

Notes

**THE OBSOLESCENCE OF *SAN ANTONIO V. RODRIGUEZ* IN THE WAKE OF THE FEDERAL GOVERNMENT'S QUEST TO LEAVE NO CHILD BEHIND**

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ABSTRACT

*Since the mid-1950s, a sea change in public education has taken place. Public education—a policy concern traditionally reserved to the states—has become a core concern of the federal government. This Note surveys three of the federal government's most significant appropriations of power: the enactment of the Elementary and Secondary Education Act (ESEA) in 1965; the creation of the Department of Education in 1980; and the passage of the No Child Left Behind Act of 2001 (NCLB), the most recent, and easily most expansive, iteration of the ESEA. This Note also considers the manner in which the Supreme Court has facilitated federal control over education, despite the Court's refusal to recognize a formal right to education. Finally, this Note argues that the federal government's incursion into the realm of public education has established an implicit right to education that has rendered *San Antonio v. Rodriguez*, the Supreme Court's 1973 decision that denied the existence of a fundamental right to education, obsolete.*

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## INTRODUCTION

“The era of big Government is over,” President Clinton declared in his 1996 State of the Union Address.<sup>1</sup> “[B]ig Government does not have all the answers.”<sup>2</sup> This sentiment, though perhaps surprising coming from a Democratic president, reflects a widely acknowledged rhetorical shift in American politics in the late twentieth and early twenty-first centuries: a transition away from the parlance of Great Society liberalism in the 1960s and toward aphorisms advocating smaller-government conservatism.<sup>3</sup> Yet the political discourse surrounding one core issue of social policy has followed a diametrically opposite trajectory. Since the 1960s, the executive and legislative branches have discussed in increasingly grandiose terms the appropriate role of the federal government with respect to public education. This rhetoric, moreover, has been translated into practice, as the two branches have appropriated progressively more significant aspects of the states’ traditional role in public education.

Since the first public schools opened in the 1840s,<sup>4</sup> education has been regarded as a quintessentially local responsibility.<sup>5</sup> The Constitution does not mention education; thus, under the Tenth

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1. President William Jefferson Clinton, Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 79, 79 (Jan. 23, 1996).

2. *Id.*

3. See GARETH DAVIES, SEE GOVERNMENT GROW: EDUCATION POLITICS FROM JOHNSON TO REAGAN 1 (2007) (“Historians commonly conceive of American politics since the 1960s as a sustained reaction against Great Society liberalism. There is plenty of evidence to support the notion of a rightward shift, be it in the form of election results, poll data (declining numbers of Americans identifying with ‘liberalism,’ levels of trust in government), growing inequalities of wealth and income, rates of incarceration, the proliferation of conservative think tanks and lobby groups, the decline of organized labor, the composition of the Supreme Court, the growth of evangelical Protestantism, welfare reform, or the declaration by Democratic president Bill Clinton that ‘the era of big government is over.’ The list could easily be extended.” (quoting Clinton, *supra* note 1, at 79)).

4. Michael W. Kirst, *Turning Points: A History of American School Governance, in WHO’S IN CHARGE HERE?: THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY* 14, 17 (Noel Epstein ed., 2004).

5. See, e.g., United States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) (“[I]t is well established that education is a traditional concern of the States.”); Milliken v. Bradley, 418 U.S. 717, 741–42 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential . . . to quality of the educational process.”); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) (“Providing public schools ranks at the very apex of the function of a State.” (emphasis added)); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (“By and large, public education in our Nation is committed to the control of state and local authorities.”); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments.” (emphasis added)).

Amendment,<sup>6</sup> the power to control public education has traditionally been reserved to the states.<sup>7</sup> In fact, until the 1950s, the federal government's involvement in public education was virtually nonexistent.<sup>8</sup>

Local control over education, however, has been steadily eroding since the Supreme Court's landmark *Brown v. Board of Education*<sup>9</sup> decision in 1954.<sup>10</sup> Local school boards and superintendents are increasingly being forced to surrender their authority to the federal government, leading some observers to call the remaining vestiges of local control "endangered species."<sup>11</sup> Whereas local education agencies used to be the sole arbiters of education policy, they are now regularly relegated to "implementing other people's goals and priorities."<sup>12</sup> In conjunction with this decrease in state and local autonomy, the federal government's involvement in public education has ballooned.<sup>13</sup> As of 2011, Congress and the Department of Education were funding more than sixty education programs,<sup>14</sup> and by 2003, federal spending on education had grown to represent

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6. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

7. See Kirst, *supra* note 4, at 16 ("In the early days of the republic, Americans distrusted distant government and wanted important decisions made close to home, especially regarding education. Thus the U.S. Constitution made no mention of schools, leaving control of education to the states, and states then delegated a great deal of power to local school districts. . . . [T]he doctrine of local control of public schools has occupied a special place in American political ideology."); Regina R. Umpstead, *The No Child Left Behind Act: Is It an Unfunded Mandate or a Promotion of Federal Educational Ideals?*, 37 J.L. & EDUC. 193, 196 (2008) ("State and local governments have traditionally been responsible for providing education in the United States. Education is not mentioned in the U.S. Constitution and is, therefore, reserved to the states through the Tenth Amendment.").

8. Patrick McGuinn & Frederick Hess, *Freedom from Ignorance?: The Great Society and the Evolution of the Elementary and Secondary Education Act of 1965*, in THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM 289, 290 (Sidney M. Milkis & Jerome M. Mileur eds., 2005).

9. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

10. See James E. Ryan, *The Tenth Amendment and Other Paper Tigers: The Legal Boundaries of Education Governance*, in WHO'S IN CHARGE HERE?, *supra* note 4, at 42, 43 ("State and federal officials have been taking more and more control away from local school districts for several decades.").

11. Kirst, *supra* note 4, at 14.

12. Noel Epstein, *Introduction to WHO'S IN CHARGE HERE?*, *supra* note 4, at 1, 3.

13. Ryan, *supra* note 10, at 44.

14. *Id.*

approximately 9 percent of the total revenue available for public schools, up from 2.9 percent in 1950.<sup>15</sup>

Curiously, although the federal government has continued to encroach upon the states' traditional role in education, both Congress and the Supreme Court have opted not to establish any formal federal right to education. Whereas all fifty states enshrine a right to education in their state constitutions,<sup>16</sup> Congress has declined to advance an analogous amendment to the federal Constitution.<sup>17</sup> Similarly, beginning with its decision in *San Antonio Independent School District v. Rodriguez*,<sup>18</sup> the Supreme Court has repeatedly refused to recognize education as a fundamental right.<sup>19</sup>

Numerous legal scholars have zealously protested against *Rodriguez* and its successors, calling on the Court to overturn that line of precedent and affirmatively establish a federal right to education.<sup>20</sup> This Note contends that this wave of discontent is

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15. THOMAS D. SNYDER & SALLY A. DILLOW, U.S. DEPT OF EDUC., DIGEST OF EDUCATION STATISTICS 2010, at 260 tbl.180 (2011), available at <http://nces.ed.gov/pubs2011/2011015.pdf>.

16. Amy L. Moore, *When Enough Isn't Enough: Qualitative and Quantitative Assessments of Adequate Education in State Constitutions by State Supreme Courts*, 41 U. TOL. L. REV. 545, 560 (2010); Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RES. L. REV. 997, 1051 (2010).

17. Congressman Jesse Jackson, Jr., proposed a resolution in 2005 that called for a constitutional amendment declaring that “[a]ll persons shall enjoy the right to a public education of equal high quality.” H.R.J. Res. 29, 109th Cong. (2005). And in his 1944 State of the Union Address, President Franklin Delano Roosevelt urged Congress to “implement[an] economic bill of rights” that included “[t]he right to a good education.” President Franklin D. Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944), reprinted in 1944–45 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 32, 41–42 (Samuel I. Rosenman ed., 1950).

18. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

19. See, e.g., *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988) (noting that the Court has never “accepted the proposition that education is a ‘fundamental right,’ . . . which should trigger strict scrutiny when government interferes with an individual’s access to it” (quoting *Papasan v. Allain*, 478 U.S. 265, 284 (1986); *Plyler v. Doe*, 457 U.S. 202, 223 (1982))); *Papasan*, 478 U.S. at 285–86 (“As *Rodriguez* and *Plyler* [*v. Doe*, 457 U.S. 202 (1982).] indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review. Nor does this case require resolution of these issues.”).

20. Edward B. Foley, *Rodriguez Revisited: Constitutional Theory and School Finance*, 32 GA. L. REV. 475, 476 (1998); see also Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 111–13, 123 (2004) (arguing that the Supreme Court has been “tragically wrong” in failing to recognize a fundamental right to education); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334 (2006) (contending that the Fourteenth Amendment “authorizes and obligates Congress to ensure a meaningful floor of

superfluous—not because *Rodriguez* was properly decided, but because actions of Congress and the executive branch in the sixty years following the decision have established an implicit federal right to education that is equivalent—and perhaps even superior—to any right the Court might have established.<sup>21</sup>

Part I of this Note tracks the expanding scope of congressional authority over education by examining three of Congress’s most substantial power grabs: the enactment of the Elementary and Secondary Education Act of 1965 (ESEA);<sup>22</sup> the creation of the Department of Education; and the passage of the No Child Left Behind Act of 2001 (NCLB),<sup>23</sup> the most recent version of the ESEA. Part II then examines the Supreme Court’s complicity in the federal government’s appropriations of power. Next, Part III introduces *Rodriguez* and the canon of cases that have considered a federal right to education. Finally, Part IV argues that Congress’s incursion into public education has rendered the Court’s *Rodriguez* decision obsolete. By enacting NCLB and empowering the Department of Education to enforce it, Congress has implicitly established a federal right to education, diminishing the need for the Court to recognize such a right.

## I. CONGRESSIONAL APPROPRIATION OF POWER OVER EDUCATION

The road to an implicit federal right to education was paved gradually over the second half of the twentieth century, as Congress expanded the scope of the federal government’s authority over education.

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educational opportunity”); Ian Millhiser, Note, *What Happens to a Dream Deferred?: Cleansing the Taint of San Antonio Independent School District v. Rodriguez*, 55 DUKE L.J. 405, 406–08 (2005) (offering a “progressive constitutional framework that includes a fundamental, affirmative right to an adequate education” and calling upon the courts to implement such a framework). *But see* Daniel S. Greenspahn, *A Constitutional Right To Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C. L. REV. 755, 783 (2008) (urging advocates not to pursue a federal fundamental right to education in the existing political and judicial climate).

21. Admittedly, some advocates of a federal right to education will be dissatisfied with an implicit federal right to education, as opposed to a constitutional amendment. For further discussion of this criticism, see *infra* Part IV.A.

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

23. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

For most of the nation's history, the federal legislature limited itself to supporting states' efforts to educate the public, playing only a negligible role in elementary and secondary education.<sup>24</sup> The notion that local control of education was "a desirable end in itself [wa]s a virtually uncontested position, put forth by commentators, courts, and government officials alike."<sup>25</sup> Beginning in the 1950s and 1960s, however, the political landscape began to shift, as the civil rights movement and President Lyndon Johnson's War on Poverty gained traction.<sup>26</sup> Motivated by a desire to improve educational equity and to provide educational opportunities for disadvantaged students, Congress embarked upon an unprecedented foray into public education.<sup>27</sup> This Part traces three of Congress's most significant incursions into the states' traditional educational sphere. These three legislative actions exemplify the federal legislature's appropriation of control over public education from the states and illustrate how education has transitioned from being "perhaps the most important function of state and local governments"<sup>28</sup> to being a top priority of the federal government as well.

#### A. *Elementary and Secondary Education Act*

The passage of the ESEA in 1965 "represented a sea-change in federal involvement in a state function."<sup>29</sup> For the first time, the federal government committed general federal aid to education, a move many conservatives regarded as an encroachment upon the

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24. Patrick McGuinn, *The National Schoolmarm: No Child Left Behind and the New Educational Federalism*, 35 PUBLIUS 41, 48 (2005).

25. Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 905 (2006).

