence.[87] "[E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties."[88]

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80. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).
81. *Id.* at 577.
82. *Id.* at 587.
83. *Id.*
84. *Id.* at 589.
85. *Id.*
86. *Id.* at 597–98.
87. *Id.* at 593.
88. *Id.* at 589–90.

Importantly, however, *Steward Machine* left open the possibility that other benefits conditioned on compliance could be invalid in the future.[89] The Court noted, "[T]he location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact."[90] Given the combination of different facts and the character of contemporary legislation, the Supreme Court should again reconsider the coercion test and formally adopt it as an element of the Spending Clause analysis in light of the situation created by NCLB.

2. Post-*Steward Machine*: Limited Application of the Coercion Test

In almost seventy years since *Steward Machine*, the judiciary's interpretation of the coercion test has not changed much because the Court has not regarded it as an independent and necessary inquiry of the *Dole* test.[91] Lower courts have adhered to the *Steward Machine* Court's cautious warning against engaging in an analysis to determine at what point pressure turns into compulsion because "[t]he outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems."[92] While the *Steward Machine* Court acknowledged that it left many questions open, it agreed that temptation or motive could rise to the level of coercion.[93]

These questions remain unanswered because modern courts consistently overrule plaintiffs' various theories without specifically reasoning why a challenged spending measure is not unconstitutionally coercive. The United States District Court for the Eastern District of Missouri ruled that a statute is not coercive even if the adverse economic impact

89. *Id.* at 590–91 ("[W]e leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power . . . . It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents.").

90. *Id.* at 590.

91. Missouri v. United States, 918 F. Supp. 1320, 1329 (E.D. Mo. 1996), *vacated*, 109 F.3d 440 (8th Cir. 1997).

92. 301 U.S. at 590.

93. *Id.* at 590–91.

for non-participation renders the state's choice illusory.[94] The United States Court of Appeals for the D.C. Circuit rejected a plaintiff's argument that the more severe a sanction is, the more unconstitutionally coercive a spending program becomes.[95] The United States Court of Appeals for the Fourth Circuit also upheld a spending program as not amounting to "outright coercion" because worse conditions had previously been upheld.[96] The United States Court of Appeals for the Ninth Circuit said that a program is not coercive simply because the degree of a state's willingness to opt in and out of the program is unequal.[97] Finally, courts commonly refused to engage in a coercion analysis given the elusiveness of the test and the failure of the plaintiff to give a "principled definition" of the coercion concept.[98]

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94. *See Missouri*, 918 F. Supp. at 1324, 1326 (upholding a spending scheme that denied highway funds for nonattainment areas as a consequence of noncompliance with the program despite plaintiff's argument that this sanction was unduly coercive).

95. *See* Oklahoma v. Schweiker, 655 F.2d 401, 414 (D.C. Cir. 1981) (refusing to speculate on the impact of the sanctions on a state, and foregoing a judicial assessment of a state's financial capabilities so as to declare what is "an offer they cannot refuse" as opposed to what is merely a "hard choice"). *See also* Mich. Dep't of State v. United States, 166 F. Supp. 2d 1228, 1233–34 (W.D. Mich. 2001) (finding the plaintiff's coercion theory without merit given the clear free choice Congress has given the state in deciding whether or not to comply with the requirement in order to receive the federal funds); Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) (suggesting that a judicial determination of a state's financial capabilities renders the coercion theory "highly suspect" as a method for resolving state-federal conflict).

96. *See* Virginia v. Browner, 80 F.3d 869, 881–82 (4th Cir. 1996) (upholding conditions threatening to withhold federal highway funding to states that did not implement an appropriate plan for issuing air-pollution permits in accordance with the Clean Air Act ("CAA")).

97. *See* California v. United States, 104 F.3d 1086 (9th Cir. 1997) (refusing to validate the argument that the state could not voluntarily opt to leave the federal program that conditioned the receipt of Medicaid funds on the state's agreement to provide certain services, such as medical services, to illegal aliens).

98. *See Skinner*, 884 F.2d at 448 (denying the argument that the government's withholding of ninety-five percent of highway funds was coercive because the plaintiff failed to provide a sufficient definition of the word, which would have required an analysis of the factual circumstance of the case, including the economy). The *Skinner* court suggested a variety of unanswered questions that the plaintiff should have considered, including:

> Does the relevant inquiry turn on how high a percentage of the total programmatic funds is lost when federal aid is cut-off? Or does it turn, as Nevada claims in this case, on what percentage of the federal share is withheld? Or on what percentage of the state's total income would be required to replace those funds? Or on the extent to which alternative private, state, or federal sources of highway funding are available? There are other interesting and more fundamental questions. For example, should the fact that Nevada, unlike most states, fails to impose a state income tax on its residents play a part in our analysis? Or, to put the question more basically, can a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds—or is the state merely presented with hard political choices?

Id.

After *Steward Machine*, an assessment of the degree that a spending program tempts a state to comply requires "extensive and complex factual inquiries on a state-by-state basis."[99] As noted, individual states experience the effects of coercion in a variety of ways, but all states suffer from the burdens of implementing spending schemes locally. While a court may hesitate to inquire into a single state's financial capabilities or the degree of compulsion felt for a particular spending program, evidence of many states experiencing similar problems should convince the Court that the coercion test has a contemporary usefulness, particularly when the political process cannot provide the adequate remedy.[100]

As discussed *infra* Part IV, the Court has never overruled the *Steward Machine* coercion test or denounced its significance in current legal challenges. The lower courts have similarly noted the test, but have not attempted to define coercion or use the test to strike down an act of Congress. As shown in Part III, NCLB satisfies the simple *Dole* Spending Clause analysis, but it would not pass muster under the coercion test if the Court applied it. NCLB offers the detailed evidence that the lower courts following *Steward Machine* lacked to legitimize the unconstitutional coercion analysis in modern times.

III. ANALYZING NO CHILD LEFT BEHIND UNDER THE CURRENT SPENDING CLAUSE DOCTRINE

It would be difficult to cure the problems identified with NCLB through the political system because of the powerful rhetoric in favor of the Act. NCLB opponents, therefore, likely will attack the Act through the courts. This section identifies the possible arguments under *Dole* that could be asserted to declare NCLB unconstitutional. Part IV then concludes that because the *Dole* limitations fail to stop Congress's abuse of its spending power in enacting NCLB, the adoption of the *Steward Machine* unconstitutional coercion test, as a fifth explicit limitation on the Spending Clause, would prevent unintended consequences resulting from Congress's ability to make offers that states cannot refuse.

Section A explores the general welfare prong of the *Dole* test, suggesting that NCLB fails to meet this requirement because the education

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99. *Schweiker*, 655 F.2d at 414 (following the lead of other courts that have "explicitly declined to enter this thicket when similar funding conditions have been at issue").

100. In *Skinner*, the court agreed that the coercion test "protect[s] state sovereignty from federal incursions," but could not justify the need for the test where the national political process provided adequate protection of state sovereignty. 884 F.2d at 448. "[W]e do not see any reason for asking the judiciary to settle questions of policy and politics that range beyond its normal expertise." *Id.*

level of students is not improving as the Act intended. Section B argues that states are unaware of the serious implications and burdensome consequences of accepting the Title I money, failing another necessary requirement. Section C proposes, as Justice O'Connor explained in her dissent in *Dole*, that the spending conditions are not related to the goals sought to be accomplished with the money because all schools, including those that opt out, are affected by the program, and the NCLB standards are explicit, directive, and unavoidable, suggesting they are actually regulations. Section D presents ways in which NCLB violates states' constitutional sovereignty rights in retaining control over education. In conclusion, these arguments highlight the serious failures of NCLB. But these failures, standing alone, do not suffice to overrule the program without the revival of the coercion analysis described *infra* Part IV.

A. Not for the General Welfare

The first prong of the *Dole* analysis requires any act by Congress under the spending power to be for "the general welfare."[101] In analyzing this prong, the Supreme Court has given "substantial deference" to Congress's findings of what constitutes the general welfare. Congress found it necessary to implement NCLB to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments."[102] The Act lists twelve methods that address these objectives, which facially appear to be for the general welfare.

