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Can Irrational Become Unconstitutional? NCLB's 100% Presuppositions

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This article identifies two presuppositions underlying No Child Left Behind's (NCLB) system of adequate yearly progress. The first is that each state must bring 100% of its students up to proficiency on state tests by the 2013–14 school year. The second is that each student's test score must effectively be treated by the state as if his or her school were 100% responsible for that score. The article demonstrates that these two 100% presuppositions are unsupportable and then explores the NCLB rules in the context of the Fourteenth Amendment's Due Process Clause, which prohibits the government from arbitrary exercises of power.

By now, we all know the "No Child Left Behind" protocol: With limited exceptions, each state must bring every one of its students up to a "proficient" level on state tests by the 2013–14 school year—100%. This is a noble goal. But it is more than that—it is also a requirement contained in the No Child Left Behind (2002) (NCLB) law. The law is grounded in the assumption that every school in every state is able to accomplish 100% proficiency. The law holds schools responsible for student achievement, subjecting the schools to escalating penalties if some students fail to make adequate progress toward the hundred-percent target. That is, each student's test score is treated by the law as if his or her school were entirely—100%—responsible for that score.

The idealism of NCLB is used to justify these two 100% presuppositions. The reasoning is: If we do not demand 100% proficiency, then we are agreeing to leave some children behind; we're agreeing that some children cannot learn. If we do not hold the schools 100% responsible for students' test scores, then we are inviting schools to excuse poor performance by pointing to the disadvantages that students face outside of school.

This article explores these two presuppositions in the context of the U.S. Constitution's Fourteenth Amendment Due Process Clause. The clause states that no person shall be deprived of life, liberty, or property "without due process of law." The Supreme Court has interpreted this clause to provide two different types of protections. The first type is "procedural," for instance, the right to advance notice and the right to be heard before the government can seize property or terminate employment. The second type, "substantive" rights, provides the context for this article. As a federal district court explained regarding teacher employment, "Teachers have a substantive due process right to be free from arbitrary, capricious, and irrational action on the part of their government employers in relation to their teaching positions" (*St. Louis Teachers Union v. Board of Education*, 1987, p. 435).

The main section of this article describes the NCLB 100% presuppositions, explaining that they are unsupported by any legitimate research. The subsequent legal analysis is then offered not as the framework for a lawsuit but rather as a lens for highlighting the fact that such capricious legislation violates a basic principle of American governance as embodied in the Constitution. Remedies to the problems discussed in this article most likely and appropriately lie in legislative, rather than in ligitative, arenas.

ARE THE 100% PRESUPPOSITIONS RATIONAL?

The NCLB Framework

The core requirements of NCLB tie federal education funding to each state's demonstration of Adequate Yearly Progress (AYP) towards the goal of each school and district bringing 100% of their students at least to academic proficiency by the school year 2013–2014. While each state determines its own definition of "proficiency," NCLB requires all states to participate in the National Assessment of Educational Progress (NAEP) every other year in grades 4 and 8 for reading and mathematics, and

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the NAEP is then to be used as a non-binding benchmark against which to measure the state proficiency determinations.[1]

Some states have proposed to fulfill AYP requirements by making steady, linear improvement over 12 years. However, the Department of Education has allowed states to set forth AYP requirements that are backloaded, meaning that most of the progress would not be expected until after 2008 or so (Linn, 2003). The states that have taken this approach are probably motivated by a cynical yet shrewd expectation that trauma suffered by other states will prompt revisions to the NCLB law before the period when steep acceleration would be required in their own state. "Buying time allows for the possibility that the law will be modified to make progress targets more realistically achievable" (Linn, 2003, p. 10). To understand these different approaches, imagine a state where the current proficiency level is 40%, meaning that it is 60 points below 100% proficiency. A plan for straight-line Adequate Yearly Progress in this case would require a five-point increase each year for 12 years. However, the state may also set forth a "waiting out the train wreck" plan, whereby an increase is not required until 2005 and targets would then remain flat for the next two years, only to begin more regular increases in 2008 (20 U.S.C. §6311(b)(2)(H)). The most daunting proficiency increases in Ohio's plan, for instance, are not demanded until after the 2009–2010 school year (Linn, 2003).[2]

Whichever plan is adopted, if the annual targets are not met, NCLB imposes burdens that are incurred by schools receiving Title 1 (20 U.S.C. §6316(b)) funding. At the school level, for instance, the law calls for the following requirements and penalties. If a school fails to achieve AYP for two consecutive years, it is identified for "school improvement." Students in schools so identified can transfer to a higher-performing school within their district. Technical assistance also must be provided to such schools. Technical assistance may "include assistance in identifying and implementing professional development, instructional strategies, and methods of instruction that are based on scientifically based research and that have proven effective in addressing the specific instructional issues that caused the school to be identified for school improvement" (20 U.S.C. §6316(b)(4)(B)(ii)). If a school fails to meet the AYP standards for three consecutive years, it must offer pupils from low-income families the opportunity to use the school's Title I money to receive instruction from a supplemental services provider of their choice. Schools that fail to meet AYP for four consecutive years must take "corrective action" from among these options: replacing school staff, implementing a new curriculum, decreasing management authority at the school level, appointing an outside expert adviser, extending the school day or year, or changing the school's internal organizational structure (20 U.S.C. Sec. 6316(b)(7)). If the school then fails to meet AYP standards for five consecutive years, it must be "restructured." Restructuring must consist of one or more of the following actions: reopening as a charter school, replacing all or most school staff, state takeover of school operations (if permitted by state law), or other "major restructuring" of school governance (20 U.S.C. §6316(b)(8)).