26. Cf. DAVIES, *supra* note 3, at 25 ("If any one legislative measure during Johnson's first year bore his distinctive stamp, then it was the War on Poverty. . . . [A]nd education was presented as being the decisive weapon that would allow the antipoverty war to be won."). See generally ELIZABETH H. DEBRAY, *POLITICS, IDEOLOGY & EDUCATION: FEDERAL POLICY DURING THE CLINTON AND BUSH ADMINISTRATIONS* 5–6 (2006) (describing the emergence of "[p]overty as an issue on Capitol Hill" and the relationship between the passage of the ESEA and President Johnson's "larger legislative and political strategy").

27. See McGuinn & Hess, *supra* note 8, at 289 ("[The ESEA] marked the first major incursion of the federal government into K–12 education policy . . . . At the heart of the ESEA was a powerful equity rationale for federal government activism to promote greater economic and social opportunity.").

28. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

29. David Karen, *No Child Left Behind?: Sociology Ignored!*, in *NO CHILD LEFT BEHIND AND THE REDUCTION OF THE ACHIEVEMENT GAP: SOCIOLOGICAL PERSPECTIVES ON FEDERAL EDUCATIONAL POLICY* 13, 14–15 (Alan R. Sadovnik et al. eds., 2008).

“last remaining bastion of traditional American federalism.”<sup>30</sup> In the century preceding the enactment of the ESEA, Congress had considered providing unrestricted general aid to public schools thirty-six times.<sup>31</sup> All thirty-six times, Congress had declined to do so.<sup>32</sup>

Congressional resistance broke down, however, following President Johnson’s election in 1964.<sup>33</sup> The Johnson administration contended that state and local governments were not making adequate strides toward alleviating poverty in America, and President Johnson forcefully urged Congress to intervene.<sup>34</sup> “With education,” Johnson explained, “instead of being condemned to poverty and idleness, young Americans can learn the skills to find a job and provide for a family.”<sup>35</sup> President Johnson encouraged Congress to take a new approach to federal aid: rather than offering schools completely unrestricted grants, President Johnson asked Congress to provide grants specifically geared toward educating children who had grown up in impoverished households.<sup>36</sup>

Conservative members of Congress railed against President Johnson’s progressive initiative.<sup>37</sup> As Professors Patrick McGuinn and

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30. DAVIES, *supra* note 3, at 10–11.

31. Kirst, *supra* note 4, at 22.

32. *Id.*

33. See DEBRAY, *supra* note 26, at 6 (“[T]he passage of the ESEA signified the end of a lengthy congressional stalemate in approving federal aid to schools.”); JULIE ROY JEFFREY, *EDUCATION FOR CHILDREN OF THE POOR: A STUDY OF THE ORIGINS AND IMPLEMENTATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965*, at 72 (1978) (“Upon coming to the presidency in 1963, Johnson had unequivocally committed himself to the passage of federal aid to education.”).

34. DEBRAY, *supra* note 26, at 6–7. Various members of Congress echoed the president’s call to arms. See, e.g., JOHN BRADEMAS, *THE POLITICS OF EDUCATION: CONFLICT AND CONSENSUS ON CAPITOL HILL 76–77* (1987) (“Many of us in Congress . . . perceived that there were indeed genuine needs—in housing, health, and education—to which state and city governments were simply not responding. It was this inattention by state and local political leaders, therefore, that prompted us at the federal level to say, ‘We’re going to do something about such problems.’ And we did.”).

35. President Lyndon B. Johnson, The President’s News Conference, 1 PUB. PAPERS 364, 365 (Apr. 1, 1965).

36. Kirst, *supra* note 4, at 23; see also DEBRAY, *supra* note 26, at 6 (“Prior legislative histories concur that a central reason for [the ESEA’s] passage was that its proponents advanced it as a ‘special purpose’ bill for the neediest students. It was not to be general aid, opposed for decades out of a fear of federal control and the inability to settle religious and racial conflicts.”).

37. See, e.g., JEFFREY, *supra* note 33, at 80–81 (describing Representative Charles Goodell’s opposition to the bill); see also HUGH DAVIS GRAHAM, *THE UNCERTAIN TRIUMPH: FEDERAL EDUCATION POLICY IN THE KENNEDY AND JOHNSON YEARS*, at xv (1984) (“[T]o propose federal ‘intrusion’ into the sanctity of the state-local-private preserve of education was

Frederick Hess explain, the ESEA marked “the first major incursion of the federal government into K–12 education policy,” and many senators and representatives were wary of President Johnson’s proposed “era of federal involvement in school reform.”<sup>38</sup> For years, antistatist conservatives, determined to thwart federal intrusion into an area they regarded as an exclusive realm of the states, had formed majorities to block the passage of any general-aid legislation.<sup>39</sup> Opponents of the ESEA argued that the federal government had no constitutional prerogative to get involved in public education and that passing the law would be an affront to federalism that would inevitably lead to federal control of public schools.<sup>40</sup>

Proponents of the bill disagreed. According to President Johnson, the ESEA would serve only to “*strengthen* State and local agencies.”<sup>41</sup> U.S. Commissioner for Education Francis Keppel reiterated the president’s message, “express[ing] ‘sympathy’ for . . . superintendents . . . but . . . indicat[ing] that [their] fear of Federal control was not well founded.”<sup>42</sup> Commissioner Keppel stressed the fact that states would retain the authority to distribute and regulate the federal funds they received as they saw fit.<sup>43</sup> The ESEA would, according to the Johnson administration, simply form a

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to stride boldly into a uniquely dangerous political mine field that pitted Democrat against Republican, liberal against conservative, . . . federal power against states rights, white against black, and rich constituency against poor in mercurial cross-cutting alliances.”).

38. McGuinn & Hess, *supra* note 8, at 289. For many members of Congress, the ESEA also raised troubling Establishment Clause concerns, as it provided government funds to parochial schools. DAVIES, *supra* note 3, at 33–35, 42–43; *see also* Charles Mohr, *President Signs Education Bill at His Old School*, N.Y. TIMES, Apr. 12, 1965, at 1 (“[The ESEA] is the first time Federal funds have been authorized to indirectly assist private, church schools. And it is the first major, general aid to elementary education to get through Congress, where there has been acrimonious disagreement on the church-state issue.”).

39. DAVIES, *supra* note 3, at 10.

40. EUGENE EIDENBERG & ROY D. MOREY, AN ACT OF CONGRESS: THE LEGISLATIVE PROCESS AND THE MAKING OF EDUCATION POLICY 11 (1969); *see also* DAVIES, *supra* note 3, at 35 (explaining that some Republicans and Southern Democrats worried that the ESEA “represented a sharp break with traditional models of federalism”).

41. President Lyndon B. Johnson, Remarks in Johnson City, Tex., upon Signing the Elementary and Secondary Education Bill, 1 PUB. PAPERS 412, 413 (Apr. 11, 1965) (emphasis added).

42. Leonard Buder, *School Aid by U.S. Is Raising Fears*, N.Y. TIMES, Oct. 29, 1965, at 45 (quoting Comm’r Keppel).

43. *Id.*; *see also* DAVID K. COHEN & SUSAN L. MOFFITT, THE ORDEAL OF EQUALITY: DID FEDERAL REGULATION FIX THE SCHOOLS? 3 (2009) (“Though the formula [established in the ESEA] decided how much money states and localities would get, it decided nothing about how that money would be spent—save that it was to be spent on the education of children from poor families.”).



new cooperative partnership between the states and the federal government that would collectively transform public education.<sup>44</sup>

President Johnson's most persuasive talking point was that the ESEA would provide federal funds to almost every congressional district in the country.<sup>45</sup> Title I of the ESEA pledged over \$1 billion in "financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families."<sup>46</sup> To allocate the funds, Congress instituted a formula that guaranteed "annual grant[s] equal to half the cost borne by the state in educating each child from a family with an income of \$2,000 a year or less."<sup>47</sup> The ESEA also appropriated funds to help schools purchase textbooks and other educational materials.<sup>48</sup> Ultimately, President Johnson's promises of massive federal grants for state coffers, combined with the assurance that prescribing programs and projects would be "left to the discretion and judgment of the local public educational agencies,"<sup>49</sup> were too enticing for legislators to pass up. The ESEA flew through Congress astonishingly quickly for such a significant piece of legislation, passing in just eighty-nine days.<sup>50</sup>

Following the enactment of the ESEA, the concept of federal aid for education rapidly won broad acceptance. Although four-fifths of the Republican representatives and 44 percent of the Republican senators had voted against the ESEA when it originally passed in 1965,<sup>51</sup> by 1974, when the ESEA came up for renewal for the first time, "conservative opposition had all but disappeared."<sup>52</sup> Within a year, federal education spending had almost tripled—from

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44. President Lyndon B. Johnson, Special Message to the Congress: "Toward Full Educational Opportunity," 1 PUB. PAPERS 25, 26 (Jan. 12, 1965) ("In all that we do, we mean to strengthen our state and community education systems. Federal assistance does not mean federal control . . .").

45. DAVIES, *supra* note 3, at 35.

46. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, sec. 2, § 201, 79 Stat. 27, 27; *see also* Mohr, *supra* note 38 ("President Johnson signed today the \$1.3 billion aid-to-education bill . . .").

47. Mohr, *supra* note 38; *see also* Elementary and Secondary Education Act of 1965 sec. 2, § 203, 79 Stat. at 28–30 (describing the grant formula).

48. Elementary and Secondary Education Act of 1965 § 201, 79 Stat. at 36. *See generally* JEFFREY, *supra* note 33, at 76–77 (explaining the various titles of the ESEA).

49. S. REP. NO. 89-146, at 9 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1446, 1454.

50. *See* DAVIES, *supra* note 3, at 37 (noting the relative ease with which Congress passed the ESEA).

51. *Id.* at 1; 111 CONG. REC. 7718 (1965) (listing the fourteen Republican senators who voted against the ESEA—44 percent of the thirty-two Republican senators who voted).

52. DAVIES, *supra* note 3, at 2.

\$890,685,000 in 1965 to \$2,408,209,000 in 1966<sup>53</sup>—and states and local school districts had quickly come to rely on the ESEA’s annual federal funding to keep their schools operating.<sup>54</sup> In light of the “difficult fiscal circumstances of the 1970s,” states—along with the men and women representing their constituencies in Congress—proved willing to overlook their federalism concerns in exchange for these critical federal dollars.<sup>55</sup>

As federal aid for education continued to gain popularity during the Nixon and Ford administrations, the idea of a federal role in education became firmly embedded in the fabric of American politics.<sup>56</sup> This ideological shift would later prove critical as the federal government tried to garner support for its second major expansion into the field of education: the creation of a federal Department of Education.

### *B. Creation of the Department of Education*

No congressional action has illuminated the shift toward greater federal involvement in education more starkly than the creation of a cabinet-level Department of Education in 1978. As Professor David Breneman and journalist Noel Epstein wrote in a contemporaneous op-ed, “Establishing a Cabinet-level department . . . [broke] with the long tradition of a limited federal involvement in education and of virtually no federal responsibility for schools . . . .”<sup>57</sup> For decades, education had been buried in the Department of Health, Education, and Welfare (HEW), an agency whose staff was small and budget was even smaller.<sup>58</sup> The creation of the federal Department of Education

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53. STEPHEN K. BAILEY & EDITH K. MOSHER, *ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW*, at vii–viii (1968).

54. DAVIES, *supra* note 3, at 2.

55. *Id.*

56. *See id.* (“[T]he growing popularity of federal aid to education during the Nixon-Ford years exemplifies a basic reality of American politics . . . : there are powerful inertial forces in American political life, and they can work to preserve the liberal legacies of periods of reform ferment in less propitious times just as much as they constrain innovation. Initially bold departures in policy become embedded in the fabric of American politics, acquire a constituency back home and supporting lobbies in Washington, and become, if not impregnable, then at least firmly resistant to assault.”).

57. David W. Breneman & Noel Epstein, Op-Ed., *Uncle Sam’s Growing Clout in the Classroom*, WASH. POST, Aug. 6, 1978, at D1.

