The Unintended Legal and Policy Consequences of the No Child Left Behind Act (The 2006 Winthrop and Frances Lane Lecture)

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Michael Heise*

The 2006 Winthrop and Frances Lane Lecture:

The Unintended Legal and Policy Consequences of the No Child Left Behind Act

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I. INTRODUCTION

The increasingly congested intersection of law and public policy is fraught with unintended consequences. Perhaps nowhere is this more true than in the education area. Recent decades provide provocative examples. Court desegregation decisions endeavoring to increase school integration levels—especially court decisions mandating forced busing in many urban public school districts—paradoxically fueled suburban migration for many families with school-age children and departures from public to private schools. One result is a reduced possibility of district-level school integration in many urban areas, especially in the North.

School finance litigation battles have also generated unintended consequences. For example, in California, judicial orders to equalize per pupil spending state-wide through a more centralized school funding system led to a sought-after dilution of the historically tight nexus between local property wealth and school and per pupil spending levels. Consequently, California property owners can no longer safely assume that local taxing efforts will largely benefit local schools. Not surprisingly, property owners' willingness to tax themselves for the benefit of public schools diminished. Although a precise causal account is both contested and complex, what is objectively clear is that California, once among the nation's leaders in terms of its willingness to invest in public elementary and secondary education, dropped precipitously in the aftermath of the Serrano decision. To be sure, while Serrano is certainly not the only reason for the decline in per pupil spending in California, it is certainly among the reasons. While the Serrano plaintiffs sought to equalize per pupil spending by raising the spending floor, they learned that judicially-mandated equalization could also be achieved by lowering per pupil spending ceilings.

2. Id. at 174.
5. A California lawmaker put the point aptly: "If the schools must actually be equal (in terms of per pupil spending), they are saying, 'then we'll undercut them all.'"
The No Child Left Behind Act of 2001 (NCLB), a recent and, to many, dramatic exercise of federal authority in the K–12 education context, contributes to a tradition of unanticipated consequences. Although a complete picture of the consequences—expected and unexpected—flowing from NCLB is far from clear, the general contours of two unanticipated consequences—one legal and the other policy—have emerged with sufficient clarity. Legally, school finance activists increasingly rely on NCLB-generated evidence to support lawsuits demanding increased school spending. On the policy front, some states have diluted their student performance requirements to blunt the threat of NCLB-related sanctions. Ironically, public attention to these unexpected results has deflected public attention away from questions about whether NCLB has accomplished what it set out to achieve—improve student achievement and reduce achievement gaps.

NCLB triggered these unintended consequences and fundamentally changed American education federalism. Through NCLB, the federal government now exerts far greater policy control over the nation's elementary and secondary schools. As many commentators have already noted, NCLB relies on Congress' conditional spending authority for its regulatory basis. Thus, in exchange for developing "rigorous" student proficiency standards (among other conditions), states, if they so choose, become eligible to participate in NCLB and receive federal education funding.

By seeking to hold states accountable for student performance while allowing states to define for themselves student performance thresholds (so long as they are rigorous), NCLB endeavors to tread lightly on delicate and uncertain federalism terrain. Professor Jim Ryan aptly notes that by structuring NCLB as it did, Congress sought to straddle the "federalism fence." According to Ryan, the case for direct federal education regulation of state standards could be made if it was "determined that states cannot be trusted." Writing in 2004, Professor Ryan concluded that "there is not enough empirical evidence to make a conclusion one way or the other." Although more evidence

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11. Id. at 988.
12. Id. at 987.
exists three years later, inconclusive evidence persists. Moreover, given the variation among states, perhaps a single conclusion for the entire country is not prudent. Nevertheless, pressure builds to revisit the issue of permitting states to retain the ability to set their own student performance standards. As a legal matter I have argued elsewhere that it is reasonably clear that the federal government possesses the requisite constitutional authority to directly regulate student performance thresholds incident to NCLB. Whether this makes for good education policy, however, is far less clear. A case study of Nebraska’s experience with its student assessment program and NCLB illustrates some of the complexities.

This article proceeds in three parts. Part II briefly describes NCLB’s basic statutory architecture. Part III explores two unanticipated consequences: increased school finance litigation exposure and states’ dilution of student performance standards. Part IV assesses a few ways in which Nebraska’s experience with NCLB illustrates how some of the necessary costs incident to our federalism structure informs elementary and secondary education policy.

II. NO CHILD LEFT BEHIND AND THE PUSH FOR STUDENT ACHIEVEMENT AND SCHOOL ACCOUNTABILITY

Critics and proponents agree that NCLB represents a significant departure from the federal government’s traditional posture regarding policymaking for the nation’s public elementary and secondary schools. NCLB’s vast scope contributes to this stark departure from the status quo. NCLB implicates every public K–12 school regardless of whether a school receives Title I funding. The imposition of school and district accountability for student academic progress drives NCLB’s vast expansion of federal engagement with local school policy.