But striving for the purpose of high academic achievement, as prescribed by NCLB, is not for the general welfare. First, standardized assessment tests may not adequately measure the quality of education or student proficiency. Educators disagree as to whether improved test scores are the best plan for ensuring quality public education in a democratic society.[103] Second, programs that have attempted to improve education through high-stakes punitive sanctions have failed. Evidence regarding the testing programs, such as the ones in place to determine AYP, refute the government's notion that testing and sanctions will help accomplish equal and proficient educational opportunities.[104]

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101. South Dakota v. Dole, 483 U.S. 203, 207 (1987).

102. 20 U.S.C.S. § 6301 (Law Co-op. 2002).

103. *See* William J. Mathis, *No Child Left Behind: Costs and Benefits*, 84 PHI DELTA KAPPAN 679 (May 2003), *available at* http://www.pdkintl.org/kappan/k0305mat.htm.

104. *See* discussion *infra* Part III.C.

Beyond methodological problems in implementation, NCLB will have several negative unintended consequences on education. Demanding AYP goals will have the reverse effect of widening, not narrowing achievement gaps. States have the responsibility to provide the educational resources to meet these standards, but they do not have the necessary funds. Former Secretary of Education Richard Riley stated, "[R]aising standards without closing resource gaps may have the perverse effect of exacerbating achievement gaps and of setting up many children for failure."[105]

Furthermore, NCLB's mandates will cause even good schools to fail to meet AYP levels and will provoke states to redefine their standards so that their schools can pass. Both effects will result in a poorer education system for children. For example, many educators question whether the tests even accurately measure the learning accomplishments of students under the mandated standards.[106] New York Times writer Michael Winerip blames this potential inaccuracy on the formulas the federal law uses to calculate school successes or failures. In short, Winerip believes the formulas are irrational and not mathematical.[107] Simple factors, such as how many special education students constitute a subgroup, can enable a school to succeed, whereas failure in a single category can make student progress in fifteen other areas irrelevant.[108] The government has not offered any evidence that all students in all subgroups will be able to meet the high standards required at the dictated AYP pace.[109] Because of these standards, certain districts will be tempted to lower their proficiency levels in order to meet the federal requirements and receive fed-

105. Mathis, *supra* note 103, at 682, *available at* http://www.pdkintl.org/kappan/k0305mat.htm (quoting Letter from Richard W. Riley, Secretary of Education (Jan. 19, 2001)).

106. *Id.* at 683 (citing Audrey L. Amrein & David C. Berliner, *High-Stakes Testing, Uncertainty, and Student Learning*, 10 EDUCATION POLICY ANALYSIS ARCHIVES 18 (Mar. 28, 2002), *available at* http://epaa.asu.edu/epaa/v10n18).

107. Michael Winerip, *How a Law Can Make a Good School Fail on Paper*, N.Y. TIMES, Oct. 8, 2003 at A25.

108. *Id.* (describing the progress of Micro-Pine Level Elementary School in Pine Level, North Carolina). Winerip says by most measures, Micro-Pine Level is a fine school, but under the federal system it has failed for a number of reasons. Eighty-six percent of Micro-Pine Level students are proficient in reading, but because one subgroup (poor students, blacks, or Spanish speakers) failed to make adequate progress, the school failed in 2003. Further, 74.6% of Micro-Pine Level's special education students had to be proficient in math. But when tested, eight were immediate failures, therefore, thirty-four of the remaining thirty-seven had to pass the test. Only thirty-one did, thus the school of 500 failed because of the test results of three special education students. Winerip's explanation continues with other examples intimate to Micro-Pine Level but which translate over to the progress of similar schools in other districts that by all other standards provide adequate educations but cannot achieve student proficiency as measured by the federal system.

109. *See* Mathis, *supra* note 103, at 679, *available at* http://www.pdkintl.org/kappan/k0305mat.htm.

eral funding. About sixty percent of Colorado's schools met the federal guidelines in 2003.[110] But all Colorado students who scored as "partially proficient" on the state's Colorado Student Assessment Program ("CSAP") exam were classified as "proficient" under the federal system.[111] Critics are skeptical that because federal AYP requirements are strict states will lower the qualifications for passing so they can avoid sanctions for consecutive years failing.[112] Recently reported AYP results allude to more problems than just schools failing to make the AYP grade—NCLB's goal to ensure all children reach highly proficient achievement levels may result in the narrowing of curriculum and increased drop-out rates.[113] The perceived plan for the general welfare actually will continue to impede assistance to the disadvantaged and reward many of those schools already in compliance.

Despite the problems encountered with implementation and these other unintended consequences, the purpose behind NCLB, to bridge the achievement gap, is a noteworthy cause and no one could dispute that a program designed to enrich the educational experience of students is for the general welfare. The Court would likely find NCLB meets the criteria of this *Dole* requirement because the strict AYP performance levels and rigorous sanctions, at least facially, push states toward the goal of improving education nationwide.

B. Ambiguous Conditions

As required by *Dole,* if Congress engages states in a conditional spending program, the conditions of doing so must be unambiguous. States must understand the likely consequences of compliance. When the conditions are clear, states can truly participate in the program voluntarily. Conditions that are vague may elicit state compliance and detrimentally infringe on the powers traditionally reserved to the states.[114]

In *South Dakota v. Dole*, the Supreme Court cited *Pennhurst State School and Hospital v. Halderman*[115] in its discussion of the unambigu-

110. Monte Whaley, *Schools Chase Federal Goals*, DENV. POST, Oct. 21, 2003, at B1.

111. *Id.*

112. *See* Malcolm Gladwell, *Making the Grade*, NEW YORKER, Sept. 15, 2003, at 31, 34 (criticizing that "Colorado has found an easier way of leaving no child behind. If you want to develop a class of high jumpers, after all, you don't necessarily have to teach every student proper jumping technique. You can just lower the bar.").

113. Mathis, *supra* note 103, at 680, *available at* http://www.pdkintl.org/kappan/k0305mat.htm.

114. *See generally* Adler, *supra* note 40, at 1205 (indicating that the Court has routinely upheld most Spending Clause conditions against a Tenth Amendment attack).

115. 451 U.S. 1 (1981).

ous spending power limitation.[116] In *Pennhurst*, the Court compared entering a conditional spending program with forming a basic contract.[117] To be enforceable, a conditional spending program and a basic contract both demand the parties' understanding of the terms and voluntary commitment to abide by them. The Court said, "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it."[118] A contract, like a conditional spending scheme, may be unenforceable if a party entered into it unknowingly or unwillingly.[119]

The terms of NCLB are ambiguous because states thought they would receive more money than the federal government has actually provided. As a result, schools now struggle to comply with the Act.[120] Now that schools are attempting to reach the federal AYP targets, they are discovering that resources are depleted and targets are out of reach. Moreover, many states with struggling economies have cut education funding thus exacerbating the problem.[121] Having relied on the existence of satisfactory federal grants when they entered the conditional spending programs, it cannot now be believed that states understood the level of federal funding they would receive. Referring to these unfulfilled expectations, Iowa State Education Association President Linda Nelson said, "This misguided law, however, sets the wrong priorities. The rigid demands of the NCLB Act force already cash-strapped school districts to spend scarce funds on more bureaucracy, paperwork, and high-stakes standardized tests."[122] The Virginia state legislature estimated that between $1.9 and $5.3 billion of their own resources would be spent implementing the federal testing requirements alone.[123] Other school districts can expect similar expenditures.[124]

The government cannot assume states voluntarily agreed to these terms and consequences of acceptance. The *Dole* court did not envision that states would be aware of unintended consequences before agreeing

116. South Dakota v. Dole, 483 U.S. 203, 207 (1987) (citing *Pennhurst*, 451 U.S. at 17).

117. 451 U.S. at 17.

