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Telling Schools What to Do, Not How to Do It: Reimagining the Federal Government's Role in Public Education

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I. INTRODUCTION

In October of 2013, California Governor Jerry Brown signed Assembly Bill 484 into law.[1] This bill changed California's standardized testing requirements for students in kindergarten through twelfth grades, abolishing the Standardized Testing and Reporting (STAR) program and replacing it with the Measurement of Academic Performance and Progress program (MAPP).[2] California Superintendent of Public Instruction Tom Torlakson explained that the change was the result of the lack of alignment between STAR and the recently adopted "Common Core Standards": the old exams assessed material that students are no longer being taught.[3] The shift was a result of a nationwide movement toward the Common Core Standards motivated, in part, by President Obama's Race to the Top program.[4]

AB 484 also authorized the Superintendent to temporarily postpone issuing Academic Performance Index (API) scores for two years if the transition compromises the utility of the scores in accurately comparing schools and districts.[5] API scores are calculated from many sources, including standardized testing,[6] and are used in California, along with other data, to determine whether students are achieving the federally mandated Adequate Yearly Progress (AYP) requirements.[7] Without a valid API score it is impossible to determine whether districts or schools are meeting AYP requirements, especially in kindergarten through eighth grade, in which API scores are the primary measures in making this determination.[8]

Almost immediately, United States Secretary of Education Arne Duncan criticized AB 484 because the No Child Left Behind Act (NCLB) mandates that

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1. A.B. 484, 2013 Leg., Reg. Sess. (Cal. 2013).

2. *Id.*

3. *See* Press Release, Cal. Dep't of Educ., State School Chief Tom Torlakson Comments on Statement by U.S. Secretary of Education Regarding AB 484 (Sep. 10, 2013) (on file with the *McGeorge Law Review*) ("Our goals for 21st century learning, and the road ahead, are clear. We won't reach them by continuing to look in the rear-view mirror with outdated tests, no matter how it sits with officials in Washington.").

4. *See generally* Tamar Lewin, *Many States Adopt National Standards for Their Schools*, N.Y.TIMES (July 21, 2010), http://www.nytimes.com/2010/07/21/education/21standards.html?_r=0 (on file with the *McGeorge Law Review*) (describing the movement toward states adopting the Common Core Standards to create some national consistency).

5. A.B. 484, 2013 Leg., Reg. Sess. (Cal. 2013).

6. *See, e.g.*, CAL. DEP'T OF EDUC., 2012–13 ACADEMIC PERFORMANCE INDEX REPORTS INFORMATION GUIDE 6 (May 2013), *available at* http://www.cde.ca.gov/ta/ac/ap/documents/infoguide13.pdf (on file with the *McGeorge Law Review*) (using STAR scores to calculate API).

7. *See* CAL. DEP'T OF EDUC., 2013 ADEQUATE YEARLY PROGRESS REPORT INFORMATION GUIDE, 5–6 (Aug. 2013), *available at* http://www.cde.ca.gov/ta/ac/ap/documents/infoguide13.pdf (on file with the *McGeorge Law Review*) ("Schools . . . and the state are determined to have met AYP if they meet or exceed each year's goals.").

8. *Id.* at 6. AYP for high schools in California also rely on graduation rates and scores from the California High School Exit Exam (CAHSEE), which is not affected by this bill. *See id.* at 5. *See also* A.B. 484, 2013 Leg., Reg. Sess. (Cal. 2013).

states determine which schools and districts are meeting AYP requirements every year and threatened to withhold federal education funding from the state.[9] He expressed concern that even a temporary halt in testing and AYP determinations would compromise the integrity of the data necessary for the transparency and accountability NCLB requires.[10]

After six months of uncertainty, the Federal Department of Education relented and granted a one-year waiver of some of the requirements of NCLB and agreed to allow California's amended testing plan to continue without penalty.[11] The approval came just over a week before California schoolchildren were scheduled to participate in the revamped testing program.[12]

This controversy exposes a fundamental problem with the manner in which the federal government has influenced public education for the last half century. Rather than claiming a specific federal interest in public education, Congress has taken a piecemeal approach culminating in massive micromanagement without a clearly articulated goal.[13] This Comment will demonstrate that the federal threat to withhold funding provided by Title I of NCLB for the temporary suspension of standardized testing is a manifestation of the coercive nature and unconstitutionality of NCLB, and will suggest an alternative model of federal public education legislation.

In order to ease the tensions between the states and the federal government, Congress should limit NCLB programs to those originally intended by its lineage, the Elementary and Secondary Education Act of 1965[14] (ESEA). Congress should then call for the creation of a basic floor of educational outcomes for all children in the United States. These outcomes would serve as constitutionally guaranteed minimum educational requirements, leaving curriculum, instructional models, assessment, and accountability to individual states, schools, and teachers. The Commerce and Due Process clauses of the Constitution empower Congress to make these changes.[15]

Part II of this Comment provides an overview of the history of the federal government's role in public education. Part III will demonstrate that the current model, relying on Spending Clause jurisprudence, is unconstitutional under the

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9. Press Release, U.S. Dep't of Educ., Statement by U.S. Secretary of Education Arne Duncan on California Bill to Exempt Millions of Students from State Assessments (Sept. 9, 2013) (on file with the *McGeorge Law Review*).

10. *Id.*

11. Letter from Deborah S. Delisle, Assistant Sec'y, U.S. Dep't of Educ., to Michael W. Kirst, President, Cal. State Bd. of Educ. and Tom Torlakson, Superintendent of Pub. Educ. (Mar. 7, 2014), http://www2.ed.gov/nclb/freedom/local/flexibility/waiverletters2009/caft3.pdf (on file with the *McGeorge Law Review*).

12. Press Release, Cal. Dep't of Educ., State Schools Chief Tom Torlakson, State Board President Kirst Issue Joint Statement on Federal Approval of California Testing Waiver (Mar. 7, 2014) (on file with the *McGeorge Law Review*).

13. *See infra* Part II.C.

14. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

15. *See infra* Part IV.

current understanding of that clause. In Part IV, this Comment will propose an alternative model that articulates and promotes the federal interest in public education while allowing the states, districts, schools, and teachers to determine how to best fulfill that interest.

II. HISTORY OF FEDERAL INVOLVEMENT IN EDUCATION

A brief overview of the trends in federal education policy from the founding fathers to modern day provides some perspective on how contemporary federal education law has developed and why the proposal called for in this Comment would mark a major shift in perspective regarding the federal role in public education.