13. See, e.g., Sam Dillon, President’s Initiative to Shake Up Education is Facing Protests in Many State Capitals, N.Y. TIMES, Mar. 8, 2004, at A12; Paul E. Peterson & Martin R. West, Is Your Child’s School Effective?: Don’t Rely on NCLB to Tell You, EDUC. NEXT, Fall 2006, at 76–80.
16. NCLB involves every state as all states receive some level of federal Title I funding. Not every individual school district within a state, however, receives Title I funds. Nevertheless, various parts (but not all) of NCLB apply even to districts that do not receive Title I funds. For a helpful summary of NCLB’s key parts, see Ryan, Perverse Incentives, supra note 10, at 942 (noting NCLB’s broad statutory reach).
NCLB enlists the imposition of greater accountability into the service of boosting student achievement generally, and reducing—to the point of elimination—achievement gaps among various student subgroups.17

To accomplish these laudable goals, NCLB requires states to develop and meet challenging academic standards,18 annually test students to assess progress toward state standards,19 and gather and disseminate relevant information to parents and others.20 At the heart of NCLB is the requirement that schools demonstrate adequate yearly progress or face increasingly onerous sanctions.21 NCLB's broad regulatory focus differs from earlier federal statutory forays into education policy which typically dwell on either specific types of schools, such as those predominately serving children from low-income households,22 or discrete subpopulations of students, such as those with qualifying disabilities.23

By upsetting the education policy status quo, NCLB invites resistance. Indeed, NCLB continues to generate substantial pushback on both the legal and political fronts. NCLB quickly triggered a number of lawsuits challenging the Act on various grounds.24 Thus far, these

lawsuits have not been especially effective.  

On the political front, however, the prospects for influencing NCLB appear more promising. That NCLB is due for reauthorization in 2007 highlights the potential for change. In addition, the recent change in congressional control, from Republican to Democratic control, will likely increase the prospects for changing NCLB. Congressional Democrats have already signaled a desire to allocate even more federal dollars toward schools laboring under NCLB. Finally, even before the recent 2006 mid-term elections, President Bush's Education Secretary, Margaret Spellings, displayed a robust appetite for NCLB rule waivers, despite strong public rhetoric to the contrary.

III. NO CHILD LEFT BEHIND'S UNANTICIPATED CONSEQUENCES

Whether NCLB is accomplishing its goals remains contested. That NCLB has generated unanticipated consequences is uncontested. These unanticipated consequences influence school finance lawsuits and state student performance standards.

A. Legal Consequence: Increased School Finance Adequacy Litigation Exposure

The passage and implementation of NCLB helped solidify the interaction between adequacy litigation and the standards and assessments movement. Under NCLB, those states that had not already

25. For example, in School Dist. of City of Pontiac v. Spellings, a federal district court recently granted Secretary Spellings's motion to dismiss the lawsuit. See No. Civ. A. 05-CV-71535-D, 2005 WL 3149545, at *5. The court concluded that as a matter of law, even if NCLB required states to spend state funds to comply with NCLB, Congress (though not an "officer or employee of the Federal Government") possesses such authority under its conditional spending authority. Id. at *4 (quoting 20 U.S.C. § 7907(a) (Supp. II 2002)). The Connecticut lawsuit is ongoing. See Robert A. Frahm, Commission Gets No-Child Earful, HARTFORD COURANT, May 10, 2006, at B1. See generally Benjamin M. Superfine, Using the Courts to Influence the Implementation of No Child Left Behind, 28 Cardozo L. Rev. 779, 782 (2006) (characterizing the litigation effort on the NCLB implementation front as ineffective).


28. Sam Dillon, Education Law is Loosened for Failing Chicago Schools, N.Y. TIMES (Sept. 2, 2005), at A12; Lois Romano & Shankar Vedantam, 'No Child'Rules to be Eased for a Year, Schools Would Have to Show That Displaced Students Hurt Test Scores, WASH. POST (Sept. 30, 2005), at A10.

29. See, e.g., Bumiller, supra note 8.

30. No Child Left Behind Act of 2001 § 1001, 20 U.S.C. § 6301 (Supp. IV 2004). For a more complete discussion of NCLB and its specific statutory provisions, see Andrew Rudalevige, No Child Left Behind: Forging a Congressional Compromise, in
done so were required to establish school accountability systems that annually assess student proficiency in math and reading. A sliding scale of NCLB-specific consequences befalls any school that does not achieve adequate yearly progress. Thus, a school's failure to achieve sufficient student achievement and progress now generates liability under federal law. The full contour of NCLB liability was not fully appreciated, however, until school finance activists, in school finance litigation, began to advance inadequate yearly progress under NCLB as legal proof of inadequate education.

