

EXAMINING U.S. SUPREME COURT REACTION TO NCLB: CONNECTICUT AND
PONTIAC AS CASE STUDIES

by

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(Under the Direction of John Dayton)

ABSTRACT

This dissertation examines the U.S. Supreme Court's reaction to two cases concerning the No Child Left Behind (NCLB) Act and the issue of unfunded federal mandates such as testing requirements. The study uses *Connecticut v. Spellings* (2005) and *School District of the City of Pontiac v. Secretary of the United States Department of Education* (2005) as case studies to examine what factors or variables influenced the nation's highest court to position itself as it did concerning the issue of unfunded mandates. This study is also concerned with how states are meeting funding requirements that are unfunded mandates in light of the current economic challenges they face. Aside from highlighting factors influencing the U.S. Supreme Court's decision to deny certiorari in these cases, this study seeks to address the question of whether there is an inherent contradiction in the NCLB law over the issue of testing requirements that are unfunded mandates. In short, should states be forced to cover testing costs given a provision in the NCLB measure that suggests states and school districts can't be forced to spend their own funds implementing the law's testing requirements or unfunded mandates? It also addresses the question of why has there not been more litigation under the NCLB law. How will states respond legally to the Obama Administration's decision to allow greater flexibility in issuing waivers from federal mandates? Will this development result in states being less inclined to pursue litigation? The study utilizes qualitative data that includes document analysis of legal briefs, case opinions, and other relevant information from the Court of Appeals to assess court reaction in refusing the cases and to predict what it may decide if a legal case concerning NCLB reaches the nation's highest court system.

INDEX WORDS: unfunded federal mandates, testing requirements, unfunded mandates
clause, spending clause, clear statement rule, state educational policy,
education reform laws, No Child Left Behind, Adequate Yearly Progress

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DEDICATION

This is dedicated to my father, the late Dr. Wilson Ceasar Deas and my mother, Ms. Ellaree Ludd Deas who provided me with the foundation to accomplish this lifelong goal. Mom, you continue today to be the wind beneath my wings. Thank you and I love you.

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SUBJECTIVITY STATEMENT

I am a Ph.D candidate in Educational Administration and Policy (EDAP) at The University of Georgia's College of Education. My area of concentration is Education Law and Policy and I am also completing a cognate in Higher Education Policy through UGA's Institute for Higher Education (IHE). My dissertation research focuses upon the No Child Left Behind (NCLB) law specifically U.S. Supreme Court reaction or response to the law as it relates to unfunded federal mandates concerning testing. This study examines the legal cases of *Connecticut v. Spellings* (2005) and *School District of the City of Pontiac v. Secretary of the United States Department of Education* (2005) as case studies for research. I use both qualitative methods and legal research methodology to determine what factors or variables influenced The U.S. Supreme Court to position itself as it did concerning the issue of unfunded mandates, whether states should be forced to cover costs given a provision in the NCLB measure that says states and school districts can't be forced to spend their own funds implementing unfunded mandates, why there has not been more litigation under the NCLB law, and what are the policy implications of unfunded mandates for states. The study employs an advocacy framework to highlight states' concerns regarding unfunded mandates. This study analyzes legal briefs to trace the legal history of these two landmark cases pertaining to the issue of unfunded federal mandates for states.

My research interests in issues relating to law and policy stem from previous academic experiences during my year of study in Finland as a Fulbright Scholar. As a student of law and policy at Turku International University, I began to see the value of pursuing research in a field such as education from the standpoint of how law and policy overlap concerning a particular issue. A better understanding of this relationship can aid in developing effective policy solutions for education reform. As a former K-12 public school educator of African American heritage who has educated at-risk students, I bring valuable insights to this study. The valuable insight I bring to this study is that as an educator of African American decent, I am sensitized to the academic challenges at-risk students face educationally in K-12 settings in overcoming achievement gaps. However, a limitation I bring to the study is that the duration of the time I spent in this capacity was only one year. Finally, having the previous experience of working in federal, state, and local government allows me to better understand aspects of the research pertaining to this study such as the financial challenges states face implementing unfunded federal mandates regarding testing given existing budgetary constraints.