A. States' Rights and a Tradition of Federalism

It has long been understood that public education falls primarily under the authority of state and local governments.[16] While the founders clearly understood the importance of an educated electorate to a functioning democracy,[17] and there is some anecdotal evidence to suggest that there was early advocacy for the notion of public education,[18] it was not until the early 19th century that "common schools," the precursors to our contemporary schools, arose[19] and not until the early 20th century that anything resembling the modern public education system began to take form.[20]

There is little mention of educational expectations, curriculum, or instruction in federal discourse until well into the 20th century.[21] The needs and priorities of the states varied greatly,[22] and the Constitution's silence on public education suggests the founders intended it to be a states' rights issue.[23]

16. JAMES RAPP, EDUCATION LAW, §3.01[1] (2014).

17. *See id.* §1.01[5][a] (quoting George Washington about the importance of education).

18. *See id.* (quoting a selection from George Washington's 1796 farewell address).

19. *Id.* §1.01[2].

20. *See id.* §1.01[6][b] (describing the emergence of the "six-three-three" system of elementary, middle, and high schools).

21. *See id.* § 3.01[1] (describing the rise of federal involvement in public education). The Federal Government did earmark specific parcels in land grants for the purpose of public education, but did not give any instruction on how public instruction should be delivered. *Id.* at § 101[5][b].

22. *See generally id.* § 1.01[2] (describing the functions early schooling served in various regions of the country).

23. *Id.* § 3.01[1].

B. 20th Century Developments

The middle of the 20th century brought two major developments that forced the federal government's hand in taking an active role in public education.[24] The 1954 Supreme Court decision in *Brown v. Board of Education* established that segregated schools violated the Equal Protection Clause.[25]

Two years later, following the Russian launch of Sputnik, lawmakers began to consider the quality of education a national security issue and passed the National Defense Education Act of 1958[26] (NDEA).[27] NDEA used federal funds to target programs in mathematics, sciences, engineering, and foreign languages for the highest-achieving students.[28]

The conflation of these two priorities set in place a fundamental policy challenge that continues today: is it the role of the federal government to ensure that states are rigorously challenging the brightest students or is it to ensure that states are teaching all students equally?[29]

C. The Elementary and Secondary Education Act

The Elementary and Secondary Education Act of 1965 (ESEA) was a centerpiece of President Johnson's "War on Poverty."[30] By far the most extensive federal foray into public education to date, ESEA provided five distinct methods of aid.[31] The most significant provision was Title I, which provided funds to improve the education of children in low-income families.[32] Under Title I, school districts are eligible for funding if 3% or at least 100 school-aged children in the district come from low-income families.[33] States provide this data to the Department of Education which, in turn, fund the states.[34] The monies then flow to school districts based on a federally mandated formula that fund districts in

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24. *Id.* § 1.01[6][a].

25. 347 U.S. 483, 495 (1954).

26. 20 U.S.C. § 401 et seq.

27. ADAM NELSON & ELLIOT WEINBAUM, N.Y. STATE EDUC. DEP'T, FEDERAL EDUCATION POLICY AND THE STATES, 1945–2009: A BRIEF SYNOPSIS 11–12 (Nov. 2009 ed.) (on file with the *McGeorge Law Review*).

28. *Id.* at 12.

29. *See infra* Part II.E.

30. *See generally* NELSON & WEINBAUM, *supra* note 27 at 16–18 (discussing the educational policies of President Johnson vis-a-vis his "War on Poverty" and the development of ESEA).

31. *Id.* at 17–18.

32. *Id.* Title II allocated funds for school libraries and instructional materials, Title III covered supplementary educational centers and services, Title IV was earmarked for research into effective teaching methods, and Title V gave money directly to State Departments of Education to help implement the other provisions of the act. *Id.*

33. Carl L. LoPresti, *The Elementary and Secondary Education Act of 1965: The Birth of Compensatory Education*, 1971 URB. L. ANN. 145, 148 (1971).

34. *Id.* at 149.

proportion to the district's number of low-income students.[35] On the local level, the funds are used to service children in "attendance areas" where at least 50% families live in poverty.[36] From the outset, some commentators noted that this distribution is both over-inclusive and under-inclusive.[37] Children from poor families who live in attendance areas that are not predominately impoverished do not receive funds while children from wealthier families who happen to live in an impoverished attendance area do receive the federal benefits.[38]

D. The Reagan Revolution

For the first decade under ESEA, the federal funding model stayed about the same.[39] However, under subsequent reauthorizations, the number of federally-funded programs increased dramatically.[40] Under this model, known as categorical funding, particular grants were earmarked for particular programs.[41] States and districts could get additional funding for specific student groups including low-income, racial minority, non-native English speakers, or handicapped children.[42] The election of Ronald Reagan changed that model.[43]

As part of their agenda to decrease the debt and diminish the size of the central government, Reagan conservatives slashed funding to categorical programs.[44] Congress cut more than $1 billion in federal aid to schools and the remaining funds changed from categorical programs into "block grant" programs.[45] Under this new funding structure, the federal government allocated considerably less money to states and school districts, but removed restrictions on how they could spend it.[46] While allotments were calculated using similar metrics as before, states were not required to spend the money for the specific programs that targeted the students of highest need.[47]

It was in the midst of this giant shift in federal education policy that Federal Education Commissioner Terrel Bell released *A Nation at Risk: The Imperative for Educational Reform*.[48] This report painted a scathing picture of American

35. *Id.*

36. *Id.* at 160.

37. *Id.*

38. *Id.*

39. *See generally* NELSON & WEINBAUM, *supra* note 27 at 18–44 (detailing the progression of federal education policy, primarily adding more categories of students for whom federal funds were being earmarked).

40. *Id.* at 36.

41. *Id.* at 28–29.

42. *Id.*

43. *Id.* at 45.

44. *Id.*

45. *Id.*

46. *Id.* at 46.

47. *Id.* at 47.