Changes in school finance litigation theory and doctrine help explain how NCLB informs litigation efforts. After the U.S. Supreme Court's decision in *San Antonio Independent School District v. Rodriguez* 31 effectively closed the federal door to school finance challenges, litigants turned to state courts and state constitutions. Litigants have challenged school finance schemes in over forty states, and nearly twenty state supreme courts have declared their respective school funding programs unconstitutional. 32 Prior to 1989, those challenging school finance systems generally sought to equalize resources among districts within a state by pursuing an equity theory. 33 Since 1989, however, adequacy-based challenges have largely supplanted equality-based claims. Modern school finance litigation contends not that all students are entitled to the same resources, but rather that all students should receive the funds necessary to finance an adequate education. 34 Indicia of school adequacy are critical to the success of adequacy-based lawsuits.

NCLB data and annual yearly progress (AYP) determinations directly speak to assessments of school adequacy. Specifically, NCLB and AYP data supplement the evidentiary foundation for school finance adequacy lawsuits. At the individual student level, the more poorly students perform on academic assessments the better it is from a litigation standpoint. Similarly, at the school level, a determination that a school failed to achieve AYP under NCLB greatly assists litigants seeking to establish that such a school is "inadequate" in a school finance adequacy lawsuit. That states set their own student

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32. For descriptions of, and citations to, the cases, see James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 266–69 & nn.70–86 (1999).
34. See Ryan, *Schools, Race, and Money*, supra note 32, at 268–69 (describing the shift in theories and pointing out that not all cases since 1989 have shifted from equity to adequacy claims).
performance thresholds make such determinations even more powerful. To the extent that school finance litigants seek to transform failure in the classroom into success in the courtroom, NCLB can provide invaluable evidentiary support.

1. Kansas

Recent adequacy litigation in Kansas illustrates how school finance adequacy litigants leveraged state standards and NCLB consequences into a successful legal claim for greater resources. The Kansas Constitution, as amended in 1966, requires the legislature to "make suitable provision for finance of the educational interests of the state." To fulfill its constitutional duty, in 1992, Kansas lawmakers passed the School District Finance and Quality Performance Act ("SDFQPA"). The SDFQPA created a statewide property tax and a statewide system for collecting and distributing property tax revenues. Although the SDFQPA begins from a presumption of equal per pupil spending, the presumption is modified by district-specific weighting factors. In addition, the SDFQPA established a guaranteed state per pupil floor along with an accountability system tied to state minimum student performance standards in specific subjects. Despite a guaranteed per pupil spending floor, a school finance lawsuit challenging SDFQPA succeeded in 2003.

NCLB data played a role in the court's conclusion that SDFQPA violated the Kansas Constitution. Specifically, part of the court's rationale for striking down the Kansas school finance system pivoted on student academic performance. In assessing whether student academic performance evidenced "adequacy" from a school finance perspective, the Kansas trial court assessed performance data generated by NCLB.

Notably, in the Kansas school finance litigation, both parties turned to NCLB data to support their respective (and opposing) legal positions. The plaintiffs introduced 2002 and 2003 math and reading proficiency scores for 5th, 8th, and 11th grade students, by racial and

36. KAN. CONST. art. VI, § 6.
40. Id. at *45.
41. Id.
ethnic cohort, into evidence. The data revealed substantial achievement gaps between and among various student cohorts. The court noted that this evidence was both "informative and disturbingly telling." The court then quickly ascribed the students' poor academic performance to inadequate school funding.

The defendant schools and districts also sought legal refuge from student academic performance as defined by NCLB. Despite the glaring student achievement gaps among various student sub-groups highlighted by the plaintiffs, these gaps were not enough to preclude the schools and districts from achieving AYP under NCLB. Achieving AYP under NCLB, the defendants reasoned, conclusively demonstrated that the schools and districts provided an adequate education from a school finance perspective.

The court, however, dismissed the defendants' interpretation of the student achievement data and noted that the districts could still achieve AYP requirements even though, for the 2002 and 2003 school years, up to 56 percent of all K–8 graderers, and 48 percent of high school students, could fail the reading standard. For math performance, AYP standards tolerated a 53 percent failure rate for K–8 and a 70 percent failure rate for high school students.

The Kansas experience evidences some courts' willingness to treat NCLB student achievement data asymmetrically in the adequacy litigation setting. Although courts—such as the Kansas court—are willing to conclude that a district's failure to achieve AYP evidences inadequate education, courts appear reluctant to conclude that a district's achievement of AYP evidences adequate education. Of course, how any particular court chooses to interpret AYP determinations for purposes of school finance adequacy is less important than the willingness of both defendants and plaintiffs to use NCLB data. That both parties to the school finance lawsuit turned to NCLB data underscores the Act's robust role in the school finance litigation context.

B. Policy Consequences: Standards' Dilution & Federalism Strain

Unanticipated consequences from the implementation of NCLB are not limited to increased legal exposure for school districts and states. NCLB also influences education policy in some states by contributing to the dilution of student proficiency standards. This policy consequence, if nothing else, is richly ironic. NCLB inadvertently contrib-

42. Id. at *47.
43. Id.
44. Id. at *49.
45. Id. at *41.
46. Id.
47. Id.
utes to states' rolling back student proficiency thresholds in its well-intentioned desire to improve student academic achievement and reduce achievement gaps among various student sub-groups. Moreover, the unanticipated legal and policy consequences relate in a critical way: the legal consequence partly explains the policy consequence. Specifically, by reducing its student proficiency standards a state increases the likelihood that it will achieve AYP under NCLB, thereby decreasing (but not eliminating) its school finance litigation exposure.