CHAPTER 1

INTRODUCTION

Statement of the Problem

This dissertation examines the U.S. Supreme Court's reaction to two legal cases concerning the No Child Left Behind (NCLB) law and the issue of unfunded mandates such as testing requirements. The study uses the legal cases of *Connecticut v. Spellings* (2005) and *School District of the City of Pontiac v. Secretary of the United States Department of Education* (2005) as case studies to examine the primary research question of what factors or variables influenced the nation's highest court to position itself as it did concerning the issue of unfunded mandates. It appears that the Supreme Court's rationale or reasoning for denying certiorari in the *Connecticut* and *Pontiac* cases is that states have unprecedented flexibility to meet the funding requirements of these mandates. Given the Court's reasoning, an important policy question this study addresses is if there is indeed flexibility as the Court contends, how are states that have elected to attempt to meet the unfunded federal mandate requirements of the NCLB law rather than seek a waiver meeting these funding requirements given the difficult economic challenges they face? This dissertation is also concerned with a set of related theoretical subquestions. First, is there an inherent contradiction in the NCLB law over the issue of testing requirements that are unfunded mandates? Specifically, should states be forced or coerced by federal officials into covering testing costs given a provision in the NCLB measure that suggests states and school

districts can't be forced to spend their own funds implementing the law's testing requirements or unfunded mandates? Why has there not been more litigation under the NCLB law? How will states respond legally to the Obama Administration's decision to allow greater flexibility in issuing waivers from federal mandates? Finally, given the Obama Administration's decision to allow greater flexibility in issuing waivers, will states be less inclined to pursue litigation?

The purpose of this study was to examine the U.S. Supreme Court's rationale for refusing to hear two legal cases concerning the NCLB law and the issue of unfunded mandates as well as learn from state policymakers how states plan to financially meet requirements of the unfunded mandates if they opt not to seek the new waivers proposed by the Obama Administration. There are several reasons why it is important to address these questions. First, the issue of unfunded mandates may have implications for states given the economic challenges many of them currently face. In a climate where state legislatures are cutting state budgets and leaving fewer funds for K-12 education, having to incur additional costs to implement federal mandates such as testing requirements not fully covered by the federal government could pose a policy challenge for respective states. Second, some scholars contend that NCLB "coerces states into complying with its mandates" which creates a Fourteenth Amendment question (Liguori, 2006, p. 1). Given the fact that there is currently limited research in the field, it would be a valuable contribution to the existing field of research to examine this constitutional question. Finally, in light of the U.S. Supreme Court's reaction to both the *Connecticut* and *Pontiac* cases, some observers contend that this clearly "underscores the need for strong action on the part of the U.S. Congress through the legislative process to reform educational policy" (Reitz, 2011; p. 2). However, at present, it does not appear to be the case that the U.S. Congress as an institution is poised to engage in any

major legislative action concerning NCLB. Therefore, it is valuable to address institutional questions concerning education reform in order to shed light upon this difference.

Theoretical Framework

There are several concepts or theories that are influencing my ideas concerning this research related to NCLB and unfunded federal mandates for states. For one, a concept or theory influencing my ideas concerning this research is the critical theory tradition drawn from the work of scholars such as Marx and social research conducted by members of the Frankfurt School (Prasad, 2005). My research draws from the disciplines of law, political science, public policy, and finance to develop a systematic critique of conditions in K-12 education and applies critical theory to the study of judicial institutions to interpret or critique their positioning or ideology on critical issues such as the funding of testing requirements (Prasad, 2005).

In terms of epistemological leanings, I find that my leanings tend to be multiple in their orientation. While I consider myself to be an objectivist on the surface, I realize that there may be instances with my research where certain “physical or material aspects” as well as “social and cultural” components could place a limitation on what I may observe and conclude to be actually reality (Preissle & Grant, 2004, p. 174). Therefore, in cases where I face such limitations, rather than be inclined to assume that there is some direct correlation between observed reality and actual reality in congruence with objectivist thinking, I am prepared to pursue my research through a constructivist lens and form my conclusions about the reality I observe based upon “ongoing interactions between myself, society, and culture” (p. 174).

