HOW FAR IS TOO FAR?: THE SPENDING CLAUSE, THE TENTH AMENDMENT, AND THE EDUCATION STATE’S BATTLE AGAINST UNFUNDED MANDATES

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On January 8, 2002, President Bush’s sweeping education reform act, No Child Left Behind (NCLB), was adopted by Congress with the stated purpose of “[c]losing the achievement gap” between economically and racially advantaged and disadvantaged school children. The law requires states to administer yearly math and reading tests to students beginning in the third grade and to ensure a 100% passage rate within twelve years. The law further imposes severe consequences for schools that do not meet adequate yearly progress.

Although NCLB has been praised for the national focus it has brought to many of America’s failing school systems, since its enactment the law has seen opposition both from legislators and school districts that have filed suit alleging various violations.

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2 Id. § 6311(b)(3)(C)(v)–(vii).
3 Id. § 6311(b)(2)(F).
4 See id. § 6316(b)(1)(E), (b)(7), (b)(8). All students in a school that fails to meet yearly progress must be given the option to transfer to another school within the district. Id. § 6316(b)(1)(E); see also id. § 6316(b)(8)(A) (requiring continuance of option to transfer for students in schools subject to corrective action under subsection (b)(7) whose schools fail to make adequate yearly progress after one full school year of corrective action). The United States Department of Education can restructure schools that fail to meet adequate yearly progress after only one year. Id. § 6316(b)(8); see also Complaint for Declaratory and Injunctive Relief at 10–11, Connecticut v. Spellings, 453 F. Supp. 2d 459 (D. Conn. 2006) (No. 3:05cv1330) [hereinafter Complaint].
However, on August 22, 2005, Connecticut became the first and only state in the country to file suit against the federal government over NCLB. In its complaint, Connecticut alleged that the federal government violated the unfunded mandates prohibition of NCLB by requiring Connecticut and its school districts to comply fully with the Department of Education’s strict interpretation of the law without providing the adequate funds. In addition, Connecticut argues that by threatening to cut the $435,946,380 the State receives in federal funds for education every year, the government is violating the United States Constitution’s Spending Clause by coercing the State into administering an educational policy which the federal government has no constitutional authority to compel a state to implement. The State of Connecticut argues that in order to meet the requirements of NCLB, the State would have to lower the standards of its Mastery Test, which it has been using for over two decades, and revamp its entire assessment program—a program that has consistently placed Connecticut’s student scores among the highest in the nation. The State has asked Secretary of Education Margaret Spellings for waivers in order to continue testing its students every other year. Despite her authority to waive any requirement under the statute, Spellings has routinely denied Connecticut’s requests. After failing to reach a compromise, the State had no choice but to file suit.
This Article analyzes the State of Connecticut's decision to bring an action against the United States government for the unfunded mandates associated with NCLB. Part I illustrates the realities of the achievement gap in the State of Connecticut and highlights the State’s successes with the implementation of its own testing scheme, in effect for over two decades. Part II focuses on what NCLB requires, the unfunded mandates portion of the State’s claim, and why Connecticut refuses to give up its own method of testing in order to lower the costs associated with the education policies of the state to comply with the law. Finally, Part III discusses the issue of federalism and how Connecticut claims that the federal government, through economic coercion, is violating Article I of the Constitution and the Tenth Amendment.

I. THE REALITIES OF THE ACHIEVEMENT GAP IN THE STATE OF CONNECTICUT

For the past twenty years, Connecticut has implemented its own assessment and accountability program that has helped to consistently rank its students among the highest achieving in the country. The Connecticut Mastery Test (CMT), one of the “most rigorous in the nation,” uses a variety of written explanations, essays, and multiple choice questions to test cognitive skills of students throughout the state. The test takes place over a three to four week period, measures the mathematics, reading, and writing skills of students in grades four, six, eight, and ten, and has helped identify those students performing below proficiency. In response to those test results, the State has funneled resources into

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18 Id. at 20.
19 OFFICE OF ELEMENTARY & SECONDARY EDUC., U.S. DEP’T OF EDUC., CONNECTICUT: CONSOLIDATED STATE APPLICATION ACCOUNTABILITY WORKBOOK 15–16 (updated version 2006), available at http://www.csde.state.ct.us/public/cedar/nclb/faq/resources/state_accountability_workbook_september_06.pdf. Note that in grade ten, students take the Connecticut Academic Performance Test (CAPT) and must reach a passing score to receive Certification of Mastery upon graduation. Id. at 16. If students fail to reach the minimum score, they can continue to take the parts of the test they failed to pass, up until graduation. CONN. GEN. STAT. ANN § 10-14n(e) (West 2007).
new preschools, early reading, and after-school programs, all in an attempt to help the lowest performing students.\textsuperscript{20} Although an achievement gap does exist in the State between its minority and non-minority school aged children, the State has seen a significant decrease in this gap.\textsuperscript{21} For instance, the percentage of black students in grade four at or above proficiency in both reading and mathematics has increased, while the percentage of white students performing at or above proficiency has actually decreased.\textsuperscript{22} In addition, although writing proficiency has increased across the board, the percentage of black students performing at or above proficiency has increased at a rate that is more than twice that of white students.\textsuperscript{23} The fact that the CMT has been successful in identifying the students most in need and the particular educational areas in which the State most needed to focus its attention is evidenced by the fact that the achievement of both blacks and Hispanics has seen its most dramatic increase in grades six and eight, four years after these students are required to take their first CMT.\textsuperscript{24} The State credits this trend to its funneling of State education dollars into programs designed to eradicate these types of gaps—gaps that the CMT alone successfully identified.\textsuperscript{25}

The achievement gap in the State of Connecticut, despite the significant progress made in recent years, still looks disparaging at first glance. However, according to the statistics given by the National Assessment of Educational Progress, the achievement gap exists because Connecticut’s “floor” is essentially at the same level as that of other states,” but its “ceiling” is higher than that of any other state.”\textsuperscript{26} The highest achieving students in the State outperform students in any other state by such a degree that there

\textsuperscript{20} Second Amended Complaint, supra note 17, at 22; SETTING THE RECORD STRAIGHT, \textit{supra} note 16, at 2. Since the 1997–98 school year, the State of Connecticut has spent $601 million in new funds for such programs in an attempt to curb the discrepancies. \textit{SETTING THE RECORD STRAIGHT, supra} note 16, at 2.