Analogous penalties await school districts failing to meet AYP requirements. For instance, if districts fail to meet AYP for four consecutive years, its state education departments will be required to take corrective action, which can include offering students the choice to transfer to a higher-performing public school in another district.

Each school must demonstrate AYP for its enrollment as a whole as well as for four defined subgroups: economically disadvantaged students, limited English proficiency students, students with disabilities, and students in major racial and ethnic groups.[3] Schools must demonstrate that all these subgroups are improving their test scores.[4] Moreover, 95% of a school's students in each of these subgroups must take the state exam.[5]

NCLB requires the testing of all students every year in grades 3–8 in mathematics and reading. States must also meet a pre-existing Title I requirement (originally set forth in the Improving America's Schools Act, the Elementary and Secondary Education Act reauthorization legislated in 1994) to test students at least once annually in mathematics and reading at grade levels 10–12. In addition, NCLB requires that states develop science exams by the 2007–08 school year, and these tests must be administered at least one time during grades 3–5, 6–9, and 10–12 (for example, one test each in grades 5, 8, and 10).

Proficiency

Even before NCLB passed through Congress, researchers began raising concerns about the AYP approach (Kane & Staiger, 2001; Linn, 2000). Issues of sample size and random measurement variation placed practical restrictions on the potential of test-based accountability systems to quantify, or even identify, true improvement. Early concerns also were raised about bias in the tests and in accountability systems (*GI Forum v. Texas Education Agency*, 2000; McNeil & Valenzuela, 2001).

Moreover, NCLB's demand that all students become proficient was immediately identified as an extreme departure from actual experience:

> One can agree that schools should improve and that holding schools accountable will contribute to improvement but still conclude that the goal of having 100 percent of students reaching the proficient level . . . is so high that it is completely out of reach. (Linn, Baker, & Betebenner, 2002, p. 12)

Using NAEP mathematics trends, Linn (2003) later graphically demonstrated how dramatic a departure

NCLB assumes to be possible. For the decade from 1990 to 2000, NAEP annual increases averaged about 1% at grades 4 and 8, and only half of 1% at grade 12. Linn explained what this means in terms of the 100% proficiency goal:

> Based on a straight-line projection of those rates of improvement, it would take 57 years for the percentage for grade 4 to reach 100. For grade 8 it would take 61 years and for grade 12 it would take 166 years. Looked at another way, the average annual rate of gain in percent proficient or above would have to increase by factors of 4, 4.3, and 11.8 at grades 4, 8, and 12, respectively, to reach 100% by 2014. Such rapid acceleration would be nothing short of miraculous (2003, p. 6).

Linn (2003) also made similar calculations, reaching similar conclusions, for NAEP reading scores. While this approach certainly paints the NCLB 100%-proficiency task as unrealistic, the actual situation may be even worse. This is because marginal costs tend to increase tremendously as a task approaches 100% success. Consider each school's final task: moving from 90% of the school's students scoring proficient to 100% scoring proficient. Some of the school's students are going to be more responsive to school interventions than others. If Bob and Mary both start out at the 20th percentile and the school focuses the same level of resources on each, they will likely not respond identically. Bob may prove unresponsive to the interventions; Mary may thrive. In short, a school may provide a variety of rich opportunities for each, but those inputs will result in different outcomes for Bob and Mary.

Looking at this hypothetical school from the macro level, one sees that the last 10% is likely to be made up of the Bobs—students who were initially low scoring and who have not been responsive to the school's educational efforts. Also, the exact composition of the group of students scoring at the bottom is likely to change substantially every year. Among all students, including the Bobs, statistical noise will account for movement in scores each year, thus exacerbating the already daunting task of having all of a school's students scoring above the level defined as proficient. That is, the school's task is actually to move all students to proficiency plus X, where X is equal to one-half the variation in scores due to the statistical noise. Otherwise, it is likely in any given year that some students will not achieve proficiency.

This is, of course, not an argument against the interventions; after all, the school cannot know in advance which students will thrive and which will not. Moreover, most students will benefit substantially from increased educational opportunities, even if they never score at the "proficient" level on a state test. However, policymakers would be wise to recognize that test scores result from a combination of several factors: educational interventions, the student, and the student's context.