In relation to the forms of social science that I most identify with at this stage of my development as a researcher, I find myself drawn to social science research that engages in elements of prediction, understanding, and emancipation (Lather, 1992). While there are critical components of my research that engage in prediction, such as whether there will be a reduction in legal challenges by states in response to the Obama Administration's decision to allow greater flexibility in granting states waivers from unfunded education mandates, I also see a value in seeking to understand through my research why judicial institutions positioned themselves as they did concerning the debate over unfunded federal mandates. Through my analysis of arguments presented in legal briefs which is clearly interpretive research, I have been able to achieve this understanding.

In addition, my research is emancipatory and also embraces an advocacy participatory approach because by advocating that states should receive more federal assistance to implement mandates, this in turn could indirectly aid in freeing at-risk children from being subjected to substandard school systems. Further, given its emancipatory objectives, my research is certainly "value-laden" (p. 91). Therefore, I find myself concurring with Lather's observation that education research is increasingly construed as a "value-constituting enterprise" (p. 91).

Although federal power over the area of education has been restricted due to cases such as *U.S. v. Lopez* (1995), the "public education system remains an area for competition among state and local governments in modern American politics" (Shippy, 2006, p. 2). A key question related to our nation's federalist system that is "often answered in the context of education" is

“how much control should the federal government have over states?” (p. 2). My research uses a conceptual lens that examines NCLB as it relates to federalism to assess how the measure has “changed the federal-state relationship concerning the issue of education” (p. 9). In fact, given the level of regulation that has been imposed upon states by the federal government as a result of NCLB, some scholars within the field contend that through the law, “the very nature of federalism has been altered” (Shippy, 2006, p. 2; McGuinn, 2006, p. 68).

In short, these theoretical or conceptual and philosophical frameworks have had a profound impact in terms of informing my research concerning NCLB and the issue of federal unfunded mandates for states. The impact these frameworks have had on my research is reflected in the nature of the research questions I have proposed for my study.

Research Questions

This study is designed to investigate the following primary research questions:

- 1.) What factors or variables influenced the U.S. Supreme Court to deny writs of certiorari in the *Connecticut* and *Pontiac* cases pertaining to the issue of unfunded federal mandates?
- 2.) Given the Court’s reasoning for refusing the cases, if there is indeed flexibility as it suggests, how are states meeting these funding requirements that are mandates in light of the current economic challenges they face?

This study is also concerned with the following set of related theoretical subquestions:

- 3.) Should states be forced to cover costs given a provision in the NCLB measure that says states and school districts can't be forced to spend their own funds implementing the law's testing requirements or unfunded mandates? In short, is there an inherent contradiction in the NCLB law over the issue of testing requirements that are unfunded mandates?
- 4.) Why has there not been more litigation under the NCLB law?
- 5.) How will states respond legally to the Obama Administration's decision to allow greater flexibility in issuing waivers from federal mandates?
- 6.) How will this development result in states being less inclined to pursue litigation?

Research Design

This study examines the cases of *Connecticut v. Spellings* (2005) and *School District of the City of Pontiac v. Secretary of the United States Department of Education* (2005) as case studies for research. The legal cases of *Connecticut* (2005) and *Pontiac* (2005) meet the standard definition of what constitutes case studies. According to Creswell (2009), "case studies are a strategy of inquiry in which the researcher explores in depth a program, event, activity, process, or one or more individuals" (p. 13). In this instance, both of these legal cases are events that the researcher explores in depth. Further, the cases in a case study are "bound by time and activity and researchers collect detailed information using a variety of data collection procedures over a sustained period of time" (p. 13). In the case of this study, these legal cases meet this

criterion as they are both bound by time and the researcher collects pertinent data using multiple data collection procedures over a sustained time period (Creswell, 2009). In addition, according to Yin (1994), well conceptualized theory should anchor case studies and this study is supported by several relevant theories in its framework. This study employs both legal and qualitative research methodology to determine what influenced the U.S. Supreme Court to position itself as it did concerning the issue of unfunded mandates, whether states should be forced to cover costs given a provision in the NCLB measure that says states and school districts can't be forced to spend their own funds implementing unfunded mandates, and why there has not been more litigation under the NCLB law. The study employs an advocacy framework to highlight state's concerns regarding unfunded mandates.