\textsuperscript{21} \textit{SETTING THE RECORD STRAIGHT, supra} note 16, at 1, 2. During a four year period beginning in the year 2000, minority students in the lowest performing schools have seen an increase in achievement at a faster rate than students in the best performing schools—all in connection with Connecticut’s regulatory scheme. \textit{See id.}.

\textsuperscript{22} \textit{Id.} at 2. The percentage of blacks in fourth grade above proficiency for math has increased 0.3%. \textit{Id.} For reading, the State saw an increase of 1.7% for black students while the proficiency of white students in both mathematics and reading has dropped by over 1.5% each. \textit{Id.}

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.} at 1.

\textsuperscript{25} \textit{See supra} note 20 and accompanying text.

\textsuperscript{26} \textit{SETTING THE RECORD STRAIGHT, supra} note 16, at 3.
is a much wider gap between the highest and lowest performers, and thus, a harder hurdle to overcome. To exemplify, white students in Connecticut outperformed white students in other states with much smaller gaps between their minority and non-minority students in the area of reading.⁷⁷ If the states with the smallest gaps had white students that achieved at a reading level that was equal to that of Connecticut, those states would have, on average, an achievement gap that would be similar to Connecticut’s.⁷⁸ In the area of writing, Connecticut’s grade four students performed better than grade four students in any other state, and no grade four student in any other state—white, black, or Hispanic—outperformed Connecticut’s black or Hispanic students.⁷⁹

The level of educational success in the State and the ever decreasing achievement gap is further evidenced by the State’s continually strong performance on the SAT for college admissions. Connecticut’s graduating senior class of 2005 had its highest combined score in over three decades.⁸⁰ The combined scores were up four points to 1034, which is six points higher than the national average.⁸¹ Additionally, although an achievement gap in SAT performance does exist between white and minority students in the State, the minority groups are seeing a tremendous increase in both scores⁸² and participation rates.⁸³ The State, as a whole, reported an 86% participation rate for graduating seniors.⁸⁴

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⁷⁷ Id.
⁷⁸ Id. Connecticut’s average white students’ scale score is 238.3, while six states with the lowest achievement gaps had scores as follows: New Mexico 221.9, Kentucky 221.4, Oregon 221.6, West Virginia 219.7, Washington 226.2, and Hawaii 221.5. Id. Connecticut’s average black students’ scaled score was 201.3 while the other states had scaled scores of: New Mexico 202.0, Kentucky 201.6, Oregon 202.1, West Virginia 202.9, Washington 212.2, and Hawaii 211.3. Id.
⁷⁹ Id. at 4.
⁸¹ Id.
⁸² Id. at 2. Despite a 219 point gap, black students have achieved at the highest level in twenty-nine years and saw a seven point increase from the previous year. Id. Hispanic students remained at the same level as the previous year with a gap of 163 total points, but both years marked the highest score for Hispanic students in the state since 1975–76. Id. Remarkably, Asian students saw an increase of twenty-six points, bringing the average score for Asian Americans in the state to 1098—seven points above the national average for students in that minority group. Id. This score is thirty-four points above that of white students in the state. Id.
⁸³ Id. at 6. There was an increase from 10% in 1985 to almost 25% in 2005 of SAT takers identifying themselves as minorities. Id.
⁸⁴ Id. at 1, 4. 86% of Connecticut’s graduating seniors participate in the SAT. Id. The
Additionally, the College Board (the group that administers the SAT) added a new writing component to the test in 2005.35 Connecticut is optimistic that its students, across all racial and economic divides, will perform “extremely well” on this portion of the test due to the State’s CMT testing.36 The State expects that this stellar performance will thus raise the average SAT score of all students even higher.

II. THE BATTLE OVER UNFUNDED MANDATES

The NCLB Act is in many ways at direct odds with the State of Connecticut’s revolutionary testing methods. The law requires that students be tested in grades six through eight and at least once in grades ten through twelve,37 that all English language learners be tested in either English or their native languages,38 and that schools take all necessary steps to ensure that special education students are tested relative to state academic content and achievement standards.39 Although rigorous in its demands that Connecticut supplement its CMT with additional tests, the Department of Education has failed to supply the State with the funding to create, administer, and grade tests for every grade, special education students, or English language learners as the statute requires.40 Without more funding, the State will be forced to forgo its own testing scheme or risk the consequences of non-compliance with the law.41 The State of Connecticut can administer its tests, but must make changes that would substantially alter those tests in order to afford to implement the additional tests required by federal law. When the shortfall was brought to the attention of the United States Department of Education’s Secretary Margaret Spellings, the State was essentially told to lower its standards on its own testing scheme or divert funds from other

national average for graduating seniors participating in the SAT is at a measly 49%. Id. at 3. The College Board will begin reporting scores for the writing portion of the test beginning in 2006. Id.

35 Id. at 3. The College Board will begin reporting scores for the writing portion of the test beginning in 2006. Id.
36 Id.
38 Id. § 6311(b)(3)(C)(x).
39 Id. § 6311(b)(3)(C)(ix)(II). This would mean that a special education student in tenth grade who is still learning fractions would have to take an algebra test. See State Sues Federal Government, supra note 9.
40 Complaint, supra note 4, at 16.
41 Id. at 22–23.
educational programs to cover the shortfall.\footnote{For instance, the federal government suggested that the State of Connecticut “replace its tests with less rigorous, less costly multiple choice tests and drop the writing portion.” State Sues Federal Government, supra note 9. The CMT tests the cognitive skills of its students by using in its scheme a variety of different question styles including written explanations, essays, and multiple choice questions, arguably a much more difficult standard then just multiple choice alone. See supra notes 16–17 and accompanying text. In addition, Secretary Spellings has called the State’s attitude “un-American” and accused the State of “soft bigotry of low expectations.” Alison Leigh Cowan, Rell Aides Set for Talks on Federal School Bill, N.Y. TIMES, Apr. 14, 2005, at B5.} The State is currently working to comply with the requirements of NCLB while the lawsuit is pending. To understand the nature of the lawsuit it must first be placed in context by understanding exactly what is required by NCLB, how it affects the culture of education in the State of Connecticut, and why the State refuses to give up its own testing system in favor of that proposed by NCLB.