The federal government already does recognize this phenomenon when it comes to environmental pollution and worker safety; employers are not required to create conditions of zero pollution or 100% safety. Federal regulatory agencies are required to submit a Regulatory Impact Analysis (RIA) including, among other things, a cost-benefit analysis.[6] "American agencies undertaking RIA are urged to analyze the impact of specific, quantifiable standards" by using marginal analysis to ask "how much to do" as well as "whether to do" (Ogus, 1998, p. 61, citing the Office of Management and Budget). Although efficiency should not be the decisive factor regarding an equity-focused educational policy, it is nevertheless curious that marginal cost curves are salient when it comes to private industry but not when it comes to public schools.

Causation

The other NCLB 100% presupposition concerns the ability of schools to improve student achievement. This presupposition is implicit in more than just rhetoric about "failing schools"—it is also apparent from the system of NCLB penalties and in the requirement that each school bring each student to the proficient level on exams. Yet schools' capacity to improve student achievement is a subject of intense debate. At one end, there are those who minimize the role that schools can play in improving student outcome (Armor, 1972; Hanushek, 1989; Hoxby, 2001; Walberg, 1984). They often cite the Coleman Report (Coleman et al., 1966) and offer analyses purporting to show no direct relationship between inputs and outputs. Hoxby's (2001) recent conclusion was that "family variables explain nineteen times as much variation in educational attainment as school input variables do" (p. 99). Conservative columnist George Will makes a similar argument by pointing out the imbalance of time Americans spend inside and outside of school:

> The intractable problem for schools is "9/91": only 9 percent of the hours lived by young Americans between birth and their 18th birthdays is spent in school, and the other 91 percent—families, popular culture and the culture of the streets—often overwhelms what schools do. (Will, 2001)

At the other end of the debate are those who think that schools can account for as much as one-third to one-half of students' academic outcomes. But "no study has been able to attribute more than half the variation in student achievement to what schools do, and most find schools responsible for no more than a quarter" (Rothstein, 2002, p. 11, citing Grissmer et al., 2000).

While researchers and others continue to debate whether school impact is minimal or substantial, NCLB assumes it is absolute. Beyond this flawed presupposition, however, lies another. To illustrate, imagine that President Bush had been required to take the Texas

Assessment of Academic Skills exam when he was a student in Texas. He attended seventh grade at San Jacinto Junior High School. Before that, his entire formal schooling was at Sam Houston Elementary School. He would thus have attended San Jacinto for less than one year by the time he took the exam. Even if we assume that his accumulated formal schooling accounted for 50% of his test score, only a portion (maybe one-seventh) of this 50% is reasonably attributable to his experiences at San Jacinto. Yet, if he failed to score at the proficient level, this junior high school would be held responsible. The NCLB attribution is complete and absolute.

Based on this patently false premise of absolute attribution, the law places direct legal burdens on districts and schools and indirect burdens on teachers and students. As Rothstein (2002) concludes, "our out-of-balance conversation [about the role of schools in America] . . . encompasses the idea that schools alone are responsible for the education of American youth and that failings in that education can be corrected only by reform of schools" (p. 10).

SCIENTIFICALLY BASED RESEARCH

NCLB also includes a requirement that programs and practices be supported by "scientifically based research," which is defined as "research that involves the application of rigorous, systematic and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs" (20 U.S.C. §7801(37)(A)). The statute explains that this includes research

> [that] relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators (20 U.S.C. §7801(37)(B)(iii));

and

> has been accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective and scientific review (20 U.S.C. §7801(37)(B)(vi)).

Consider the implications of this provision. Some parts of the NCLB law are based on premises that fail to meet the standard that another part of the same law sets for other federally funded programs and practices. If, for instance, a school district wanted to use Title I funds to adopt a new program or curriculum, it would have to show that the program or curriculum was proven effective by "scientifically based research," pointing, for example, to peer-reviewed scholarship supported by multiple studies. However, if we held Congress to the same standard as Congress has chosen for school districts, then it could not have adopted NCLB. In fact, peer-reviewed scholarship, supported by multiple studies, flatly contradicts the NCLB 100% presuppositions. Although the statute does not, in fact, require the law itself to be supported by such scientifically based research, the inconsistency does show a staggering level of political arrogance.

DUE PROCESS

The following legal analysis is offered not as the framework for a lawsuit, but rather as a lens for highlighting the fact that capricious legislation violates a basic principle of American governance, as embodied in the Constitution.[7] The discussion here focuses on the constitutional principle that laws must not arbitrarily distribute punishments and rewards. Although this principle is not in dispute, it must be acknowledged that any legal challenge to NCLB brought by a student or teacher and based on the due process clause would face daunting procedural hurdles. Since the effects of NCLB on students and teachers are indirect, with punishments being meted out to institutions rather than to individuals, it would be difficult for individuals to convince a court that they are actually harmed by the law—which is a requirement for standing to sue. This "standing" problem, however, should not impair lawsuits brought by school districts against their respective states, challenging sanctions imposed pursuant to NCLB.[8]

