

## **Abstract**

Both history and case law make clear that the power to regulate education is reserved to the states by the 10th Amendment. Signed into law in early 2002, the No Child Left Behind Act (NCLBA) imposes highly intrusive standards on states if they wish to continue receiving federal education dollars that have long been provided with significantly less onerous conditions attached. While the NCLBA is the greatest federal foray into education to date, Congress claims it is legitimate pursuant to the Spending Clause, which, if properly utilized, allows federal laws to affect state powers to a certain extent, without violating the 10th Amendment. However, in order for such legislation to be constitutional, it must meet several stringent requirements. Most significantly, it must be presented to the states as an incentive, rather than a mandate. If such a law is coercive, meaning it forces states into compliance, rather than allowing them to rationally adopt or reject it, that law violates the Constitution by implementing direct federal regulation where the 10th Amendment prohibits it. This paper considers the potential results of a hypothetical lawsuit brought against the federal government by the state of Oregon, challenging the NCLBA on grounds that it is coercive. Given the dire financial situation and heated political climate with regard to public schools in the state, I argue that Oregon has no choice but to accept the NCLBA and should, therefore, prevail.

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## Introduction:

“Education is perhaps the most important function of state and local governments.”<sup>1</sup> Traditionally, the government has recognized public education as a power reserved to the states by the 10th Amendment and sought only minimal intervention in the affairs of elementary and secondary schooling.<sup>2</sup> In early 2002, this radically changed when President Bush signed the No Child Left Behind Act (NCLBA) into law. This monumental legislation “represents an unprecedented level of federal involvement in the affairs of...public schools.”<sup>3</sup> In exchange for federal education dollars, it holds states highly accountable to the federal government with regard to student achievement and teacher quality. Additionally, the NCLBA implements strict procedures to improve schools that fail to meet these federal standards.<sup>4</sup> While this appears to be a clear violation of state sovereignty, Congress claims authority for the act based on the Spending Clause, which permits federal legislation to influence reserved state powers, provided it meets several requirements. Most significantly, such legislation may only be presented to the states as an offer of federal funds in exchange for state acceptance of federal rules. In other words, Spending Clause legislation that forays into powers reserved by the 10th Amendment, may induce, but not coerce states into adopting it.<sup>5</sup> The states, not Congress, must make the ultimate decision, thereby retaining their sovereignty.

This essay examines the NCLBA in Oregon, specifically considering the potential for victory in a hypothetical lawsuit filed by the state, challenging the NCLBA on grounds that it is coercive. Because Oregon has, for some time, been in a dire financial situation with regard to public education, and because the political climate is adverse to any decision that rejects federal funding for schools, this essay argues that Oregon cannot realistically opt out the NCLBA.

Therefore, in such a lawsuit, the NCLBA should be struck down for violating the 10th Amendment.

### **The 10th Amendment and Education**

To define the 10th Amendment's relationship to education it is first necessary to examine some background information on the text itself, which reads "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." The 10th Amendment formally codifies the division between federal and state power. It makes clear that the Constitution is an authorizing document, granting the federal government enumerated powers, and requiring state sovereignty in all others.

However, like many other parts of the Constitution, the 10th Amendment is somewhat ambiguous. Its roots lie in Article II of the Articles of Confederation, which is essentially identical to the present clause, except for one word: the amendment's predecessor held that the federal government could undertake only those powers "expressly" delegated to it.<sup>6</sup> "Expressly" is omitted in the 10th Amendment. While a subtle change, this is significant because, throughout United States history, case law has demonstrated that the federal government may undertake certain actions not expressly codified in the Constitution, provided they help to carry out those that are. For example, in *McCulloch v. Maryland*, the court held that, although the federal government has no expressed power to create a national bank, it does have the power of the purse.<sup>7</sup> Forming a national bank, it was held, allowed better execution of the power of the purse.

As a result of this ambiguity, it is not sufficient to claim that the NCLBA violates the 10th Amendment solely because no constitutional provision gives the federal government the right to regulate education. While, indeed, no such clause exists, one must also scrutinize case

law to determine the courts' take on whether or not regulating education has been determined to help the federal government carry out its expressed powers.