118. *Id.*

119. *Id.*

120. *See* discussion *supra* Part I and *infra* Part IV.

121. Mathis, *supra* note 103, at 681, *available at* http://www.pdkintl.org/kappan/k0305mat.htm.

122. Linda Nelson, *Back Off, D.C. Bureaucrats—Schools Don't Need You; Iowa View*, DES MOINES REG., Sept. 16, 2004, at 17A, *available at* LEXIS, News Library, CURNWS File.

123. H.R.J. Res. 87, 2004 Gen. Assem., Reg. Sess. (Va. 2004).

124. *Political Battle Surges Over Bush Education Policy: Seeks $2 Billion Increase in Funding*, CNN.COM, Jan. 8, 2004, *at* http://www.cnn.com/2004/ALLPOLITICS/01/08/elec04.prez.bush.education/index.html (reporting that the Act in 2004 will be underfunded by $9 billion). *See also* funding discussion *infra* Part IV.

to buy into a conditional spending scheme. The Court simply evaluates whether the states made a knowing and cognizant choice in accepting federal funds.[125] States cannot be said to have knowingly agreed to the Act when they were unaware that federal funding would be insufficient or that their resources would have to make up for the federal shortfall. While it could be argued that the difference between the money necessary and the money granted to implement the Act have created ambiguity, the present Court would likely validate NCLB because the states read the legislation, understood it, and agreed to participate in and comply with it.

C. Conditions Are Not Related to the Purpose for Spending

Conditions on accepting federal money for the implementation of state programs must be reasonably related to the reason for pledging the funds, according to the *Dole* test. A relatedness inquiry analyzes Congress's specificity in declaring the conditions imposed on spending and the nexus between those conditions and the particular program's larger legislative purpose.

In order to fully understand the relatedness inquiry, a brief discussion of AYP is necessary. NCLB promises to hold schools, school districts, and states more accountable for inadequate student performance. The Act accomplishes this task by setting forth a performance target in reading and math that will bring students in every state, district, school, and subgroup to a 100 percent proficiency level by the 2013–2014 school year.[126] The state is responsible for defining AYP and for making other AYP determinations.[127] Each year the state must then conduct individual testing to ascertain students' progress.[128] Also affecting the testing results is the student participation rate. Every school and subgroup, in every district of every state, must accomplish a ninety-five percent participation rate or else that school and district may fail to make AYP.[129] As determined by NCLB, subgroups are groups of thirty or more racial or ethnic students, economically disadvantaged students, students with disabilities, and students with limited English proficiency.[130] Attaining

125. South Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

126. *ABCs*, *supra* note 18, *at* http://www.cde.state.co.us/cdeunified/download/NCLB_word_ABCsofAYP.pdf.

127. *Id.*

128. *See ESEA Q & A*, *supra* note 10, at 3, *at* http://www.nea.org/esea/images/eseaqa.doc.

129. *ABCs*, *supra* note 18, *at* http://www.cde.state.co.us/cdeunified/download/NCLB_word_ABCsofAYP.pdf.

130. *Id.*

AYP is challenging because the results are unpredictable from year to year.

In addition, the NCLB accountability scheme provides that the state will enforce sanctions on the schools and districts that are adjudged to have "failed" AYP goals. Failure to meet AYP levels in the first year does not result in sanctions, but the consequences become progressively worse for each consecutive year the school fails. Schools completed their first year of implementing NCLB in spring 2003 and now, amidst their third year of measured performance, will face the effects of failure and the requirement to execute a school improvement plan.[131] Many states reported in fall 2004 that more than thirty percent of their schools did not make AYP.[132] If a school persistently fails, eventually, as the Colorado Department of Education suggests, either the state or the federal government can withhold NCLB funds.[133]

A strong argument exists that NCLB does not meet the relatedness inquiry under *Dole*. NCLB's federally-approved performance levels and sanctions are overbroad because the statute's purpose is to improve the education of low-income students but schools' success is dependent on all students meeting its standards. School failure rates do not accurately represent the competency of the low-income and special needs students that NCLB dollars aim to assist.[134] Under NCLB, the government pushes the school to bring up the achievement levels of all students.[135] While only schools that accept the federal money can be required to heed the consequences for failed AYP achievement, a school opting out of NCLB that consistently fails to meet the standards is still exposed to in-

131. *Id.*

132. Resnick, *supra* note 13, *at* http://www.nsba.org/site/docs/33800/33767.pdf.

133. *ABCs*, *supra* note 18, *at* http://www.cde.state.co.us/cdeunified/download/NCLB_word_ABCsofAYP.pdf. This is because ultimately states are accountable for complying with the Act. A failing school may be required to design an improvement plan with the state government at which point a decision to withhold funds for noncompliance may be necessary. *See also* Wenkart, *supra* note 54.

134. Stephen D. Sugarman comments that Title I money may not actually help the students it was designed to benefit. Sugarman, *supra* note 11, at 84. Title I funds do not prevent eligible schools from consistently underperforming. Complicated by the fact that states must report their progress, Sugarman presumes that states are engaging in special education programs that are not the most beneficial primarily because they are the easiest to document. *Id.* He seems to imply that there are other methods states could use to attain proficiency with underperforming students but because the annual levels require so much from states they will opt for the procedure to attain those standards, as opposed to employing a system that more accurately and effectively raises students' proficiency. *Id.* at 84–86.

135. Jack Jennings, *Knocking on Your Door: With 'No Child Left Behind,' the Federal Government is Taking a Stronger Role in Your Schools*, AM. SCH. BOARD J., Sept. 2002, at 25, 27.

creased federal oversight.[136] Thus, NCLB casts too wide a net over schools irrespective of their formal commitment to the program.

Holding states accountable for achieving high-proficiency ratings through an AYP-prescribed pace, high-stakes testing, and punitive sanctions does not rationally serve the larger purpose of improving education given the varying education needs at the local level. First, the validity of the tests given to measure academic proficiency is suspect because they do not accurately represent the states' standards for instruction. NCLB's measuring tools may be an ineffective indicator of proficiency.[137] Second, teachers are encouraged to increase test scores and, therefore, will be tempted to "teach to the test" rather than to provide a more well-rounded education. Third, the sanctions imposed on schools for failing to meet AYP are not related to the purpose of equal and proficient educational opportunities because these demands will impede progress. The assumption that schools will meet AYP out of fear of the penalties for not doing so,[138] demonstrates the unreasonableness of this condition given the inadequacy of funding.

By remaining insensitive to local strategies that may better improve education, NCLB's standards and sanctions may represent the impermissible mandates O'Connor warned of in her *Dole* dissent. Congress designed AYP sanctions to be more than just conditions that apply to the acceptance of federal funds for education.[139] When Congress articulates detailed conditions of a spending program and the effects of implementation drastically alter the substance of local education, the question is raised whether the federal government has actually conditioned spending or has directly regulated the states. Such burdens typify the over-inclusive mandates that Justice O'Connor feared would be permissible under the *Dole* majority's holding. She surmised that "Congress could effectively regulate almost any area of a State's social, political, or economic life."[140] Congress has done just that with NCLB; it has claimed education as its sovereign power over the states and pursued a national education system that compares the product of schools and not the di-

136. *Cf.* Ed Barna, *Rutland Northeast Schools Consider Rejecting Federal Aid*, RUTLAND HERALD, Oct. 6, 2003, *available at* http://www.rutlandherald.com//apps/pbcs.dll/article?AID=/20031006/NEWS/310060311&searchID=73189269089765 (explaining that schools in districts with other schools that accept money can be affected by district reorganization).

137. Mathis, *supra* note 103, at 682, *available at* http://www.pdkintl.org/kappan/k0305mat.htm.

138. *Id.* at 683 (citing Audrey L. Amrein and David C. Berliner, *High-Stakes Testing, Uncertainty, and Student Learning*, EDUCATION POLICY ANALYSIS ARCHIVES (March 28, 2002)).

139. *See* discussion *infra* Part I for a description of AYP.