1. Student Proficiency Standards: Reversing a Race-To-The-Top

Potentially increased exposure to school finance adequacy lawsuits (as well as other adverse consequences to states and local school districts flowing from NCLB), fueled partly by a school's inability to achieve AYP, prompted some states to dilute their student proficiency standards.\(^48\) Such a result should surprise few. State lawmakers are far more reluctant to establish bold student proficiency standards in an effort to stimulate improvement now that litigants can transform such standards into legal entitlements for additional education resources.

During the early 1980s, motivated in part by the publication of the Nation At Risk report,\(^49\) as well as by a healthy dose of political ambition, a set of young governors—principally from Southern states—made education reform a priority.\(^50\) Prominent in their education reform pushes was a focus on developing and implementing challenging student performance standards. Writing in 1986 for the Chairman's Summary for the National Governor's Association report, Time For Results,\(^51\) then-governor Lamar Alexander underscored the governors' collective commitment to meaningful standards and assessments.\(^52\) Indeed, many governors boasted about their rigorous student performance standards and tethered them to efforts to make their states more economically competitive.\(^53\)

\(^{48}\) See, e.g., Ryan, Perverse Incentives, supra note 10, at 946–48.


\(^{50}\) These governors included: Lamar Alexander (Tennessee), Bill Clinton (Arkansas), Bob Graham (Florida), Dick Riley (South Carolina), John Ashcroft (Missouri), and Tom Kean (New Jersey). This gubernatorial coalition included, most famously, a U.S. President (Clinton), two U.S. Secretaries of Education (Alexander and Riley), and five U.S. Senators (Alexander, Ashcroft, Bill Clinton, Kean, Riley, and Graham).


\(^{52}\) Id. at 4.

Two critical changes have taken place since 1986. First, in 1989, the education reform world was altered when the Kentucky Supreme Court ushered school finance adequacy theory onto the legal stage.\textsuperscript{54} Under adequacy theory, litigants abandoned the contention that all students are entitled to the same resources in favor of the argument that all students should receive the funds necessary to finance an adequate education. In this context, adequacy is construed principally in terms of student academic performance.\textsuperscript{55} Second, in 2001 Congress passed,\textsuperscript{56} and in early 2002 President Bush signed, NCLB into law.\textsuperscript{57} These two changes altered the legal terrain and helped re-cast states' policy efforts to implement rigorous student achievement standards in a manner that enhanced legal liability for states and school districts.

The new legal terrain, the prospect of NCLB liability, the experience of districts failing to achieve AYP, and attendant parental, homeowner, and voter expressions of concern understandably disquiet many state policymakers and assuredly influence modifications to student performance standards. Although it remains impossible to discern with absolute certainty what states would have done absent NCLB and the emergence of school finance adequacy litigation, it is clear that, at best, the new legal terrain generates a dilemma for states. At worst, it creates a palpable incentive for states to dilute their academic standards and proficiency thresholds. States with rigorous proficiency standards increase their potential to fail AYP thresholds and trigger NCLB sanctions. Conversely, states with comparatively weak proficiency standards are better positioned to successfully navigate NCLB requirements.

The adverse incentive influenced state student standards. Prior to the emergence of school finance adequacy lawsuits and NCLB, many states engaged in something resembling a race-to-the-top when it came to developing and implementing rigorous student proficiency standards. The emergence of adequacy litigation, accelerated by state standards and assessments and NCLB consequences, had the effect of reversing a race-to-the-top as states have responded by diluting student proficiency standards.\textsuperscript{58}

\begin{footnotesize}
\begin{enumerate}
\item For a general discussion of the movement from school finance equity to adequacy theory and possible explanations for it, see Heise, \textit{State Constitutions}, supra note 33.
\item See Superfine, supra note 25, at 787.
\item Ryan, \textit{Perverse Incentives}, supra note 10, at 948 n.77 (noting that such states as "Louisiana, Colorado, Connecticut, and Texas have all tinkered with their [student] scoring systems in order to increase the number of students who will be deemed proficient for purposes of the NCLBA."). See also David C. Hoff, \textit{States}
New York's experience, while perhaps more ambiguous as it relates to the reaction to NCLB, vividly illustrates this trend and also illustrates why states fear a potential financial sting flowing from high student performance standards, how this potential can come into fruition, and the potential magnitude of the stakes involved.

Prior to 1996, as almost all New York residents with school children know well, the state awarded high school diplomas to graduates and the more prestigious Regents Diploma to those students that demonstrated the necessary level of academic achievement. Then in 1996, the New York State Board of Regents voted to require that student achievement at the state's prestigious Regents Standards was necessary for every student desiring a diploma from a New York public high school.59 In 2003, however, the Board of Regents voted to delay imposing the higher standard for two additional years.60 New York also retreated on other fronts by lowering the passing score threshold and the required number of proficiency exams.61 Indeed, it remains unclear whether, how, or when New York will fully implement its Regents Standards state-wide, as well as whether the Regents Diploma will ever reflect the standards that existed prior to 1996.