Fortunately, the courts have been blatantly clear on this subject: the states alone have the right to regulate education. In *Brown v. Board of Education*, the Supreme Court established this principle, writing: "Education is perhaps the most important function of state and local governments."<sup>8</sup> This was further emphasized in *Wisconsin v. Yoder*, where the court held that "Providing public schools ranks at the very apex of the function of a State."<sup>9</sup> One author succinctly states this principle, noting "the Constitution does not establish, either explicitly or implicitly, education as a right or delegate the authority over schools to the federal government."<sup>10</sup>

### **The No Child Left Behind Act**

In this context, it is now appropriate to examine the legislation central to the study at hand. The NCLBA is a revised reauthorization of the Elementary and Secondary Education Act (ESEA).<sup>11</sup> Passed in 1965 to enhance education for the impoverished and "socially disadvantaged", the ESEA stems both from the civil rights movement and President Johnson's 'War on Poverty'.<sup>12</sup> The primary achievement of the original law was to establish "Title I funds", which are granted to states for use in "low-income student-populated schools."<sup>13</sup> Funds are distributed based on the number of children meeting these criteria that attend the public, K-12 schools in a given state.<sup>14</sup> The original ESEA provides Title I dollars on the condition that they are used to provide "instruction and support to the disadvantaged students in order to bridge the achievement gap between them and their peers."<sup>15</sup> Since 1965, the ESEA has grown to provide funding to over 90% of schools in the nation and is the "largest single program of federal aid for

elementary and secondary education.”<sup>16</sup> As a law, it must be reauthorized (and, optionally, revised) every five to six years.<sup>17</sup>

Enacted in early 2002, the NCLBA is the most recent reauthorization of the ESEA. It is also the most radical revision to date because it drastically increases Title I funds, and, in order for states to receive them, imposes several highly-intrusive requirements.<sup>18</sup> These hold states strictly accountable to the federal government with regard to K-12, public education.

Specifically, the NCLBA prescribes national achievement requirements that must be met by all schools within a given state (including those do not receive Title I funds). Each state must, within stringent federal specifications, establish benchmarks, known as Adequate Yearly Progress (AYP). AYP is gauged by annual, standardized tests that must be administered to at least 95% of all students.<sup>19</sup> If a school receiving Title I funding fails to meet AYP, the NCLBA imposes increasingly severe sanctions for each year of underperformance. These range from mandatory implementation of a “two-year improvement plan”, to required use of Title I funds to provide transfers for students that wish to move to better-performing schools. In the most extreme cases, where a school continuously fails to meet AYP, the federal government may withhold Title I funding altogether.<sup>20</sup>

These extensive requirements and corresponding sanctions have led some to describe the NCLBA as the “most ambitious and intrusive federal education legislation to date.”<sup>21</sup> What is particularly significant for this study is the constitutional quandary this statement raises. As established above, the 10th Amendment reserves the right to regulate education to the states. Consequently, the NCLBA appears to fly in the face of state sovereignty. However, the 10th Amendment rubs edges with several other constitutional provisions, in this case, the Spending Clause. While direct federal regulation of education is reserved to the states, Congress can enact

certain financial programs, pursuant to this clause, which influence reserved state activities, but do not usurp state authority. As the remainder of this study will demonstrate, it failed to do so in crafting the NCLBA.

### **The Spending Clause**

Located in Article I, § 8, the Spending Clause reads: “The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States.” One striking aspect of the text is its breadth and ambiguity: which activities properly serve “the common defense and general welfare of the United States?” To compensate for this, the courts have developed several requirements, which Spending Clause legislation affecting reserved state powers must meet in order to be constitutional. In *South Dakota v. Dole*, the Supreme Court summarized these as five ‘tests’. First, Spending Clause legislation, which, by definition must involve funding, has to be enacted “in pursuit of ‘the general welfare’.”<sup>22</sup> Second, when Congress attaches conditions to money it offers to states, it “must do so unambiguously...enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation.”<sup>23</sup> In other words, states must be clear as to what they are required to do in exchange for funds. Third, any such conditions must be related “to the federal interest in particular national projects or programs.”<sup>24</sup> Fourth, the conditions must not be prohibited by any other part of the Constitution.<sup>25</sup> Finally, the federal government may only persuade states to accept a given Spending Clause program; it may not force them to comply. In other words, all Spending Clause legislation must be “cast as a financial inducement, not a coercion.”<sup>26</sup> This is because coercion is tantamount to unconstitutional, direct regulation.

Before applying these standards to the NCLBA, it is first necessary to elaborate on the fifth, 'coercion' test because it is the most ambiguous of the five; where is the line drawn between inducement and coercion? While no precise answer to this question exists, a dichotomous comparison of two landmark cases, *South Dakota v. Dole* and *New York v. United States*, places the line within a reasonably narrow range.