The research for this study includes an extensive search for relevant sources of law, including federal and state constitutional provisions, legislation, regulations, case law, scholarly commentary, and other relevant documents using library data bases such as Lexus Nexus and Westlaw. The resulting federal and state constitutional provisions, legislation, regulations, case law, scholarly commentary, and other relevant documents will be reviewed, analyzed, and synthesized to construct an accurate historical perspective on the law concerning NCLB and a current composite perspective on the current legal status of NCLB.

Rationale For Using A Qualitative Research Design

There are a number of advantages to using qualitative methods in evaluating a particular phenomenon of interest to researchers. For one, qualitative methods help to "facilitate the study of issues in depth and detail" (Patton, 2002, p. 14). Through the use of qualitative methodology,

researchers can “approach their field work without being constrained by predetermined categories of analysis” (p. 14). This approach in turn “contributes to the depth, openness, and detail of qualitative inquiry” (p. 14). Another advantage in using a qualitative research design is that through this approach, it is possible for researchers to “measure the reactions of many people to a limited set of questions” (p. 14). This is quite valuable as it allows the researcher to “facilitate comparison and statistical aggregation of data” (p. 14). Further, this approach provides a “broad, generalizable, set of findings presented succinctly and parsimoniously” (p. 14). In addition, qualitative research approaches tend to “produce a wealth of detailed information about a smaller number of people and cases” (p. 14). This can aid in increasing the “depth of understanding of the cases” being evaluated by a researcher (p. 14).

The underlying strength of a qualitative research design or approach is “derived primarily from its inductive approach” (Maxwell, 2005, p. 22). Moreover, qualitative research designs are valuable because they can aid researchers in focusing more directly upon “specific situations or people” (p. 22). These approaches also allow researchers to “delve into complex processes and illustrate the multifaceted nature of human phenomena” (Morrow, 2007, p. 211). Most importantly, qualitative research designs or approaches are quite useful in aiding researchers in accomplishing a number of critical research goals (Maxwell, 2005). First, qualitative research designs are useful in helping researchers better “understand the meaning of events, situations, experiences, and actions involving participants in a study” (p. 22). Second, qualitative research approaches help researchers better understand the “context within which participants act and the influence this context may have on their actions” (p. 22). Third, qualitative research designs can assist researchers in “identifying unanticipated phenomena and influences and generating new

grounded theories” (p. 22). In instances where “theories are not yet available to explain phenomena, qualitative research designs or approaches can assist in facilitating the theory-building process” (Morrow, 2007, p. 211). Fourth, qualitative approaches to research can aid researchers in better “understanding the process by which events and actions take place” (Maxwell, 2005, p. 23). Finally, qualitative research approaches or designs can aid researchers in “developing or formulating causal explanations” (p. 23).

Extant Studies

The literature review for this study is arranged in chronological order and by subject in order to provide a perspective on the historical development of the law concerning NCLB. The body of previous research in the field primarily examines how NCLB is being implemented, issues raised by the current law, and implications the law has for minority and low-income students (Sunderman, Kim, & Orfield, 2005). In addition, many of the previous studies in the field highlight the political dynamics in the process that allowed NCLB to pass and provide a historical perspective concerning the evolution of NCLB legislation (McGuinn, 2006; Hayes, 2008). A critical study by McDermott and Jensen (2005) examines federal conditions of aid and “analyzes the implications of NCLB for federalism and intergovernmental relationships in education governance” (McDermott & Jensen, 2005, p. 39). Some scholars within the field such as Goertz (2009) highlight the history of the standards in the U.S., examine the implementation and overall effect of the standards movement, and bring to the forefront issue policymakers face who are proponents of national standards to achieve education reform. Goertz (2009) utilizes the approach of historical analysis to trace the evolution of the education standards movement in