\textbf{A. How No Child Left Behind is at Odds with Connecticut’s Testing Scheme}

One of NCLB’s core principles is annual testing for all students in grades three through eight and at least one test between grades ten and twelve.\footnote{20 U.S.C. § 6311(b)(3)(C)(v)–(vii); see also Dillon, U.S. is Sued, supra note 7 (quoting Susan Aspey, Department of Education spokeswoman, as saying “[a] core principle of No Child Left Behind is annual testing in grades three through eight”); All Things Considered: Connecticut Challenges No Child Left Behind (NPR radio broadcast Aug. 22, 2005).} The main goal of the annual testing is not to pinpoint student proficiency for both educators and parents, but more accurately to identify what student deficiencies need to be addressed.\footnote{See Dillon, U.S. is Sued, supra note 7.} The U.S. Department of Education fears testing every other year can “miss important information and in fact may provide information when it’s too late.”\footnote{Id. (quoting Susan Aspey, Department of Education spokeswoman); see also Doug Gross, Connecticut’s No Child Suit Called a “Red Herring”, DESERET MORNING NEWS, Aug. 25, 2005, at A11 (quoting Secretary Spellings as saying “[p]arents want to know where their children stand”); Editorial, Funding, Yes, But Accountability, Too, CHATTANOOGA TIMES FREE PRESS, Aug. 31, 2005, at B7 (quoting Secretary Spellings’ harsh criticisms of Connecticut officials’ stance on the issue: “What are they afraid of knowing, I guess, is one of the things I’d like to know”).} Thus, educators will have missed the opportunity to correct the types of learning deficiencies that are the root cause of the achievement gap, and another generation of minorities will fall further behind their contemporaries. For instance, a student who is deficient in reading and is tested under Connecticut’s scheme is deprived of an entire year of remedial help that could have improved those reading skills.
Additionally, NCLB requires that English language learners, or more appropriately, students who do not yet speak English with any type of proficiency, be tested yearly as well. The law is flexible insofar as it allows the State to test the student in either English or the student’s native language, but requires that the student be tested in English once the student has attended an American school for three years. The law further requires that special education students be tested at grade level despite any individual educational needs. Thus, a special education student in the tenth grade learning decimals and fractions would be required to take an algebra test. Essentially, the federal government is mandating that schools gear curriculum towards passing the test, completely disregarding the fact that some students do not learn at the same level as their compatriots. The federal government offers no solution as to how to correct these learning deficiencies outside of placing a rigid time limit for full compliance.

The State of Connecticut wants to continue its alternate grade testing using the CMT, supplemented by formative testing in the alternate years. The formative testing would be more focused and individualized than the CMT. In addition, it would allow instant feedback to teachers responsible for a particular student. The State of Connecticut argues that it wants to keep its CMT specifically because the CMT is designed to test higher level skills through a combination of short essays, written answers, and multiple choice questions. The State further argues that testing an English language learner in English after only one year in public schools is ridiculous. Likewise, to force a tenth grader who is being instructed at an eighth grade level in mathematics to be tested at actual grade level as opposed to instructional level would
be unfair and contrary to the very foundation of the learning system.\(^{56}\) Connecticut argues that in order to meet the rigorous and often arbitrary requirements put forth by the Bush Administration, the State will have to spend in excess of $41 million of its own money.\(^{57}\) This figure is based on the difference between the State’s estimated costs and the funds received from the federal government.\(^{58}\) The most costly of these expenditures (nearly one-third) are for development and administration of the yearly examinations, which will cost the State in excess of $8 million.\(^{59}\) The costs include convening subject area professionals, developing samples of student work, and training teachers and administrators.\(^{60}\) In addition to these expenditures, the State would have to spend money to develop tests for English language learners in 150 different languages, or else test each student in English and risk not meeting adequate yearly progress—exposing the schools to the harsh sanctions that follow.\(^{61}\)

Although the United States Department of Education has pointed to the $750 million it has already sent to the State to implement the necessary changes,\(^{62}\) the Federal Government’s Accounting Office has estimated that the appropriations would meet only 59% of the State of Connecticut’s expenses.\(^{63}\) As discussed earlier in this Article, the federal government has suggested altering the State’s CMT with less rigorous tests consisting solely of multiple choice

\(^{56}\) See id. at 13.
\(^{58}\) Id. It will cost the State of Connecticut $112,185,000 in reallocated staff time and contracted service materials as opposed to the $70,580,000 earmarked for the project by the federal government. Id.; see also id. at 9 (providing a detailed breakdown of extra costs associated with the mandate). The shortfall is being felt in other states as well. “In Ohio and Texas, state taxpayers could be forced to ante up $1.5 and $1.2 billion respectively.” Fed Up with the Feds, NEA TODAY, Sept. 2005, at 10 [hereinafter Fed Up with the Feds], available at http://www.nea.org/neatoday/0509/upfront.html).
\(^{59}\) CONN. STATE DEP’T OF EDUC., supra note 57, at v.
\(^{60}\) Id. at 6.
\(^{61}\) Complaint, supra note 4, at 14.
\(^{63}\) Complaint, supra note 4, at 12. Furthermore, in June 2005 the House of Representatives voted to cut NCLB funding even further below the levels originally set. Fed Up with the Feds, supra note 58, at 10.
questions and by doing away entirely with the writing assessment in order to counterbalance the shortfall.\footnote{See supra note 42 and accompanying text.} This could rectify the funding shortage and Connecticut would be in compliance with the law because under the law, states are required to test only reading, mathematics, and one other subject of the State’s choosing.\footnote{20 U.S.C. § 9622(b)(2) (Supp. IV 2004).} School districts in other states have substituted daily attendance as the other subject, which qualifies as an “academic indicator,”\footnote{Editorial, \textit{Feds Should Pay Up For Tests}, HARTFORD COURANT, Aug. 26, 2005, at A10.} possibly because it costs nothing and is easy to administer. Other states have also cut the required score to pass their tests, in an attempt to avoid the sanctions that accompany low passage rates.\footnote{Sam Dillon, \textit{States Are Relaxing Education Standards to Avoid Sanctions From Federal Law}, N.Y. TIMES, May 22, 2003, at A29 [hereinafter Dillon, \textit{States Are Relaxing Education Standards}]. For instance, the Texas State Board of Education voted to reduce the number of questions needed for a passing score on its assessment tests to avoid sanctions. \textit{Id.} Additionally, Michigan lowered its passage rate from 75% to 42% in order for its schools to qualify as making adequate yearly progress within the State. \textit{Id.}}