58. When the U.S. Office of Education moved from the Department of the Interior to HEW in 1950, it had a staff of three hundred and a budget of \$40 million. Kirst, *supra* note 4, at 22–23. As of January 2012, the Department of Education had a staff of more than 4200 and

forever “transformed the way education is governed in the United States” and officially recognized, for the first time, that education is an important federal responsibility.<sup>59</sup>

Beginning in the early 1900s, members of Congress had introduced more than 130 bills seeking to create a federal Department of Education.<sup>60</sup> For half a century, these bills had lacked the support of the executive branch and had failed to gain momentum with Democrats.<sup>61</sup> Thus, much to the chagrin of education reformers, the bills had languished and stalled year after year without ever being considered in committee.<sup>62</sup>

Abraham Ribicoff’s ascension to the Senate breathed new life into the quest for a federal department dedicated exclusively to education.<sup>63</sup> Beginning in 1965, Senator Ribicoff, a former secretary of HEW, faithfully introduced a “Department of Education Act” each year.<sup>64</sup> Ribicoff made little progress until 1974, when the little-known governor of Georgia, Jimmy Carter, decided to seek the presidency.<sup>65</sup> One of Carter’s key campaign promises was his pledge to transform the “complicated and confused and overlapping and wasteful federal government bureaucracy” into “an efficient, economical, purposeful, and manageable government.”<sup>66</sup> Carter “opposed the proliferation of executive agencies and . . . promised to cut their number from 1,900 to 200.”<sup>67</sup> And with his plans to consolidate the twenty agencies that were administering education programs into one central department, Carter aimed to streamline the executive branch and eliminate

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spent over \$68.6 billion annually. *The Executive Branch*, THE WHITE HOUSE, <http://www.whitehouse.gov/our-government/executive-branch> (last visited Jan. 25, 2011).

59. Breneman & Epstein, *supra* note 57.

60. ROBERT V. HEFFERNAN, CABINETMAKERS: STORY OF THE THREE-YEAR BATTLE TO ESTABLISH THE U.S. DEPARTMENT OF EDUCATION 40 (2001).

61. *See id.* (explaining that Jimmy Carter was the first “modern American President” to commit to establishing a federal Department of Education).

62. DAVIES, *supra* note 3, at 231; *see also* HEFFERNAN, *supra* note 60, at 40 (“Congress had not even taken one [of the bills to create the Department of Education] from the file drawer since the 1950s.”).

63. *Cf.* DAVIES, *supra* note 3, at 361 n.44 (“Ribicoff . . . had long argued that [HEW] was unmanageable and had been trying to break it up ever since he had joined the Senate.”).

64. S. REP. NO. 95-1078, at 14 (1978).

65. *See* HEFFERNAN, *supra* note 60, at 21 (declaring that once President Carter entered the presidential race, “[t]eacher power . . . blossomed into a mature political force”).

66. Jimmy Carter, Our Nation’s Past and Future, Address Accepting the Presidential Nomination at the Democratic National Convention in New York City (July 15, 1976) (transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25953>).

67. DAVIES, *supra* note 3, at 229.

bureaucratic inefficiencies at HEW.<sup>68</sup> In March 1977, just two months after President Carter took office, Senator Ribicoff commenced hearings on his annual bill to create a Department of Education.<sup>69</sup> This time, however, he enjoyed the backing of more than fifty senators<sup>70</sup> as well as the support of the administration.<sup>71</sup>

Senator Ribicoff and his cosponsors garnered support for the bill by emphasizing the government's fragmented approach to education<sup>72</sup> and the need for a federal commitment to public schools.<sup>73</sup> The Senate report for Ribicoff's bill argued that education needed a cabinet-level secretary if it was going to receive any meaningful attention: "[T]he American people need a highly visible, responsible, high-level Federal official who can be held accountable for the successes or failures of educational programs and policies . . . . Education needs a strong advocate in Washington to speak for its needs and to assist in solving its problems."<sup>74</sup> According to the report, "problems in education [had] reached near-crisis proportions," and the best way to "aid" the "troubled state of education" was to create a federal department.<sup>75</sup>

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68. *Id.*; DEANNA L. MICHAEL, JIMMY CARTER AS EDUCATIONAL POLICYMAKER: EQUAL OPPORTUNITY AND EFFICIENCY 88 (2008). President Carter's pledge to create a cabinet-level Department of Education was also influenced by Carter's sense of indebtedness to the National Education Association (NEA). DAVIES, *supra* note 3, at 222. The NEA's decision to endorse Carter and the "massive support from teachers" that the endorsement subsequently guaranteed were widely acknowledged to have been "crucial to [Carter's] winning [the] election." *Id.* at 228 (quoting Hamilton Jordan, Carter's campaign manager) (internal quotation marks omitted).

69. S. REP. NO. 95-1078, at 14.

70. *Id.*

71. DAVIES, *supra* note 3, at 233.

72. *See, e.g.*, 124 CONG. REC. 32,216 (1978) (statement of Sen. Charles H. Percy) ("[T]he Federal education effort is greatly fragmented, resulting in an uncoordinated approach to solving the many problems facing our Nation's schools.").

73. *See, e.g.*, S. REP. NO. 95-1078, at 7 ("The [Senate Committee on Governmental Affairs] believes the improvement of the Federal education effort must be a major priority. But education will never be a priority as long as it is smothered in layers of bureaucracy, fragmented across several Federal agencies, and diminished by a severe lack of attention in our National Government."); 124 CONG. REC. 32,215-16 (1978) (statement of Sen. Charles H. Percy) ("This is a question of national priorities. I think it is about time we really state that education must be one of our highest priorities. It is the duty and the responsibility of . . . the U.S. Senate . . . to determine whether or not the structure [of the government] assigns a high enough priority to education when it is buried so deep in a department that spends 95 percent or 94 percent of its resources in some other areas.").

74. S. REP. NO. 95-1078, at 11.

75. *Id.* at 7-8.

Senator Ribicoff's bill, Senate Bill 991,<sup>76</sup> faced zealous opposition from senators who believed the creation of a Department of Education would usurp state control and expand the role of the federal government in public education. Senator Harrison Schmitt, for instance, delivered the following remarks:

[Our] locally controlled educational system is under attack by those who believe . . . that there is a national elite which can better govern the people than can the people themselves. . . .

. . . .

Education in the United States has traditionally been the responsibility of local and State authorities. By its silence on education, the Constitution specifically leaves control to the individual States. . . .

. . . .

There is no question that the United States must have a deep commitment to education; our future depends on that commitment. The commitment, however, must be met through local and State control of education . . . [T]here is no reason to believe, nor is there any historical evidence to prove, that the quality of education will be improved by the increased Federal control that a new Department of Education would encourage.<sup>77</sup>

Those senators who supported the bill, however, fought back against Senator Schmitt and other like-minded members of Congress, insisting that a cabinet-level Department of Education would not diminish local control over public schools.<sup>78</sup> In fact, the original

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76. Department of Education Organization Act, S. 991, 95th Cong. (1977).

77. 124 CONG. REC. 32,182–83 (1978) (statement of Sen. Harrison Schmitt); *see also id.* at 32,183 (“The people of the United States want less government and not more. They want less governmental control and not more. They want less regulations and not more. Yet, the creation of this new department will result in more government, more governmental control, and more regulations in education than we have ever seen before.”); *id.* at 32,196 (“I would say that the lack of mention of education in the Constitution, along with the reservation of powers to the States, strongly suggests to this Senator that there was never any intent by the Founding Fathers nor any intent subsequently, through recent decades, to have the Federal Government involved in any significant way in the policymaking, in the administration, or other activities of the educational system of this country.”).

78. *See, e.g.*, S. REP. NO. 95-1078, at 161 (additional views of Sens. John C. Danforth & William V. Roth, Jr.) (“The establishment of a Cabinet-level Department of Education is not in any way intended or expected to result in expanded Federal involvement in education issues that are the primary responsibility of States and localities. Rather, the new Department is

Senate bill was revised to include a finding reiterating the argument that the role of the federal government in education was not actually expanding.<sup>79</sup> According to the sponsoring senators, the federal government would continue to leave questions of policy and curriculum to state and local authorities.<sup>80</sup> The Department of Education would simply serve as an “assistant” to the states and would use its resources to “supplement and complement” traditional educational authorities.<sup>81</sup>

This battle over the constitutional significance of a federal Department of Education did not end even after President Carter signed Senate Bill 991 into law on October 17, 1979.<sup>82</sup> For nearly twenty years, the creation of the Department of Education continued to generate conflict and draw ire from those who rejected such a large federal role in education.<sup>83</sup> The promised abolition of the Department of Education was a central feature of several Republican presidential candidates’ platforms during the 1980s and 1990s.<sup>84</sup> In his first State of

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intended to strengthen the capacity of States, localities, and private institutions to meet their educational needs.”).

79. See Department of Education Organization Act, Pub. L. No. 96-88, § 103(a), 93 Stat. 668, 670 (1979) (codified at 20 U.S.C. § 3403(a) (2006)) (“It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments . . . and to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education *shall not increase the authority of the Federal Government over education* or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States.” (emphasis added)); 124 CONG. REC. 32,211 (1978) (statement of Sen. Abraham Ribicoff) (“[T]he Senators . . . had the findings and purposes of the original bill changed to assure that local control would be preeminent, and this new department would really supplement, complement, and assist local governments.”).

80. See S. REP. NO. 95-1078, at 11 (“But effective management does not mean ‘more control.’ The responsibility for education policy and curriculum will remain at State, local and private levels.”).

81. *Id.* at 8.

82. Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J.L. & EDUC. 1, 5 (2010).

83. See McGuinn, *supra* note 24, at 54 (noting that not until “the late 1990s” did “congressional Republicans drop[] their proposals to eliminate the Department of Education and to cut federal education spending”).

84. Veronique de Rugy & Marie Gryphon, *Elimination Lost: What Happened to Abolishing the Department of Education?*, NAT’L REV. ONLINE (Feb. 11, 2004, 9:14 AM), <http://www.nationalreview.com/articles/209477/elimination-lost/veronique-de-rugy>. Several candidates seeking the Republican presidential nomination in 2012 have revived this trend, pledging to abolish or drastically shrink the Department of Education should they be elected. See Trip Gabriel, *G.O.P. Anti-Federalism Aims at Education*, N.Y. TIMES, Oct. 9, 2011, at A28 (“[T]he quest to sharply shrink government that all the Republican candidates embrace . . . has brought a sweeping anti-federalism to the fore on education . . .”). Despite these candidates’ promises,

the Union Address,<sup>85</sup> President Reagan renewed an earlier campaign promise to dismantle the Department of Education,<sup>86</sup> and Senator and presidential candidate Bob Dole declared that he intended to “cut out the Department of Education” while on the campaign trail in 1996.<sup>87</sup> The Department of Education also faced regular organized attacks from members of Congress in the twenty years after its creation.<sup>88</sup> In January 1995, for instance, several members of Congress “declared their intent to dissolve the [Department of Education] and turn programs over to the states.”<sup>89</sup>

Each of these resistance efforts ultimately fizzled,<sup>90</sup> and by the late 1990s, Republicans had been forced to abandon their quest to

the elimination of the Department of Education seems unlikely. *See infra* notes 217–18 and accompanying text.

85. President Ronald Reagan, Address Before a Joint Session of the Congress Reporting on the State of the Union, 1 PUB. PAPERS 72 (Jan. 26, 1982).

86. REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1980 (1980), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25844> (“[T]he Republican Party supports deregulation by the federal government of public education, and encourages the elimination of the federal Department of Education.”); MARIS A. VINOVSIS, FROM A NATION AT RISK TO NO CHILD LEFT BEHIND: NATIONAL EDUCATION GOALS AND THE CREATION OF FEDERAL EDUCATION POLICY 15 (2009); *see also* DAVIES, *supra* note 3, at 245 (“[Reagan] believed that [the creation of the Department of Education] was a dangerous development and pledged to dismantle it, as part of a broader effort to return responsibility for the schools back to the states.”).