In fact, states, rather than the federal government, seem the more likely defendants in lawsuits such as the type suggested here. This is largely due to a line of cases concerning the Constitution's "spending clause," the provision that gives Congress authority to attach conditions to the receipt of federal funds so long as the conditions are in pursuit of the "general welfare" (U.S. Const., Art. I, Sec. 8, cl. 1). For instance, the Supreme Court has held that Congress can make receipt of some federal highway money conditional upon a state's making the minimum drinking age 21 years old (*South Dakota v. Dole*, 1987). This clause allows Congress to require that states accepting ESEA money must also accept the NCLB accountability regime. Given that a state may refuse to accept both the funds and the conditions, ESEA is not strictly a mandate. This removes the direct relationship between NCLB, on the one hand, and teachers and students, on the other. That is, even if the burdens placed on teachers give rise to a due process claim, it is the state and the school district that have opted into the accountability regime. Congress only offered the pact. If South Dakota adopts the older drinking age and a 19-year-old South Dakotan wants to challenge the state's law, it is that state law that is the most appropriate target of the lawsuit—not the federal law that provided the conditional funds.

Nevertheless, the *South Dakota* Court did identify several limitations on Congress' spending-clause powers, one of which is that the law must be a "financial inducement," as opposed to coercion (*South Dakota*, 1987,

p. 211[9]). The National Conference of State Legislatures (NCSL, 2005) recently argued that NCLB does, in fact, cross this "line between inducement and coercion":

> Federal officials note that, pursuant to federal policy, failure to participate in No Child Left Behind would jeopardize not only the additional money available to states for NCLB, but also the tens of millions of dollars they were receiving before NCLB. The fact that the federal government has increased the stakes for not participating in Title I programs, while expanding its scope without commensurate funding increases, creates a coercive relationship between states and the federal government.[10] (p. 7)

To date, fines for violating NCLB's mandates have, however, been relatively small. The largest fine has been for $444,282—directed at Texas, in April 2005, for greatly exceeding the federal cap on the percentage of students with learning disabilities who can be given a modified state exam. A policy adviser for the National Conference of State Legislatures took note of the mild fine: "Texas got a slap on the hand for breaking a fundamental principle of No Child Left Behind. Now any other state that doesn't comply is going to expect a similar financial penalty" (Gest, 2005, p. A01). In fact, the fine amounted to just 0.04% of the state's federal education allocation, and the state had no immediate plans to change its special-education testing policy.

If future penalties are similarly mild, the coercive nature of NCLB will be mitigated and a legal challenge on this basis would likely be unsuccessful. Whether or not litigation would be successful, however, does not detract from the basic principle barring the government from placing legal burdens upon a group of people without some rational basis for doing so. As the Supreme Court has stated, "[T]here is no place in our constitutional system for the exercise of arbitrary power" (*Garfield v. United States*, 1908, p. 262). While the government may have an interest in prodding educators to produce better outcomes, it should avoid capricious means of furthering the interest.

For instance, an educational policy that threatens a teacher's job must not be arbitrary; rules of substantive due process require that the policy be rationally related to a reasonable governmental objective (*Harrah Indep. School District v. Martin*, 1979).[11] Consider, then, the NCLB provision that authorizes the replacement of all or most school staff after five consecutive years of the school not reaching AYP. Given the demonstrably false 100% presuppositions, this provision threatens to deprive teachers of their jobs arbitrarily.[12] In *St. Louis Teachers Union v. Board of Education* (1987), the federal district court in Missouri upheld a claim that a school district acted arbitrarily, capriciously, and irrationally by evaluating teachers and rating them as "unsatisfactory" on the basis of their students' California Achievement Test (CAT) scores. Similarly, in *Richardson v. Lamar County Board of Education* (1989) the court issued a judgment in favor of a teacher, whose contract had not been renewed, finding that the district's decision was based on the arbitrary choice of a cut-score on the Alabama Initial Teacher Certification Test.[13]

The type of arbitrariness inherent in No Child Left Behind is illustrated by the following exaggeration. Imagine a "Bedtime Reading Always Is Nice" (BRAIN) Act, mandating that elementary schools be closed down if parents fail to read to their children for at least one hour every night. The governmental goal is reasonable and, in fact, laudable. Such a law would likely induce more such reading and therefore improve the overall educational level of the nation's children. It would no doubt prompt school-based efforts to increase parents' nighttime reading, and these efforts would result in significant increases in reading achievement. However, the activity is not under the direct control of the school or its educators. The fact that the burdened parties would have no direct control over their status could be one factor considered by a court faced with a constitutional challenge. More generally, the Act is based on too tenuous a nexus between the reasonable goal and the restrictive law.

EQUAL PROTECTION

The prohibition on arbitrary governmental burdens also applies to claims brought under the Fourteenth Amendment's Equal Protection Clause. Two decades ago, the Supreme Court considered a Texas law that denied public education to children who were not legally admitted into the United States (*Plyler v. Doe*, 1982). In striking down the state law as a violation of the equal protection clause, the Court contrasted the situation of these children with that of their parents. The parents had chosen to enter the country illegally; the children had simply been taken along by their parents. The law, therefore, placed an unfair legal burden on the children, punishing them "on the basis of a legal characteristic over which [they] can have little control" (*Plyler*, p. 220). This, the Court reasoned, would be inconsistent with "the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing [and would thus] not comport with fundamental conceptions of justice" (pp. 219–220).