140. *Id.* at 215.

verse impact of the students. Realistically, schools differ dramatically from community to community, which is why education decisions are best made at a local level. But by offering conditional financial incentives, Congress has employed its national education plan, stripping away state and municipal flexibility in setting goals.[141] Nevertheless, states are so far agreeing to accept the federal money.

Justice O'Connor's dissent, of course, is not controlling; therefore, the Court would likely follow the *Dole* majority's opinion. This analysis would declare NCLB's conditions on the grant, for example implementing particular education programs, to be reasonably related to the federal interest of bridging the achievement gap between disadvantaged students and their peers.

D. Violation of Constitutional Rights of Schools, Students, Parents, and Teachers

Another prong of the *Dole* test forbids Congress's conditions from causing the states to violate other constitutional rights.[142] In allowing the federal government to take control under NCLB, states and local school districts waive their sovereign rights to make education decisions.[143] The Constitution reserves all powers to the states not enumerated to Congress and other branches of government.[144] Education is not an enumerated power of Congress and, therefore, forcing states to acquiesce to federal regulation in education is also, in a basic sense, asking them to violate their own constitutional sovereignty rights.[145]

Conditional spending programs encourage states to participate by assuring them a distribution of funds upon successful and strict fulfillment of the law's objectives. Over the years, federal funds have become an increasing source of state and local financial support.[146] In the con-

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141. *See ABCs*, *supra* note 18, at 6, *at* http://www.cde.state.co.us/cdeunified/download/NCLB_word_ABCsofAYP.pdf.

142. South Dakota v. Dole, 483 U.S. 203, 207 (1987).

143. *See generally* Baker & Berman, *supra* note 59, at 484 (discussing rights of waiver).

144. U.S. CONST. amend. X.

145. Local sharing of responsibility for public education also known as local control was recognized as a valuable principle in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). This principle assumes that states and school districts can work together to make important education decisions. "It cannot be seriously doubted that in Texas education remains largely a local function, and that the preponderating bulk of all decisions affecting the schools is made and executed at the local level, guaranteeing the greatest participation by those most directly concerned." *Id.* at 51 n.108.

146. Mitchell, *supra* note 41, at 168. Mitchell suggests that these conditional spending schemes "often do not leave states with the realistic alternative of declining to administer federal programs." *Id.* at 170.

text of education, it would be difficult for states to forego the extra revenue. At the same time that states have begun to rely more heavily on federal assistance, Congress has initiated a new spending program that mandates strict compliance with the funding conditions and imposes more rigorous penalties for insufficient compliance. This methodology forecloses states' rights to receive those benefits of federal assistance.[147]

Traditional local control of education is not a federal constitutional right,[148] but there are many areas not specifically contemplated in the Constitution over which the federal government has authority to regulate. Ultimately, NCLB does not conflict with other constitutional provisions and does not provoke states to engage in unconstitutional activities, therefore, the fourth *Dole* limitation would prevent the Court from declaring invalid this spending scheme.

IV. POLITICAL AND PRACTICAL COMPULSION: THE NEED FOR *STEWARD MACHINE*

Although Part III provides persuasive evidence as to why NCLB might fail under *Dole*, it would be an arduous lawyering task to argue that NCLB is unconstitutional without the *Steward Machine* coercion test. Indeed, the Court has not overruled a spending scheme since the *Butler* decision in the 1930s. The evidence presented earlier typifies the economic and political problems NCLB has created for states and school districts that have spent the last three years unsuccessfully attempting to comply with the law. The United States Department of Education refuses to recognize that NCLB lacks significant funds[149] or that the implementation of the program caused unintended consequences. Empirical evidence and other effects of compulsion created by NCLB provide the requisite factual basis upon which to adopt a coercion test as another

147. *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1435–42 (1989) (defining "coercion" as the differences between "penalties" and "nonsubsidies"). Sullivan suggests the government achieves deterrence when a rightholder is "coerced" into not exercising his or her right. *Id.* at 1435. Second, a penalty arises when a rightholder is "coerced" to forego a benefit when exercising a constitutional right. *Id.* Finally, she comments that the "choice between benefit-without-the-right ('deterrence') and right-without-the-benefit ('penalty') is coercive no matter which is chosen because each is undesirable." *Id.* at 1436.

148. Bd. of Educ. of Sch. Dist. No. 1 in the City & County of Denver v. Booth, 984 P.2d 639, 646 (1999). Generally speaking, states must confer control of education to local governments via a state constitutional provision or statute. *Id.* However, even the United States Supreme Court has recognized the fundamental importance of local control of education. *See* Wright v. Council of the City of Emporia, 407 U.S. 451, 469 (1972).

149. Secretary of Education Rod Paige said recently that the Bill is sufficiently funded. *See* discussion *supra* note 32.

limitation on the Spending Clause. Doing so would start a new era of Spending Clause litigation seeking to protect states' rights and further social change more amicably and forthrightly.

In the many years since the Supreme Court developed the coercion analysis in *Steward Machine*, all of the lower courts reviewing challenges to spending programs have declined to apply the test, although each has recognized its validity. Most of these courts have worried that empirical evidence alone was not sufficient to demonstrate the coerciveness of a condition to a spending program.[150] In *West Virginia v. Department of Health & Human Services*, the district court agreed with that position and suggested that empirical evidence combined with normative proof of coercion may suffice to argue the unconstitutionality of a conditional spending program.[151]

The next section provides the empirical evidence that NCLB economically coerces states to comply because it does not fulfill its promise to states to fully fund the Act. Section B discusses other forms of normative proof of coercion that states and school districts cannot opt out of NCLB's regulations due to political rhetoric and the practical effect of choosing to do so. In conclusion, federal legislation, like NCLB, justifies cementing the *Steward Machine* coercion test as a fifth judicially created Spending Clause limitation. This additional prong would pro-

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150. *See* West Virginia v. United States Dep't of Health & Human Servs., 132 F. Supp. 2d 437, 444 (S.D.W. Va. 2001).

151. *Id.* The *West Virginia* court considered Harvard University Assistant Professor of Law Kathleen Sullivan's analysis of the relationship between private law and moral philosophy when an offered benefit is depicted as coercive. Sullivan argues:

> But coercion in these settings is inevitably normative, not merely descriptive, empirical, or psychological. It necessarily embodies a conclusion about the wrongfulness of a proposal, not merely the degree of constraint it imposes on choice. It therefore depends on underlying theories of autonomy, utility, fairness, or desert. The effort to locate a point at which government benefit conditions rise to the level of coercion cannot succeed in the absence of such a theory.

Id. (quoting Sullivan, *supra* note 147, at 1443). Sullivan declares that interpersonal coercion in this context helps to define coercion in the unconstitutional conditions context. Sullivan, *supra* note 178, at 1442. Professor Sullivan critiques the Court's inconsistent review of the unconstitutional conditions rulings in an article that has since been cited by courts. *See generally id.; see also United States Dep't of Health & Human Servs.*, 132 F. Supp. 2d at 444 (citing Sullivan, *supra* note 147). She acknowledges that the Court has "never developed a coherent rationale for determining when such offers rise to the level of 'coercion,'" primarily because the Court considers coercion a matter of description or measurement. Sullivan, *supra* note 147, at 1428. In the past, the coercion argument focuses on empirical evidence. According to Sullivan, empirical proof insufficiently proves coercion. She also advocates a normative view that demonstrates coercion as more than just a lack of reasonable alternative choices. In proposing a stronger approach to proving coercion, she values the unconstitutional conditions doctrine as a "state-checking function" that "guards against a characteristic form of government overreaching." *Id.* at 1506.

hibit the attachment of coercive conditions to federal funding grants in order to preserve the quality of education and to restrict the almost unfettered congressional spending power.