The intersection of New York's Regents Standards and school finance litigation was hammered home to all New York taxpayers when the state's highest court brought contentious school finance litigation that persisted for more than a decade to a close. After protracted litigation, New York's highest court imposed on state taxpayers, at a minimum, an additional $1.93 billion for New York City's public schools.62 A critical piece of the plaintiffs case—and the original trial court decision—involved results from New York's Regents Standards tests.

Prior to 1996, New York State's Regents Standards were among the nation's most rigorous. The standards’ rigor, however, guaranteed a steady stream of students who failed to achieve the coveted New York Regents Diploma. New York City successfully leveraged its students' struggles on Regents tests as evidence of the state's failure to provide an adequate education.63 During the 1998–99 school year, for example, the court noted that fourth and eighth-grade New York City school children dramatically underperformed their counterparts.

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60. Id.
61. Id.
across the state.\textsuperscript{64} Although the court took great pains to note that it was not prepared to equate New York's Regents Standards with the threshold for adequacy,\textsuperscript{65} New York City's school finance lawsuit pivoted partly on the assumption that adequate funding is the amount necessary to ensure that New York City's students perform at a level commensurate with their counterparts state-wide.

2. \textit{NAEP's Failed Assumption}

Given the potential financial exposure to a school finance judgment, it is quite clear in hindsight why lawmakers in New York (and elsewhere) started diluting student performance standards. Such a race to the bottom, however, was precisely what an under-appreciated requirement under NCLB sought to deter. Perhaps understanding the potential that states might react to NCLB by diluting state student performance standards, NCLB also made mandatory what was once voluntary: state participation in National Assessment of Educational Progress (NAEP) testing.\textsuperscript{66} NCLB requires states to submit a sample of their fourth and eighth graders to NAEP reading and math tests every other year.\textsuperscript{67} Until NCLB, state participation in NAEP testing, the nation's only true metric that facilitates comparisons of student achievement across states (and across nations) was voluntary. Some states, anxious to see how their students fared in comparison to their counterparts in other states, willingly participated in NAEP testing prior to NCLB's enactment. Other states did not. Although NAEP test results do not trigger any NCLB sanctions, by mandating state participation in NAEP testing, NCLB ensures one common national assessment of student performance.

The need for a common national assessment of student achievement is important because NCLB affords states tremendous latitude in setting their own student performance standards. Variation in state standards frustrates comparisons of student performance across states. Mandating state participation in NAEP was designed, in part, to establish one external check on student achievement. NCLB proponents assumed that the threat of embarrassment flowing from a state reporting that its students performed exceptionally well on state tests but poorly on NAEP would blunt a state's desire to dramatically lower its student performance standards.\textsuperscript{68}

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id.} at 484--84 (noting the court would use Regents test data with "prudence").


\textsuperscript{67} \textit{Id.}

If NCLB proponents assumed that the specter of public embarrassment from unflattering comparisons of state and NAEP assessments would blunt a state’s impulse to dilute its state student achievement standards, they were wrong.\textsuperscript{69} If the legal and related financial exposure from school finance litigation did not provide enough incentive to dilute standards, the political pressures incident to failing to achieve AYP under NCLB supplied additional incentive.\textsuperscript{70} Finally, the preferences of historically strong performing suburban districts,\textsuperscript{71} as well as a distaste for the increased emphasis on standardized student achievement testing,\textsuperscript{72} provided even more political pressure to dilute student achievement standards, notwithstanding NAEP.

Increased legal and financial liability, public embarrassment from comparisons between state and NAEP student achievement data, political discomfort generated by the annual requirement of meeting AYP, and increased attention to standardized testing generate a dilemma for many states: the maintenance of high student proficiency standards now comes with a price—and the price can be steep. As it relates to the potential financial price (triggered by NCLB or legal liability from a successful school finance adequacy lawsuit), in a world of ever-increasing claimants on state resources, the policy path of least resistance becomes even more attractive to many lawmakers. Increasingly, this policy path is for states to relax student performance standards. Early evidence, while far from definitive, suggests that many states are responding in exactly this manner.