\section{B. The Fight to Keep Its Own Testing Scheme}

Connecticut has refused to abandon its twenty year history of success with the CMT or to shortcut its students. Instead, State Attorney General Richard Blumenthal, with the approval of Republican Governor M. Jodi Rell, has initiated the lawsuit specifically citing a provision in the NCLB Act that requires the federal government to pay for the Act in its entirety.\footnote{State Sues Federal Government, \textit{supra} note 9.}

Most State officials that have opposed unfunded federal mandates have pointed to the financial burdens these mandates place on city and state budgets.\footnote{See \textit{PRICE WATERHOUSE, IMPACT OF UNFUNDED MANDATES ON U.S. CITIES} app. at A-1 (1993).} However, the State of Connecticut can go further. The State can point to a specific provision within NCLB.\footnote{Complaint, \textit{supra} note 4, at 11.} Although the provision the State of Connecticut points to does not specify a particular dollar amount the federal government is required to provide, the NCLB Act, according to the State, does specifically prohibit the State from incurring any financial burden from the law’s implementation.\footnote{20 U.S.C. § 7907(a) (Supp. V 2005).}

\textit{GENERAL PROHIBITION.} Nothing in this chapter shall be construed to authorize an officer or employee of the
Federal Government to mandate, direct, or control a State, local educational agency, or school’s curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.\(^{72}\)

The U.S. Department of Education claims that the law does not prevent unfunded mandates; instead, “it just prohibits federal employees from adding extra requirements to those in NCLB itself without providing extra money.”\(^{73}\) But the clear and unambiguous language of this provision was carried over almost word for word from the 1994 Reauthorization of the Elementary and Secondary Education Act. The sole purpose of this language was to prohibit the imposition of unfunded mandates on the states.\(^{74}\) Thus, the government is violating a strict provision of its own law by requiring the State of Connecticut to fully comply with the statute despite the shortfall in federal funding. In addition, the General Assembly of the State of Connecticut, which is empowered to determine the distribution of State funds, has already modified its CMT to coordinate with NCLB in reliance on this provision, believing that its clear, unambiguous language would require the federal government to fully fund the act.\(^{75}\) The fact that the State has made a good faith effort to abide by the law’s mandates, as evidenced by this modification to the statutory scheme of its CMT, makes the State a sympathetic plaintiff.

Aside from the express language of the act forbidding unfunded mandates, Connecticut can point to other persuasive evidence to win its case. First, the State has a twenty-year history with its own version of NCLB, the Connecticut Mastery Test.\(^{76}\) As this Note has discussed, although an achievement gap does exist in the State, that gap has been decreasing; the State has credited its CMT as the sole factor in identifying weaknesses in the educational system and has

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\(^{72}\) Id. (emphasis added); see also Complaint, supra note 4, at 11 (quoting NCLB’s prohibition against unfunded mandates).

\(^{73}\) NEA TODAY, supra note 58, at 10.

\(^{74}\) H.R. 6, 103d Cong. § 14512 (1994).

\(^{75}\) Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school’s curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under the Act. H.R. REP. No. 107-334, at 1051–52 (2002).

\(^{76}\) CONN. GEN. STAT. ANN. § 10-14n(g) (West Supp. 2007).

\(^{76}\) Complaint, supra note 4, at 1.
reacted by channeling necessary funding with the intention of rectifying those deficiencies.\(^7\) This, after all, is the point of NCLB. NCLB was created to ensure a high quality education for all school-aged children.\(^8\) NCLB implements the yearly testing scheme to allow states to find and rectify any deficiencies in their educational programs.\(^9\) Connecticut has complied with this spirit. Its own testing scheme was born from this same concept and Connecticut has begun to see the fruit of its labor.\(^\)\(^\)\(^0\)

NCLB was meant to draw attention to the achievement gap in the nation’s school system.\(^1\) The Act was implemented as an outline for states to address the problem. In addressing this achievement gap, the Act was not meant to be rigid and arbitrary. Congress was aware that the educational needs and the deficiencies in the State of Utah, for instance, are far different than that of Connecticut. Likewise, the needs of the greater New Haven school district are probably unique from those of the City of Hartford. With this in mind, Congress specifically intended that Act to be flexible in order to allow different states the opportunity to deviate from its structure to experiment and implement programs that fit an individual state’s unique educational needs.\(^2\) The State of Connecticut has specifically asked Secretary of Education Spellings to waive several requirements under the Act.\(^3\) For instance, Connecticut has asked that testing be required every other year, instead of annually, allowing the State to administer formative testing in the alternate years.\(^4\) This would allow Connecticut to keep its own rigorous testing scheme and to implement additional tests that could be used to pinpoint target areas that need to be addressed. Additionally, the State has asked to test special education students at their instructional level instead of at their grade level, and for English language learners to be tested in English after three years in American schools—as opposed to requiring them to be tested in either English or their native language after only one year.\(^5\) These requests have all been

\(^{77}\) See supra notes 19–20 and accompanying text.
\(^{79}\) Id. § 6301.
\(^{80}\) See supra notes 19–34 and accompanying text.
\(^{81}\) 20 U.S.C § 6301(b)(1).
\(^{82}\) For instance, the NCLB Act specifically provides that the Secretary of Education can specifically waive any requirements under the Act. 20 U.S.C. § 7861(a) (emphasis added).
\(^{83}\) Complaint, supra note 4, at 15–16.
\(^{84}\) Id. at 15.
\(^{85}\) Id. at 16.
Secretary Spellings has publicly stated that testing every year is one of the Act’s “bright lines,” and “the requirement will not be waived.”