A. Empirical Evidence of Economic Compulsion

Under NCLB, schools cannot afford to reject federal funds and, as a result, must opt into the program. NCLB is intended to supplement, not to serve as the primary basis for, local school finance. When Congress enacted Title I, it established a relationship with states founded on financial support for the educational improvement of low-income children. Over the years, states have come to rely on that federal money to enrich the academic programs for those disadvantaged students. This reliance has increased as the recent economy has hurt local schools.[152] According to a case study chartered by the Center on Education Policy ("CEP") in October 2003, schools have experienced funding cuts at the district level as a result of state budget deficits.[153] As a consequence, the reduction in local funds has made compliance with NCLB difficult because the rigorous standards set forth in the Act are expensive and under-funded at the federal level.[154] Likewise, the federal government has dealt with budgetary problems and has proposed more cuts for next year.[155] With the sources of revenue significantly tightened and more regulations to sustain, school districts cannot make ends meet.

Despite increasing educational standards, the federal government has not provided full financial support. As of January 10, 2004, the money set aside for Title I was reported to be $6 billion less than Congress allotted when NCLB was first passed.[156] In July, the House and

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152. The National School Boards Association recommends that school districts raise local property taxes, obtain increased state funding, cut other programs, or combine all options in order to fund NCLB. The association also proposes that school districts investigate the specific costs of the legislation in order to explain the financial burden to the public. Resnick, *supra* note 13, at 3, *at* http://www.nsba.org/site/docs/33800/33767.pdf.

153. ELIZABETH PINKERTON ET AL., CTR. ON EDUC. POLICY, IMPLEMENTING THE NO CHILD LEFT BEHIND ACT: A FIRST LOOK INSIDE 15 SCHOOL DISTRICTS IN 2002–2003 2 (Oct. 2003), http://www.ctredpol.org/pubs/learningfromnclbcasestudies_oct2003/learningfromnclb casestudies_ oct2003.pdf [hereinafter IMPLEMENTING THE NO CHILD LEFT BEHIND ACT]. *See also* ELIZABETH PINKERTON ET AL., CTR. ON EDUC. POLICY, NCLB YEAR 2: A LOOK INSIDE 33 SCHOOL DISTRICTS (Feb. 2004), http://www.ctredpol.org/pubs/nclby2/html/cep_nclb_ y2.htm (reporting the most recent statistics on the progress of various school districts nationwide).

154. IMPLEMENTING THE NO CHILD LEFT BEHIND ACT, *supra* note 153, at 2 (reporting, for example, that a Cleveland, Ohio school district is expected to have $33 million less to spend over the next two years).

155. *See also* discussion *supra* Part I.

156. *School Reform Left Behind*, *supra* note 29.

Senate approved the 2004 budgetary outline calling for a 5.6% increase for discretionary education programs in general.[157] Amidst the warming intensity of the campaign season, President Bush announced on January 8, 2004, that he planned to seek a more than $2 billion budget increase, a forty-eight percent hike from 2001, for elementary and secondary education.[158] Bush's budgetary plan would increase total education funding, including that devoted to NCLB, to $57.3 billion.[159] This proposed amount would be a three percent rise over the 2004 level and a more than sixty percent gain since President Bush took office.[160] Funding for Title I of the ESEA has increased about thirty percent with the NCLB amendments but is still insufficient to support the new NCLB demands.[161]

The adequacy of NCLB funding is a heated topic among political parties and social policymakers because even with the increase, federal funding is insufficient. The total amount of federal Title I money allocated and shared among the states in 2001–2002 was $9,654,721,000;[162] in 2004–2005 Title I distributions had grown to $12,215,421,108.[163] Each year since the enactment of NCLB, Congress has promised a certain amount of money but has actually allocated much less. In the three years after the bill became law, Congress promised to grant an aggregate of $48 billion to school districts for Part A of Title I,[164] but only allo-

157. Jack Jennings & Diane Stark, *The Continuing Effects of No Child Left Behind*, 13 PHI DELTA KAPPA INT'L WASH. NEWSL. 1 (Aug. 14, 2003), *at* http://www.pdkintl.org/whatis/washv13n1.htm. In 2000, discretionary appropriations totaled $35.6 billion, whereas President Bush's request would raise that sixty-one percent to $57.3 billion in 2005. U.S. DEP'T OF EDUC., FISCAL YEAR 2005 BUDGET SUMMARY (Feb. 2, 2004), *at* http://www.ed.gov/about/overview/budget/budget05/summary/edlite-section1.html.

158. *Political Battle Surges Over Bush Education Policy: Seeks $2 Billion Increase in Funding*, *supra* note 124, *at* http://www.cnn.com/2004/ALLPOLITICS/01/08/elec04.prez.bush.education/index.html.

159. Press Release, U.S. Department of Education, President Bush Proposes Record $57 Billion for FY 2005 Education Budget (Feb. 2, 2004), *available at* http://www.ed.gov/news/pressreleases/2004/02/02022004.html (representing the largest increase in funds to any domestic agency); *see also* U.S. DEP'T OF EDUC., *supra* note 157, *at* http://www.ed.gov/about/overview/budget/budget05/summary/edlite-section1.html.

160. U.S. DEP'T OF EDUC., *supra* note 157, *at* http://www.ed.gov/about/overview/budget/budget05/summary/edlite-section1.html. Overall discretionary education appropriations would rise to $57.3 billion in 2005 from $35.6 billion in 2000. *Id.*

161. *See School Reform Left Behind*, *supra* note 29.

162. U.S. DEP'T OF EDUC. BUDGET SERV., APPROPRIATIONS FOR TITLE I AND TITLE VI, NO CHILD LEFT BEHIND ACT OF 2001, BY STATE OR OTHER AREA AND TYPE OF APPROPRIATION: 2000-01 AND 2001-02 (Mar. 2002).

163. FAGAN & KOBER, *supra* note 31, at 3, *available at* http://www.cep-dc.org/pubs/Title1_Funds_15June2004/Title_1_Funds_15June2004.pdf. The funds distributed in 2003–2004 totaled $647 million less than in 2004–2005. *Id.*

164. *See* Resnick, *supra* note 13, at 2–3, *at* http://www.nsba.org/site/docs/33800/33767.pdf (explaining that Part A of Title I of the ESEA is what NCLB primarily amends).

cated $34.4 billion, amounting to a $13.6 billion shortfall.[165] Using the law's own expenditure factors, it would cost nearly $24.7 billion to aid all children counted by the Title I basic formula,[166] but Congress only appropriated $12.3 billion in 2004.[167] Based on President Bush's proposed budget for 2005, $13.3 billion will be allocated for Title I, whereas the program actually costs $20.5 billion.[168]

Added requirements imposed by NCLB exacerbate the burdens on states already caused by federal budgeting shortfalls. Ohio, for example, determined that it would cost $1.5 billion a year until 2014 to comply with NCLB, $105 million of that sum being spent on raising student achievement.[169] The New Hampshire School Administrators Association estimated the law creates over $126 million in new financial obligations, but only provides "$17 million . . . in federal money to support the law."[170] Similarly, fewer than three percent of superintendents in Minnesota said they expected that their districts' share of the Title I funds would cover the new costs of NCLB.[171] The number of expenses mandated by NCLB is extensive,[172] but each year more states see reductions

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165. *Id.* at 3. On September 13, 2004, the day he introduced Senate Bill 2794 that proposed to improve elementary and secondary education, Senator Ted Kennedy (D-Mass.) said, "No Child Left Behind promised a great deal to our students and to their families. . . . [b]ut [the promise] hasn't been kept." S. Res. 2794, 108th Cong., 150 CONG. REC. S9131 (daily ed. Sept. 13, 2004) (statement of Sen. Kennedy).

166. Title I contains four allocation formulas, all based on census figures: basic grants formula, concentration grants formula, targeted assistance grants, and education finance incentive grants. FAGAN & KOBER, *supra* note 31, at 5, *at* http://www.cep-dc.org/pubs/Title1_Funds_15June2004/Title_1_Funds_15June2004.pdf.

167. *Id.* at 1.