87. *The Department of Education*, PBS NEWSHOUR (Fall 1996), [http://www.pbs.org/newshour/backgrounders/department\\_of\\_education.html](http://www.pbs.org/newshour/backgrounders/department_of_education.html) (quoting Sen. Dole) (internal quotation mark omitted). The official GOP party platform similarly declared:

Our formula is as simple as it is sweeping: the federal government has no constitutional authority to be involved in school curricula or to control jobs in the work place. That is why we will abolish the Department of Education, end federal meddling in our schools, and promote family choice at all levels of learning.

REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1996 (1996), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25848#axzz1cZohA9Fc>.

88. *See de Rugy & Gryphon, supra* note 84 (“While the Republican congresses of the mid-1990s are most famous for their efforts to eliminate the department, their goal was not a new one. Conservatives had talked about eliminating the department since its creation by President Carter.”).

89. DEBRAY, *supra* note 26, at 1; *see also id.* (“The great federal experiment in education is over. It is failed. It is time to move on.” (quoting Rep. Joe Scarborough) (internal quotation marks omitted)).

90. President Reagan’s reversal was particularly notable. An outspoken critic of the Department of Education, Reagan fought bitterly against the expanding federal role in education. DAVIES, *supra* note 3, at 246–47. At the end of Reagan’s first term, however, the president’s most significant accomplishment in education was his commission of NAT’L COMM’N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983), an official report that assessed the quality of American schools and compared them with those in other advanced nations, *id.* at 1. This report’s somber diagnosis—that the country was “at risk” because of “disturbing inadequacies” in the American educational

eliminate the Department of Education.<sup>91</sup> *A Nation at Risk*,<sup>92</sup> the official report on education commissioned by President Reagan,<sup>93</sup> helped “stimulate a national conversation about educational excellence” that “revolutionize[d] the federal role” in education.<sup>94</sup> Responding to voters, who ranked education at the top of their agendas during the 1996 presidential election, Republicans were forced to “put forward their own vision for federal educational leadership.”<sup>95</sup> By 2000, conservatives had abandoned their states’-rights and small-government principles in the realm of public education, as political considerations ultimately superseded the party’s federalist concerns.<sup>96</sup>

This dramatic shift paved the way for President George W. Bush to introduce the “most significant overhaul and expansion of the federal role in education since [the ESEA]”: No Child Left Behind.<sup>97</sup>

### C. *No Child Left Behind*

In their landmark 1968 book chronicling the enactment of the ESEA, Professors Stephen Bailey and Edith Mosher ominously foretell the “profound consequences” the ESEA will have on “American education and . . . the American Federal system generally.”<sup>98</sup> By enacting the ESEA, they contend, Congress has used its spending power to “plunge[] the Federal government smack into the middle of the total educational enterprise.”<sup>99</sup> Professors Bailey and Mosher note, “The fact is that once the [Spending Clause] is interpreted liberally, it is impossible to set limits to the extent of

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process, *id.* at 5, 18—catapulted education to the front of the American consciousness, *see* VINOVSIS, *supra* note 86, at 17 (“*A Nation at Risk* hit a very responsive chord . . .”). As the public called for national education reform, President Reagan’s vision of a diminished federal role in education quickly eroded; in his second inaugural address, the president made no mention of abolishing the Department of Education. *See* President Ronald Reagan, Inaugural Address, 1 PUB. PAPERS 55 (Jan. 21, 1985).

91. McGuinn, *supra* note 24, at 54.

92. NAT’L COMM’N ON EXCELLENCE IN EDUC., *supra* note 90.

93. *See supra* note 90.

94. DAVIES, *supra* note 3, at 275.

95. McGuinn, *supra* note 24, at 54.

96. *Id.* at 55–56. A decade later, several candidates for the 2012 Republican presidential nomination renewed the debate, *see supra* note 84, and in January 2011, Senator Rand Paul introduced a bill that would have defunded almost all of the Department of Education’s programs, *see* Cut Federal Spending Act of 2011, S. 162, 112th Cong. § 7 (2011).

97. McGuinn, *supra* note 24, at 41.

98. BAILEY & MOSHER, *supra* note 53, at vii.

99. *Id.* at 3.



Federal involvement in public education.”<sup>100</sup> Bailey and Mosher scoff at the notion that Congress is actually limited by its “constitutional authority.”<sup>101</sup> Unless Congress chooses to exercise self-restraint, they warn, the federal government will continue to “move[] massively into areas of educational support formerly deemed the exclusive province of State and local governments.”<sup>102</sup>

Although the words of Professors Bailey and Mosher perhaps seemed hyperbolic in the 1960s, they seem clairvoyant in the twenty-first century. In the four decades following the enactment of the ESEA, Congress indeed tested constitutional limits and used its spending power to infringe further upon state and local governments’ traditional authority.<sup>103</sup> NCLB, Congress’s most recent reauthorization of the ESEA, provides a new paradigm for the balance of power in education that is remarkably consistent with Bailey and Mosher’s predictions. “[A]n unprecedented extension of federal authority over states and local schools,” NCLB completely obfuscates the traditional dividing line between federal and state roles in education.<sup>104</sup> Since its enactment in 2002, local control has become a virtual anachronism, and Congress’s ability to direct education policy and reform seems limitless.<sup>105</sup>

In a clear break from the small-government conservatism of the Reagan era, NCLB was enacted under President George W. Bush.<sup>106</sup>

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100. *Id.* at viii.

101. *Id.*

102. *Id.*

103. *See supra* notes 4–15 and accompanying text. Using its spending power, Congress has passed numerous landmark pieces of legislation—for example, Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1685 (2006)); section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2006)); the Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, 88 Stat. 514 (codified as amended at 20 U.S.C. §§ 1701–1758 (2006)); and the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1482 (2006)). Umpstead, *supra* note 7, at 197–98.

104. Andrew Rudalevige, *The Politics of No Child Left Behind*, EDUC. NEXT, Fall 2003, at 63, 63.

105. *See infra* notes 116–37 and accompanying text.

106. *See* DAVIES, *supra* note 3, at 5 (“The fact that so prescriptive a measure was sponsored by President George W. Bush, a Republican, and enacted by a GOP-dominated Congress illustrated anew that conservatives had traveled a long way since the enactment of ESEA, decisively abandoning the small government faith of their forefathers.”); David E. Sanger, *Bush Pushes Ambitious Education Plan*, N.Y. TIMES, Jan. 24, 2001, at A1 (“[T]he Bush plan . . . demonstrated how much the Republican Party’s position has changed to conform to Mr. Bush’s initiative. In 1994, one of his party’s rallying cries was the elimination of the

Unlike the Republicans of the 1980s and 1990s, who had lobbied tirelessly for federal withdrawal from the field of public education, President Bush advocated a strong role for the federal government.<sup>107</sup> “Change will not come by disdaining or dismantling the Federal role of education,” Bush argued.<sup>108</sup> “[E]ducational excellence for all is a national issue . . . .”<sup>109</sup>

Yet President Bush insisted that an increased federal role would not equate to decreased local control or upset the federal balance.<sup>110</sup> “[E]ducation is primarily a state and local responsibility,” Bush explained.<sup>111</sup> “I believe strongly in local control of schools.”<sup>112</sup> According to President Bush, NCLB would offer states “unprecedented freedom and flexibility” in exchange for increased accountability.<sup>113</sup> States would be required to measure student performance more rigorously,<sup>114</sup> but in exchange, the president pledged that his administration would “pass power back from Washington, D.C., to [the] states.”<sup>115</sup>

Although President Bush’s stated intentions may have been sincere, the notion that NCLB preserved local autonomy has been thoroughly discredited in the years following its enactment.<sup>116</sup> NCLB

Department of Education. Under Mr. Bush’s plan, it would become significantly more powerful, overseeing the yearly assessments of how schools and states have progressed.”).

107. Rudalevige, *supra* note 104, at 65; *see also* Kirst, *supra* note 4, at 31–32 (“Thus, Republican presidents had done an about-face, going from Reagan’s desire to dismantle the U.S. Department of Education to Bush’s dramatic expansion of Washington’s power over education.”).

108. President George W. Bush, Remarks on Submitting the Education Reform Plan to the Congress, 1 PUB. PAPERS 11, 12 (Jan. 23, 2001).

109. *Id.* (emphasis added).

110. Note, *supra* note 25, at 888.

111. GEORGE W. BUSH, NO CHILD LEFT BEHIND 1 (2001), available at <http://ed.gov/nclb/overview/intro/presidentplan/proposal.pdf>.

112. Bush, *supra* note 108, at 12; *see also* Ronald Brownstein, *Bush Moves To Reposition Republicans on Education*, L.A. TIMES, Jan. 24, 2001, at A12 (“The core of Bush’s plan is his belief that ‘authority and accountability must be aligned at the local level’ . . . .” (quoting Bush, *supra* note 108, at 13)).

113. George W. Bush, *Gov. George W. Bush’s Plans for Education in America*, 82 PHI DELTA KAPPAN 122, 125–26 (2000); *see also* BUSH, *supra* note 111, at 7 (“Accountability for student performance must be accompanied by local control and flexibility.”).

114. BUSH, *supra* note 111, at 7.

115. Sue Kirchoff, *Schools Bursting with Issues*, 58 CQ WKLY. 112, 113 (2000) (quoting then-Governor George W. Bush) (internal quotation mark omitted).

116. *See, e.g.*, Karen, *supra* note 29, at 17 (“One might wonder how Bush was able to bring such overwhelming majorities in Congress (381–41 in the House and 87–10 in the Senate) to support a bill that infringed on the prerogatives of so many, often cross-cutting, constituencies. States, districts, schools, and teachers have lost autonomy.”); Pinder, *supra* note 82, at 10 (“On

“imposes unprecedented requirements on the states and localities . . . it funds,”<sup>117</sup> thereby mandating several substantive policy directives.<sup>118</sup> First, NCLB orders states to develop plans that establish “challenging academic content standards” and “challenging student academic achievement standards.”<sup>119</sup> To determine whether students are meeting these rigorous standards, states must “implement[] a set of high-quality, yearly student academic assessments” and must test students in third through eighth grades annually.<sup>120</sup> States must also administer the National Assessment of Educational Progress (NAEP) biennially to test the rigor of their standards and to provide a measure of comparability among the states.<sup>121</sup>

Perhaps most significantly, NCLB mandates “unprecedented gathering, analysis, and reporting of data by state education agencies.”<sup>122</sup> States must publish their test results annually to demonstrate that a sufficient percentage of students have made “adequate yearly progress” (AYP) toward “proficient” academic achievement on the state assessments.<sup>123</sup> Because one of NCLB’s primary goals is to eliminate the educational achievement gap, local educational agencies do not report “average test performance in schools, which can mask underperforming groups.”<sup>124</sup> Instead, states must disaggregate their assessment data for four specific subgroups: (1) “economically disadvantaged students”; (2) “students from major racial and ethnic groups”; (3) “students with disabilities”; and (4) “students with limited English proficiency.”<sup>125</sup> If each of the four subgroups has made “continuous and substantial improvement[s],” the school has made AYP.<sup>126</sup>

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the other hand, NCLB represented a sweeping change from the traditional roles of the various levels of government in education policy in that the federal role in educational achievement went from extreme deference to the states and districts to a much more prescriptive role.”)

117. Ryan, *supra* note 10, at 45.

118. Andrew G. Caffrey, Note, *No Ambiguity Left Behind: A Discussion of the Clear Statement Rule and the Unfunded Mandates Clause of No Child Left Behind*, 18 WM. & MARY BILL RTS. J. 1129, 1130 (2010); Note, *supra* note 25, at 889.

119. No Child Left Behind Act of 2001, 20 U.S.C. § 6311(b)(1)(A) (2006). States must establish standards in mathematics, reading or language arts, and science. *Id.* § 6311(b)(1)(C).

120. *Id.* § 6311(b)(3)(A).

121. *Id.* § 6311(c)(2).

122. Kirst, *supra* note 4, at 32.

123. 20 U.S.C. § 6311(h)(1)(A)–(C).

124. Karen, *supra* note 29, at 16.

125. 20 U.S.C. § 6311(b)(2)(C)(v)(II).