In *South Dakota v. Dole*, the Supreme Court addressed the question of coercion as it pertained to a Spending Clause program, which required states to establish a minimum drinking age of 21 or forfeit 5% of their federal highway funds.<sup>27</sup> Here, the court held that the contested law was not coercive because opting out of it made states lose only a "relatively small percentage of...funds."<sup>28</sup>

In *New York v. United States*, the court addressed the other end of the spectrum. Here, the contested law was a three-part, Spending Clause and Commerce Clause regulation program. First, in exchange for additional tax revenue, the federal government required states to develop nuclear waste disposal facilities. Next, it authorized them to increase user fees at these facilities and, eventually, to block access to them to nuclear waste producers from states lacking such facilities. The final component required states that opted out of the first two provisions to assume ownership of and responsibility for all nuclear waste within their borders. In its ruling, the court upheld the first two provisions, but struck down the third. This, it held, "crossed the line distinguishing encouragement from coercion."<sup>29</sup> Here, the court emphasized that "the Federal Government may not compel the states to enact or administer a federal regulatory program."<sup>30</sup> Of even greater significance, the court noted that the second provision was not coercive solely because "any burden caused by a State's refusal to regulate [would] fall on those who generate waste...rather than on the State as a sovereign."<sup>31</sup>

Together, *New York v. United States* and *South Dakota v. Dole* establish a continuum, ranging from inducement to coercion. It can be summarized as follows: Spending Clause legislation is coercive if opting out of it places a burden on a state, equal to, or more severe than, responsibility for nuclear waste disposal. At the same time, such legislation constitutes inducement if opting out burdens a state with sanctions equivalent to, or less severe than, a 5% reduction in highway funding. The area in between remains relatively grey, though it is worth noting that “temptation or motive...[can] rise to the level of coercion.”<sup>32</sup>

### **The Spending Clause and the NCLBA**

These tests can now be applied to the NCLBA. The primary focus of this study is the coercion test, because, as can be readily demonstrated, the NCLBA easily passes the other four. First, the act clearly intends to serve the “general welfare” because it seeks to improve the education system. The second, ‘ambiguity’, test passes muster for the sole reason that all states currently receiving Title I funds signed on to the NCLBA. While some have argued that the law is obviously ambiguous (because it is over 1000 pages long and confusing), this does not withstand scrutiny. Like any contract, signing on legally indicates understanding, and it is unlikely that a court would hold otherwise.<sup>33</sup> Concerning the third test, the conditions attached to Title I funds are indisputably related to the federal interest in this case: “leaving no child behind.” The law calls for increased accountability precisely to ensure that federal dollars provide a quality education for the underprivileged.<sup>34</sup>

The NCLBA also passes the fourth test, which requires that all conditions attached to federal funding be constitutional. Demonstrating this, however, requires further explanation of the test. As established, the 10th Amendment prohibits the federal government from directly regulating education; however, the fourth test operates under the assumption that states retain the

choice of whether or not to participate in Spending Clause legislation. In short, it does not acknowledge the potential for coercion, which means that this test is not concerned with issues of state sovereignty.<sup>35</sup> Instead, the fourth test examines only whether the conditions attached to funding require states to conduct any unconstitutional activities. In *South Dakota v. Dole*, the court clarified this by example, explaining that “a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power.”<sup>36</sup> By accepting Title I funds, states are only required to improve education for the underprivileged, which is by no means unconstitutional.

### **The Coercion Test and the NCLBA**

Having satisfied the first four tests, it is now appropriate to address the core subject matter of this study: the coercion test. *Steward Machine Co. v. Davis* notes that the point at which “pressure turns into compulsion...[is] a question of degree, at times, perhaps of fact.”<sup>37</sup> In other words, because the line of coercion remains somewhat ambiguous, each case in which debate arises must be scrutinized meticulously. Consequently, to address the coerciveness of the NCLBA with regard to the entire nation, one would have to conduct fifty separate analyses, defining the circumstances in each state and the resulting ramifications of non-compliance there. However, if, in federal court, the act is held to be coercive as it applies to a single state, it will be invalidated altogether. Both for this reason and because space and practically do not allow for such a detailed report, it is here that the focus narrows to the NCLBA as it applies to Oregon.

While certainly any state is a viable candidate for analysis, Oregon is the subject of this inquiry for two reasons. As will be established, education funding has been a particularly contentious issue within the state for more than a decade, making the NCLBA coercion debate

particularly ripe there. Second, I have lived in Oregon for seventeen years, and attended public schools within it for my entire K-12 education. Having experienced the ramifications of budget shortfalls firsthand, I am deeply interested in any matter relating to Oregon's education funding system. In this context, the question at issue is now: based on the consequences of opting out of the NCLBA, both financially and politically, can Oregon realistically do so, or is the state coerced into participation?