Closely tied to this issue of lack of personal control is the idea of the immutability of the key characteristic that the government has chosen. An immutable characteristic is basically one that is not alterable by a voluntary act of the relevant individual and was not acquired through the voluntary choice of the individual (Marcosson, 2001). If the government, for example, chooses to deny a benefit to all members of a given gender or racial group, courts will apply a high level of scrutiny, in part because the characteristic (gender or race) is considered immutable.

For the most part, courts hearing equal protection claims have applied these ideas of immutability and lack of control when deciding whether to apply heightened scrutiny. For instance, compare a law that intentionally burdens or privileges members of a given racial group with one that intentionally burdens or privileges those who live in a flood zone. The racial categorization will only survive a constitutional challenge if it is *narrowly tailored* to serve a *compelling* governmental interest. However, the law that categorizes based on residence in a flood zone will survive a constitutional challenge if it has a *rational* relationship to a *reasonable* governmental interest—a much lower level of scrutiny. People who choose to live in a flood zone have control over this choice; it does not reflect an immutable characteristic. Nor is this a group that has been subject to past discrimination as a "discrete and insular minorit[y]" (*United States v. Carolene Prods*, 1938, p. 152 n. 4). Government may use classifications as part of normal policy-making, so long as those classifications do not arise out of invidious or arbitrary discrimination.

"HAVE DONE" VERSUS "CAN DO"

Notwithstanding the flawed 100% presuppositions, consider the defenses that may be offered for NCLB's rationality. Some of these defenses focus on policy and some on law, but most have implications in both arenas.

One can imagine the political rhetoric likely to be leveled against the arguments made in this article:

> Progress is never made by those who think that the future is limited to what has been accomplished in the past. With such thinking, President Kennedy would have been advised, "Jack, don't propose this moon thing. Set forth a goal that we know we can reach."

This is an argument that distinguishes "what we have done" from "what we can do," and it should resonate with educational reformers who point to policies ranging from early childhood education (Barnett, 2002), to detracking (Burris & Welner, 2005), to choice (Hoxby, 2003) as carrying the potential to raise achievement dramatically. Yet, although the moon launch was a reach beyond what had thus far been accomplished, President Kennedy could point to experts describing the plausibility of the goal. President Bush is not in a position to do this.

The unreachability of NCLB's goals might nonetheless be defended with the rationale that, even if schools come up short, pursuit of the goals will lead to substantial improvement. This rationale is explained by *Washington Post* writer Jay Mathews as a defense to the charge, "The law's goal of 100% student proficiency in reading and math by 2014 is impossible":

> True, say its framers, but emphasizing that fact misses the point. The 100 percent goal was simply a target, an admittedly unreachable goal designed to motivate schools to stretch themselves to do better, such as scientists trying to cure cancer or gardeners hoping to grow the perfect tomato. The creators of the law say they knew they would have to revise it in a few years. That, they say, is what legislators do—take their best shot with the votes they have and come back later to fix the rough spots. (Mathews, 2003, p. A08)

But the government does not penalize scientists whose efforts do not cure cancer, nor do they penalize gardeners for sub-perfect tomatoes. Perhaps more importantly, the motivational goals are misguided. The theory is analogous to the mechanical rabbit at a dog track—out of reach, but still a motivator. Teachers, however, are not greyhounds. "[H]aving a goal that is unobtainable no matter how hard teachers try can do more to demoralize than to motivate greater effort. Goals need to provide a challenge but not be set so high that they are unachievable" (Linn, Baker, & Betebenner, 2002, p. 12).

Moreover, even if the mechanical rabbit approach were to prove effective, it nevertheless places unfair legal burdens on school districts, schools, teachers, and students. Consider again the hypothetical modification of NCLB, the "BRAIN" Act, whereby schools would be shut down if parents failed to read to their children. Since family factors may be more important to a child's achievement than school factors (Hoxby, 2001), such a family-oriented provision may be more sensibly targeted than the current teacher-focused accountability system. However, the assignment of responsibility in such a policy is too arbitrary. Without limitations on government capriciousness, schools and teachers might conceivably be sanctionable if a student robs a bank or gets a cavity, even if the school did nothing to contribute to that student's transgression.[14]

Setting aside such concerns, a third defense may argue that courts should never determine that a policy goal is out of reach. Just because schools have not raised the portion of "proficient" students beyond 1% per year, does this mean that they cannot improve—perhaps to a 2% annual increase? If 2%, why not 3, 4, 5, or even 12%? Similarly, if research demonstrated that schools could account for as much as 75% or even 90% of a student's measured achievement, could a school, working with that portion, bring a student above proficient even if the remaining 10–25% of the student's potential opportunities to learn were nonexistent? If yes, then where does the cut-off lie? If 75%, then why not 50%? Faced with an constitutional challenge to NCLB, most courts would struggle to find a way to avoid interfering with the policy choices of elected officials. Accordingly, asking questions such as these, any given court may find that there is indeed a rational basis for NCLB.

