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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

the NAEP is then to be used as a non-binding benchmark

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

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).

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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.

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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.

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 T

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 [illegible] to serve a [illegible] governmental interest. However, the law that categorizes based on residence in a

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.

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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

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 statu-