### **Oregon and the NCLBA**

There are two types of factors to consider in assessing the consequences Oregon would face for opting out of NCLBA: statutory penalties, as defined within the act, and the specific financial and political circumstances that the state faces, because these stand to significantly augment the statutory penalties. The first category is simplest. Most significantly, any state that opts out of the NCLBA loses *all* of its Title I funding, including that granted under earlier revisions of the ESEA. This is significant because it means that the NCLBA places new conditions on funds that states have long received with far-more lenient strings attached. Also, several other funding programs included in previous versions of the ESEA stand to be eliminated or significantly reduced: technology, safe and drug free schools, and after school programs.<sup>38</sup> This is because the formula used to determine their allocation is the same as that used to calculate Title I distribution. A state that opts out of NCLBA is no longer allowed to use this formula. The precise level of reduction these programs would lose is unclear due to debate as to whether alternative, less generous formulas would be applied in place of Title I funding, or whether funds for these programs would be cut altogether.<sup>39</sup>

Greatly augmenting these statutory penalties, Oregon faces a dire financial and political situation with regard to K-12 education. Starting in 1990, voters radically restructured the

funding system, passing Measure 5 into law. Whereas before, local property taxes funded the majority of school-related costs, this bill cut property taxes and drastically reduced the percentage of property-tax dollars that could be used for education. In addition, it required the legislature to make up for these lost funds with state revenue.<sup>40</sup> In 1997, voters passed Measure 50, which placed limits on future property tax increases. These measures have dramatically affected Oregon's school financing system by shifting the burden of funding from individual school districts and localities to the state legislature. Statistics clarify this: in 1990, the state funded only 28% of all K-12 expenses. Today, it provides over 70%.<sup>41</sup>

This restructuring, has had devastating effects on Oregon schools. Most significantly, relying on the state legislature for funding has placed K-12 education at the mercy of an "unstable resource."<sup>42</sup> This is because Oregon's "general fund," which provides state dollars for education, receives 90% of its financial input from income tax revenues.<sup>43</sup> These are inherently tied to the economy, which can spell disaster for schools during a recession.<sup>44</sup> A second problem is that the state legislature has had difficulty making up the local funds cut by Measures 5 and 50.<sup>45</sup> Collectively, these two problems have led to budget cuts in public schools around the state. Administrators have been forced to trim the school year, in some cases below the minimum required days in Oregon.<sup>46</sup> Additionally, arts, music, athletics and electives have been rampantly cut, denying many students a well-rounded education.<sup>47</sup> On top of this, rudimentary school supplies and janitorial services are severely limited in many facilities.<sup>48</sup> Oregon is also plagued with the fourth-largest class sizes in the nation.<sup>49</sup> Recent trends show no sign of improvement: in early May, 2006 the Portland School Board voted to close five elementary schools and merge several others, due to a shortage of funds.<sup>50</sup>

These financial problems have turned K-12 education into a political football within the state. While the majority of Oregonians claim to view it as the most important function of government, voting statistics demonstrate that they are sharply divided as to how it should be funded.<sup>51</sup> The best example of this is Measure 5, which narrowly passed with only 52 percent of the vote.<sup>52</sup> Like many other aspects of Oregon politics, the school funding debate reflects the starkly divided nature of Oregon politics. As one author explains, “the state is driven by two different visions of government and politics. Many...desire an active government that rationally seeks to solve societal problems; other residents want a smaller government that keeps taxes low, produces few regulations, and protects traditional social values.”<sup>53</sup> He identifies these groups as “progressives” and “conservative populists,” respectively.<sup>54</sup> Generally, the latter sponsored and supported Measures 5 and 50, while progressives staunchly opposed them.<sup>55</sup> A second political problem with K-12 education in Oregon is that, in light of the funding shortages to date, many parents have lost faith in the public schools and “are contemplating opting out of the public school system for private schools.”<sup>56</sup> Some have even advocated a voucher program, which, if passed, would provide public education funding to individual families in order to defray the cost of private school tuition.<sup>57</sup>

In the context of these financial and political circumstances, it is now possible to assess the consequences the state would suffer if it opted out of the NCLBA. As the following will demonstrate, their severity leaves Oregon with no real choice but to participate in the NCLBA, and far exceeds the minimum court-established requirements for coercion.

## The Price of Opting Out

Computing the actual dollar amount that Oregon would lose by opting out of the NCLBA is more complex than subtracting all funding the state currently receives under the program. This is because, as noted above, the NCLBA drastically increases Title I funds with the intent that they will be used to implement its new programs. To be fair, a state opting out of the act must be assumed to no longer require this money. Instead, analysis may only include funds that Oregon received under *previous* versions of the ESEA, but which will be eliminated if the state withdraws from the NCLBA. The best way to calculate these is to examine Title I and other formulaically related funding, as allocated to Oregon during the last school year before the NCLBA went into effect: 2000-2001. During this period, the state received roughly \$84.5 million under Title I.<sup>58</sup> In other programs utilizing Title I formulas, it received at least \$7.5 million.<sup>59</sup> Assuming the NCLBA had never been enacted, and adjusting these numbers for inflation, this amounts to roughly \$99 million in 2005 dollars.<sup>60</sup> If Oregon opted out of the NCLBA today, it would lose between \$91 million and \$100 million dollars, depending on the extent to which non-Title I programs utilizing Title I formulas are cut.<sup>61</sup> Given Oregon's current rate of spending, even the lowest possible reduction is equivalent to the annual expenditures for roughly 12,300 students.<sup>62</sup>