the U.S. and reach a set of specific findings. Through her analysis, Goertz (2009) finds that while there have been some periodic efforts to support the adoption of common education standards over the years, the call for higher standards for all American children is not a new phenomenon. Goertz (2009) finds what is new is that the debate concerning high standards takes place in a context where all U.S. students are expected to attend and graduate from high school. Further, Goertz (2009) finds that accountability has shifted its focus away from students to schools and districts while the area of assessment has expanded from an emphasis on placing and promoting students to generating indicators of performance. Goertz's (2009) research indicates that standards and accountability systems are essentially driving educational change. Goertz (2009) finds that states are moving away from school finance systems emphasizing inputs and equity to those focused upon adequacy where efforts are undertaken to provide school districts with necessary resources to provide all students with a quality education in congruence with state standards. While America has an extensive history of standards driven reform, Goertz's (2009) research finds that the "type, target, and use of standards has changed over time" (p. 202). Goertz's (2009) research also finds that standards themselves do matter along with the incentives to use them to improve education. Moreover, her research indicates that who establishes standards is even more significant (Goertz, 2009). Finally, Goertz's (2009) research finds that the prospect for achieving some consensus concerning standards remains quite elusive in light of the fragmented and decentralized nature of the U.S. education system.

However, there is a need for more research in the field that examines the policy implications of unfunded mandates for states in light of the economic challenges many of them face in funding K-12 education. This is the overall significance of this study. The issue of

meeting the demands of K-12 education with adequate funding is a major challenge or problem facing states across the country. Further, there are very few studies that examine factors or variables that impact how judicial institutions react or respond to litigation related to NCLB and the issue of unfunded mandates. This study attempts to fill this existing void in the current body of research within the field.

Anticipated Contributions of This Study

This study is significant and makes a contribution to the current body of literature because there is a need for more research in the field that examines the policy implications of unfunded mandates for states in light of the economic challenges many of them face in funding K-12 education. Further, there are very few studies that examine factors or variables that impact how judicial institutions react or respond to litigation related to NCLB and the issue of unfunded mandates. This study attempts to fill this void in the current body of research within the field.

Limitations

In relation to its limitations, the overall scope or context of this study is not focused upon identifying or bringing to the forefront the ideal policy to achieve education reform. This is outside the scope of the study and is clearly an existing limitation. Rather, the study seeks to assess the Court's rationale or reasoning for refusing to hear the *Connecticut* and *Pontiac* cases, how states are managing to meet requirements to fund federal mandates, and identify policy implications for respective states of unfunded federal mandates. Further, in examining whether there is an inherent contradiction in the NCLB law over the issue of testing requirements that are unfunded mandates, the study will highlight possible inconsistencies in the measure that should

be addressed to improve the law if reauthorization ever occurs in the future. Finally, the study intends to identify factors that influenced the nation's highest court to refrain from hearing both the *Connecticut* and *Pontiac* cases.

CHAPTER 2

Review of the Literature

The NCLB Act signed into law on January 8, 2002 by President George W. Bush is an example of standards-based reform and accountability policies which state legislatures and state executives increasingly became supportive of during the first term of the Bush Administration (Koski, 2007). The NCLB Act promised to elevate the academic performance of at-risk children and close the achievement gap (Koski, 2007). However, the NCLB Act has been criticized for falling short of providing much needed educational resources and proper learning conditions for all children regardless of race to reach their highest academic potential (Koski, 2007). In fact, many supporters of education reform question whether it is appropriate to “hold students accountable in failing to learn without providing them with necessary opportunities to learn” (p. 2). In seeking to understand U.S. Supreme Court Reaction to NCLB, it is useful to provide an overview of the history of educational reform in the U.S., the origins and politics of NCLB and how it evolved into law, the measure’s legal history, and previous research or studies in the field.