126. *Id.* § 6311(b)(2)(B)–(C). To achieve AYP, schools must also ensure that at least 95 percent of the students in each subgroup take the assessments. *Id.* § 6311(b)(2)(I)(ii). By the

Finally, as President Bush promised, NCLB imposes increased accountability in the form of escalating actions against schools with unsatisfactory academic results. Any school that fails to make AYP for two consecutive years is “identif[ied] for school improvement.”<sup>127</sup> Schools in need of improvement face drastic sanctions: the state-monitored local educational agency may replace the school staff who are relevant to the school’s failure to make AYP, may institute a new curriculum, may restructure the internal organizational structure of the school, or may extend the school year or school day.<sup>128</sup> In addition, students who are enrolled in a school that is identified for school improvement are eligible to transfer to another public school in the district.<sup>129</sup>

The fact that NCLB, a law that “effected a substantial . . . power grab of education policy from the states,”<sup>130</sup> passed with overwhelming bipartisan majorities in both the House and the Senate<sup>131</sup> evidenced yet another shift in congressional thinking about the proper role of the federal government in education. The enactment of the ESEA was defended as a means of achieving educational equity for disadvantaged students, and Congress rationalized the creation of the Department of Education by citing staggering bureaucratic inefficiency.<sup>132</sup> With NCLB, however, Congress boldly seized legislative authority over two quintessential areas of state control: academic achievement and education policy and reform.<sup>133</sup>

In *United States v. Lopez*,<sup>134</sup> the Court expressed its concern that too expansive an interpretation of Congress’s Commerce Clause

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end of the 2013–2014 school year, every public school in America is expected to attain 100 percent proficiency in all four subgroups. *Id.* § 6311(b)(2)(F).

127. *Id.* § 6316(b)(1)(A).

128. *Id.* § 6316(b)(7)(C)(iv).

129. *Id.* § 6316(b)(1)(E)(i).

130. Note, *supra* note 25, at 886.

131. The House voted 381–41 in favor of NCLB, and the Senate count was 87–10. McGuinn, *supra* note 24, at 57.

132. See *supra* notes 27, 34–36, 66–68, 72–75 and accompanying text.

133. See Kirst, *supra* note 4, at 36 (“When it was felt that states could not be relied upon to meet achievement goals either, more decisionmaking moved to Washington, most recently with NCLB.”); cf. Susan H. Fuhrman, *Less than Meets the Eye: Standards, Testing, and Fear of Federal Control, in WHO’S IN CHARGE HERE?*, *supra* note 4, at 131, 131 (“When Washington starts issuing mandates about standards for student learning and how to assess that learning, controversies begin. Such policies, after all, have strong implications for school curriculums, and federal control of curriculum has long been taboo.”).

134. *United States v. Lopez*, 514 U.S. 549 (1995).

power might enable the federal government to “regulate the educational process directly.”<sup>135</sup> Congress might, for example, “mandate a federal curriculum,” the Court warned.<sup>136</sup> Though NCLB was not enacted pursuant to Congress’s commerce power, its enactment validates the Court’s concerns in *Lopez*. If Congress can use \$20 billion in funding<sup>137</sup> to strong-arm states into enacting standards, conducting regular standardized assessments, and dedicating attention to the educational achievement gap, the possibility that Congress might mandate a federal curriculum—or anything else in the field of education, for that matter—seems very plausible indeed.

## II. THE FEDERAL JUDICIARY’S ROLE IN THE FEDERAL APPROPRIATION OF POWER

The federal appropriation of power has not been achieved by Congress alone. The Supreme Court has been complicit in the gradual seizure of control from state and local education authorities. As many scholars have observed, the aggrandizement of federal involvement in public education has been facilitated in large part by the Supreme Court’s decision not to impose any meaningful restrictions on Congress’s prodigious spending power.<sup>138</sup> Article I, Section 8 of the Constitution provides that Congress has the “Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”<sup>139</sup> Although the meaning of “general welfare” has been the source of considerable debate,<sup>140</sup> the Supreme Court clarified

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135. *Id.* at 565.

136. *Id.*

137. Kirst, *supra* note 4, at 23.

138. *See, e.g.*, Ryan, *supra* note 10, at 48–49 (“The expansive scope of Congress’s authority under the Spending Clause is especially important in the field of education, for the simple reason that most federal education programs have been enacted pursuant to this power.”); Umpstead, *supra* note 7, at 203 (“In spite of its inability directly to regulate education, Congress has passed a series of laws that have significantly influenced the educational program throughout the country. To do this, Congress has utilized its spending power under Article I, Section 8, clause 1 to induce the states to cooperate with its policies.”).

139. U.S. CONST. art. 1, § 8, cl. 1.

140. Two Framers, James Madison and Alexander Hamilton, advocated opposing readings of the Spending Clause. Ryan, *supra* note 10, at 49. Madison argued that Congress’s spending power was restricted by its enumerated powers under the Constitution. *Id.* Hamilton believed, however, that Congress could use its spending power to pursue goals outside of its enumerated powers, as long as the spending advanced the general welfare. *Id.*

the scope of Congress's authority in *United States v. Butler*,<sup>141</sup> holding that Congress could use its spending power to regulate the states indirectly in ways that it could not otherwise directly mandate.<sup>142</sup>

In *South Dakota v. Dole*,<sup>143</sup> the "most recent and thorough pronouncement on the scope of the Spending Clause,"<sup>144</sup> the Supreme Court established five criteria for determining the constitutionality of a conditional spending law.<sup>145</sup> First, the spending legislation must be "in pursuit of the 'general welfare.'"<sup>146</sup> Second, any conditional strings must be stated clearly and unambiguously, enabling states to make an informed choice whether to accept the federal funds.<sup>147</sup> Third, the conditions must be related to "the federal interest in particular national projects or programs."<sup>148</sup> Fourth, Congress cannot use conditional spending legislation to induce states to engage in activities that are unconstitutional.<sup>149</sup> Fifth, the financial inducement associated with the legislation cannot be so coercive that it becomes compulsive.<sup>150</sup>

In the years following *Dole*, these five requirements have proved to be "entirely toothless."<sup>151</sup> The Court has not enforced any of the five restrictions with any zeal and has exhibited extreme deference in considering whether a particular expenditure serves the general

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

142. *Id.* at 66 ("[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.").

143. *South Dakota v. Dole*, 483 U.S. 203 (1987).

144. Ryan, *supra* note 10, at 50.

145. *Dole*, 483 U.S. at 207–08, 211. In *Dole*, the Court upheld the constitutionality of legislation that conditioned the receipt of federal highway funds on states' willingness to enact laws raising the legal drinking age. *Id.* at 205–06.

146. *Id.* at 207 (quoting *Comm'r v. Davis*, 301 U.S. 619, 640–41 (1937); *Butler*, 297 U.S. at 65).

147. *Id.*

148. *Id.* at 207–08.

149. *Id.* at 208.

150. *Id.* at 211.

151. Note, *supra* note 25, at 891; see also Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 32–33 (2003) ("It was suggested, and perhaps even expected, that the *Dole* exceptions . . . would be swept into the maelstrom of a post-*Lopez* revolution. Instead, New Federalism notwithstanding, Congress's essentially unquestioned power to spend money, with regulatory strings attached, continues to provide practically limitless opportunities for the national government indirectly to shape policy at the state and local levels of society and government." (footnote omitted)).

welfare.<sup>152</sup> In fact, the Court has rejected every federalism-based challenge to federal appropriations legislation since 1936.<sup>153</sup> This remarkably deferential disposition has allowed Congress to invoke its spending power to circumvent traditional federalism parameters and to disrupt the federal-state balance that has long existed with respect to public education.<sup>154</sup>

In the education sphere, the Court's expansive reading of the Spending Clause has afforded Congress "almost unfettered discretion to direct the education policies of the states."<sup>155</sup> Major pieces of education legislation like the Individuals with Disabilities Education Act (IDEA)<sup>156</sup> and NCLB offer states millions of dollars in federal grants in exchange for compliance with increasingly stringent educational requirements.<sup>157</sup> Although states theoretically have the power to reject Congress's directives, their autonomy is in actuality severely constrained.<sup>158</sup> Cash-strapped states are increasingly being forced to cede power to the federal government, allowing Congress to transform itself into a monolithic dictator of education policy.<sup>159</sup>

Although the Supreme Court's role in the federal appropriation of authority over education has taken a back seat to Congress's, the Court has been a powerful accomplice. Instead of checking the

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152. See *Dole*, 483 U.S. at 207 ("In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress."); *id.* at 207 n.2 ("The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." (quoting *Buckley v. Valeo*, 424 U.S. 1, 90–91 (1976) (per curiam))). For examples of cases in which the Court has affirmed *Dole*'s deferential approach to the Spending Clause, see *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 295–96 (2006); *Sabri v. United States*, 541 U.S. 600, 604–08 (2004); *United States v. American Library Ass'n*, 539 U.S. 194, 202–03 (2003); and *New York v. United States*, 505 U.S. 144, 158–59 (1992).

153. Brett D. Proctor, Note, *Using the Spending Power To Circumvent City of Boerne v. Flores: Why the Court Should Require Constitutional Consistency in Its Unconstitutional Conditions Analysis*, 75 N.Y.U. L. REV. 469, 469, 477 (2000).

154. *Id.* at 469–70.

155. Ryan, *supra* note 10, at 43.

156. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2006).

157. See Ryan, *supra* note 10, at 44 ("All major federal programs, including Title I and IDEA, provide money to states and localities, and the money comes with strings that, over the years, have formed a tangled web of rules and regulations enveloping public schools.").

158. See Michael Salerno, Note, *Reading Is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 509, 538 (2007) ("While any state is free to decline to follow NCLB, a decision to do so would result in the state's loss of federal education assistance. This result is impractical for states, as they are incapable of funding education without federal assistance.").

159. *Id.*

legislature's influence, the judiciary has consistently exercised restraint, and thus has facilitated the federal takeover.

### III. THE FEDERAL REJECTION OF A FEDERAL RIGHT

Given the staggering pace at which Congress has expanded the scope of its authority over education, one might reasonably conclude that the federal government's desire to engage in education reform has no limits. Yet both Congress and the Supreme Court have refused to venture beyond one particular frontier: neither the legislature nor the judiciary has been willing to formalize a federal right to education.

Congress's rejection of a fundamental constitutional right to education has been implicit; the legislature has simply never acted to amend the Constitution and establish the right.<sup>160</sup> Despite support from various members of Congress and from at least one presidential administration in favor of a constitutional amendment formalizing a right to education, Congress has never seriously considered making such a change.<sup>161</sup>

The Supreme Court, by contrast, has explicitly considered the issue. Since the beginning of the twentieth century, the Supreme Court has repeatedly affirmed the importance of education.<sup>162</sup> Nevertheless, the Court has refused to recognize a fundamental right to education under the federal Constitution, even after the passage of the ESEA and the creation of the Department of Education.<sup>163</sup>

The seminal case regarding a federal fundamental right to education is *San Antonio Independent School District v. Rodriguez*. In that case, the parents of Mexican-American schoolchildren challenged Texas's school-finance system, arguing that their children

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160. See *supra* note 17 and accompanying text.

161. See *supra* note 17 and accompanying text.

162. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society."); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.").

163. See *supra* note 19 and accompanying text.



were not receiving equal educational opportunities because of their socioeconomic class.<sup>164</sup> Due to its heavy reliance on local property taxes, Texas's funding scheme had generated substantial interdistrict disparities: Edgewood, the poorest district in San Antonio, received \$356 in funding per pupil, whereas Alamo Heights, the most affluent district, received \$594 per pupil.<sup>165</sup> The plaintiffs contended that these dramatic funding disparities amounted to discrimination on the basis of wealth and, thus, that they constituted a violation of their children's rights to equal protection.<sup>166</sup>

To evaluate the plaintiffs' equal protection claim, the Court questioned whether the state's funding system "operate[d] to the disadvantage of some suspect class or impinge[d] upon a fundamental right explicitly or implicitly protected by the Constitution."<sup>167</sup> The Court first held that indigent individuals did not constitute a protected class, noting that the plaintiffs had not been relegated to a position of political powerlessness or absolutely deprived of any meaningful benefit.<sup>168</sup> Next, despite affirming the "undisputed importance of education," the Court rejected the plaintiffs' fundamental-right argument.<sup>169</sup> According to the Court, a fundamental right to education is neither explicitly nor implicitly guaranteed by the Constitution, even if education might be considered a necessary prerequisite to the effective exercise of First Amendment freedoms and the right to vote.<sup>170</sup>

Although most courts have interpreted *Rodriguez* as precluding a federal right to education, this reading oversimplifies the Court's nuanced holding.<sup>171</sup> Writing for the majority, Justice Powell first

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164. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4-5 (1973).