While these numbers are impressive in isolation, they gain even more meaning via financial analysis of how their loss would affect Oregon schools. Immediately after withdrawing from the NCLBA, the state legislature would have to reallocate education funds on a statewide basis. This is because, otherwise, Title I recipients (schools with many poor and disadvantaged) would absorb nearly the entire loss. Assuming the legislature would work to spread the deficit evenly around the state, the consequences still stand to be significant; given the financial woes

Oregon schools already face, they have essentially no 'buffer zone' to handle further shortfalls. Specifically, the sudden disappearance of \$91-\$100 million would likely trim more days off the school year, forcing additional districts below the state's minimum requirements. Also, Oregon's student-teacher ratio is only 2.5 students away from the nation's highest, and layoffs as a result of a funding shortage could force the state into an infamous lead. The effects of past funding shortages support these conclusions. Over a two year period (2001-2003), funding deficits only 1.5 times greater those which would result from NCLBA withdrawal caused widespread staff layoffs and an average loss of 5 school days in half of Oregon's school districts.<sup>63</sup> Some were forced to cut as many as 17 days.<sup>64</sup> Finally, losing Title I and related funds would prompt an increase in tuition at Oregon's public universities. Evidence for this stems from the fact that, since 1990, the legislature, in an effort to adequately fund K-12 education, has repeatedly increased the cost of tuition at these institutions.<sup>65</sup> There is no evidence to suggest that this practice would cease in the face of further losses. In short, the financial impact of an Oregon withdrawal from the NCLBA would be devastating.

The political consequences of withdrawing from the NCLBA would also be drastic. First, so doing would further stir up existing divisions within the state by agitating both "progressives" and "conservative populists." In recent history, the former group has been virulently opposed to any reduction in school funding. Deliberate refusal of federal support by the state legislature would almost certainly outrage "progressives." On the other end of the spectrum, "conservative populists" would oppose withdrawing because it has the potential to cause tax increases, which, as noted above they staunchly oppose. Evidence to support this stems from the fact that past shortages have brought about local taxes to make up for some of the lost money.<sup>66</sup>

A second political consequence stems from the aforementioned parental distrust in Oregon's public schools. Much of this is a result of the cleverly-composed title, 'No Child Left Behind'. To the average citizen, opting out would be viewed as the state's intentional decision to abandon, or 'leave behind' Oregon's children.<sup>67</sup> This would almost certainly create public outcry and demonstration, but, more significantly, it could push the large number of parents with shaky faith in Oregon's education system over the edge and spark widespread flight from public schools. Ultimately, confidence in the public education system could plummet. While this alone is a devastating prospect, it pales in comparison to the maximum damage that could occur. If such flight led to the passage of a voucher program, withdrawing from the NCLBA could bankrupt the public school system.

### **Clear Coercion**

To demonstrate that Oregon is coerced into adopting the NCLBA it is necessary to place the state's situation along the continuum established above. As the following demonstrates, Oregon is more compelled to participate in the NCLB than each of the state facing an unwanted federal program in both *South Dakota v. Dole* and *New York v. United States*. As a result the case at hand not only fails to satisfy the criteria for inducement, but also surpasses those required for coercion.

In *South Dakota v. Dole*, the court held that a 5% reduction in federal highway funding for non-compliant states constituted only inducement. This pales in comparison to what Oregon would lose by opting out of the NCLB: at minimum, 25% of its federal funding.<sup>68</sup> Additionally, the threat of reducing education quality is significantly more severe than a potential shortage of road repair funds. Next, *New York v. United States*, held that forcing states, which refused to adopt a federal regulation program, to take ownership of and responsibility for all nuclear waste

within their borders was coercive. Oregon stands to face much greater sanctions, among them, a shortened school year, increased class sizes, widespread political outrage, and potential flight from and bankruptcy of public schools. Granted, forcing a state to dispose of nuclear waste is a significant burden in the short run, but children represent the future. If they are not properly educated, Oregon will face a burden as extreme as economic and social collapse in years to come.