**IV. NEBRASKA, FEDERALISM, AND NO STATE LEFT BEHIND**

At one level, NCLB illustrates the law of unintended consequences. NCLB provides an accelerant to school finance litigation and incents states to dilute student performance standards. At a more abstract and theoretical level, however, NCLB provides an important lesson on federalism. As Nebraska’s experience illustrates, NCLB’s structure conveys uncertainty about or discomfort with the proper allocation of policymaking authority among the federal, state, and local actors in the education context.\textsuperscript{73}

\begin{itemize}
  \item \textsuperscript{69} See supra note 58 and accompanying text.
  \item \textsuperscript{70} Ryan, Perverse Incentives, supra note 10, at 944–52.
  \item \textsuperscript{73} For a more general discussion see Heise, Federalism, supra note 14.
\end{itemize}
A. Standards, Assessments, and Conflict Over Control

Federal lawmakers "blinked" in terms of their willingness to push the federalism boundary by assigning to the federal government authority to impose sanctions for failing to achieve AYP, while giving the states the authority to develop their own student assessment systems and define student proficiency. Of course, NCLB requires that state assessment systems must be "rigorous" and receive U.S. Department of Education approval. Nevertheless, while NCLB seeks to hold states accountable for unacceptable student academic progress, NCLB largely permits states to define for themselves what constitutes acceptable and unacceptable student performance. Whether NCLB's structure reflects uncertainty about the reach of Article I authority or represents a necessary political compromise is unclear. What is clear, however, is that NCLB generated criticism by endeavoring to split the federalism atom.

Nebraska's experience with student assessment systems, required for those states participating in NCLB, illustrates some of the inevitable problems that flow from efforts to straddle the "federalism fence." Prompted by state legislation passed during the 2000 session and subsequently informed by the passage of NCLB, Nebraska policymakers undertook the development of its STARS accountability system. Unlike most states that implemented state-wide assessment instruments, Nebraska's more than 500 school districts developed local assessment instruments consistent with state standards. Nebraskans pursued a decentralized approach to avoid pressuring local school districts or inducing undue curriculum narrowing. Nebraska's approach, however, was not without risk as its protracted struggle with the U.S. Department of Education regarding assessment approval illustrates.

Nebraska's most recent tussle with the federal government began on June 30, 2006, when the U.S. Department of Education notified the Nebraska Commissioner of Education that Nebraska's STARS assess-

75. 20 U.S.C. § 6311(e)(1).
76. As to the reach of Article I authority in this context I have previously argued that Congress' conditional spending authority would enable it to regulate student achievement proficiency levels. See Heise, Federalism, supra note 14.
77. Ryan, Perverse Incentives, supra note 10, at 987.
78. L.B. 812, 96th Leg., 2nd Sess. (Neb. 2002).
79. STARS stands for "School-based, Teacher-led Assessment and Reporting System."
80. Pat Roschewski et al., Nebraskans Reach for the STARS, 82 PHI DELTA KAPPAN 611, 613 (2001).
ment system failed to meet NCLB’s accountability requirements.81 Needless to say, the U.S. Department of Education’s finding did not sit well with Nebraskans in general and the state’s chief education officer, Doug Christensen, in particular. In a letter to Nebraskans, Christensen expressed his dismay and noted, among other points of objection, his distinct dissatisfaction that the federal government, which contributes “less than 9% of the funding [for education in Nebraska],” nonetheless manages to “leverage[] 100% of the accountability.”82

Although the U.S. Department of Education’s hesitation over STARS did not specifically reference the gap between the percentage of Nebraska students the state reported as “proficient” and the percentage of Nebraska students that achieved proficiency on NAEP tests (Figures 1 and 2), given the growing public attention to such gaps, it is hard to imagine federal officials were unaware of them.83 Regardless of the federal government’s motivation for denying certification to Nebraska’s STARS program, access to 25% of the Nebraska Department of Education’s federal Title I administrative fund allocation for fiscal year 2006 (totaling $126,741) was at immediate risk.

The immediate financial threat to Nebraskans was blunted, however, when the U.S. Department of Education softened its original position incident to a formal appeal by Christensen.84 On September 15, 2006, after a review of Nebraska’s appeal, the Department redesignated Nebraska’s standards and assessment system as “Approval Pending.”85 While the redesignation means that Nebraska’s STARS assessment system remains noncompliant with NCLB requirements, based on assurances from the Nebraska Department of Education, the U.S. Department of Education now expects that certain conditions (including a requirement to complete a peer-review process) will be satisfactorily completed by the end of the 2006–07 school year. The federal government’s “Approval Pending” classifica-

tion also means that Nebraska can receive its full share of Title I education funds.86

Christensen's lingering complaint about the federal government seeking to exert significant policy leverage in exchange for the federal government's comparatively small contribution to education funding raises a critical federalism issue. As a matter of formal constitutional law, almost all agree that NCLB is a constitutionally permissible exercise of the federal government's conditional spending authority. Yet from a policy perspective, should the federal government be permitted to "constitutionally coerce" states in a manner that exceeds the federal financial contribution? Why is Nebraska's submission to NAEP testing not an adequate federal check? Although I have discussed the federalism point from a more theoretical perspective previously,87 the Nebraska experience permits the application of actual facts to legal theory.