III. ISSUES OF FEDERALISM

The State of Connecticut argues that by requiring the State to comply with NCLB even though the federal funding is insufficient, the U.S. Department of Education is coercing the State into implementing policies which the state could not otherwise be forced to implement. Although the State of Connecticut can choose to opt out of NCLB, it would risk losing all Title I funds (including all funds that rely on the Title I formula), an amount which would exceed hundreds of millions of dollars. According to State Attorney General Richard Blumenthal, this is a direct violation of the Spending Clause and the Tenth Amendment. He argues that the Spending Clause is not without limits and, by exceeding those limits, the federal government is in violation of the Tenth Amendment because it is controlling state educational systems—education is not one of the enumerated powers, and is traditionally an area left to state control.

A. The Spending Clause and its Limitations

The United States Constitution provides that “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.” Historically, there has always been a debate as to the breadth of this clause. To James Madison, the clause only allowed Congress to pursue ends “specifically enumerated in the Constitution.” Conversely, Alexander

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86 Id. at 21.
87 Id. at 17.
88 Id. at 25.
89 Id. at 11. Title I funds are provided to the states to be directed to the neediest schools. By choosing to opt out of NCLB, the State of Connecticut would not only lose these funds, but would also lose other funds that—while they do not fall under the requirements of the act—rely on the Title I formula. This would include funding for programs such as drug-free school zones and technology programs. Id. at 10–11.
90 Id. at 25–26.
91 U.S. CONST. art. I, § 8, cl. 1.
Hamilton believed that limitations on Congress’s power under this provision were not confined to those specifically enumerated powers. This controversy has largely been extinguished by the Supreme Court’s 1936 ruling in United States v. Butler “that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.” However, the Court ruled that despite its breadth, the Spending Clause is not without limits.

In Butler, the Supreme Court had to wrestle with the constitutionality of the Agricultural Adjustment Act. The Secretary of Agriculture had levied a processing tax and floor stock tax during the depression, and used the appropriations to pay farmers to reduce acreage and help raise the price of crops to desired levels. Although the Supreme Court declined to decide whether or not the appropriations fell within the broad definition of “general welfare” in the Spending Clause, it did hold that the Agricultural Adjustment Act was unconstitutional because it was an invasion of States’ rights pursuant to the Tenth Amendment. The Court held that the Act was an attempt to regulate agricultural activity beyond the powers of the federal government. The government argued that the regulation was voluntary and therefore not a regulatory implementation. However, as the Court pointed out, although the farmer may choose not to comply, he would risk losing valuable benefits. The amount of the benefits he would lose was designed to pressure him into following the regulation. The Court held that the “power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may

95 Butler, 297 U.S. at 66.
96 Id. However, the Court did note that it was not called on to define what the precise limits of the term “general welfare” are. Id. at 68.
97 Id. at 53.
98 Id. at 56, 58–59.
99 Id. at 68. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.” Id. at 68 n.18 (quoting U.S. CONST. amend. X).
100 Id. at 68.
101 Id. at 70.
102 Id.
103 Id. at 70–71.
Although the Supreme Court in *Butler* claimed that defining the breadth of the Spending Clause was beyond the scope of its inquiry, it is arguable that the Court inadvertently put two limits upon its invocation: economic coercion and the Tenth Amendment.

B. Economic Coercion and the Tenth Amendment

In 1987, the Supreme Court heard a case in which the State of South Dakota brought an action challenging, as unconstitutional, Congress’ ability to condition the allocation of highway funds to the State dependent upon whether the State raised its minimum drinking age from nineteen to twenty-one. The State sued, arguing that the condition was both a violation of the Twenty-first Amendment and that it exceeded the limitations of Congress’ spending power.

The majority of the Supreme Court, in a decision written by Chief Justice Rehnquist, reiterated that the Spending Clause has some limitations: funds must be spent in pursuit of the “general welfare,” the conditions attached to receiving funds must be put forth unambiguously, the conditions must be related to the federal interest sought to be regulated, and there can be no independent constitutional bar that prevents the sought-after end. The Court also held that economic coercion could be a factor

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104 *Id.* at 71.
105 See *id.* at 68, 70–71.
107 *Dole*, 483 U.S. at 205.
108 *Id.* at 207.
109 *Id.* (citing *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937)). In deciding whether or not a provision has reached this threshold, the courts should defer to Congress. *Helvering*, 301 U.S. at 640.
110 If the receipt of federal funds is conditional, those conditions must be set forth clearly and unambiguously. *Dole*, 483 U.S. at 207 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).
111 *Id.* at 207–08 (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).
112 *Dole*, 483 U.S. at 208 (noting that there may be other constitutional prohibitions that prevent Congress from implementing the condition) (citing *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 269–70 (1985)). This last limitation has been interpreted by the Court to prevent Congress from requiring the states to engage in “activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress’ broad spending power.” *Id.* at
that invalidates an otherwise legitimate exercise of the spending power.\footnote{See id. at 211.} The Court acknowledged what the \textit{Steward Machine Co.} Court recognized—in some instances the price of refusing to comply with the will of Congress would simply be too high to resist.\footnote{Id. (citing \textit{Steward Mach. Co. v. Davis}, 301 U.S. 548, 590 (1937)).}

Although the Court has never held exactly how high the price would have to be before “‘pressure turns into compulsion,’”\footnote{Id. (quoting \textit{Steward Mach. Co.}, 301 U.S. at 590).} they did decide in \textit{Dole} that South Dakota’s loss of only 5\% of its highway funds for refusing to raise the State’s drinking age to twenty-one did not cross this undefined threshold.\footnote{Id. 116}

\[\text{[E]very rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.}\footnote{Id.} \]