48. *Id.* at 49.

schools, pointing out a precipitous drop in high school student's SAT scores since the late 1950's.[49] The report suggested that the federal government's pursuit of equity came at the expense of quality.[50]

The Reagan administration responded quickly by calling for vague federal goals like "excellence" and stressing that federal aid should only be given to schools that can demonstrate this nebulous trait.[51] In a harbinger of the oxymoronic policies that would develop in the field of federal education law,[52] the report called for a "nationwide [but not federal] system of state and local standardized tests."[53] The seeds had been planted for the next generation of federal education policy—draconian, punitive measures imposed on states by way of vague instructions and a complete lack of codified objectives.[54]

E. No Child Left Behind

In 2001, the landscape once again shifted with the passage of NCLB. An enormous federal program that promised excellence for all while threatening underachieving schools was the highpoint of this conflation of the competing goals of excellence and equality.[55]

NCLB retained the designation of Title I schools that emerged under ESEA, but while it provided them with substantially increased funding, it also saddled them with a multitude of new requirements.[56] NCLB compelled all states receiving funds to administer standardized tests that assess students on "challenging academic content and achievement standards."[57] It further required states to adopt a metric of AYP that would compare the progress of schools.[58] States were required to institute penalties for schools that did not meet targets and to ensure that all students in all schools would be "proficient" in the content standards by 2014.[59] If Title I schools did not meet their AYP targets, they faced a series of federally mandated penalties that could include shutting down schools or a state takeover of a district.[60] NCLB deliberately did not define "challenging

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49. *Id.*

50. *Id.*

51. *Id.* at 48.

52. *See infra* Part II.E.

53. NELSON & WEINBAUM, *supra* note 27, at 49.

54. *Id.*.

55. *See* Martin R. West and Paul E. Peterson, *The Politics and Practice of Accountability*, *in* NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 1, 8 (Martin R. West and Paul E. Peterson eds. 2003) (describing the twin aims of excellence and equality in terms of accountability).

56. LEARNING FIRST ALLIANCE, MAJOR CHANGES TO ESEA IN THE NO CHILD LEFT BEHIND ACT 2 (2002) (on file with the *McGeorge Law Review*).

57. *Id.* at 5.

58. *Id.* at 6–7.

59. *Id.*

60. *Id.* at 8.

academic content," prescribe a specific annual test, or even define what AYP meant.[61] In an apparent nod to the notion of states' rights, NCLB did not tell states what to do—only the consequences of not doing it.

F. Contemporary Trends

NCLB has become an unpopular law with coalitions on all sides of the political divide for various reasons.[62] Conservatives feel it is a federal takeover and too intrusive into the rights of states.[63] Teachers' unions note that in many states, NCLB has created controversial policies that tie teacher salaries, or even employment, to test scores.[64] Many educators believe the notion that all students would be able to demonstrate a high level of proficiency by 2014 was an unattainable goal from the very beginning.[65] NCLB was due for reauthorization in 2007,[66] but that deadline has come and gone. Developing trends suggest a stark partisan divide on reauthorization, but proposals from both parties lead the federal law further astray from the original intention of ESEA.

President Obama's "Blueprint for Reform" suggests amending NCLB further by adding additional objectives, including improving teacher effectiveness, providing information about schools to families, and implementing college and career-ready standards and assessments.[67]

In February of 2015, the House of Representatives postponed a vote on a reauthorization bill sponsored by Representative John Kline, a Republican from Minnesota.[68] At one point this bill appeared poised to make it through that chamber quite easily, but it subsequently came under fire by the most conservative wing of the Republican Party.[69] A significant force in stalling the

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61. *See generally id.* at 2 (describing the new policies without mention of specific standards or practices).

62. *See generally* Jennifer Hochschild, *Rethinking Accountability Politics*, *in* NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 107, 107–08 (Martin R. West and Paul E. Peterson eds. 2003) (discussing the general unpopularity of NCLB).

63. *Id.* at 108.

64. *Id.* at 107.

65. *See generally* RICHARD ROTHSTEIN, REBECA JACOBSEN, & TAMARA WILDER, 'PROFICIENCY FOR ALL' – AN OXYMORON 1 (2006), *available at* http://s4.epi.org/files/page/-/old/webfeatures/viewpoints/rothstein_2006 1114.pdf (on file with the *McGeorge Law Review*) (describing how the 100% proficiency by 2014 goal established by NCLB is unattainable).

66. Barbara Michelman, *The Never-Ending Story of ESA Reathorization*, POLICY PRIORITIES (ASCD), Spring 2012 (on file with the *McGeorge Law Review*).

67. U.S. DEP'T OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2010) *available at* http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf (on file with the *McGeorge Law Review*).

68. Alyson Klein, *House Leaders Officially Postpone Vote on NCLB Rewrite*, EDUCATION WEEK (February 27, 2015), http://blogs.edweek.org/edweek/campaign-k-12/2015/02/house_leaders_officially_postp.html (on file with the *McGeorge Law Review*).

69. Alyson Klein, *How a Conservative Blogger Helped Derail the House NCLB Rewrite*, EDUCATION WEEK (Mar. 5, 2015), http://blogs.edweek.org/edweek/campaign-k-12/2015/03/how_a_conservative_blogger_hel.html (on file with the *McGeorge Law Review*).

bill came from an education blogger whose (factually incorrect) post claiming the bill would require states to adopt the Common Core Standards "went viral."[70]

As of the time of this comment's publication, the Senate appears to be close to agreement on bipartisan overhaul of ESEA.[71] It appears that this bill, in its current state, would continue the current practice of requiring states to adopt "challenging academic standards" with no federal oversight and, presumably, little federal guidance.[72]

III. THE CURRENT NCLB IS UNCONSTITUTIONAL

This section will demonstrate that NCLB, and any similar subsequent reauthorization under the Spending Clause, is unconstitutional. This argument begins with a discussion regarding the articulation of coercion under *National Federation of Independent Business v. Sebelius*[73] and then applies that analysis to NCLB.

A. Factors of Coercion

Under Article I, section 8.1 of the Constitution, Congress has the power to spend money "for the general welfare" of the United States. Congress' spending programs must be optional, specific, limited in scope, and unambiguous.[74] In *National Federation of Independent Business v. Sebelius*, the Court struck down the Medicaid expansion portion of the Affordable Care Act (ACA) by finding it improperly coercive.[75] While not establishing a bright-line rule, the Court highlighted aspects of the new law that it considered in determining that the Medicaid expansion was unconstitutional.[76]

The ACA greatly expanded the number of individuals covered by Medicaid and provided the federal funds to pay for their inclusion.[77] States needed to agree to accept the new standards of inclusion to receive any Medicaid funding.[78] The Court identified three factors that made the Medicaid expansion coercive.[79]

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70. *Id.*

71. Lauren Camera, *Senate Education Leaders Close in on Bipartisan ESEA Rewrite*, EDUCATION WEEK (April 3, 2015), http://blogs.edweek.org/edweek/campaign-k-12/2015/04/senate_education_leaders_close.html (on file with the *McGeorge Law Review*).