The History of Education Reform in the U.S.

In examining the U.S. educational system since World War II, it is clear that sociopolitical, socioeconomic, and historical contexts have had a significant impact on the development of curriculum policy and education reform efforts in the nation (Marsh & Willis, 2007). As the U.S. entered World War II, the nation began to focus more upon training and

preparedness (Marsh & Willis, 2007). This change in America's focus was most definitely a social or historical context that influenced curriculum policy and education reform (Marsh & Willis, 2007). Because of this shift in the nation's focus, "society-centered curricula" was moved to the forefront ahead of "individual-centered curricula." (p. 52). In fact, during and after World War II, with the national mood becoming more conservative, U.S. educators began to advocate for school curricula that was more conducive to successfully incorporating students into American society (Marsh & Willis, 2007). However, the impact of the Cold War along with the increasing viewpoint that science and technology were important for solving problems of national concern were social and historical contexts that caused the mood in the 1940s and 1950s to turn more towards traditional academic education (Marsh & Willis, 2007). During this period, the American public demanded that U.S. schools teach "subject-centered curricula which they believed would lead to academic excellence" (p. 52).

The former Soviet Union's successful launch in October 1957 of *Sputnik*, the first man-made satellite to orbit earth, is another historical event that influenced curriculum policy and education reform efforts in the U.S. (Marsh & Willis, 2007). The U.S. perceived this development as a threat to our country's national security (Marsh & Willis, 2007). A result of this concern was that the U.S. began to move in the direction of supporting the notion of a single curriculum for American schools (Marsh & Willis, 2007). While the idea of a universal adoption of a single curriculum for U.S. schools may have been desirable, given the implications of America's tradition for local control of schools and its values of independence, proponents of such a policy questioned its feasibility (Marsh & Willis, 2007).

Many U.S. observers concerned with education reasoned that if the success of *Sputnik* was evidence of the former Soviet Union's advantage in the area of military technology, then the Soviet educational curricula in areas such as science and mathematics must be superior when compared to the curricula in U.S. schools (Marsh & Willis, 2007). As a result, U.S. schools were urged to strengthen teaching in science and mathematics to produce a new generation of American scientists and mathematicians (Marsh & Willis, 2007). In addition, American schools were also urged to improve teaching in other vital subject areas (Marsh & Willis, 2007). The significance of this development was that it was consistent with efforts to move "toward subject-centered curricula that had been building since World War II" (p. 53).

The U.S response to the former Soviet Union's success with *Sputnik* was to focus directly upon improving the American school curriculum (Marsh & Willis, 2007). While the federal government could not essentially prescribe school curricula, it was in the position to provide vital finances to institute critical changes (Marsh & Willis, 2007). The particular strategy embraced by the federal government was to develop a series of attractive curricula packages that would entice U.S. schools to adopt them for educating students (Marsh & Willis, 2007). In fact, some of America's leading academicians which included Nobel Prize winners from some of the nation's leading higher education institutions were directly involved in creating these curricula packages for U.S. schools (Marsh & Willis, 2007). The position embraced by federal agencies such as the National Science Foundation (NSF) involved in supporting the development of school curricula packages was that these field experts as opposed to teachers responsible for teaching the curriculum were in the best position to make critical decisions concerning curriculum content (Marsh & Willis, 2007). During the late 1950s through the 1960s, the

National Science Foundation (NSF) was the leading federal agency in the “unprecedented billion-dollar program effort to give priority to the sciences and mathematics in the U.S. school curriculum” (Tanner, 1986, p. 5).