B. Student Academic Achievement: Nebraska, NAEP, and the Nation

Independent of the dispute over whether Nebraska's STARS assessment program comports with NCLB requirements, Nebraska, along with every other state, is now required to submit to the NAEP testing program.88 Indeed, mandatory NAEP participation was desired, in part, to help mitigate the risk that states would establish low student performance thresholds to better ensure meeting AYP requirements. Only by comparing a state's assessment of its student proficiency with the state's performance on the NAEP test can one place a state's annual AYP reports into meaningful context. Data from the NAEP tests are among the precious few measures that facilitate comparisons of student performance across states. Thus, Nebraska's NAEP participation addresses at least one federal interest—the dissemination of an additional measure of student academic progress that comes from a source other than Nebraska.

While NCLB's desire to generate and disseminate helpful information may be served through NAEP—and regardless of what student assessment system Nebraskans use—other critical NCLB goals can be thwarted by states that fail to implement "rigorous" student performance assessments as required under NCLB.89 While NAEP participation should reveal any state with weak student academic proficiency standards, NCLB does not require that states do anything about even jarring gaps between a state's definition of student proficiency and

86. Id.
87. See Heise, Federalism, supra note 14.
NAEP's definition. Thus, for annual AYP determinations to have any meaning and for NCLB to operate coherently, states must have in place a serious student assessment system with legitimate student performance thresholds.

By avoiding certified state assessments (at least as of now and according to the U.S. Department of Education), Nebraska may unduly insulate itself from the sliding scale of NCLB sanctions and, if so, thwart a critical legislative goal. To be sure, under NCLB the new “price” of access to federal education dollars is the development of student performance standards that the Department deems “rigorous.” At this point, aside from declining federal education funds (which, of course, remains a legal option for Nebraskans), the only viable issue is whether the new price for federal Title I funds (for Nebraska, the remaining cost involves bringing its STARS program into full compliance with NCLB requirements) is politically acceptable. From a constitutional perspective, it is well understood that the Department can enforce such a price.

Although all Nebraska school districts were charged with developing their own local assessment standards consistent with state thresholds, variation across school districts was almost inevitable. Such variation increases the probability that standards in some local districts are more rigorous than others. Although NCLB exposed itself to some level of risk by permitting states to devise their own assessment mechanism and, more importantly, establish their own proficiency standards, this risk increases dramatically when these critical standards-setting tasks are delegated to individual school districts, as is the case in Nebraska.

By maintaining a decentralized system of standards-setting while NCLB increased centralization, Nebraskans assuredly understood they were adopting a contrarian posture. Nevertheless, by participating in the NAEP testing program, Nebraska addressed at least one of the Act’s goals: creating and disseminating useful student achievement data. Perhaps NAEP data might provide information germane to Nebraska's federalism position.

To the extent that a comparison of NAEP and Nebraska's STAR results supplies information, the information thus far has not been positive. As Figures 1 and 2 illustrate, a consistent and sizable gap separates what Nebraska's STARS assessment defines as proficient and what NAEP deems proficient. To take results from the most recent school year for which there are data (2004–05), while more than 84 percent of Nebraska fourth graders met or exceeded state reading standards, only 33 percent of these same fourth graders performed at the “proficient” or above level on the NAEP reading test. A similar gap emerged in math. While more than 87 percent of students met or exceeded Nebraska state standards, only 36 percent performed
“proficiently” on the NAEP test. Moreover, if there is a trend over time, it suggests a widening gap between those students satisfying Nebraska reading and math standards and achieving “proficiency” on the NAEP tests.

Figures 1 & 2: Nebraska STARS Results v. Nebraska NAEP Results:
4th Grade Reading & Math

SOURCE: U.S. Dept. of Education, various years; Nebraska Dept. of Education, various years.

To be sure, the existence of a gap between a state’s standards and NAEP performance, by itself, does not establish much. However, a significant gap that persists over time at the very least raises questions that warrant serious consideration and study. It may be that
NAEP tests are a flawed measure of student academic performance. Notwithstanding any flaws, however, NAEP data are almost unique in that they facilitate direct comparisons among students across states. It is also possible that Nebraska's STARS assessments provide a more accurate and meaningful measure of student academic performance. Even if reasons exist to prefer Nebraska's STARS over NAEP data, it remains exceptionally difficult to test the reasons without the benefit of an external (that is, non-Nebraskan) reference. To the extent that the nation's only external data—NAEP data—suggest that Nebraska may have set its performance thresholds too low, perhaps the evidentiary burden is properly placed on Nebraska to establish that its STARS assessment program remains probative, notwithstanding discrepancies with NAEP data. The NAEP data cast important light on the U.S. Department of Education's hesitation over Nebraska's STARS system.90

Nebraska's Commissioner of Education, Doug Christensen, made his views clear on the efficacy of the NAEP results. In an editorial discussing various state and national assessments, Christensen discounted NAEP's probative value as a measurement of Nebraskan student achievement.91 While acknowledging that NAEP results "tell us something," he argued that the test scores' "accuracy and validity .