168. Resnick, *supra* note 13, at 3, *at* http://www.nsba.org/site/docs/33800/33767.pdf.

169. David J. Hoff, *Debate Grows on True Costs of School Law*, EDUC. WK., Feb. 4, 2004, at 1, *available at* http://www.edweek.org/ew/articles/2004/02/04/21nclbcost.h23.html? querystring=hoff. The consultants measured the "additional costs of NCLB to the state, minus the anticipated increases in federal dollars." FAGAN & KOBER, *supra* note 31, at 10 (citing WILLIAM DRISCOLL & HOWARD FLEETER, OHIO STATE DEP'T OF EDUC., PROJECTED COSTS OF IMPLEMENTING THE NO CHILD LEFT BEHIND ACT IN OHIO (2003)), *at* http://www.cep-dc.org/pubs/Title1_Funds_15June2004/Title_1_Funds_15June2004.pdf.

170. Nat'l Ass'n of State Bds. Of Educ., *Cost to States of NCLB Implementation Debated*, LEGISLATIVE BRIEF, Apr. 2003, at 2, *at* http://www.nasbe.org/membership/Educational_Issues/ Legislative_Brief/3_5.pdf.

171. FAGAN & KOBER, *supra* note 31, at 10, *at* http://www.cep-dc.org/pubs/Title1_Funds_15June2004/Title_1_Funds_15June2004.pdf. A report from the Office of the Legislative Auditor in Minnesota calculated that it will cost the state and its districts $19 million per year to administer the new tests and could cost districts up to another $20 million per year to offer choice and tutoring services to children in low-performing schools. *Id.*

172. According to the National School Boards Association, the most significant NCLB-related expenses include: acquiring data systems required to track and report "school-by-school performance of student subgroups" and teacher credentials; hiring and retaining highly-qualified teachers; hiring and retaining highly-qualified paraprofessionals; implementing particular program innovations, including reducing class size; providing after-school or weekend

in the amount of money allocated to them. According to 2004–2005 allocations from the United States Department of Education, "7,397 districts, or 55.6% of all Title I districts, will receive fewer Title I funds" than they received in the previous school year.[173]

The costs of implementing NCLB create even more dramatic disparities between funding obtained and funding required, especially for states exhibiting only marginal success or high failure rates. When states agree to comply, NCLB provisions hold them responsible for failing to achieve the conditions of the funding. Compliance requires not only implementing the remedial programs, such as testing students and reporting progress, but also self-administering the sanctions that are imposed, including the development of school improvement plans. States are held accountable for the federal government's failures to fund the program.[174]

During the years since the creation of Title I, states and schools have become increasingly dependent on these funds. The significant lack of federal funding, the increasingly restricted state budgets, and the heightened demands imposed by NCLB have limited states' options. Whereas many schools relied on Title I funds to help support the task of improving the academic performance of low-income children, these monies now carry the burden of implementing numerous other programs. With no alternative source of funding for these purposes, states are compelled to opt into the program in order to receive the money and continue operating the Title I objectives. A federal district court in Virginia envisioned this unintended consequence when it defined coercion to mean that the choice to accept federal funds must be "freely made as long as

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programs, or parent involvement programs; providing services for students with limited English proficiency and students with disabilities; offering choice and supplemental services for Title I schools that amount to at least twenty percent of Title I funds, and those that are "in 'improvement status' will face additional costs;" accounting for other Title I sanctions, such as staff costs, instructional programs, or redesigning curriculum; issuing report cards and parent notifications; and accommodating the significant amount of staff time needed to handle NCLB-related activities. Resnick, *supra* note 13, at 1–2, *at* http://www.nsba.org/site/docs/33800/33767.pdf.

173. FAGAN & KOBER, *supra* note 31, at 3, *at* http://www.cep-dc.org/pubs/Title1_Funds_15June2004/Title_1_Funds_15June2004.pdf.

174. The Kennett Consolidated School District in Pennsylvania initiated a lawsuit in December 2003 because the proscribed AYP levels are unachievable federal mandates without sufficient financial support. Nat'l Sch. Bds. Ass'n, *Pennsylvania School District First to Sue Over NCLB*, LEGAL CLIPS, Dec. 17, 2003, *at* http://www.nsba.org/site/doc.asp?TRACKID=&VID=2&CID=810*ID=32579. According to the National School Boards Association, the Pennsylvania Department of Education ("PDE") settled the lawsuit concerning the designation of one of its elementary schools as "in need of improvement." Nat'l Sch. Bd. Ass'n, *Pennsylvania Department of Education Settles Suit Over Designation of School as "In Need of Improvement,"* LEGAL CLIPS, Sept. 9, 2004, *at* http://www.nsba.org/site/doc_cosa.asp?TRACKID=&VID=50&CID=1046&DID=34457. PDE agreed to withdraw its negative designation of the school without explaining its justifications for doing so. *Id.*

the funds conditioned are not so necessary to a state that the only practical choice is to accept the funds and the accompanying federal demands."[175] States should not have to assume debt from spending their own money in order to achieve the federal NCLB initiatives.[176] Congress intended to improve schools with NCLB's educational reform but it has only accomplished implementing the program by economically coercing states to comply.

B. Other Evidence of the Political and Practical Effects of Coercion

In addition to the proof of economic coercion discussed above, other evidence demonstrates that states and school districts have been politically and practically coerced into participating in NCLB. This section outlines that evidence. Part one explores how the combined effect of NCLB's initial presentation to both Congress and the American people, public sentiments about education, and public understanding of the Act forces both state and local decision makers to opt into the program. Part two discusses how state investments in education to date make it extremely difficult for states and school boards to abandon the Title I program as reauthorized by NCLB.

1. Political Coercion

States and school board officials cannot afford to opt out of NCLB without committing political suicide. Public perceptions about NCLB, public sentiments about the importance of education, and public ignorance of the Act's actual methodology have combined to make the choice to opt out very unpopular. In short, it is impractical to assume members of the general public who are aware of education issues would support a school's decision not to comply with the Act, thereby leaving children behind.

Originally, NCLB was promoted as a bold plan that appealed to many members of the public. To gain support, President Bush and Congress reported to the public the grand ideal that schools will attain federally-approved and assessed high-performance levels by the start of the 2013–2014 school year. Indeed, NCLB seemed like sound educational

175. Bane v. Va. Dep't of Corr., 267 F. Supp. 2d 514, 528 (W.D. Va. 2003).

176. H.J. Res. 87, 2004 Gen. Assem., Reg. Sess. (Va. 2004), *available at* LEXIS 2004 Bill Text VA H.J.R. 87 (estimating the state of Virginia would have to supply an additional $1.9 billion to $5.3 billion of its own resources to enact only the Act's testing provisions); *see also* Sam Dillon, *Utah House Rebukes Bush with Its Vote on School Law*, N.Y. TIMES, Feb. 11, 2004, at A16, *available at* LEXIS, News Library, NYT File [hereinafter Dillon, *Utah House*].

reform. But it fooled even politicians that initially advocated for it.[177] For example, Senator Ted Kennedy (D-MA), who first joined other congressmen in support of the bill, later criticized NCLB during a Senate floor debate saying, "when the klieg lights go out and the bunting comes down and the cameras leave, the money isn't there. . .[consequently, s]ix million children are being left behind."[178]

Just as rhetoric enabled the bill to pass in Congress, rhetoric provoking the public's support for NCLB prevents states and school districts from voluntarily opting out of the program. NCLB attracts a sizeable populace politically, but many supporters lack basic knowledge about the bill and the history of education control. NCLB gains great support from the public through its pledge to enrich education and to equalize academic opportunities. When first enacted, school districts questioning the Act faced tremendous pressure from their constituents because even the name, "No Child Left Behind," had created power in citizens' hands to prevent their districts from refusing to cooperate with NCLB's policies. Congress cleverly gave the bill a name it knew the public would naively accept and solemnly believe to be a positive step forward.[179] Congress has numbed the public with the facial appearance of a bill that will not let children be left behind and, as expected, the public will not let the Act be left behind by school districts. The grave irony of this political situation, according to Gallup Organization polls, is that most people cannot explain what the bill achieves or how it functions in schools.[180] Therefore, they are forming their impressions of the bill primarily from sources of political rhetoric.