For a court to do so, however, would simply add one more layer of irrationality to the NCLB story. It is true that a court may not be able to determine when an ambitious policy goal (for example, increasing the portion of "proficient" students at a rate of 1.5% annually instead of 1%) becomes too ambitious. NCLB's twin 100% presuppositions, however, result in goals that are not merely ambitious; they are unattainable. NCLB is so extreme in its presuppositions and targets that a court presented with a challenge to the law would not be faced with the difficult task of drawing an arbitrary line within a gray area.

CONCLUSION

Some states, such as Texas, currently make receipt of a graduation diploma dependant upon demonstrating proficiency on state accountability exams. The current NCLB allows, but does not require, such provisions. In his acceptance speech at 2004 Republican National Convention, however, President Bush proposed an expansion of NCLB: "We will place a new focus on math and science. As we make progress, we will require a rigorous exam before graduation" (Bush, 2004). Such an amendment would deepen the contradictions in the current NCLB school-level accountability presuppositions. If the school is held accountable for the student's score, then the student is assumed not to have been given adequate opportunities to learn. But if the student were held accountable for the score, then it would be assumed that the school had given that student an adequate opportunity to learn. This is comparable to the district attorney who tries two different defendants for the same murder, on two different theories. If the government is offering two underlying and mutually contradictory theories about responsibility, both theories—both suppositions—cannot be true.

Of course, the truth is that each—school and student—bears some responsibility, along with the state, the school district, the family, the community, peer groups, libraries, and various other people and institutions including the federal government. And the truth is that if it were possible to measure the actual contributions of each to student test scores, we would find varying proportions for each community, family, student, teacher, and school. A more rational NCLB would acknowledge and reflect both those truths.

For the moment, though, American schools are faced with the current, irrational NCLB. The law may indeed push some schools toward improvement, but this improvement will be achieved at a steep cost for the families and teachers in these and other school communities who will watch their schools stumble inexorably through the annual rite of escalating NCLB penalties. Any benefits are outweighed by the injustice, a informative illustration of the wisdom underlying our constitutional disapproval of arbitrary and capricious laws.

NOTES

1. Although initial drafts of NCLB proposed using NAEP as a yardstick for expressly adjusting state proficiency standards, the actual law only proposes that NAEP will provide a universal benchmark upon which policymakers and others might ground conversations. The rationale here is that, if NAEP scores indicate that a state's proficiency level is set too low, the comparison will (hopefully) embarrass that state into raising the bar.

2. The Education Department recently hinted at a alteration that may substantially change the 100% proficiency (AYP) requirement. It is planning to convene a panel of experts to consider including growth modeling in the accountability systems of states that can show that they are already making good progress improving student achievement (Hoff, 2005). Ostensibly, a state would meet growth model targets instead of AYP targets.

3. The Department of Education issued regulations in December of 2003 that give states the option of counting, in their AYP calculations, alternate achievement measures of "proficient" for students with the most significant cognitive disabilities, so long as this does not exceed 1% of all students in the grades tested (34 C.F.R. 200, Part 200, Subpart A, Sec. 200.6). In April 2005, Education Secretary Spellings announced a further amendment regarding students with special needs. Up to 2% of students with "persistent academic disabilities" may be given separate assessments based on standards set to match their abilities (Hoff, 2005). Also, the Department of Education announced in February of 2004 a proposed rule allowing states up to two years to include in the Limited English Proficient subgroup those students who have attained English proficiency (Federal Register, 2004).

4. The NCLB does include a "safe harbor" provision, summarized by Lee (2004) as follows:

> For [a] school where the performance of one or more student subgroups on one or both of reading and math assessments fails to meet AYP targets, the school will be considered to have reached AYP under this provision if the percentage of students in that group who failed to reach proficiency decreased by 10 percent from the preceding year and also the group made progress on another academic indicator (p. 2).

However, Lee's analysis concludes that this provision "would do little to reduce the risk of massive school failure due to unreasonably high AYP targets for all student groups" (p. 1). In fact, this has proven to be the case: "The very small percentage of schools that are saved by the safe harbor provision is due to the fact that the 10% decrease in students scoring below proficient sets a very high bar in comparison to what is achieved by even high performing schools" (Linn, 2004, p. 7). Linn suggests that a decrease closer to 3 or 4%—which is above average—would be more reasonable.

5. The Department of Education issued a revised policy on in March of 2004 allowing states to use a two- or three-year

average participation rate for a school and/or subgroup. If this average meets or exceeds 95%, the school is considered to have met this AYP requirement (Paige, 2004).