Because Oregon is, by legal standards, coerced into accepting the NCLBA, the act allows the federal government to directly regulate education in the state. As established, the 10th Amendment prohibits such activity. Therefore, a lawsuit filed by the state of Oregon, challenging the NCLBA on grounds that it is coercive, should succeed.<sup>69</sup>

Recent Supreme Court trends further support this conclusion. Throughout much of the 20<sup>th</sup> century, the court granted Congress significant leniency to undertake activities related to those expressed in the Constitution. However, the last fifteen years have seen substantial change. Beginning with *United States v. Lopez*, the court closely scrutinized and denied Congress the Commerce Clause authority to regulate gun control in schools on grounds that this was a power reserved to the states by the 10th Amendment. *United States v. Morrison* followed suit, invalidating an act that made violence against women, even in the most local incidence, a federal offense. Once again, Congress cited the Commerce Clause for authority.<sup>70</sup> While both cases represent change in the court's interpretation of the Commerce Clause, rather than the Spending Clause, they reflect a broader principle, which lends support to an Oregon victory. They demonstrate that the Supreme Court has increasingly come to respect state sovereignty.

## **Counterarguments**

Further strength for this conclusion comes from refuting several counterarguments. First, one could argue that the only reason Oregon is coerced into accepting the NCLBA is because the state has irresponsibly managed its education dollars over the last fifteen years. By this logic, it is Oregon's fault that it must comply with the act. From here, one could conclude that the state is not coerced by the federal government, but by its own actions, and, therefore, that the NCLBA does not violate the 10<sup>th</sup> Amendment. While it is true that, if the state had a better financial system in place, it could more easily opt out of the NCLBA, this argument lacks merit because it ignores basic chronology. Measures 5 and 50, which are responsible for much of Oregon's financial woes regarding public education, were both passed in the 1990s. In other words, the state was in dire financial shape long before the NCLBA went into effect. To blame Oregon for its lack of choice in adopting the act burdens the state with the responsibility of predicting Congress' future actions. The latter premise is clearly absurd; Oregon cannot be held responsible for the ramifications of future federal laws. Therefore, because the NCLBA was passed well after the state's financial woes ensued, the federal government is entirely responsible for forcing it on Oregon.

Another counterargument holds that the NCLBA is not coercive because Oregon could make up all funds lost from opting out by simply increasing taxes. While this is theoretically possible, it is not realistically practical. As noted above, some local bonds and levies have been implemented to offset lost funding, but these are the exception rather than the rule. As both Measure 5 and 50 demonstrate, Oregonians generally vote down tax increases, even those designed to help schools. Using these two measures as precedent, it is fair to say that voters are unlikely to pass any such taxation. While one might also argue that the legislature could simply

impose a tax, this is also unrealistic. Legislators, like all public officials, must maintain public approval if they wish to keep their jobs. As a result, they are not likely to pass a levy to which the majority of their constituents are outwardly opposed.

Furthermore, Oregon is notable for its initiative and referendum processes, otherwise known as "The Oregon System."<sup>71</sup> The initiative process allows constituent-written measures to be placed on the general election ballot, without legislative intervention, provided enough signatures are gathered. Similarly, the referendum process permits voters to invalidate legislatively-passed laws by gathering signatures to place these contested acts on the general election ballot.<sup>72</sup> This means that, even if the legislature did somehow approve a tax increase, it is well within the power of voters to strike it down. In short, the NCLBA is coercive because tax increases, while helpful, are not a politically feasible solution.

## **Conclusion**

The NCLBA attaches new and onerous conditions to preexisting federal education funding. This, combined with Oregon's dire financial and political situation with regard to K-12 schooling, leaves the state no practical choice but to comply with the act. Because this legally constitutes coercion, the NCLBA violates Oregon's 10<sup>th</sup> Amendment right to state sovereignty in the realm of public education. Both for this reason, and in light of recent court rulings showing increasing respect for state sovereignty, Oregon should emerge victorious, should it choose to sue the federal government over the NCLBA.

Beyond these technical details, this case demonstrates that the Constitution, while relatively brief in comparison to the volumes of legal proceedings and legislation that are composed each day, is truly at the heart of American politics. Perhaps the best evidence of this is the fact that the entire case study above and all supporting documents stem from the mere 59

words comprising the 10th Amendment and the Spending clause. In this sense, the Constitution is the ultimate living document, subject to constant debate and reinterpretation. The case study at hand represents only small subchapter in this exciting process.

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<sup>1</sup> *Brown et al. v. Board of Education*. 347 U.S. 483, 493 (1952).

<sup>2</sup> Richard A. Clucas, Mark Henkels and Brent S. Steel, *Oregon Politics and Government*, (Lincoln: University of Nebraska Press, 2005), 35.

<sup>3</sup> Ann McColl, *Tough Call: Is No Child Left Behind Constitutional?* PHI DELTA KAPPAN, April 2005, "Is There Constitutional Authority for NCLB?"

<sup>4</sup> Coulter M. Bump, student author, *Comment: Reviving the Coercion Test: a Proposal to Prevent Federal Conditional Spending that Leaves Children Behind*. 76 U. COLO. L. REV. 521, 524-526 (2005).

<sup>5</sup> McColl, "Spending Clause Legislation as a Contract."