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177. *See* Kate Zernike, *The 2004 Campaign: Overhauling Schools: 'No Child Left Behind' Brings a Reversal: Democrats Fault a Federal Education Plan,* N.Y. TIMES, Jan. 12, 2004, at A16. (capturing reactions to NCLB from Democratic congressmen who originally supported the Act).

178. 149 CONG. REC. S5266 (daily ed. Apr. 11, 2003) (statement of Sen. Kennedy), *available at* LEXIS 149 Cong Rec S5266p*5283. *See also* Judy Holland, *Once Ally, Kennedy Now Critic of Schools Law,* HOUSTON CHRON., Feb. 29, 2004, at A10, *available at* LEXIS, News Library, HCHRN File.

179. *See* S. Res. 2794, 108th Cong., 150 CONG. REC. S9131 (daily ed. Sept. 13, 2004) (statement of Sen. Kennedy). Senator Kennedy said, "I was proud to stand with President Bush in January 2002 as he signed the No Child Left Behind Act into law. At that time, Republicans and Democrats came together to recognize the need to create a strong education system where every child attends a good school with a good teacher. . . . Today, [President Bush is] leaving 4.6 million children behind . . . ." *Id.*

180. *See* Lowell C. Rose & Alec M. Gallup, *The 35th Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools,* 85 PHI DELTA KAPPAN 41 (2003). *See also* Ruy Teixeira, *Public Opinion on the No Child Left Behind Act,* EMERGING DEMOCRATIC MAJORITY (Feb. 26, 2004), *at* http://www.emergingdemocraticmajorityweblog.com/donkeyrising/archives/000400.php (explaining indicators of the public's increasing concerns with the implementation of NCLB).

In September 2003, Phi Delta Kappa/Gallup Organization Poll published a survey regarding the public's attitudes toward education and particularly NCLB.[181] Of those surveyed, nearly sixty-nine percent said they lacked the information necessary to say whether or not their impression of NCLB was favorable. Further, seventy-six percent said they knew very little or nothing at all about the bill.[182] Yet despite these numbers, school districts across the nation considering opting out of the program have faced extreme pressure from a dissenting public, most of whom, as reflected by this recent poll, have either never heard of NCLB or do not know enough about the Act to comment on it.[183]

Yet 2004 election polls showed little waning support for NCLB. A Time Magazine article, citing a Public Education Network poll, reported that opposition to NCLB grew from eight percent in 2003 to twenty-eight percent in 2004, while support dropped only slightly from forty percent to thirty-six percent.[184] Eighty-four percent of those surveyed by Phi Delta Kappa responded that a school's performance should be measured on the improvement of the students from where they started, as compared to fourteen percent of people that thought students should meet a fixed standard of improvement.[185] NCLB implements a fixed standard of improvement through its AYP levels projected for each school as determined by a national goal. Clearly, the public is unaware of what it actually supports. Individual student achievement and educational needs are lost when these values are measured according to a national uniform schedule. The Phi Delta Kappa poll showed that a sizeable majority of the public prefers local control of education. Sixty-one percent responded to the survey favoring local school board control and another twenty-two percent favored state control.[186]

However, because of high pro-education sentiment, the consequences of declining to follow NCLB's regulations are pervasive. Some examples include a political attack by a naïve public, a denial of funding with no existing alternative revenue source for schools, and a shift in poverty levels that affects the amount of funds school districts are eligible to receive. Thus far, states' and school districts' reactions have vali-

181. Rose & Gallup, *supra* note 180.

182. *Id.* at 42.

183. *Id.* at 45. In *New York v. United States*, the Court noted that a radioactive waste transfer policy was coercive due to the overburdening effect on New York state legislators who would be held accountable to the polity for Congress's decision on where to locate waste disposal sites. 505 U.S. 144, 182–83 (1992).

184. Perry Bacon, Jr., *Who's the Education President?*, TIME, Aug. 5, 2004, *available at* http://www.time.com/time/election2004/article/0,18471,676891,00.html.

185. Rose & Gallup, *supra* note 180, at 45.

186. *Id.*

dated the idea that NCLB, through political pressure, coerces participation. For example, in June 2003, only nine schools had considered turning down NCLB funding.[187] The decision-making process in one school district helps explain why that number is so small. In early September 2003, the superintendent of a school district in Escondido, California, hoped the board would accept his suggestion to decline NCLB funds for two of their schools.[188] The decision to accept the money for the other schools resulted in only fifty-six percent of the county's public schools having a higher state academic rating, sixty-eight percent of county schools meeting federal academic goals in 2004, and "middle schools across the county more often than not fail[ing] to make the federal grade."[189]

This dilemma crosses state boundaries. By the end of September 2003, only two towns in Connecticut and four of six schools targeted as under-performing in Vermont, opted out of NCLB.[190] In October 2003, several state board members in West Virginia renounced their intent to join a lawsuit being considered by several state agencies against the federal government.[191] Finally, in January and February of 2004, Utah and Virginia effectively passed resolutions prohibiting participation in NCLB.[192] When schools eligible for Title I evaluate their options of

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187. *Much Talk, Some Action on Turning Down Federal Funds*, YOUR SCHOOL & THE LAW, June 6, 2003, *available at* LEXIS, Legal News Library, SCHOOL File [hereinafter *Much Talk*].

188. *See* Erin Walsh, *Escondido, Calif., School District Could Give up Federal Funds for Poor Kids*, N. COUNTY TIMES, Sept. 5, 2003, *available at* LEXIS, News Library, CURNWS File.

189. Sherry Parmet & Chris Moran, *Schools Earn Higher Marks; County Climbs in Both the State, Federal Ratings*, SAN DIEGO UNION-TRIB., Sept. 1, 2004, at B1, *available at* LEXIS, News Library, SDUT File.

190. *See* Robert A. Frahm, *Two Towns Reject Federal School Funds*, HARTFORD COURANT, Sept. 26, 2003, at A1, *available at* LEXIS, News Library, HTCOUR File; Molly Walsh, *Four Vermont Schools Opt Out of Federal Program*, BURLINGTON FREE PRESS, Sept. 22, 2003, at 1A, *available at* LEXIS, News Library, BURLFP File.

191. *See* Carrie Smith, *To Sue or Not to Sue: Conflict Builds as State Weighs Fight Against School Act*, CHARLESTON DAILY MAIL, Oct. 10, 2003, at P1A, *available at* LEXIS, News Library, CHRDYM File.

192. *See* Jo Becker & Rosalind S. Helderman, *Virginia Seeks to Leave Bush Law Behind; Republicans Fight School Mandates*, WASH. POST, Jan. 24, 2004, at A01, *available at* LEXIS, News Library, WPOST File; Ronnie Lynn, *No Child Bill About to Be Left Behind for the Year: Lawmakers Table Bill on Federal Education Law*, SALT LAKE TRIB., Feb. 27, 2004, at A1, *available at* LEXIS, News Library, SLTRIB File. Some states have pursued state legislation in reaction to the unfunded mandates of NCLB. In June, sources reported that "New Jersey, North Dakota and Tennessee passed resolutions asking Congress to fully fund" NCLB, while Hawaii considered another type of resolution requesting the state return any Title I allocated money to the federal government until NCLB is fully funded, and New Hampshire proposed a law prohibiting school districts from using any money other than federal funds to meet NCLB. *Much Talk*, *supra* note 187. Also, in Utah, a republican senator proposed H.B. 43, later ap-

whether to take federal money, their hesitancy has—more often than not—resulted in the choice to comply, thus showing a dwindling of those willing to risk educational reform without NCLB.

2. Practical Compulsion

The structure of NCLB and its entanglement with Title I and public education finance in general makes it particularly difficult to initially opt in and to opt out in the future. First, undoing the changes already implemented under NCLB would be impractical for states once they have discovered the program is not working. Second, schools feel practically compelled to take federal money, simply because they know if they forego the sum allotted to them it can be reallocated to another district.