165. *Id.* at 12-13, 15.

166. *Id.* at 17.

167. *Id.*

168. *Id.* at 23-24, 28.

169. *Id.* at 35.

170. *Id.* at 33-37.

171. *E.g.*, Greenspahn, *supra* note 20, at 768; *see also* Penelope A. Prevolos, *Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 83 (1980) ("[C]ontrary to a popular misconception of the *Rodriguez* holding, the Court did not decide that education is not a fundamental right, but that the facts of *Rodriguez* did not violate that right. Furthermore, there is no right to equal education per se, but there may be a right to whatever quantum of education is required for the meaningful exercise of other rights." (footnote omitted)); Emily Barbour, Note, *Separate and Invisible: Alternative Education Programs and Our Educational Rights*, 50 B.C. L. REV. 197, 210-11 (2009) ("[T]he idea that there may be a fundamental right to an identifiable quantum of education lives on as *Rodriguez*'s 'unheld holding.' The Court recognizes this inconsistency, citing *Rodriguez*

explained that education is not afforded explicit or implicit protection under the Constitution.<sup>172</sup> Justice Powell then, however, raised the possibility that “some identifiable quantum of education” might be constitutionally protected and that an “absolute denial of educational opportunities” in other circumstances might interfere with a fundamental right.<sup>173</sup>

The Court took up the issue of a fundamental right to education again in *Plyler v. Doe*,<sup>174</sup> which held that Texas could not deny undocumented children enrollment in its public schools.<sup>175</sup> In *Plyler*, the Court again equivocated. “Public education is not a ‘right’ granted to individuals by the Constitution,” the Court declared.<sup>176</sup> “But neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”<sup>177</sup> Because of what it described as education’s “fundamental role in maintaining the fabric of our society,”<sup>178</sup> the Court applied heightened scrutiny in analyzing Texas’s statute.<sup>179</sup> This decision—to forgo rational basis review in favor of some form of intermediate scrutiny—seemed, in the words of one commentator, to “confirm that *Rodriguez* left open the possibility that some level of education is a constitutionally protected fundamental right.”<sup>180</sup>

The Court last addressed this issue in *Papasan v. Allain*<sup>181</sup> and *Kadrmars v. Dickinson Public Schools*<sup>182</sup> with ambiguous results. In *Papasan*, a 1986 decision, the Court examined Mississippi’s disbursement of land funds for public schools.<sup>183</sup> Referencing both

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both for the proposition that there is no fundamental right to education and for the proposition that there may be a fundamental right to education.” (footnote omitted) (quoting Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 566 (1992)).

172. *Rodriguez*, 411 U.S. at 35.

173. *Id.* at 36–37.

174. *Plyler v. Doe*, 457 U.S. 202 (1982).

175. *Id.* at 230.

176. *Id.* at 221.

177. *Id.*

178. *Id.*

179. Exactly what level of scrutiny the Court actually applied is unclear, as the Court slightly confused the standard terminology of equal protection: “In light of these countervailing costs, the discrimination contained in [the Texas statute] can hardly be considered *rational* unless it furthers some *substantial* goal of the State.” *Id.* at 224 (emphasis added).

180. Greenspahn, *supra* note 20, at 769.

181. *Papasan v. Allain*, 478 U.S. 265 (1986).

182. *Kadrmars v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988).

183. *Papasan*, 478 U.S. at 267–68.

*Rodriguez* and *Plyler*, the Court noted that “the question[] whether a minimally adequate education is a fundamental right” meriting “heightened equal protection review” had not yet been definitively settled.<sup>184</sup> Two years later, in *Kadrmas*, the plaintiffs challenged their school district’s decision to charge students for a door-to-door bus service,<sup>185</sup> contending that the user fees unconstitutionally deprived indigent children of “minimum access to education.”<sup>186</sup> This time, the Court declined to apply heightened scrutiny, refusing to extend *Plyler* beyond its “unique circumstances.”<sup>187</sup> After all, noted Justice O’Connor, the Court had never “accepted the proposition that education is a ‘fundamental right’ [that] should trigger strict scrutiny when government interferes with an individual’s access to it.”<sup>188</sup>

The precedential value of *Rodriguez* and its successors is unclear. The only unequivocal truth that can be extracted from these four cases is that a federally protected right to education has never been affirmatively established.

#### IV. AN IMPLICIT FEDERAL RIGHT TO EDUCATION AND ITS IMPLICATIONS FOR *RODRIGUEZ*

Since the Court decided *Rodriguez* in 1973, numerous legal scholars have lambasted the decision and have articulated lengthy pleas for the Court to recognize a fundamental right to education.<sup>189</sup> Professors Cass Sunstein, Laurence Tribe, and Erwin Chemerinsky, three of the most renowned constitutional law scholars of their generation, have all criticized *Rodriguez*<sup>190</sup> and censured the Burger Court for failing at such a “critical juncture in the battle for educational equality.”<sup>191</sup> This chorus of opposition has accused

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184. *Id.* at 285.

185. *Kadrmas*, 487 U.S. at 453–55.

186. *Id.* at 458.

187. *Id.* at 459–60 (quoting *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring)).

188. *Id.* at 458 (quoting *Papasan*, 478 U.S. at 284; *Plyler*, 457 U.S. at 223) (internal quotation marks omitted).

189. *See supra* note 20 and accompanying text.

190. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 140 (1993); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-52, at 1654, § 16-58, at 1667 (2d ed. 1988); Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure To Achieve Equal Educational Opportunity*, 45 *MERCER L. REV.* 999, 1000 (1994).

191. Chemerinsky, *supra* note 190, at 999.

*Rodriguez* of stalling the effort to equalize educational opportunity and of forsaking the “majestic promise of *Brown*.”<sup>192</sup>

In the face of *Rodriguez*'s widespread excoriation, a few scholars have risen to the Court's defense, arguing that the case was decided correctly.<sup>193</sup> Professor Edward Foley, for example, asserts that *Rodriguez* was decided correctly under both a “strict originalist” and a “moral” reading of the Constitution.<sup>194</sup> According to Professor Foley, strict originalists evaluating *Rodriguez* need only cite the Framers' lack of any “specific intent to ban unequal levels of spending per student among different school districts within a state.”<sup>195</sup> Professor Foley concedes that strict originalism may be a “rather unattractive theory of constitutional interpretation” at times, but he bolsters his strict-originalism argument with a moral reading of the Equal Protection Clause.<sup>196</sup> Although Professor Foley agrees that the Fourteenth Amendment embodies the “fundamental principle” that all humans have equal intrinsic value, he maintains that disparities in educational opportunities “do[] not necessarily violate the principle of intrinsic equality.”<sup>197</sup> Rather, just as *Rodriguez* suggested, the Constitution requires only a minimum level of educational opportunity.<sup>198</sup> As Professor Foley himself hints, however, his published support of *Rodriguez* places him in the minority among legal scholars.<sup>199</sup>

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192. *Id.*

193. See, e.g., John Dayton, *When All Else Has Failed: Resolving the School Funding Problem*, 1995 BYU EDUC. & L.J. 1, 19–20 (“Although it may be tempting to embrace judicial action as a panacea for school funding inequities, political reality dictates otherwise. Political reality supports the Court's conclusion in *San Antonio v. Rodriguez* that ‘the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.’” (footnote omitted) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973))); Foley, *supra* note 20, at 541 (“If *Rodriguez* had imposed a requirement of equal educational opportunity, as some prominent constitutional scholars still wish, the Court would have been acting as tyrannical philosopher-kings, usurping the democratic authority of the people and their elected representatives.”).

194. Foley, *supra* note 20, at 476–78. Professor Foley borrows the notion of a moral reading of the Constitution from Professor Ronald Dworkin. *Id.* at 477 (citing RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1–14 (1996)).

195. *Id.*

196. *Id.* at 477–79.

197. *Id.* at 478–79.

198. *Id.* at 479.

199. See *id.* at 476–77 (noting the widespread criticism of *Rodriguez* within the legal community and acknowledging that “academic commentators [have not] satisfactorily defended” the case).

Another scholar, Judge Jeffrey Sutton of the Sixth Circuit, contends that regardless of whether *Rodriguez* was rightly or wrongly decided, the plaintiffs in the case “potentially gained by losing.”<sup>200</sup> In his article on the decision, Judge Sutton describes the states’ reaction to *Rodriguez* and argues that the states were better equipped to address the complex and diverse issues of school financing and educational spending than the federal government was anyway:

As the *Rodriguez* story suggests, the answer to the pragmatist judge’s question—“What happens if we do nothing?”—is not invariably that the States will do nothing, and it occasionally may be that the States will do more for a given cause than the federal courts ever could have done.<sup>201</sup>

This Note similarly contends that perhaps the plaintiffs in *Rodriguez* “gained by losing,” though for different reasons from those Judge Sutton articulates. This Part argues that Congress’s enactment of NCLB, in conjunction with the Department of Education’s growing prominence, has established an implicit federal right to education that is equivalent, and perhaps even superior, to any right the judiciary could identify and protect. Thus, even if the pervasive derision *Rodriguez* inspired when it was handed down was well founded, pleas for the Court to overrule the decision are now largely unnecessary.

#### A. *The Cases for and Against Implicit Legislated Rights*

Whether legislation can implicitly establish a right is not a settled question.<sup>202</sup> The clearest rights, of course, are those that are explicitly enshrined in positive law—the right to free speech,<sup>203</sup> for example, or the right to be free from sex discrimination when participating in an

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200. Jeffrey S. Sutton, Essay, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1978 (2008).

201. *Id.* at 1986.

202. *Gonzaga University v. Doe*, 536 U.S. 273 (2002), for example, suggests that Congress cannot confer a right unless it “speak[s] with a clear voice,” and manifests an ‘unambiguous’ intent,” *id.* at 280 (alteration in original) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Similarly, *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), cautioned courts not to “attribute to Congress an unstated intent” and infer substantive rights or private causes of action, particularly when such inferences would “impose affirmative obligations on the States,” *id.* at 16–17; see also *infra* notes 205–07.

203. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

educational program.<sup>204</sup> Yet courts have also historically recognized implicit rights that are not clearly enumerated in a specific textual provision. For instance, under the doctrine of substantive due process, courts have identified fundamental rights ranging from the right to marry<sup>205</sup> to the right of parents to direct the upbringing of their children.<sup>206</sup> These rights, although not mentioned in the Constitution, are, according to the Court, protected either by the word “liberty” in the Due Process Clause or by the “penumbras” of various amendments in the Bill of Rights.<sup>207</sup>

At the most basic level, when a court recognizes a right, it is doing two things. First, the court is preserving some modicum of positive or negative liberty.<sup>208</sup> Second, the court is ensuring that a remedy exists should that liberty be infringed.<sup>209</sup> As the subsequent Sections in this Part explain, these two things—preserving a liberty interest and ensuring a remedy—are precisely what the passage of

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204. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006).

205. *See* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”).

206. *See* *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (“Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390 [(1923)], we think it entirely plain that the [law in question] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”).

207. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965) (“In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. . . . [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”). Of course, a sizable contingent of legal scholars, including Justices Scalia and Thomas, would contend that rights can be established only if they are identified explicitly, whether in the text of the federal Constitution, a state constitution, a statute, or a regulation. This Note’s argument, however, is not incompatible with these scholars’ textualist approaches to the Constitution. This Note does not hinge on whether the Constitution protects—or theoretically *could* protect—a substantive-due-process right to education, nor does it aim to prove that implicit rights are legitimate or even possible. Rather, this Note makes the more modest argument that the protections individuals enjoy under NCLB and the auspices of the Department of Education are comparable to the protections individuals would enjoy pursuant to a formalized right, whether it be enshrined in a constitution or in a statute. *See infra* notes 209–62 and accompanying text.