Although \textit{Dole} has shed light on what is not economic coercion,\footnote{See id. (noting that withholding only 5\% of the allocable highway funds was merely “mild encouragement” to the states). It should be noted that \textit{Dole} is different from \textit{Connecticut v. Spellings} in that \textit{Dole} dealt with highway safety concerns as regulated under the Spending Clause. \textit{See generally id.} Although Congress has wide authority to regulate under either the Spending or Commerce Clause, \textit{Dole} is relevant in any discussion dealing with economic coercion. The Supreme Court, however, has refused to allow Congress to regulate schools under the auspices of the Commerce Clause. For example, in \textit{United States v. Lopez}, the Court held that the Federal Gun-Free School Zones Act was unconstitutional. 514 U.S. 549, 551 (1995). Congress had passed the law, pursuant to its power under the Commerce Clause, rationalizing that violence in schools disrupted education and, as a result, harmed the national economy. \textit{Id.} at 564. In declining to extend Congress’ power under the Commerce Clause in this instance the Court held that if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, \textit{a fortiori}, it also can regulate the educational process directly. Congress could determine that a school’s curriculum has a ‘significant’ effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant ‘effect on [education],' and that, in turn, has a substantial effect on interstate commerce. \textit{Id.} at 565 (internal citation omitted). Aside from the fact that schools had nothing to do with commerce, the Court noted that education was an area in which the states had \textit{always} been sovereign. \textit{Id.} at 564.} the question remains as to how far is too far? Despite the Supreme Court’s silence on the issue, there have been several lower court
decisions that have echoed the Supreme Court’s ruling in favor of Congress’ power under the Spending Clause when states have faced similar financial loss for failure to bend to the will of Congress. For instance, in *Hodges v. Shalala*, the State of South Carolina brought suit alleging the federal government was exceeding the limits of the Spending Clause by withholding funds due to the State’s failure to comply with the Child Support Enforcement Act.\(^{119}\) After finding the conditions attached to the receipt of federal funds met the criteria laid out by the Supreme Court in *Dole*, the District Court of South Carolina found the conditions of the Act were not unduly coercive because the State stood to lose less than 6% of its allocable monies.\(^{120}\)

In *West Virginia v. United States Department of Health & Human Services*, the State of West Virginia brought suit against the United States, claiming the Federal Medicaid program—which required states to adopt an estate recovery program to recoup Medicaid expenditures from deceased beneficiaries—was a Tenth Amendment violation, because it was unduly coercive.\(^{121}\) Although the State authorized the program, it did so reluctantly and the State’s Attorney General initiated a suit to test the constitutionality of the mandate.\(^{122}\) The Fourth Circuit, although validating the coercion theory, declined to recognize any such coercion in this case because the State was threatened with a loss of only part of its Medicaid funding.\(^{123}\) A law or congressional policy which is unduly coercive may violate the Tenth Amendment if it deprives the State of any reasonable ability to regulate an area that is traditionally left to the State and outside the federal government’s enumerated powers.\(^{124}\)

The Tenth Amendment of the United States Constitution states “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the


\(^{120}\) *Id.* at 872.

\(^{121}\) *Id.* at 875.

\(^{122}\) 289 F.3d 281, 283–84, 287 (4th Cir. 2002).

\(^{123}\) *Id.* at 285–86.

\(^{124}\) *Id.* at 286–87.
States respectively, or to the people.” Education has traditionally been an area left under State control, and did not begin to see much of a federal presence until passage of the National Defense Education Act of 1958, the Civil Rights Act of 1964, and the Elementary and Secondary Education Act of 1965. For example, in the 1945–46 school year, the federal government provided only 1.4% of funds for public education. In 1992–93, that number had increased to 6.9%.

The federal government’s role in education policy is supposed to be limited and this role has traditionally been facilitated through encouragement, not mandates. “While the federal government is constrained in its ability to coerce education policy from states and localities, it can work to facilitate the adoption of national policies.” However, the federal government’s foray into public education should “not signal the end of local control.” There is a fine line between the financial encouragement contemplated and usurping power from the states—forcing a national policy that absent the Spending Clause, Congress would have no power to implement. There are two situations which offer substantial evidence that the federal government has violated a Tenth Amendment right traditionally left to the states: (1) forcing a “state to impose substantial burdens on its . . . citizens” and (2) regulations that “explicitly require some specified form of political or institutional structure for state or local government.”

C. How NCLB Violates the Spending Clause and the Tenth Amendment

In its complaint, the State of Connecticut argues that NCLB violates the Spending Clause and the Tenth Amendment of the

125 U.S. CONST. amend. X.
127 Michael Mintrom & Sandra Vergari, Education Reform and Accountability Issues in an Intergovernmental Context, PUBLIUS, Spring 1997, at 143, 150. 63.9% came from local school districts and 34.7% came from state governments. Id.
128 Id. at 150. 47.4% was provided by local school districts and 45.6% came from state governments. Id.
129 Id. at 152.
130 Id.
131 Id.
United States Constitution. Although states have had a tenuous relationship with the courts over Spending Clause violations, the State of Connecticut has a legitimate dispute.

First, NCLB is vague and ambiguous in many respects. The unclear language of the Act has required the United States Department of Education to issue numerous clarifications to school districts throughout the country. In one instance, the agency had to issue a response to clear up the ambiguities related to a state choosing to opt out of the law. The State of Utah passed House Bill No. 43 refusing federal funds. The Secretary of Education then informed the Utah Legislature that opting out of NCLB would result in not only a loss of $43 million in Title I funds, but also a forfeiture of any funds that rely on the Title I formula. For the State of Connecticut, this could translate into a loss of hundreds of millions of dollars. Case law has made it clear that one of the linchpins of Congress' exercise of the Spending Power is that if receipt of federal funds is conditional, those conditions must be set forth clearly and unambiguously so that any state that chooses to opt out does so knowingly and cognizantly.