72. *Id.*

73. 132 S. Ct. 2566 (2012).

74. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981).

75. 132 S. Ct. at 2608.

76. *Id.* at 2602–07.

77. *Id.* at 2606.

78. *Id.* at 2603.

79. *Id.* at 2606.

First, the Court described the Medicaid expansion as "a shift in kind, not merely degree."[80] In this analysis, the Court examined the intent of the original Medicaid program and compared it to the program offered under the ACA.[81] The original program designated discrete categories of individuals that were deemed especially needy.[82] The expansion, on the other hand, provided healthcare for a far greater number of people and was an element of a comprehensive universal healthcare plan.[83] The Court saw the enormity of the covered class in this change of legislation as a fundamentally different program rather than an expansion of an existing program.[84]

Next, the Court considered whether states would have been able to anticipate the transformation of the program when they initially agreed to accept funding.[85] Citing *Pennhurst State School and Hospital v. Halderman*,[86] the Court ruled that attaching unforeseeable conditions to the acceptance of federal monies constituted an abuse of the Spending Clause power given to Congress.[87]

Finally, the Court discussed the amount of the funds the States had been receiving from the program before the expansion.[88] Distinguishing *South Dakota v. Dole,*[89] the Court reasoned that since Medicaid made up 20% of the average State's total budget, the threat to remove those funds was "much more than 'relatively mild encouragement'—it is a gun to the head."[90]

The Court explicitly stated that its holding does not identify a specific bright-line defining when a Spending Clause law becomes coercive; it merely indicates that, in this case, it is "surely beyond it."[91]

B. Coercion in NCLB

Applying these factors to NCLB makes it clear that NCLB is also unconstitutional as a coercive federal action.[92]

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80. *Id.* at 2605.

81. *Id.* at 2605–06.

82. *Id.*

83. *Id.* at 2606.

84. *Id.* at 2605–06.

85. *Id.* at 2606.

86. 451 U.S. 1 (1981).

87. *Sebelius*, 132 S. Ct. at 2606.

88. *Id.* at 2604–05.

89. 483 U.S. 203 (1987).

90. *Sebelius*, 132 S. Ct. at 2604.

91. *Id.* at 2606.

92. The Sixth Circuit Court of Appeals suggested this plausibility in *Pontiac v. Duncan,* 584 F.3d 253 (2009), but as it was never raised by the States, it has never been directly addressed.

1. NCLB Was a New Program—A Shift in Kind, Not Degree

In *Sebelius*, the Court first considered whether the Medicaid expansion replaced or amended existing law.[93] The Court first dismissed the idea that since the program was still called Medicaid, it must be a change of an existing program rather than a new program.[94] Instead, the Court viewed the distinction between the intention of the original law and the intention of the new one as the compelling characteristic determining whether it was a shift in kind or in degree.[95]

The purpose of ESEA was to fight poverty.[96] Federal funds were intended "to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children."[97] The programs within ESEA are certainly aligned to this clearly delineated goal.[98]

In contrast, NCLB's defined purpose is "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."[99] The change in purpose here is potentially even more extreme than it is in the ACA's Medicaid expansion. Not only is the class of citizen greatly expanded (from low-income to everyone), the focus of the purpose is shifted from a funding scheme to an oversight mechanism.[100] While the concern for low-income students may be implicit in the NCLB's statement of purpose, the intent of NCLB is vastly different than the intent of the original ESEA.[101]

One commentator suggests that this analysis is inappropriate because while ACA implicitly created two programs (Medicaid expansion and "pre-existing Medicaid) there is no such distinction under NCLB.[102] In her dissent, Justice

93. *Sebelius*, 132 S.Ct. at 2605.

94. *Id.*

95. *Id.* at 2605–06.

96. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

97. *Id.*

98. *Id.*

99. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1439.

100. *Compare* Elementary and Secondary Education Act of 1965, 79 Stat. 27 (defining the purpose of the act to provide money to schools with low-income students), *with* No Child Left Behind Act of 2001, 115 Stat. 1439 (defining the purpose of the act to ensure quality education to everyone).

101. No Child Left Behind Act of 2001, 115 Stat. 1439.

102. Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 619 (2013).

Ginsburg drew this distinction, but the majority shot it down.[103] The Court was clear that Congress' intent, not the label, controls this factor.[104]

The change in purpose between the original ESEA and NCLB closely mirrors the change in purpose of the Medicaid expansion proposals under ACA and, consequently, NCLB should be seen as a "new program" under the analysis in *Sebelius*.

2. NCLB was Unforeseeable

In *Sebelius*, the Court relied on the "clear-notice" requirement of the Spending Clause articulated in *Pennhurst*.[105] Under *Pennhurst*, Congress must provide clear-notice of the conditions for funding at the time the state initially claims funds under a given act.[106] The *Sebelius* Court found it unlikely that a state, upon initial acceptance of Medicaid funds, would have anticipated the transformation of Medicaid under the ACA.[107]

Applying that standard to NCLB, the question becomes whether state education officials would have anticipated the requirements of state-wide testing and standards under the original ESEA of 1965.[108] The answer is no. On its face the ESEA prohibited the federal government from "exercise[ing] any direction, supervision, or control over the curriculum [or] program of instruction."[109] Moreover, the "standards movement" and rise of standardized testing did not even begin until the 1980s.[110] It is unimaginable that state education officials would have been able to predict, much less anticipate, the size and scope of NCLB when they accepted ESEA funding in 1965.

3. NCLB is Dragooning State Legislatures

The size of a federal grant is very important in determining whether the requirements to receive funding under a federal program amount to commandeering state law or operating coercively.[111] In one extreme, the Court found that 5% of the funds from a particular highway grant was so low (less than .5% of the state budget) that it was not coercive, but only "mild

103. Sebelius, 132 S. Ct. at 2635 (Ginsburg, J., dissenting).

104. *Id*. at 2605.

105. *Id.*

106. *Id.* at 2606.

107. *Id.*

108. *See id.* at 2606 (discussing the perspective from which to conduct a coercion analysis).

109. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

110. BENJAMIN MICHAEL SUPERFINE, THE COURTS AND STANDARDS-BASED EDUCATION REFORM 5 (2008).

111. *Compare Sebelius*, 132 S. Ct. at 2604 (deciding a grant was so large it must be coercive), *with* South Dakota v. Dole, 483 U.S. 203, 211 (1987) (finding a grant was so small it could not be considered coercive).

encouragement."[112] In the other extreme, in *Sebelius* the Court ruled that 100% of federal Medicaid funds, on average 20% of total state revenue, represented "a gun to the head."[113] Unfortunately, the Court has not yet defined a bright-line rule as to when encouragement turns to compulsion, but it is possible that the funding levels in NCLB could meet this threshold.

Federal NCLB payments represent about 8.3% of K-12 education funding (1.5% of the average state budget).[114] Since the Court in *Sebelius* did not establish a clear line dividing when a grant becomes large enough to be coercive, it is unclear on which side of that line NCLB would fall. It is more than 300% of "mild encouragement" but less than 8% of "a gun to the head."[115] Further guidance into this matter may come from the fact that no state refused to take money under NCLB.[116] It is certainly feasible to suggest that 100% buy-in from the states is an indicator that the size of the grant was large enough that the states could not simply leave it behind. This would seem to indicate that NCLB might have passed that line into coerciveness.

No doubt there will be discussion among commentators regarding the waiver California received in response to the AB 484 controversy.[117] Some are likely to argue that the waiver process provides an escape clause for states so they can avoid the dragooning effect of large Spending Clause enactments and reduce the coercive nature of such federal programs. That argument fails to address the gravity of the constitutional problem invoked by a coercive federal action. An administrative remedy that may or may not be granted to a requesting state is hardly sufficient to cure a major constitutional defect. Further, absent an "intelligible principle" that articulates the criteria the Department of Education uses in applying such waivers, there is a potential constitutional violation in that delegation itself.[118]

4. NCLB is Coercive

On balance, the factors delineated in *Sebelius* indicate that the structure of NCLB should be considered coercive. There are strong indicators that NCLB is a new program: a shift in kind rather than a shift in degree. It seems very unlikely

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

113. *Sebelius*, 132 S. Ct. at 2604 (deciding a grant was so large it must be coercive).

114. U.S. DEP'T OF EDUC., 10 FACTS ABOUT K–12 EDUCATION FUNDING 2 (June 2005), *available at* http://www2.ed. gov/about/overview/fed/10facts/10facts.pdf (on file with the *McGeorge Law Review*).

115. *See Sebelius*, 132 S. Ct. at 2604 (ruling that 20% of a state's budget is "a gun to the head" and distinguishing it from *Dole* which was less than one-half of one percent of the state's budget).

116. Pontiac v. Duncan, 584 F.3d 253, 284 (6th Cir. 2009) (Sutton, J., dissenting).

117. *See supra* Part I.

118. *See* Whitman v. American Trucking Assn., 531 U.S. 457, 472 (2001) (holding that Congress must articulate an intelligible principle to guide enforcement of a law when delegating lawmaking authority to executive agencies).

that the curricular and testing requirements under NCLB could have been predicted by state officials when they initially agreed to take advantage of the ESEA funds. Finally, while there may be some question of whether or not the size of the federal grant was as extreme as it was under the ACA, it is certainly plausible that the grant was large enough to coerce states into accepting it.

IV. PROPOSAL

If NCLB or any similar measure were invalidated due to coercion, what would the future hold for federal involvement in education reform? The answer may lie in realizing there are actual federal interests in public education above and beyond providing for the general welfare.

This section presents an argument that legitimate federal interests in public education can be found in both the Commerce Clause, controlling interstate commerce through public education, and in the Due Process Clause, protecting individual students' rights.

A. Federal Guarantee of Minimum Educational Outcomes

This proposal calls for the creation of specific and articulated minimum outcomes for all students. These outcomes should guarantee all Americans have a basic opportunity to participate in American governance and commerce. This is not a call for a national curriculum or even a common set of curricular standards, but a basic floor of skills and understandings that are essential to citizens of the United States.

1. Educational Outcomes Under Commerce Power

Congress explicitly has the authority to "regulate Commerce . . . among the Several States."[119] Between the mid-1930s and mid-1990s, the Supreme Court consistently upheld a very broad definition of this power.[120] However, in 1995 that trend ebbed somewhat in *United States v. Lopez,*[121] the first case in over fifty years that substantially limited the federal government's Commerce Clause authority.[122] While some commentators suggest *Lopez* explicitly denies Congress Commerce Clause authority in the field of public education,[123] the ruling is

119. U.S. CONST. art. 1, § 8.

120. *See, e.g.,* Wickard v. Filburn, 317 U.S. 211 (1942) (holding that Congress, under the Commerce Clause, could regulate the growth of wheat for personal consumption).

121. 514 U.S. 549 (1995).

122. *Id.*

123. Nicole Liguori, *Leaving No Child Behind (Except in States That Don't Do What We Say): Connecticut's Challenge to the Federal Government's Power to Control State Education Policy Through the Spending Clause*, 47 B.C. L. REV. 1033, 1072 n.263 (2006).

considerably narrower in scope. *Lopez* does not deny that there may be some Commerce Clause authority over education, moreover it actually lays out a test that seems to expressly allow Congress some control—just not the control it was exerting in *Lopez*.

Lopez ruled a provision of the Gun-Free School Zones Act of 1990 unconstitutional due to lack of congressional authority.[124] The Gun-Free School Zones Act made it a federal offense to knowingly possess a firearm in a school zone.[125] In dissent, Justice Breyer, joined by three other justices, justified Congresses' Commerce Clause authority by finding an impact on interstate commerce: firearms in schools could lead to an increase in school violence; an increase in school violence could lead to an inferior educational experience; and an inferior educational experience could lead to a decrease in potential workforce capabilities.[126] While the majority believed this connection was too attenuated,[127] they did admit, "[w]e do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process."[128] Thus, *Lopez* does not stand for a blanket rejection of federal power over education; it simply finds this particular attempt too attenuated. Moreover, in a concurring opinion, Justice Kennedy, joined by Justice O'Connor, articulated his concern that the federal law proscribes the method of enforcement.[129]

While it is doubtful that any State, or indeed any reasonable person, would argue that it is a wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various collations where the best solution is far from clear.[130]

Justice Kennedy's concerns stem from the notion that Congress is telling the states how to solve a problem, not that they are telling the states that they must solve a problem.[131]

2. *Distinguishing* Lopez

In *Lopez*, the Court identified the three categories of activity that Congress has the authority to regulate under the Commerce Clause.[132] Congress has the

124. *Lopez*, 513 U.S. at 551.
125. *Id.*
126. *Id.* at 619–20. (Breyer, J., dissenting).
127. *Id*. at 565.
128. *Id.* at 565–66.
129. *Id.* at 581 (Kennedy, J., concurring).
130. *Id.*
131. *Id.*
132. *Id.* at 558.

authority to regulate the use of channels of interstate commerce; the instrumentalities of interstate commerce, or persons or things in interstate commerce; and activities that substantially affect interstate commerce.[133] The establishment of a minimum educational guarantee reasonably falls into both the first and third of these categories.