208. *Cf. Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” (emphasis omitted)).

209. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”); *id.* at 163 (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”).

NCLB and the Department of Education's role in enforcing NCLB have accomplished.

The most immediate response to this proposition is that a right recognized implicitly by Congress could never rival—and certainly could never trump—a constitutional right. After all, constitutional rights sit atop the hierarchy of rights in terms of the reverence they enjoy, and they are virtually impossible to rescind.<sup>210</sup> Thus, as this line of thinking goes, those who deride the holding in *Rodriguez* have a compelling reason to continue their chorus of opposition for as long as a constitutional right to education is denied.

This argument, however, overestimates the value of an explicit right recognized by the judiciary and underestimates the power of an implicit right recognized by Congress. First, although constitutional rights are nearly impossible to rescind, doing so is not impossible, particularly when the right is not expressly mentioned in the Constitution or a statute. As the oft-maligned case *Lochner v. New York*<sup>211</sup> demonstrates, implicit constitutional rights are not necessarily irrevocable. *Lochner* infamously invoked a right to freedom of contract,<sup>212</sup> a right that was later abandoned in *West Coast Hotel Co. v. Parrish*.<sup>213</sup> Similarly, *Dred Scott v. Sandford*,<sup>214</sup> another blight on the Court's record, affirmed “the right of property in a slave” and the right of citizens to engage in slave trafficking.<sup>215</sup> These rights were

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210. *Cf. Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 259 (2d Cir. 1948) (“Clearly, the general rule is that ‘powers derived wholly from a statute are extinguished by its repeal.’ . . . This being true, so long as the claims, if they were purely statutory, had not ripened into final judgment, regardless of whether the activities on which they were based had been performed, they were subject to whatever action Congress might take with respect to them.” (quoting *Flanigan v. Sierra Cnty.*, 196 U.S. 553, 560 (1905))).

211. *Lochner v. New York*, 198 U.S. 45 (1905).

212. *See id.* at 53 (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.”).

213. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *see also id.* at 392 (“But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses.” (quoting *Chi., Burlington & Quincy R.R. Co. v. McGuire*, 219 U.S. 549, 567 (1911)) (internal quotation mark omitted)).

214. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

215. *See id.* at 451–52 (“[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slaves escapes from his owner.”).

later resoundingly rescinded with the passage of the Thirteenth and Fourteenth Amendments.<sup>216</sup> Hence, although revoking implicit constitutional rights that have been recognized by the Court might be anomalous, even if *Rodriguez* had established an implicit constitutional right to education, that right would not be indubitably impervious to future attack.

Second, a right to education that has been implicitly recognized by Congress—albeit easier to repeal than a constitutional right—is unlikely to be eroded or rescinded, for pragmatic and political, if not jurisprudential, reasons. When Congress establishes a new statutory scheme, particularly a scheme that enshrines a right, the momentum in favor of such a scheme and the “inertial forces” that often tie Congress’s hands are unlikely to allow for a “bold” departure.<sup>217</sup> Having grown accustomed to policies that suggest a federal commitment to education over five decades, the American people are unlikely to support the federal government’s drastically scaling back its commitment to public education. In effect, the implicit right to education protected by NCLB and the Department of Education is probably already so “embedded in the fabric of American politics” that it has “become, if not impregnable, then at least firmly resistant to assault.”<sup>218</sup>

For these reasons, the contention that a constitutional right affirmed by the Supreme Court would be the preeminent

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216. See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”); U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”). The Court’s shift in position from *Bowers v. Hardwick*, 478 U.S. 186 (1986), to *Lawrence v. Texas*, 539 U.S. 558 (2003), as well as its willingness to reconsider *Roe v. Wade*, 410 U.S. 113 (1973), in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), further demonstrates the potentially transitory nature of implicit constitutional rights recognized by the judiciary.

217. DAVIES, *supra* note 3, at 2; see also Liaquat Ali Khan, *A Portfolio Theory of Foreign Affairs: U.S. Relations with the Muslim World*, 20 TRANSNAT’L L. & CONTEMP. PROBS. 377, 406 (2011) (“The President can request that Congress modify or repeal a certain statutory portfolio. But such requests rarely materialize, because repealing a federal statute requires a new political consensus in both chambers of Congress.”); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 505 n.66 (1997) (“The burden of inertia in repealing existing legislation is another unavoidable consequence of a present generation’s right to control the present.”).

218. See DAVIES, *supra* note 3, at 2.



accomplishment for education advocates is cogent but not irrefutable or insuperable; in fact, it may be misguided. In the following Sections, this Note first compares the right to education that presumably would have been established under *Rodriguez* with the right that has been implicitly recognized by Congress under NCLB. It then defends the hypothesis that the protections the *Rodriguez* Court could have formalized would have been no more expansive than the protections available under NCLB, insofar as those protections are enforced by the Department of Education.

### B. *Equity- Versus Adequacy-Based Rights to Education*

*Rodriguez* and the numerous state-finance cases that were litigated under state constitutional provisions in its wake<sup>219</sup> volunteer two possible versions of a right to education.<sup>220</sup> The first wave of cases envisioned a right to education grounded in *equity*.<sup>221</sup> The equity-based right to education guarantees equal educational opportunities to all students, regardless of their race, gender, or disability.<sup>222</sup> The second wave of cases suggested a right to education grounded in *adequacy*.<sup>223</sup> The adequacy-based right to education focuses on the quality of education students are receiving and demands that school

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219. *E.g.*, *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (en banc); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993).

220. *See* Lauren Nicole Gillespie, Note, *The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education*, 95 CORNELL L. REV. 989, 991 (2010) (noting that advocates changed litigation strategy after *Rodriguez* “from seeking equitable funding across all school districts to ensuring that all districts have sufficient funding to provide their students an adequate education”); *see also* Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1202 (2011) (describing three waves of cases but identifying the same two “distinct theories of legal action”).

221. *E.g.*, *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994) (en banc); *Serrano*, 487 P.2d 1241; *McWherter*, 851 S.W.2d 139. Some courts have alternatively used the word “equality.” *E.g.*, *Rose*, 790 S.W.2d at 207.

222. *See, e.g.*, *McWherter*, 851 S.W.2d at 140–41 (“The provisions of the constitution guaranteeing equal protection . . . require that the educational opportunities provided . . . be substantially equal. The constitution, therefore, imposes upon the General Assembly the obligation to maintain and support a system of free public schools that affords substantially equal educational opportunities to all students.”).

223. *E.g.*, *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995); *Leandro*, 488 S.E.2d 249; *Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999). Many scholars actually discuss school-funding litigation in terms of *three* waves: “federal equality litigation, state equality litigation, and state adequacy litigation.” Gillespie, *supra* note 220, at 991; *see also, e.g.*, Tang, *supra* note 220, at 1202. Because this Note is focused solely on the possibility of a *federal* right to education, it has simply collapsed these “three waves” into two general visions of what a right to education might look like.

districts meet certain minimum standards.<sup>224</sup> In creating the Department of Education and enacting NCLB, Congress unofficially instituted a federal right to education that conforms with both of these visions.

1. *No Child Left Behind and an Equity-Based Right to Education.* In *Rose v. Council for Better Education, Inc.*,<sup>225</sup> the Supreme Court of Kentucky provided a useful explanation of an equity-based right to education:

Each child, *every child*, . . . must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of the rich, the children who live in poor districts and the children who live in rich districts must be given the same opportunity and access to an adequate education.<sup>226</sup>

This vision is strikingly consistent with the vision set forth in NCLB, which seeks to “ensure that *all* children have a fair, equal, and significant opportunity to obtain a high-quality education.”<sup>227</sup> Its provisions embody Congress’s express purpose of “closing the achievement gap . . . between minority and nonminority students, and between disadvantaged children and their more advantaged peers.”<sup>228</sup> This objective is precisely what the litigants in equity-based education lawsuits were seeking: the assurance that classifications like race and socioeconomic status would not interfere with educational access and opportunity.<sup>229</sup>

In particular, NCLB’s disaggregation requirements help secure this right. NCLB requires states to disaggregate the results of their standardized tests by “race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically

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224. See, e.g., *Leandro*, 488 S.E.2d at 254 (“The principal question presented by this argument is whether the people’s constitutional right to education has any qualitative content, that is, whether the state is required to provide children with an education that meets some minimum standard of quality. We answer that question in the affirmative and conclude that the right to education provided in the state constitution is a right to a sound basic education. An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.”).

225. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

226. *Id.* at 211.

227. No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2006) (emphasis added).

228. *Id.* § 6301(3).

229. See *supra* note 222 and accompanying text.

disadvantaged.”<sup>230</sup> Under NCLB, a school cannot achieve AYP unless students in each of these traditionally underserved groups are making “continuous and substantial” academic progress.<sup>231</sup> Essentially, these requirements prevent schools from using their high-performing students’ scores to mask the fact that they are neglecting students in the traditionally low-performing subgroups.<sup>232</sup> By hinging schools’ ability to make AYP on the success of these historically disadvantaged groups, Congress has forced schools to provide equal educational opportunities for students in each subgroup.<sup>233</sup>

2. *No Child Left Behind and an Adequacy-Based Right to Education.* The second half of NCLB’s express purpose clarifies exactly what “all children” are promised: “significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”<sup>234</sup> This portion of NCLB’s “purpose” provision speaks to Congress’s establishment of an adequacy-based right to education.

An adequacy-based right to education guarantees students a certain minimum level of proficiency.<sup>235</sup> For example, in *Leandro v. State*,<sup>236</sup> a North Carolina education-finance case, the court held that the state must provide students with four basic skills that will allow them to succeed in the future.<sup>237</sup> In *Rose*, the Kentucky Supreme Court held that students’ “right to an adequate education” meant that the state must ensure that “each and every child” has attained seven specific “capacities,” including “sufficient oral and written communication skills . . . to function in a complex and rapidly changing civilization” and “sufficient knowledge of economic, social,

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230. 20 U.S.C. § 6311(h)(1)(C)(i).

231. *Id.* § 6311(b)(2)(C)(v)(II).

232. Sarah L. Browning, *Will Residency Be Relevant to Public Education in the Twenty-First Century?*, 8 PIERCE L. REV. 297, 333 (2010).

233. See Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 158–59 (2009) (“NCLB’s requirement that adequate yearly progress goals be met by subgroups that include both minorities and students with disabilities may be the prime motivator for schools to increase the intensity of services given to both African-American children and children with disabilities.” (footnote omitted)).

234. 20 U.S.C. § 6301 (footnote omitted).

235. Christina Payne-Tsoupros, *No Child Left Behind: Disincentives To Focus Instruction on Students Above the Passing Threshold*, 39 J.L. & EDUC. 471, 471 (2010).

236. *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997).

237. *Id.* at 255.

and political systems to enable the student to make informed choices.”<sup>238</sup> NCLB focuses on student achievement in three subject areas—language arts, mathematics, and science<sup>239</sup>—and pledges that by the end of the 2013–2014 school year, every child in America will be proficient in each.<sup>240</sup>

NCLB assures this federal right to an adequate education through several different strategies. Most obviously, NCLB commands states to enact challenging standards.<sup>241</sup> This requirement closely corresponds with the notion that an adequacy-based right to education guarantees a minimum bar below which academic instruction cannot fall. States are then required to create rigorous assessments that will measure whether students are actually receiving an adequate education.<sup>242</sup> In addition, states must administer the NAEP biennially to ensure that individual states have not set the minimum educational floor too low.<sup>243</sup>

Perhaps most importantly, NCLB requires states to create plans that ensure that every teacher of a core subject in the state is “highly-qualified.”<sup>244</sup> To be “highly-qualified,” teachers must have at least a bachelor’s degree, must satisfy all state certification requirements, and must have a high level of competency in their assigned subjects.<sup>245</sup> Numerous studies have identified teacher quality as the top determinant of student success.<sup>246</sup> Therefore, requirements that would place an effective teacher in every classroom are a critical part of providing students with an adequate education.