6. This requirement originated in 1981 with President Reagan's Executive Order No. 12,291 (1981). This was amended by President Clinton's Executive Order No. 12,866 (1993) and again amended by President Bush's Executive Order No. 13,258 (2002).

7. More viable lawsuits challenging NCLB are likely to be based on a provision in the law stating, "Nothing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act" (20 U.S.C. 7907(a)). Such lawsuits are discussed elsewhere in this volume (Welner & Weitzman, 2005).

8. Reading School District brought an action in state court against Pennsylvania in 2003 challenging sanctions resulting from its low performance rating. The court rejected the district's claim, but the only subjects addressed concerned statutory interpretation; no constitutional or standing matters were at issue (*Reading School District v. Pennsylvania Department of Education*, 2004). The district argued, among other things, that its Spanish-speaking students could not adequately read the state-imposed tests. More recently, ten California school districts brought a lawsuit against the state in June 2005, alleging that the testing in English of students with limited English skills violates NCLB (Helfand, 2005).

9. Page references to U.S. Supreme Court cases are to the official citation—*U.S. Reports.*

10. The *South Dakota* (1987) Court also set forth the requirement that the key provisions of the law be clear and unambiguous at the time that the law is enacted. McColl (2005) argues persuasively that this part of the Court's test is also not met by NCLB. How, she asks, can a state knowingly accept the terms of the NCLB "contract" if the key requirements keep changing?

11. The substantive due process standard described here applies to so-called "legislative" acts, but not necessarily to non-legislative (so-called "executive") acts whereby an employee is singled out for allegedly unfair treatment. The distinction was recently summarized as follows:

> When a plaintiff challenges the validity of a legislative act, substantive due process typically demands that the act be rationally related to some legitimate government purpose. In contrast, when a plaintiff challenges a non-legislative state action (such as an adverse employment decision), we must look, as a threshold matter, to whether the property interest being deprived is "fundamental" under the Constitution. (*Nicholas v. Pennsylvania State University*, 2000, p. 142)

12. Most likely, this provision will be implemented by states and districts by reassigning teachers, not firing them. The examples are, therefore, offered here simply as illustrations of arbitrariness, not as examples of likely lawsuits.

13. This was a discrimination claim brought under Title VII of the Civil Rights Act of 1964.

14. Pursuant to "spending clause" jurisprudence, Congress cannot impose conditions on the receipt of federal money that are "unrelated 'to the federal interest in particular national projects or programs,'" (*South Dakota v. Dole*, 1987, p. 208). However, given that schools are asked to teach lawfulness and hygiene, schooling would probably be held to be sufficiently related to robbery and cavities.

REFERENCES

Armor, D. J. (1972). School and family effects on black and white achievement: A reexamination of the USOE data. In F. Mosteller & D. P. Moynihan (Eds.), *On equality of educational opportunity* (pp. 168–229). New York: Random House.

Barnett, W. S. (2002). Early childhood education. In A. Molnar (Ed.), *School reform proposals: The research evidence.* Retrieved February 4, 2005, from http://www.asu.edu/educ/epsl/EPRU/documents/EPRU%202002-107/EPSL-0202-107-EPRU.pdf

Burris, C. C., & Welner, K. G. (2005). Closing the achievement gap by detracking. *Phi Delta Kappan, 86*(8), 594–598.

Bush, G. W. (2004, September 2). Acceptance speech at the 2004 Republican National Convention. Retrieved February 4, 2005, from http://uspolitics.about.com/od/speeches/a/bush_speech_p.htm

Civil Rights Act of 1964. (1964). Pub. L. No. 88-352, 78 Stat. 252, 42 U.S.C. §§2000e et seq.

Coleman, J. S., Campbell, E. Q., Hobson, C. J., McPartland, J., Mood, A. M., Weinfeld F. D., & York, R. L. (1966). *Equality of educational opportunity*. Washington, DC: U.S. Department of Health, Education and Welfare, U.S. Government Printing Office.

Elementary and Secondary Education Act. (1965). Pub. L. No. 89-10, 79 Stat. 27, 20 U.S.C. §§6301 et seq.

Executive Order No. 12,291. (1981). 3 C.F.R. 127.

Executive Order No. 12,866. (1993). 3 C.F.R. 638.

Executive Order No. 13,258. (2002). 3 C.F.R. 204.

Federal Register. (2004, June 24). Vol. 69, No. 121.

Garfield v. United States. (1908). 211 U.S. 249, 29 S.Ct. 62, 53 L.Ed. 168.

Gest, J. (2005, April 23). Texas fined for No Child defiance. *Houston Chronicle*, p. A01.

GI Forum v. Texas Education Agency. (2000). 87 F.Supp.2d 667 (W.D.Tex.).

Grissmer, D. W., Flanagan, A. E., Kawata, J. H., & Williamson, S. (2000). *Improving student achievement: What state NAEP test scores tell us*. Santa Monica, CA: RAND.

Hanushek, E. A. (1989). The impact of differential expenditures on school performance. *Educational Researcher, 18*(4), 45–51, 62.