Identifying a minimum educational guarantee is closely tied to the notion that school children are likely to become employed in some field that engages in interstate commerce. Therefore, the schools, at least to the extent that they are preparing students for the workplace, are channels of interstate commerce. While the Supreme Court has not addressed this notion directly, it emerges by connecting two ideas.

In *Wisconsin v. Yoder*,[134] the majority opinion analogized compulsory education laws to child labor laws: "The two kinds of statutes—compulsory school attendance and child labor laws—tend to keep children of certain ages off the labor market and in school; this regimen in turn provides opportunity to prepare for a livelihood of a higher order than that which children could pursue without education and protects their health in adolescence."[135] While this Comment calls for a minimal educational guarantee rather than a federal compulsory education law, the connection between the two is obvious: the only justification for a compulsory education law is that it provides some form of minimal education for children.

In *United States v. Darby Lumber Company*, the Court ruled that, among other workplace requirements, federal child labor laws were constitutional.[136] The rationale that the Court relied on was, in part, that these laws forbade companies from using injurious practices upon the citizens of one state in order to keep prices down, thereby creating an unfair business advantage over other states.[137] Lawrence Tribe expands upon this argument:

> Plainly, *Darby's* concept of what might make an object's use in the state of destination 'injurious to the public health, moral, or welfare' is broad enough to encompass a 'moral injury' of creating a market for, encouraging, or simply exploiting the fruits of, practices tolerated by the state of origin, and perhaps by the state of destination, but not by the nation at large.[138]

133. *Id.* at 558–59.

134. 406 U.S. 205, 227 (1972).

135. *Id.* at 228.

136. 312 U.S. 100, 117–121 (1941).

137. *Id.* at 117.

138. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 827 n.8 (2000).

If Congress has Commerce Clause authority to forbid child labor (*Darby*), it should have a similar control over child labor's conceptual antecedent, compulsory education, and, by proxy, minimal educational outcomes.

The policy in both cases is the same. One reason states would choose to allow child labor is to keep labor prices low and give companies within their borders a competitive advantage.[139] States (or districts) could have the same motivation to keep educational standards artificially low. Their citizens would not be competitive in a job market outside the state (or district) and would consequently lower the local cost of labor and give companies in that region a competitive advantage.

The creation of federal minimum education standards would also fall within the commerce power of Congress under the third prong of the *Lopez* Test: "activities that substantially affect interstate commerce."[140] In *Morrison*, the Court identified four factors it uses to determine whether an activity substantially affects interstate commerce.[141]

Two of the factors are procedural in function. The statute must have an "express jurisdictional element, that is, a clear statement of the rationale Congress is using in applying the Commerce Clause to the given statute.[142] This element is met simply enough during the drafting of new legislation by including a statement of legislative intent that addresses the statute's nexus to the Commerce Clause.

The other "procedural" element is that there must be congressional findings that suggest there is an effect on interstate commerce.[143] To meet this element, Congress would need to demonstrate that a failure to ensure that all children have basic educational competency has a deleterious effect on interstate commerce. This could be demonstrated by a showing that lower educational attainment leads to a difference in worker productivity or market value. Congress could also factor in the costs of retraining employees in the workforce to meet the basic competencies that could or should be assured by the public education system.

The other two factors to be considered are more substantive in nature. First, the court must determine whether the activity being controlled is some sort of economic endeavor.[144] The definition of an economic endeavor has historically included activities that are traditionally done for money.[145] In *Wickard v. Filburn*, the Court ruled that even grain cultivated for personal use could be controlled under the Commerce Clause because it had the potential to impact traditional

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139. *See Darby*, 312 U.S. at 115 (explaining that the purpose of the Act was to prevent states from using substandard labor conditions to gain a competitive advantage in the interstate marketplace.").

140. United States v. Lopez, 513 U.S. 549, 558–59 (1995).

141. United States v. Morrison, 529 U.S. 596, 610–12 (2000).

142. *Id.* at 611–12.

143. *Id.* at 612.

144. *Id.* at 610.

145. Wickard v. Filburn, 317 U.S. 111 (1942).

commercial agriculture..[146] Under this broad definition, the answer seems clear: education is something traditionally done for money. The first schools in the country were private and parents still spend over $40 billion on private schools today.[147] The fact that the government subsidizes local public schools with tax dollars does not make them any less an economic endeavor. Moreover, unlike *Lopez*, which dealt with a criminal statute,[148] this proposal calls for a quality-control statute in an economic arena.

The second substantive factor is the degree to which the effect of the proposed law on interstate commerce is direct or attenuated.[149] This Comment proposes legislation that directly impacts interstate commerce in that it would normalize a minimum level of output across states and would forbid states (or districts) to undercut each other in a race to the bottom. Unlike *Lopez*, where a series of assumptions are necessary in order to find an effect,[150] the effect here is clear: states need to assure that all students are prepared to be competitive in interstate commerce.

Under this analysis, the extent to which a federal statute can control minimum educational opportunities for students is limited. Federal outcomes must be minimum guarantees, not standards for all states, districts, schools, or children. Clearly the scope of these outcomes would be very contentious and, consequently, would need to be removed from a partisan process as far as possible. These guarantees should be established by a national, bipartisan consortium of higher education and business interests and should be aimed at a level which would provide all young people with a competitive opportunity for college admittance or a career. The dangers lie in setting these outcomes too high, making them impossible to meet, or making them too low, effectively rendering them moot.