133 Second Amended Complaint, supra note 17, at 42; see also State Sues Federal Government, supra note 9.
134 Second Amended Complaint, supra note 17, at 13. Connecticut alleges that the United States Department of Education had to issue "numerous guidance documents," twenty letters to state school officials, hundreds of letters to local officials, and several sets of regulations. Id.
135 Id. at 16. As discussed earlier, ambiguity runs contra to the second of the three conditions laid out in Dole. See South Dakota v. Dole, 483 U.S. 203, 207 (1987).
136 H.B. 43, 55th Leg., 2004 Gen. Sess. (Utah 2004). This bill was reviewed by Utah’s Office of Legislative Research and General Counsel, as well as the Office of the Legislative Fiscal Analyst, which determined that there was “no definitive measure to accurately assess potential future costs to implement the federal law known as ‘No Child Left Behind.’” OFFICE OF THE LEGISLATIVE FISCAL ANALYST, FISCAL NOTE: BILL NO. HB0043 (2004), available at http://www.leg.state.ut.us/~2004/bills/hbillint/hb0043.pdf.
137 WILLIAM T. POUND, NAT’L CONF. OF STATE LEGS., TASK FORCE ON NO CHILD LEFT BEHIND: FINAL REPORT 49 (2005).

The consequences of opting-out of the NCLB Act apparently are not limited to Title I funding. The State of Utah formally posed the question of opting-out of the mandates of the NCLB Act to the USDOE. In 2004, the USDOE responded that not only would Utah lose its NCLB funds (including its Title I funds), but it also would forfeit nearly twice that much in other formula and categorical funds because all federal funding that relied upon the Title I formula would also be forfeited. Unrelated programs such as the special education funds under the IDEA, and preschool programs for handicapped children, would be negatively affected.

138 Second Amended Complaint, supra note 17, at 16.
139 Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). A statute is vague if states are unable to “exercise their choice knowingly, cognizant of the consequences of their participation.” Id. This would require the government to inform the states as to what they
define the consequences of opting out renders the law inapplicable.

The Act has also imposed a huge financial burden on the citizens of the State of Connecticut. The rigid requirements imposed are tantamount to institutionalizing the structure of the State’s school system, taking control out of local hands and placing it into the hands of the federal bureaucracy. The State is forced to choose between abandoning its own accountability system and control over the education of its children or losing money earmarked for its neediest schools. If a school fails to meet annual progress requirements, the federal government can come in and “restructure” the school. In addition, the government can force the State to provide students with the option to transfer to another school within the district, regardless of whether or not the school has the capacity to receive more students.

Ambiguities in the statute concerning the penalties for noncompliance, huge financial burdens on the citizens of the State, restructuring of the school system, and loss of all Title I funding and funding for various other programs that rely on this formula—these are the types of economic pressures the Supreme Court alluded to in both Butler and Dole. Although the Supreme Court was clear in Dole that a “conditional grant of federal money” is not “unconstitutional simply by reason of its success in achieving the congressional objective,” in this case, the amount and type of funding Connecticut stands to lose is designed to pressure the State into following the regulation. Here, NCLB far exceeds the congressional objective of raising the achievement level of the country’s lowest performing students, because it tends to run the schools and requires states to comply fully with the provision or risk monetary sanctions—such as losing all funds—for failure to meet specific educational goals and standards dictated by the federal government. The result of this pressure is evident in the fact that states have lowered the passing scores for standardized tests and watered down the content of those tests to avoid the sanctions associated with NCLB, and to reduce the possibility of losing federal funds.

stand to lose if they decide to opt out of NCLB before the state opts out.

See supra note 4 and accompanying text.


Cf. United States v. Butler, 297 U.S. 1, 70–71 (1936). In Butler, the Court held that the statute in question was designed to pressure farmers into complying with the law. Id.

Dillon, States are Relaxing Education Standards, supra note 67.
To prevail legally, Connecticut must overcome the presumption that no congressional exercise of the spending power is impermissibly coercive. To overcome this presumption, the State’s Attorney General will have to prove that the government is not in fact spending for the general welfare, but rather regulating.

Congress has the power to spend for the general welfare, it has the power to legislate only for delegated purposes.

The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress’ intent in making the grant will be effectuated. 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 a condition, but a regulation, which is valid only if it falls within one of Congress’ delegated regulatory powers.

The Supreme Court has never specifically invalidated a congressional exercise of the spending power as unduly coercive. Although the Supreme Court in United States v. Butler arguably placed two limits on the Spending Clause—economic coercion and the Tenth Amendment—the Court was clear that the Agricultural Adjustment Act at issue was invalid because it invaded “the reserved rights of the states.” The Court found that the statute was designed to regulate an area beyond the powers of the federal

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145 The Supreme Court has not struck down a congressional exercise of the spending power since 1937. Federal circuits have expressed doubts as to the validity of the coercion theory. For example, the Tenth Circuit stated in Kansas v. United States, 214 F.3d 1196, 1202 (10th Cir. 2000), that “the coercion theory is unclear, suspect, and has little precedent to support its application.” In California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997), the Ninth Circuit held that “to the extent that there is any viability left in the coercion theory, it is not reflected in the facts of this record.” In Oklahoma v. Schweiker, 655 F.2d 401, 414 (D.C. Cir. 1981), the D.C. Circuit noted that “[t]he courts are not suited to evaluating whether the states are faced . . . with an offer they cannot refuse or merely a hard choice” and “therefore follow[ed] the lead of other courts that have explicitly declined to enter this thicket when similar funding conditions have been at issue.” Some circuits, the Ninth in particular, have avoided applying the coercion theory because of the belief that it presents difficult political questions not justiciable by the judiciary. Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989). These questions prevent the courts from deciding disputes between state and federal sovereigns. Id.