School districts may not readily opt out of NCLB because of the number of years already invested in the program, during which time they have altered their standards as directed by the federal government. For nearly forty years, states have received Title I monies and have perfected their compliance and educational reform—persuading them to set aside all the progress they made may be disheartening and wasteful. Further, many schools now implementing grandiose changes to comply with NCLB may not want to quit given all the initial efforts that have been made.

Title I has evolved with NCLB, forcing more accountability standards on states and school districts in the implementation of its programs. According to Jack Jennings, director of the Center on Education Policy, NCLB "places greater demands on states and school districts than ever before."[193] States must now define levels of proficiency that all students are expected to reach and schedule deadlines for schools to help students achieve those levels by 2013–2014.[194] States must expand their pro-

proved by the Legislature, which prohibits authorities, starting July 1, 2004, from participating in NCLB by accepting any of the $103 million of Title I money allotted to the state. Dillon, *Some School Districts*, *supra* note 32; Dillon, *Utah House*, *supra* note 176. *See generally* H.B. 43, 55th Leg., Gen. Sess. (Utah 2004), *available at* LEXIS 2004 Bill Text UT H.B. 43. Similarly, the Virginia House of Delegates passed a joint resolution on January 14, 2004, sponsoring a fiscal evaluation of the Act to determine by November 30, 2004, whether Virginia should exempt itself from NCLB. H.J. Res. 87, 2004 Gen. Assem., Reg. Sess. (Va. 2004), *available at* LEXIS 2004 Bill Text VA H.J.R. 87; *see also* Dillon, *Utah House*, *supra* note 176. The states are essentially beginning to boycott the federal measure due to its impracticalities. The above list is not an exhaustive account of states implementing joint "opt out" resolutions.

193. Jack Jennings, *From the Capital to the Classroom: State and Federal Efforts to Implement the No Child Left Behind Act*, CENTER ON EDUC. POL'Y, Jan. 2003, at iv, *at* http://www.ctredpol.org/pubs/nclb_full_report_jan2003/nclb_full_report_jan2003.pdf.

194. *See ABCs*, *supra* note 18, at ¶ 1Q, *at* http://www.cde.state.co.us/cdeunified/download/NCLB_word_ABCsofAYP.pdf.

grams, analyze and report test results in new ways, and provide assistance to underperforming schools.[195] Teacher qualifications must be improved as a strategy for helping the progress of underperforming schools.[196] Clearly, money in the account does not match the education scheme as priced. Several examples illustrate why NCLB practically compels states and schools to support the program, ranging from the lack of alternative sources of financial support, to the assistance in providing uniform student assessment tests.

NCLB also practically compels schools to participate because if a district opts out and passes up the money in any given year, it may unknowingly do so to the advantage of other states and schools.[197] Realistically, the only schools that will actually opt out will be those failing to perform at their AYP levels and those receiving an insignificant sum of money targeted toward funding the burdensome program.[198] Wealthier school districts that can afford NCLB compliance even without Title I money will help bolster the program's credibility. "[A] vote in favor of the conditional grant is nearly always a vote to impose a burden solely on other states."[199] The political dynamic between representatives from wealthy and poor districts may affect the degree to which an Act becomes compulsive based on the unfairness in application it creates. States easily opted into NCLB, but now are finding opting out to be difficult.

Political rhetoric sold NCLB to federal policymakers, who in turn encouraged state participation. Public support for the Act now prevents states from opting out of the program. States are also compelled to comply with NCLB because the impractical choice to deny the funds and denounce the program is more costly.

CONCLUSION

Last spring, states measured their students' performance levels for the first time. At the conclusion of the current 2004–2005 school year, states will again conduct the same tests and compile the results. Those schools that failed the two consecutive years will be required to imple-

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195. *See generally id.*; *ESEA Q & A*, *supra* note 10, *at* http://www.nea.org/esea/images/eseaqa.doc.

196. *See ESEA Q & A*, *supra* note 10, at 5–6, *at* http://www.nea.org/esea/images/eseaqa.doc.

197. *Id.* Congress could save this foregone money in the federal treasury and use it for other purposes. *See* Baker, *supra* note 34, at 224.

198. *See ESEA Q & A*, *supra* note 10, at 4, *at* http://www.nea.org/esea/images/eseaqa.doc (outlining the consequences for schools failing in consecutive years).

199. Baker, *supra* note 34, at 224.

ment a plan for school improvement. Each year that a school fails to achieve its AYP, charted on the federally-approved uniform schedule, the consequences become more severe. Eventually, by the 2008–2009 school year, many districts may have to drastically change a failing school by replacing all staff, converting the school into a charter school, or turning the school operations over to the state, among others penalties.[200] Anticipating future federal budget cuts, schools fear not being able to survive. In the meantime, the government and public may not realize that this program actually leaves millions of children behind.

The creation of uniform education opportunities, as prescribed by the Act, is an unrealistic goal because the methodology employed to attain that progress fails to take into account the individual characteristics of schools. Subjecting all schools to the same rigorous demands will cause lower-performing schools to close their doors and will inevitably increase federal supervision and control over local education.

First, NCLB treats all schools the same regardless of extenuating circumstances. For example, a particular school that has well-educated parents and generous resources will be compared to an impoverished inner-city school with students who grew up with one parent or in an abusive household.[201] Inherently, it is unfair to judge any race that allows the fastest athletes to begin running sooner than the slowest. This analogy typifies the situation of the disadvantaged schools. Schools failing to meet those goals will eventually be pegged with generalized characteristics relating to their demographics and not to their federal assistance level.[202] These failing schools will be sanctioned for continued noncompliance, a direct result of the inadequate federal financial support and unrealistic demands given the composition of their student bodies.

Second, schools may either meet these standards on their own initiative, or subject themselves to state policing that forces them to develop new remedial programs as the consequence for failing to achieve the federal goals.[203] The progress reports of schools, thirty-two percent of which are failing to meet AYP[204] and most of which are demanding

200. Nat'l Educ. Ass'n, *supra* note 26, *at* http://www.nea.org/esea/eseaschools.html.

201. Mathis, *supra* note 103, *at* http://www.pdkintl.org/kappan/k0305mat.htm.

202. *See id.*

203. *See ESEA Q & A*, *supra* note 10, at 4, *at* http://www.nea.org/esea/images/eseaqa.doc (discussing the sanctions imposed when a school fails to meet AYP levels). AYP levels are based on student performance. *Id.* at 3. Sanctions require school improvement, corrective action, and school restructuring. Further, the possibility exists that students could take money from the school where they are enrolled to transfer to another school that is performing well or eventually, a school could be seized by the state and dissolved unless student performance improved. *Id.*

204. Greg Toppo, *Fewer Schools Than Expected Are Falling Short on "No Child Left Behind,"* USA TODAY, Oct. 7, 2004, at 8D.

more federal funds in order to keep up with the implementation of their programs, provide ample evidence that the conditional spending program is inherently unfair and coercive. Rather than bridging the achievement gap, NCLB's mandates and the social effect of its program contribute to a deeper more prominent rift between advantaged and disadvantaged students and schools. This effect runs counter to the purposes of the Act, but under the current Spending Clause doctrine, NCLB would be upheld as constitutional.

Spending Clause jurisprudence is ineffective and seriously outdated. NCLB exemplifies a terribly designed piece of legislation that satisfies the criteria of the *Dole* test but that would grossly fail the *Steward Machine* test if applied. NCLB provides the evidence of coercion needed by the Court to overrule a spending program. Having relied on Title I funds for more than forty years and expecting future state budget cuts, schools cannot afford to forego NCLB money, despite the risk that the actual federal allocation will be insufficient to meet the program's demands. Public sentiment favoring the Act prevents school officials from considering alternatives to accepting federal money. Finally, the practical implications of the economic and human capital investment thus far discourage schools from undoing years of implementation of Title I programs. The effects experienced by schools prove that the federal government is coercing the states. The *Steward Machine* test must be adopted to prevent Congress from further enacting legislation, like NCLB, that compels state participation. There is no better cause than the education of our future leaders.