While Christensen's view of NAEP data is understandable, it bears noting that other perspectives on NAEP's usefulness exist. NAEP results are widely acknowledged as providing the evidentiary foundation for the "Nation's Report Card."93 In addition to measuring national student academic achievement, NAEP has been administered biennially since 1990 to representative samples of public school students in individual states. Consequently, limitations notwithstanding, NAEP results are the only psychometrically valid basis for interstate student achievement comparisons.94

90. On the other hand, Nebraska is far from alone in promoting a state assessment system that generates positive results that far exceed the results suggested by NAEP data. See Peterson & Hess, Keeping an Eye, supra note 83.
92. Id.
C. Checkbook Federalism

Assuming that Nebraska's assessment system eventually comes into compliance with NCLB requirements, the possibility of a gap between Nebraska's assessment mechanism and NAEP assessments persists (this is true of virtually every other state as well). Should the possibility come to fruition, consequences from it are better dealt with as a matter of policy than law.

Although conventional wisdom in federalism debates—at least in academic circles—points to Nebraska's experience with NCLB as evidence of problems with federalism that require fixing, alternative perspectives exist. Indeed, one may view the Nebraska experience as identifying a potential federalism boundary from a policy (rather than Constitutional) perspective. Giving shape and texture to this possible boundary is the degree to which we want to tether education policy authority and funding responsibility.

Federalism promotes important benefits that cut deeply in the education setting, including diversity and the ability of states to experiment with policies. Federalism also fuels subsidiarity, or the principle that public decisions are best made at the lowest governmental unit of analysis. Finally, federalism helps ensure that the unit of government saddled with financial responsibility enjoys policy authority. One critical cost of federalism, however, is that, in certain contexts—such as education in general and student performance standards setting in particular—it can fuel a race-to-the-bottom.

NCLB endeavors to maximize federalism's benefits while minimizing its costs. Under NCLB, each governmental actor—individual states and the federal government—more or less gets what it pays for. The federal government makes federal education dollars for states conditional on participation in NCLB and submitting to its policy overhang. States, however, remain free to define for themselves proficiency levels. While Nebraska may yet have to tinker with its assessment instruments to fully conform with NCLB requirements, once it does so, it will then have paid "in full" the current price of access to federal education funding. The costs associated with NCLB participation increase, however, in the event that Nebraska school districts fail to achieve AYP. Whether the benefits exceed the costs overall or in any particular state, such as Nebraska, endures as an important question. If nothing else, NCLB generates the derivative benefit of making the relevant costs and benefits more transparent than they were prior to 2001.

Even if a gap between what Nebraskans deem proficient and what NAEP suggests persists, Nebraska is not obligated to close that gap. So long as the tradeoffs are transparent, open, and notorious, Nebraskans remain free to resist national perspectives on student proficiency. That is, once informed about the gaps between what their
state deems as proficient and what NAEP deems as proficient, Nebraskans will have received the information required under NCLB. From a normative perspective, whether something ought to be done about persistent, significant gaps between what Nebraska's STARS results deem as proficient student achievement and what NAEP results might suggest raises an interesting question perhaps best left to state policymakers and voters.

Making this question even more difficult is that under our present understanding of Congress's conditional spending authority, it is reasonably clear that Congress possesses the necessary Constitutional authority to expand NCLB in a way that could force states to adopt NAEP as its assessment mechanism. To do so under NCLB as presently structured, however, raises troubling policy issues and threatens to erode some of federalism's benefits. NCLB's policy influence over the nation's public elementary and secondary schools far exceeds the federal government's financial contribution. While NCLB does not constitute impermissible constitutional coercion, even NCLB's harshest critics must concede it illustrates the high art of policy coercion. To strain the nexus between policy influence and financial contribution beyond the degree NCLB already strains it would threaten to undermine our federalism structure, at least as it relates to education policy.

Again, this is not to say that Congress lacks the authority to push NCLB even further and, for example, impose upon states NAEP as the national barometer of student performance. In so doing, Congress would be assigning to the federal government enforcement authority as well as standards setting authority. Perhaps this is the only efficacious solution to guard against states' standards dilution efforts. Such a move by Congress, however, would enhance NCLB's already significant influence over state education policy. To enhance federal influence over state and local education policy without a corresponding increase in the federal government's financial contribution to the nation's elementary and secondary schools risks straining the nexus between policy control and financial responsibility beyond its breaking point. Such a consequence risks ceding important federalism benefits.

V. CONCLUSION

For better or worse (or, perhaps more accurately, for better and worse), NCLB's influence over America's public elementary and secondary schools is both enormous and increasing. Setting aside debates about the efficacy of NCLB as education policy, few dispute the proposition that it has generated consequences, both intended and unintended. Among an array of unintended consequences, two stand clear: NCLB's contribution to school finance adequacy litigation as well as the related—though distinct—result of prompting some states to di-
lute their student proficiency standards. One of NCLB's legacies is its contribution to a heritage of unexpected consequences in a familiar context—education. These particular unexpected consequences also call attention to critical federalism questions that NCLB raises. These federalism questions arise owing to NCLB's bold effort to restructure policymaking authority in American education. To the extent that NCLB succeeds in its effort to reallocate education policymaking authority among the federal, state, and local governments, NCLB's most significant legacy may have little to do with lawsuits and student performance standards.