Harrah Indep. School District v. Martin. (1979). 440 U.S. 194, 99 S. Ct. 1062, 59 L. Ed. 2d 248.

Helfand, D. (2005, June 2). 10 Districts Sue State Over Testing. *Los Angeles Times*, p. B4.

Hoff, D. J. (2005, April 13). States to get new options on NCLB law. *Education Week, 24*(31), 1, 38.

Hoxby, C. M. (2003). School choice and school competition: Evidence from the United States. *Swedish Economic Policy Review* (p. 10).

Improving America's Schools Act. (1994). Pub. L. No. 103-382, 108 Stat. 3518, 20 U.S.C. §6301 note.

Kane, T. J., & Staiger, D. O. (2001). Volatility in school test scores: Implications for test-based accountability systems. Paper presented at a Brookings Institution Conference. Later published in *Brookings Papers on Education Policy* (2002), pp. 235–283.

*Lee, J., (2004, April 7). How feasible is adequate yearly progress (AYP)? Simulations of school AYP "uniform averaging" and "safe harbor" under the No Child Left Behind Act. *Education Policy Analysis Archives, 12*(14). Retrieved February 4, 2005, from http://epaa.asu.edu/epaa/v12n14/

Linn, R. L. (2000). Assessments and accountability. *Educational Researcher, 29*(2), 4–16.

Linn, R. L. (2003). *Accountability: Responsibility and reasonable expectations. CSE report 601*. Boulder, CO: National Center for Research on Evaluation, Standards, and Student Testing.

Linn, R. L. (2004). *Rethinking the No Child Left Behind accountability system*. Paper presented at a forum sponsored by the Center on Education Policy, Washington, DC. Retrieved February 4, 2005 from http://www. ctredpol.org/pubs/Forum28July2004/BobLinnPaper.pdf

Linn, R. L., Baker, E. L., & Betebenner, D. W. (2002). Accountability systems: Implications of the requirements of the No Child Left Behind Act of 2001. *Educational Researcher, 31*(6), 3–16.

Mahr, C. (2005, April 14). Another district joins No Child Left Behind suit. *The Desert Sun*. Retrieved April 18, 2005, from http://www.thedesertsun.com/apps/pbcs.dll/article?AID=/20050414/NEWS04/504140328/1006

Marcosson, S. A. (2001). Constructive immutability. *3 University of Pennsylvania Journal of Constitutional Law* 646.

Mathews, J. (2003, November 11). No Child Left Behind Act: Facts and fiction. *Washington Post*, p. A08.

McColl, A. (2005). Tough call: Is No Child Left Behind constitutional? *Phi Delta Kappan, 86*(8), 604–610.

McNeil, L. & Valenzuela, A. (2001). *The harmful impact of the TAAS system of testing in Texas: Beneath the accountability rhetoric*. In G. Orfield & M. L. Kornhaber (Eds.), *Raising standards or raising barriers? Inequality and high-stakes testing in public education* (pp. 127–150). New York: Century Foundation Press.

National Conference of State Legislatures. (2005). *Task force on No Child Left Behind: Final report*. Denver, CO: Author.

Nicholas v. Pennsylvania State University. (2000). 227 F.3d 133 (3rd Cir.).

No Child Left Behind Act of 2001. (2002). Pub. L. No. 107–110, 115 Stat. 1425, 20 U.S.C. §§6301 et seq.

*Office of Management and Budget. (1996). *Economic analysis of federal regulations Under Executive Order No. 12866*. Washington, DC: Author.

Ogus, A. (1998). Regulatory appraisal: A neglected opportunity for law and economics. 6 *European Journal of Law and Economics* 53.

Paige, R. (2004, March 29). *Secretary Paige issues new policy for calculating participation rates under No Child Left Behind*. Retrieved February 4, 2005, from http://www.ed.gov/news/pressreleases/2004/03/03292004.html

Plyler v. Doe. (1982). 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786.

Reading School District v. Pennsylvania Department of Education. (2004, August 6). No. 03–2685 (Pa).

Richardson v. Lamar County Board of Education. (1989). 729 F. Supp. 806 (M.D.Ala.).

Rothstein, R. (2002). *Out of balance: Our understanding of how schools affect society and how society affects schools*. [Electronic version]. http://www.spencer.org/publications/conferences/traditions_of_scholarships/traditions_of_scholships.pdf

South Dakota v. Dole. (1987). 483 U.S. 203, 107 S. Ct. 2793; 97 L.Ed.2d 171.

St. Louis Teachers Union v. Board of Education. (1987). 652 F. Supp. 425 (E.D.Mo.).

United States v. Carolene Prods. Co. (1938). 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234.

Walberg, H. J. (1984). Families as partners in educational productivity. *Phi Delta Kappan, 65*(6), 397–400.

Welner, K. G., & Weitzman, D. Q. (2005). The soft bigotry of low expenditures. *Equity and Excellence in Education, 38*(3), 242–248.

Will, G. (2001, February 1). Tall order for a few federal dollars. *Washington Post*, A. 21.

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