<sup>6</sup> Judith Adams, *The American heritage History of the Bill of Rights: The Tenth Amendment*, (Englewood Cliffs: Silver Burdett Press, 1991), 35.

<sup>7</sup> *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

<sup>8</sup> *Brown v. Board of Education* at 493.

<sup>9</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

<sup>10</sup> McColl, "Is There Constitutional Authority for NCLB?"

<sup>11</sup> Bump, 523.

<sup>12</sup> Bump, 523.

<sup>13</sup> Bump, 523.

<sup>14</sup> Susan Castillo, *Oregon Title I-A Handbook*, Oregon Department of Education, [http://www.ode.state.or.us/opportunities/grants/nclb/title\\_i/a\\_basicprograms/ortitleiahandbook2005.pdf](http://www.ode.state.or.us/opportunities/grants/nclb/title_i/a_basicprograms/ortitleiahandbook2005.pdf), 3.1.

<sup>15</sup> Bump, 523.

<sup>16</sup> Castillo, 3.1.

<sup>17</sup> Bump, 523.

<sup>18</sup> *President's Budget Request For Fiscal Year 2007*, National Education Association, <http://www.nea.org/lac/fy07edfunding/images/or.pdf>.

<sup>19</sup> Bump, 525.

<sup>20</sup> Bump, 527.

<sup>21</sup> Abigail Aikens, student author, *Student Work: Being Choosy: An Analysis of Public School Choice Under No Child Left Behind*, 108 W. Va L. REV. 233, 243 (2005).

<sup>22</sup> *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

<sup>23</sup> *South Dakota v. Dole* at 207.

<sup>24</sup> *South Dakota v. Dole* at 207.

<sup>25</sup> *South Dakota v. Dole* at 208.

<sup>26</sup> McColl, "Spending Clause Legislation as a Contract."

<sup>27</sup> *South Dakota v. Dole* at 211.

<sup>28</sup> *South Dakota v. Dole* at 211.

<sup>29</sup> *South Dakota v. Dole* at 211.

<sup>30</sup> *New York v. United States*, 505 U.S. 144, 188 (1992).

<sup>31</sup> *New York v. United States* at 174, italics added for emphasis.

<sup>32</sup> Bump, 535.

<sup>33</sup> Bump, 542.

<sup>34</sup> Bump, 542-545.

<sup>35</sup> *South Dakota v. Dole* at 210, 211.

<sup>36</sup> *South Dakota v. Dole* at 211.

<sup>37</sup> *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

<sup>38</sup> *Preliminary Analysis of Implications of State/District Nonparticipation in NCLB*, Council of Chief State School Officers, <http://www.ccsso.org/content/pdfs/AnalysisEDletter.pdf>.

<sup>39</sup> Sen. Steve Saland, *No Child Left Behind Act is stifling state innovations in education*, Stateline.org, <http://www.stateline.org/live/ViewPage.action?site NodeId=136&languageId=1&contentId=18855>. This article claims that, in the event a state withdraws from the NCLBA, a complete cut of Title-I related formulas will occur; the previous article (38) claims that there will be a reversion to pre-NCLB formulas.

<sup>40</sup> Clucas et al., 280.

<sup>41</sup> Oregon Education Association *What Happened to Education Funding: 12 Years of Budget Deficits, Bandages, and Unfunded Mandates*, Oregoned.org, [http://www.oregoned.org/atf/cf/%7B3F7AF7EC-F984-4631-A411-148CD1FB8421%7D/What\\_Happened\\_To\\_Education\\_Funding.pdf](http://www.oregoned.org/atf/cf/%7B3F7AF7EC-F984-4631-A411-148CD1FB8421%7D/What_Happened_To_Education_Funding.pdf).

<sup>42</sup> Oregon Education Association.

<sup>43</sup> Clucas et al., 209.

<sup>44</sup> Oregon Education Association.

<sup>45</sup> Legislative Fiscal Office, *Education*, Oregon State Legislature, [http://www.leg.state.or.us/comm/lfo/03\\_05\\_leg\\_adopt\\_budget/1%20Education.pdf](http://www.leg.state.or.us/comm/lfo/03_05_leg_adopt_budget/1%20Education.pdf), 20.

<sup>46</sup> Legislative Fiscal Office, 20.

<sup>47</sup> Clucas et al., 270. In addition, I experienced these cuts and shortcomings attending Portland Public Schools for my K-12 career.

<sup>48</sup> I experienced these shortfalls during my K-12 career in Portland Public Schools.

<sup>49</sup> ECONorthwest, *Comprehensive Analysis of K-12 Education Finance in Oregon*, Oregon School Boards Association, <http://www.osba.org/hotopics/funding/2002/analysis/final.pdf>, A-1.

<sup>50</sup> KATU.com Web Staff, *More schools added to Portland Closure List*, KATU News <http://katu.com/stories/85655.html>.