3. Minimum Educational Outcomes Are a Fundamental Right

Beginning with *Meyer v. Nebraska* in 1923, the Court has addressed the question of whether education is a fundamental right.[151] However, it has yet to answer the question directly. If Congress identified a minimum level of education as a fundamental right, it could trigger the first case in which the Court was forced to decide this matter directly. This section will suggest that minimum

146. *Id.*

147. *K–12 Facts*, CTR. FOR EDUC. REFORM (Jan. 11, 2014, 5:20 PM), http://www.edreform.com/2012/04/k-12-facts (on file with the *McGeorge Law Review*).

148. United States v. Lopez, 513 U.S. 549, 551 (1995).

149. *Morrison*, 529 U.S. at 612.

150. *Lopez*, 513 U.S. at 558–59.

151. 269 U.S. 390, 399 (1923).

educational outcomes are within the "penumbras" and "emanations"[152] of explicit constitutional guarantees and should be protected under the Due Process Clause.

The major focus of Supreme Court decisions involving education and the Due Process Clause has been protecting parents, teachers, and sometimes students from the state implementing laws limiting educational opportunities.[153]

In *Meyer*, the court ruled that a state statute forbidding the teaching of a foreign language to students not yet fluent in English was a violation of the Due Process Clause.[154] While this case turned on the teacher's right to teach and the parent's right to allow the child to be taught,[155] in a broad pronouncement, Justice McReynolds suggested that liberty "denotes not merely freedom from bodily restraint, but also the right of the individual . . . to engage in any of the common occupations of life, [and] to acquire useful knowledge."[156] He goes on to say "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance."[157] This central idea was reinforced in 1968, in *Epperson v. Arkansas*, declaring unconstitutional a statute that forbade the teaching of evolution.[158]

Parents' rights to hold some degree of control over their child's education has also been identified as a fundamental right.[159] Moreover, school children have been given individual protection under both the Equal Protection Clause[160] and the Due Process Clause.[161] In fact, in *Brown v. Board of Education*, Chief Justice Warren seems to suggest that there is something about public education that makes it a particularly protected institution for civil rights: "We conclude that *in the field of public education* the doctrine of 'separate but equal' has no place."[162] While the Court in *Brown* avoided the due process question, this pronouncement certainly seems to demonstrate the Court was placing public education in a protected realm of its own.

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152. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

153. *See generally Meyer*, 269 U.S. at 400 (holding a teacher has the right to teach German to a child not yet proficient in English and a parent has the right to choose to have them learn that language); Pierce v. Soc'y of Sisters, 268 U.S. 510, 518 (1925) (holding parents have a fundamental right to send their children to private school instead of public school); Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (holding a science teacher has the right to teach evolution).

154. *Meyer*, 269 U.S. at 403.

155. *Id.*at 400.

156. *Id.* at 399.

157. *Id.* at 400.

158. 393 U.S. at 107.

159. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

160. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493–94 (1954) (holding that segregating school children by race is a violation of the Equal Protection Clause).

161. *See* Goss v. Lopez, 419 U.S. 565, 575 (1975) (finding school children have procedural due process rights in the context of suspensions and expulsions).

162. *Brown*, 347 U.S. at 495 (emphasis added).

Many commentators point to *San Antonio Independent School District v. Rodriguez*[163] (*San Antonio*) as definitively rejecting a fundamental right to a public education:[164] "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[165] While this pronouncement seems, initially, rather conclusive, it must be understood in context.

First of all, *San Antonio* was an equal protection case, not a due process case; consequently the discussion of due process is not controlling.[166] School children in San Antonio, Texas had sued the State claiming its school-funding mechanisms favored wealthier families.[167] The Court reasoned that the decision in *Brown* was not so broad as to guarantee that every student be funded at exactly the same level.[168]

Additionally, the majority later wrote: "Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [other constitutional] right[s], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short [of providing the necessary minimal skills]."[169]

Some lower courts have since expounded upon this view. In *Fialkowski v. Shapp*, the Eastern District Court of Pennsylvania distinguished the case at bar from *San Antonio* by saying that, in *San Antonio*, "the Court held that *when a state educational system affords minimally adequate educational opportunities to all children*, that some children are afforded greater opportunities than others does not amount to a denial of equal protection."[170] In *Valdez v. Graham*, the Middle District of Florida distinguished its case from *San Antonio* by saying: "that decision dealt with a claimed equal protection violation and, thus, is not controlling on a due process claim."[171]

Even the Supreme Court has appeared uncomfortable in determining that the decision in *San Antonio* forbade the federal government from setting the level of education the Constitution guarantees: "Public education is not a 'right' granted to individuals by the Constitution. But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation . . . In sum, education has a fundamental role in maintaining the fabric of our society."[172]

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163. 411 U.S. 1 (1973).

164. VICTORIA J. DODD, PRACTICAL EDUCATION LAW FOR THE TWENTY-FIRST CENTURY 111 (2003).

165. *Rodriquez*, 411 U.S. at 35.

166. *Id.* at 28.

167. *Id.* at 4–5.

168. *Id.* at 23–24.

169. *Id.* at 36.

170. 405 F. Supp. 946, 958 (E.D. Pa. 1975) (emphasis added).

171. 474 F. Supp. 149, 157 (M.D. Fla. 1979).

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

Moreover, even the most recent decisions on this issue came more than thirty years ago.[173] In that time, the field of education and the international economy have shifted to such a great extent that the Court could rule that, in our modern economy, a minimum educational guarantee is absolutely a fundamental right. As laid out in *Planned Parenthood v. Casey*, one legitimate reason for overruling a previous decision is a change in facts that renders the previous decision obsolete.[174] The vast changes in public education and the global economy since *San Antonio* was decided in 1973 suggest the "identifiable quantum of education" may have grown large enough to warrant specific constitutional protection.

The key to creating a federally guaranteed minimum level of education is keeping it specific enough that it can be considered "some identifiable quantum of education [that] is a constitutionally protected prerequisite to the meaningful exercise of [the right to free speech or the right to vote]."[175] While this would certainly be a contentious determination, it seems clear that it would include basic reading and writing skills, fundamental mathematics, some civics and history, and potentially some science. A nonpartisan group would need to draft these outcomes, being sure to draw the standards around preparing a child to speak, write, and vote—but not what to say or how to vote.