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238. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989).

239. 20 U.S.C. § 6311(b)(1)(C).

240. *Id.* § 6311(b)(2)(F).

241. *Id.* § 6311(b)(1)(A).

242. *Id.* § 6311(b)(3)(A), (C).

243. *Id.* § 6311(c)(2).

244. *Id.* § 6319(a)(1)–(2).

245. *Id.* § 7801(23).

246. *See, e.g.*, DAN GOLDHABER WITH EMILY ANTHONY, *TEACHER QUALITY AND STUDENT ACHIEVEMENT 7–9* (ERIC Clearinghouse on Urb. Educ., Urban Diversity Ser. No. 115, 2003), available at <http://www.eric.ed.gov/PDFS/ED477271.pdf> (presenting studies demonstrating that student achievement is best predicted by “teacher quality”); Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 119 (2009) (noting research that shows “quality instruction is the most important factor . . . in predicting academic success”).

C. *Comparing a Legislatively Recognized and a Court-Recognized Right to Education*

1. *Similarities.* Congress cannot absolutely guarantee that schools will honor students' rights to education, but neither can the courts. The judiciary simply has the capacity to identify rights and then to provide relief when those rights are violated. By enacting NCLB and tasking the Department of Education with its enforcement, Congress has effectively done the same thing.<sup>247</sup> First, as discussed in Section B, Congress has implicitly identified a federal right to education grounded in both notions of equity and adequacy. Then, Congress has preemptively established remedies should schools violate students' rights to education.

Were the Supreme Court to recognize a fundamental right to education, plaintiffs presumably would not have available to them any more remedies than NCLB already provides.<sup>248</sup> Under NCLB, schools whose students fail to obtain proficiency are identified for improvement.<sup>249</sup> Students in these schools enjoy two kinds of remedies. First, NCLB imposes strict requirements geared toward immediately improving the education the school is providing. For example, schools can be forced to reopen as charter schools, to replace their entire staffs, or to submit to an executive state takeover.<sup>250</sup> In addition, schools "needing improvement" are required to incorporate scientifically based research into their teaching methods and to provide "high-quality professional development" to all teachers and principals to help address the specific academic issues the school is having.<sup>251</sup> Second, NCLB provides a remedy to ensure that students whose educational rights have been violated are protected thenceforward. Students in schools that have failed to meet AYP are entitled to transfer to a higher-performing school,<sup>252</sup> or they can force their schools to provide supplemental instructional services.<sup>253</sup> Together, these sanctions serve to protect students' federal rights to education in the same way judicial remedies would.<sup>254</sup>

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247. See *supra* notes 208–09 and accompanying text.

248. For counterarguments to this proposition, see *infra* Part IV.C.3.

249. 20 U.S.C. § 6316(b)(1)(A).

250. *Id.* § 6316(b)(8)(B).

251. *Id.* § 6316(b)(3)(A)(iii).

252. *Id.* § 6316(b)(1)(E).

253. *Id.* § 6316(b)(5)(B), (e)(1).

254. See *infra* Part IV.C.3.

2. *Congressional Superiority.* Not only is Congress able to provide equivalent remedies, but in many ways, the protection available under NCLB is superior to the protection the Court could provide by recognizing a fundamental right to education. To begin with, Congress's ability to enforce both the right and its remedies is far superior to the Supreme Court's. As the states' lethargic reaction to *Brown* illustrated, the Court has very little leverage actually to induce states to take action.<sup>255</sup> Congress, by contrast, has the power of the purse and can employ this formidable bargaining chip as a means of ensuring state compliance.<sup>256</sup> In accordance with this principle, NCLB establishes harsh sanctions for states that violate students' implicit rights to education. The secretary of education is authorized to withhold all federal funding from states that fail to establish challenging standards or rigorous statewide assessments.<sup>257</sup>

Institutional-competence considerations similarly weigh in favor of a legislatively enforced right to education. Since the federal judiciary's first foray into public education in *Brown*, the Court has repeatedly insisted that it is ill equipped to correct problems in American schools.<sup>258</sup> Judges lack both the administrative capacity to evaluate potential educational reforms and the training to make critical policy decisions.<sup>259</sup> Consequently, judicial inquiries are usually limited to comparing concrete, tangible factors like physical facilities, instructional materials, and budgets,<sup>260</sup> and their remedies are

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255. See Jack Greenberg, *Report on Roma Education Today: From Slavery to Segregation and Beyond*, 110 COLUM. L. REV. 919, 983 (2010) ("Desegregation in the United States was hobbled from the outset by 'massive resistance,' as school districts did not even pretend to comply with *Brown*.").

256. See *supra* Part I.C.

257. 20 U.S.C. § 6311(g).

258. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) (explaining that "few, if any, judges are qualified" to devise remedies in segregated school districts).

259. See Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203, 1253 (2006) ("Courts . . . must look at problems one case at a time, which may prevent them from taking an appropriately global view of a given issue. They must rely on the information presented by the parties and their amici or engage in their own independent inquiry. But the parties' data may be skewed to support only one side of the dispute, and courts typically lack the resources—the time, the expertise, the sheer manpower—to collect and digest vast amounts of extra-record data." (footnotes omitted)).

260. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 191–93 (Ky. 1989) (documenting the lower courts' findings of fact on the efficiency of the local school system—findings based on facilities, personnel, and instructional materials).

necessarily couched in abstract directives.<sup>261</sup> Congress, by contrast, can delve into the minutiae by consulting experts and holding legislative hearings, and it therefore regularly makes policy decisions with confidence.<sup>262</sup>

Congress's institutional competence is also superior in terms of regulatory power. Because Congress can delegate enforcement responsibilities to the Department of Education, it can regulate schools' observance of students' rights in a manner the Court cannot. Whereas the Court must rely on individuals to bring a case or controversy, Congress, in conjunction with the Department of Education, can constantly police violations and exact immediate corrective action. This ability, in turn, largely eliminates the sometimes-insurmountable issues of litigation costs and unequal access to the American court system. Because Congress and the Department of Education serve as constant watchdogs, they are able to intervene on behalf of many students who otherwise would probably be unable to vindicate their rights.

3. *Counterarguments.* This contention—that the protections students enjoy under NCLB are equivalent to the protections students would have enjoyed had *Rodriguez* formalized a right to education—faces two obvious counterarguments.

First, one could highlight the fact that the Department of Education has not effectively enforced NCLB's stringent requirements, despite its authorization to do so. Although countless schools have been restructured and restaffed pursuant to Department of Education mandates, the agency has yet to revoke completely any state's federal funding, and numerous studies suggest that NCLB has not improved academic achievement markedly, if at all.<sup>263</sup> This first

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261. See, e.g., *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438 (1968) (instructing the school board to devise a plan that will provide “meaningful assurance of prompt and effective disestablishment of a dual system”); *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (ordering school districts to desegregate “with all deliberate speed”).

262. Lemos, *supra* note 259, at 1251–53; Sean Mulryne, Comment, *A Tripartite Battle Royal: Hamdan v. Rumsfeld and the Assertion of Separation-of-Powers Principles*, 38 SETON HALL L. REV. 279, 317 (2008).

263. See generally ROBERT MANWARING, EDUC. SECTOR, RESTRUCTURING ‘RESTRUCTURING’: IMPROVING INTERVENTIONS FOR LOW-PERFORMING SCHOOLS AND DISTRICTS (2010), available at [http://www.educationsector.org/usr\\_doc/Restructuring.pdf](http://www.educationsector.org/usr_doc/Restructuring.pdf) (describing the corrective actions taken in states throughout the country pursuant to NCLB and charting by state the number of schools in restructuring); Regina Ramsey James, *How To Mend a Broken Act: Recapturing Those Left Behind by No Child Left Behind*, 45 GONZ. L. REV. 683

criticism, though sound, is not uniquely applicable to the congressionally created remedies available under NCLB. As discussed in Section C.2, because of various institutional-competence considerations, the courts are ill suited and ill equipped to compel state compliance in the realm of education.<sup>264</sup> Moreover, were the judiciary to formalize a right to education, the catalogue of potential remedies the courts could make available to rectify violations would likely be identical to the remedies available under NCLB. One could put forward a compelling argument that these remedies are ineffective as means of improving academic achievement, but that argument would not be rebutted by appointing the courts to be the primary guardians of the right to education. Thus, although the proposition that the sanctions available under NCLB should be refined and employed more effectively is important—and almost certainly correct—the same proposition would hold true if those sanctions were instead available pursuant to a court’s holding.

The second counterargument is far more persuasive and suggests a new goal around which education reformers might mobilize. Although NCLB implicitly preserves a liberty interest and establishes remedies to help protect that interest, the statute creates no private right of action. Thus, whereas a constitutional right to education would allow individuals to obtain judicial review and vindicate their rights through litigation,<sup>265</sup> under NCLB, students are entirely dependent on Congress and the Department of Education to vindicate their rights and are left vulnerable if those two organizations opt not to act.

In practice, the absence of a private right of action is not nearly so significant as it seems in theory. Because students are free to transfer out of any school that fails to provide an adequate and equitable education<sup>266</sup> as that concept is defined by NCLB,<sup>267</sup> students retain a key instrument for vindicating their rights. Moreover, although evidence suggests that the Department of Education’s

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(2010) (describing the ways in which NCLB has “fallen far short of its lofty expectations and objectives”).

264. See *supra* Part IV.C.2.

265. See 42 U.S.C. § 1983 (2006) (providing a private right of action for individuals whose constitutional or statutory rights have been violated by an actor acting “under color of” state law); *Ex parte Young*, 209 U.S. 123, 159–68 (1908) (affirming a federal right of action for equitable relief against government officials who have violated federal law).

266. No Child Left Behind Act of 2001, 20 U.S.C. § 6316(b)(1)(E)(i) (2006).

267. See *supra* Part IV.B.



efforts to revolutionize schools in need of improvement have not yet been successful,<sup>268</sup> the problem has not been agency inaction. A thorough analysis of the value of private rights of action, as compared to protection by the administrative state, falls outside the bounds of this Note. But, in all likelihood, the availability of a private right of action would not alter the list of schools that are already subject to sanctions under NCLB, nor would it alter the sanctions that are already in place at those schools. Nevertheless, lobbying Congress to establish a private right of action under NCLB is probably a more realistic strategy for education reformers than convincing the Court to recognize a constitutional right to education. If that strategy were successful, it would provide students with another powerful—and almost certainly more efficient—means of vindicating their rights.

#### CONCLUSION

The notion that the federal government has established an implicit, legislatively created right to education will undoubtedly—and understandably—be met with some skepticism. The concept of an implicit, legislatively created right itself is novel, and some skeptics will argue that such a right cannot exist. Other skeptics will rightly argue that any advocate would prefer to bring a suit asserting a constitutional right to education rather than to rely on a right implied by legislation. Still others will highlight the flaws in NCLB that diminish the law's effectiveness, thereby diminishing the quality of the right it confers.

Each of these criticisms is warranted. The goal of this Note, however, is not to dispel all skepticism. This Note seeks simply to spark consideration of what the educational landscape would actually look like had the outcome of *Rodriguez* been different—namely, whether the scope of the federal government's involvement in education would be even more expansive; whether the chasm between students in wealthy school districts and those in poor school districts would have narrowed; and whether it is possible that, even if a superior right to education theoretically exists, the implicit right the federal government has enshrined in NCLB is not actually so different from the judicially created right to education the plaintiffs in *Rodriguez* so desperately sought years ago.

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268. See *supra* note 263 and accompanying text.

Admittedly, some of the provisions of NCLB need revision, and the Department of Education's enforcement role could certainly be heightened and refined. Ultimately, however, the plaintiffs' goal in the *Rodriguez* litigation was to ensure that no child in the Edgewood School District in San Antonio would be left behind. Nearly forty years later, the federal government has dedicated itself to achieving that goal, a transition that suggests that overruling *Rodriguez* at this point would actually have no cognizable effect.