<sup>51</sup> Clucas et al., 270.

<sup>52</sup> Barnes C. Ellis *Tax Limit Wins Favor of 52*, THE OREGONIAN, Nov. 8, 1990.

<sup>53</sup> Clucas et al., 1.

<sup>54</sup> Clucas et al., 1.

<sup>55</sup> Prof. Jerry Medler, *Lecture Notes*, University of Oregon, (2005).

<sup>56</sup> Clucas et al., 286.

<sup>57</sup> Clucas et al., 286.

<sup>58</sup> NCES Digest of Education Statistics Tables and Figures, *Table 370. Appropriations for Title I and Title VI, No Child Left Behind Act of 2001, by state or other area and type of appropriation: 2000-01 and 2001-02*, National Center for Education Statistics, <http://nces.ed.gov/programs/digest/d02/dt370.asp>.

<sup>59</sup> United States Department of Education Budget Department, *Funds for State Formula-Allocated and Selected Student Aid Programs: U.S. Education Funding: Oregon* <http://www.ed.gov/about/overview/budget/statetables/07stbystate.pdf>, 85. The minimum figure of \$7.5 million in non-Title I, formulaically related formulas was computed by adding figures for pre-NCLB “Education Technology State Grants” and “Safe and Drug Free Schools and Communities State Grants”

<sup>60</sup> S. Morgan Friedman, *The Inflation Calculator* S. Morgan Friedman <http://www.westegg.com/inflation/>.

<sup>61</sup> The range of \$91-100 million is due to the ambiguity regarding the extent to which non-Title I programs relying on Title I formulas would be reduced. The low end assumes no reduction whatsoever, and the high end assumes complete elimination.

<sup>62</sup> ECONorthwest, 3-3. In 2000-2001: Oregon spent 7357 dollars per student. By this standard, Title I funds are equivalent to the total spent on over 12350 students.

<sup>63</sup> Clucas et al., 273. The author notes that there are 198 school districts in Oregon.

<sup>64</sup> Legislative Fiscal Office, 20. This reference discusses how 273.2 million dollar shortfall over 2001-2003 led to these cuts, mainly in 2003.

<sup>65</sup> Clucas et al., 282-283.

<sup>66</sup> Scott Learn *Tax Will Likely Beget New Tax*, THE OREGONIAN, Apr. 28, 2003. This article discusses the consideration of a temporary tax in Multnomah County in May, 2003. The same author explains a temporary business licensure fee increase, levied to help Portland Public Schools in: Scott Learn, *Council Agrees to Raise Fees to Support Portland Schools*, THE OREGONIAN, Mar. 13, 2003.

<sup>67</sup> Bump, 552-553.

Here Bump notes that it is politically difficult for states to deny rhetoric that claims to leave no child behind.

<sup>68</sup> Common Core of Data, *Reported student membership and number of teachers, and estimates of revenues, expenditures, and pupil/teacher ratio, for public elementary and secondary schools, by state, for grades prekindergarten through 12: School year 2000-01/fiscal year 2001*, National Center for Education Statistics,

<http://nces.ed.gov/quicktables/Detail.asp?Key=759>. This was used for calculation, as explained below, along with: Common Core of Data, *Percentage distribution of revenue for public elementary and secondary schools, by source and state: School year 2000-01*, National Center for Education Statistics, <http://nces.ed.gov/quicktables/Detail.asp?Key=991>.

The statistic of 25% was computed by determining the total operating budget of Oregon Schools in 2001 (\$4,485,000,000), then determining the federally contributed dollar amount, by calculating the real value of the published percentage (Federal percent of Oregon school revenues 7.4%). Total, pre-NCLBA, Title I (\$84,506,000 in 2001-2002: endnote 60) and formulaically related formulas (at least \$7.5 million: endnote 61) were then divided by this total number to determine their percentage of the whole (minimum 25%, maximum over 27%).

<sup>69</sup> The continuum established by *South Dakota v. Dole* and *New York v. United States* is still valid law, supporting this conclusion. Evidence for this comes from reliance on the former case in Bump and McColl, and based on *Shepard's for Supreme Court Cases*, which shows no significant opposition to *New York v. United States*.

<sup>70</sup> Prof. Julie Novkov, *Lecture Notes: Constitutional Law*, (2006). Commerce Clause history taught during this class emphasized that, since the Great Depression, numerous Supreme Court cases reflected a high level of deference to congressional power. This changed with *United States v. Lopez*, 514 U.S. 549, (1995), when the court extended state sovereignty to pre-depression levels. *United States v. Morrison*, 529 U.S. 598, (2000), continued this, establishing a trend.

<sup>71</sup> Clucas et al., 2.

<sup>72</sup> Clucas et al., 63-71.