147 Butler, 297 U.S. at 68.
government—namely agriculture. Thus, the statute was a “means to an unconstitutional end.”

The Second Circuit offers no major case law on the narrow issue of how many federal dollars must be at stake in order to qualify as undue coercion. The Fourth Circuit, however, has acknowledged that the theory of coercion is viable and that its explanation is persuasive. In *Virginia Department of Education v. Riley*, the Commonwealth of Virginia brought suit to challenge the U.S. Department of Education’s (“USDOE”) withholding of funds allocable to the State under the Individuals with Disabilities Education Act. The USDOE withheld the funds because it accused Virginia of violating the Act by refusing disabled students the Commonwealth’s public educational services. The students had been expelled for disciplinary reasons that were completely independent of and unrelated to their handicaps. Although the Fourth Circuit held that the USDOE could not withhold the funds because the statute was ambiguous and did not clearly set forth the conditions by which it would supply funding, six judges did raise Tenth Amendment concerns.

For refusing to offer public educational services to the expelled students, the Commonwealth of Virginia stood to lose 100% of its federal grant. The number of expelled students, .001%, led the six justices to believe that this was the type of coercion the Supreme Court spoke of in *Dole*, and not the mere “mild encouragement” on which the holding in *Dole* turned. In fact, Judge Luttig noted passionately in his opinion—which was adopted en banc—that this situation (the same situation facing the State of Connecticut) was the very type of situation the Court alluded to, but failed to articulate, in *Dole*.

If the Court meant [at all] what it said in *Dole*, then I would think that a Tenth Amendment claim of the highest

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148 Id.
149 Id.
150 106 F.3d 559, 560 (4th Cir. 1997).
151 Id. at 561.
152 Id.
153 Id. at 560–61.
154 Id. at 569 (opinion of Luttig, J., in which Wilkinson, C.J., and Russell, Widener, Wilkins, and Williams, J.J., joined).
155 Id.
order lies where, as here, the Federal Government . . . withholds the entirety of a substantial federal grant on the ground that the States refuse to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States. In such a circumstance, the argument as to coercion is much more than rhetoric; it is an argument of fact. It is, as well, an argument that the Federal Government has, in an act more akin to forbidden regulation than to permissible condition, supplanted with its own policy preferences the considered judgments of the States as to how best to instill in their youth the sense of personal responsibility and related values essential for them to function in a free and civilized society. As such, it is an argument well-grounded in the Tenth Amendment’s reservation “to the States respectively, or to the people” of those “powers not delegated to the United States by the Constitution, nor prohibited by it to the States.”

The State of Connecticut may very well be the first state filing suit to have reached the phantom threshold left undefined by our American jurisprudence. The State stands to lose not only 100% of its Title I funding, but also any funding dependent on the Title I formula but unrelated to NCLB if it chooses not to follow the exact dictates of the Act, even insubstantially.

IV. CONCLUSION

The State of Connecticut has a long history of placing the education of all its citizens at the forefront of its agenda. Although a disparaging achievement gap does still exist in the State, Connecticut’s reputation as the Education State should be applauded. There is almost no state in the country that requires more education for its teachers, and almost no state in the country that has shown more success from its students.

The State has a long and arduous road ahead as it begins its legal battle. Although the State can point to a specific provision within the NCLB Act that prohibits the State from incurring any costs associated with the law, or authorizing an officer of the Federal

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157 Riley, 106 F.3d at 570 (internal citation omitted).
158 See Complaint, supra note 4, at 10–11.
government to mandate, direct, or control an educational agency or program of instruction,\footnote{20 U.S.C. § 7907(a) (Supp. IV 2004).} the fact remains that the State has been widely criticized for its voluntary acceptance of the funds.\footnote{See, e.g., News Hour with Jim Lehrer: Connecticut Sues Over NCLB (PBS television broadcast Aug. 24, 2005), available at http://www.pbs.org/newshour/bb/education/july-dec05/nclb2_8-24.html.}

Although it seems the State is caught in a catch-22 by first pointing to the clear and unambiguous language of the statute that requires the federal government to incur all costs incurred by NCLB and at the same time claiming that the statute is imprecise in both its language and the scope of its consequences for failing to comply with its “conditions,” if either argument is upheld by the Courts, the provisions in question could be invalidated. If the language of the statute does prevent the State from having to spend any of its own money to comply with the Act according to congressional intent, then by definition the federal government is in violation of its own provision. Additionally, if the conditions attached to the receipt of the federal funds are deemed to be vague and ambiguous, the statute could be in clear violation of the Spending Clause for one of the plainly articulated conditions of \textit{Dole} is that the conditions attached to the receipt of federal funds must be clear so as to allow a State to choose knowingly.\footnote{South Dakota v. Dole, 483 U.S. 203, 207 (1987) (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).}

Far more compelling, although uncertain, is the argument that NCLB is unduly coercive because it conditions federal dollars unrelated to the mandates of NCLB on compliance with the statute. If the State fails to implement any of the statutory dictates, it risks losing all education dollars. By using its economic might to pressure the State into full compliance with NCLB, the government is in essence implementing a federal education plan and thus violating the State of Connecticut’s Tenth Amendment right to educate its youth.

It is without question that the federal government has a right to attach conditions on its funds. It is also without question that the role of the federal government in public education has been greatly expanded in the past few decades. However, this could be the very root of the problem the government is trying to rectify. The federal government’s role in education should be limited. All major decisions such as curriculum, testing schemes, and teacher
credentials should be left to the states and, more importantly, to the local school districts—both arguably more qualified to deal with the individualized problems unique to that area.

The federal government should limit its role to preventing invidious discrimination in schools, providing money under the condition that it be spent to help raise up the lowest performing members of a state’s public school system, and to ensure that all children are given the opportunity to reach their highest potential. However, the actual process of helping to raise up the lowest performing members of a state’s public school system, and providing the opportunity to reach that potential, through testing schemes and teacher improvement, should be left where it always belonged—with the States themselves. There is nothing wrong with the federal government setting an educational benchmark, however, it is up the states to reach that benchmark without interference.

Perhaps the State of Connecticut can prevail on a theory of coercion. The spending power should not be limited only by the requirement that Congress spend for the general welfare. If that has become the sole limitation, then the Spending Clause has given the “power to the Congress to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.”