4. Limited Spending Power Authority

While this Comment does call for the dismantling of most of NCLB and a shift of focus from Spending Clause authority to Commerce and Due Process Clause authority, it does not suggest that the federal government completely abolish all spending programs. Rather, spending programs must be adjusted to meet the requirements laid out in *Pennhurst*.[176] They should be optional, specific, limited in scope, and unambiguous.[177] While the call for federal guarantees eliminates the need for many of the proposals under NCLB and discretionary block grant funding, Spending Clause power is still appropriate for what has historically been considered categorical funding.

Furthermore, states could not shoulder the burden of a complete loss of federal funding. This proposal calls for little actual reduction in state funding. Instead, it calls for a return to the process of earmarking federal funds for specific programs schools may accept or decline without any effect on which other funds may be available. The federal government could reduce some costs by reducing

173. *Id.*

174. 505 U.S. 833, 855 (1992).

175. San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 36 (1973).

176. 451 U.S. 1 (1981).

177. *See id.* (holding Federal law did not create substantive rights enforceable against states because those rights were not explicit in the statute).

certain monitoring expenses, but the remainder of spending should remain at the same level. The government should break spending down into programs that states or districts know how to accept.

B. A Civil Rights Remedy

Any right to a minimum education prescribed by Congress must have an accompanying remedy in order to be meaningful. The creation of a federal statute guaranteeing a minimum education to all children should explicitly contain language articulating that a violation of this right could result in a civil action under 42 U.S.C. § 1983.

Under 42 U.S.C. § 1983, an individual has a federal claim against any "person" who violates his civil rights while acting in an official capacity and under color of state law.[178] Courts have interpreted *person* to include governmental bodies where appropriate.[179] Case law indicates that in order to bring a claim, section 1983 must specifically protect the right in question.[180]

In this context, a section 1983 claim would arise when a school, district, or state, by means of official policy or procedures, fails to provide a student with the specific educational outcomes guaranteed by the statute.

The remedy in these actions could parallel existing federal remedies for students whose rights have been violated in other ways. For example, the Individuals with Disabilities Education Act (IDEA) already entitles students who suffer from specific learning disabilities to reimbursement for a private school education if there is a material breach of his or her learning plan.[181]

A similar remedy for a violation of this proposed statute would be appropriate. If a student can show that certain fundamental outcomes have not been effectively met by a certain age, the state, district, or school could be required to provide additional services on site, require the student to repeat a grade or enter a targeted intervention program, or pay for private school tuition.

C. Expected Challenges with a Civil Rights Proposal

The proposal to replace the bulk of NCLB with a federally guaranteed minimum education and a section 1983 remedy is fraught with political and policy concerns above and beyond the constitutional concerns already discussed. Among these are claims of immunity, the possibility of inviting enormous amounts of litigation, and the argument that a federal guarantee is a "power grab"

178. 42 U.S.C. § 1983 (2006).

179. Monell v. Dep't. of Soc. Serv., 436 U.S. 658, 690 (1978).

180. Gonzaga Univ. v. Doe, 536 U.S. 273, 280 (2002).

181. Rapp, *supra* note 16, at §10C.13[4][a].

that violates the traditional relationship between state and federal governments. Proper drafting could mitigate each of these concerns.

1. School Districts Are Not Immune From Federal Suits

The Eleventh Amendment generally provides states with immunity from federal suits.[182] This immunity, however, does not apply to school districts.[183] Consequently, there would be no constitutional bar preventing individuals from suing the school district (or districts) they attended in a section 1983 action.

2. There Will Not Be Crushing Liability

There is an enormous public policy concern that a statute of this sort would encourage massive amounts of both frivolous and justified litigation against school districts that are already strapped for cash. Language regarding the minimum outcomes would need to be clear, specific, and concrete—leaving very little room for judicial interpretation.

Moreover, the threat of litigation would likely be exactly the "stick" needed to encourage school districts to create appropriate intervention, monitoring, and support strategies in order to best support students.

Lastly, limiting the statue to equitable, rather than legal, remedies would prevent students or parents from using the statute as an avenue to "get rich quick."

3. Overcoming Political Resistance

In addition to these concerns, there would be considerable political resistance to the implementation of federal guarantees. Contemporary rhetoric regarding the "common core standards" is a likely prelude to the interests of the major players in this debate.[184] To assuage concerns, it is essential that the statute contain clear language as to the functions of these guaranteed minimums. A recent study suggests a significant majority of both Democrats and Republicans support an intra-state set of standards as long as they are not called "the Common Core" standards.[185]

The first concern would be that by declaring guaranteed federal outcomes, Congress may be "dumbing down" more strenuous local and state standards. It is

182. U.S. CONST. amend. XI.

183. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

184. *See e.g.*, Stan Karp, *The Problems with the Common Core*, RETHINKING SCHOOLS, Winter 2013–14, at 10 (identifying some of the perceived problems of the Common Core movement including increased testing, less local control, concerns about federalism, and unfunded mandates).

185. LOUISIANA STATE UNIVERSITY PUBLIC POLICY RESEARCH LAB, PUBLIC SUPPORTS COMMON STANDARDS WHEN NOT CALLED 'COMMON CORE' (Mar. 2015), *available at* https://sites01.lsu.edu/wp/pprl/files/2012/07/LA-Survey-Report-2015-Fourth-Report-CommonCore.pdf (on file with the *McGeorge Law Review*).

imperative, in this regard, to stress that the constitutional guarantees are a floor and not a ceiling. States, districts, and schools should be encouraged to develop their own standards that build off of the federal guarantees and tailor them more closely to the specific needs of their communities.

Other contingents would argue that the school teacher, not the federal government, is in the best position to determine how to teach students. This statute must reflect that concern and make it clear that this is not the creation of a federal curriculum. Nothing in the language of the statute should suggest how the guarantees are to be taught or assessed. In fact, the statute should specifically state that the manner in which the guarantees are delivered is the province of the states, districts, schools, and teachers to determine.

V. CONCLUSION

In order to comply with contemporary constitutional understandings, the role of the federal government in public education must be profoundly changed. While some specific, narrowly tailored spending programs are both appropriate and essential, massive federal oversight, masked in the cloak of optional funding programs, must be reined in. Instead, Congress should articulate a base set of constitutionally protected educational guarantees for all students, giving the states, districts, and schools the authority to meet those guarantees in the way they find most appropriate. Congress can aid the states in accomplishing these goals with specific funding for particularly difficult or expensive programs, but the manner in which these funds are used should be reserved to the states. Through this proposal, we can guarantee the right to a basic education in a constitutional, pedagogically appropriate manner.