In placing this emphasis on science and mathematics in the school curriculum, the objective was to increase the number of scientists and engineers in the U.S. to meet underlying challenges posed by the space race and the Cold War (Tanner, 1986). In order to accomplish this goal, “discipline-centered curriculum packages” emphasizing “new math”, “new physics”, and “new chemistry” were developed for America’s elementary and secondary schools by “teams of university scholar-specialists” (p. 6). Further, as a result of these efforts, there were predictions that these changes would essentially “double the proportion of students enrolled in high school physics within five years” and lead to “increases in college majors in physics” (p. 6). However, in actuality, there was a decline in the proportion of students enrolled in high school physics along with a decline in college students majoring in physics (Tanner, 1986). In fact, at the collegiate level, this decline in the number of college students majoring in physics occurred despite an increase in the total college population in the U.S. during the 1960s (Tanner, 1986). Moreover, the new math and science curriculum reforms instituted for American schools ultimately “failed to deliver what was promised” (p. 6). For one, the introduction of these new curriculum reforms actually resulted in a “decline in students’ ability to make mathematical application” (p. 6).

After efforts to institute “discipline-centered curriculum reforms” in response to challenges posed by the space race and the Cold War, there was a movement in the late 1960s

and early 1970s to essentially “humanize the schools” in the U.S. (p. 6). By the late 1960s, the American public’s increasing concerns about the merits of pursuing the Vietnam War along with growing disillusionment over the Johnson Administration’s promises to “use education as a means to eradicate poverty, achieve social justice, and create the Great Society” were sociopolitical contexts that clearly influenced curriculum policy and education reform (Marsh & Willis, 2007, p. 55). Many Americans held the viewpoint that education in general but particularly subject-centered curricula were not adequately geared towards addressing many of the social problems that divided America in the late 1960s and early 1970s (Marsh & Willis, 2007). As a result of these sociopolitical contexts occurring during this period, American educators and the public briefly supported the idea of free schools and were proponents of an open-classroom movement that would embrace or incorporate individual and society-centered curricula (Marsh & Willis, 2007; Tanner, 1986).

While the open-classroom movement was making inroads with U.S. elementary schools, a national program that supported career education in America was introduced by U.S. Commissioner of Education Sidney Marland (Tanner, 1986). In launching this program to support career education, Marland was highly critical of schools as well as society in general for placing too much emphasis on attending college at the expense of extolling some of the values of career education (Tanner, 1986). Further, during this period, there were also changes that occurred in schools’ curricula that were related to the historical *Brown v. Board of Education* (1954) court decision (Cuban, 1992). This development was a historical context that influenced both the intended and taught curricula in U.S. schools (Cuban, 1992). As a direct result of the Civil Rights movement, attention became focused upon both school practices and curriculum

content (Cuban, 1992). For instance, particularly in U.S. secondary schools, “new courses that focused upon blacks, Hispanics, and other ethnic groups appeared in the curriculum” (pp. 228-229). In addition, curriculum guides that included new content and revisions in subject areas such as history and English were also published (Cuban, 1992).

The period of efforts to humanize U.S. schools which occurred in the late 1960s and the middle to late 1970s was followed by an “era of educational retrenchment” or “back-to-basics” movement (Tanner, 1986, p. 7). Some scholars point to the tendency of university researchers concerned with the effects of formal education to evaluate secondary schooling negatively compared to their more positive evaluations of higher education (Tanner, 1986). This tendency to evaluate secondary schooling negatively on the part of university researchers “provided some impetus for the retrenchment of back-to basics during the 1970s” (pp. 7-8).

Further, during this period, a number of reports were issued concerning adolescents and secondary schools that essentially “portrayed adolescence as a pathological stage of human development” (p. 8). Several reports such as the ones released by the National Commission on the Reform of Secondary Education and the National Panel on High School and Adolescent Education for the most part “viewed problems such as youth disaffection, unemployment, and disruption as evidence of the failure of U.S. schools” (p. 8). These problems are clearly examples of some of the socioeconomic contexts or conditions that influenced curriculum policy and education reform efforts during the middle to late 1970s (Tanner, 1986; Anderson, 2003). These socioeconomic contexts and conditions that were prevalent during this period served as an impetus for high schools to “return to their narrow academic mission by emphasizing basic

academic skills” (Tanner, 1986, p. 8). This movement supported “training and education in non-school settings for the masses” as well as “a higher-order academic program in high school for college-bound students” (p. 8). Many of the influential reports released during this period advocated for “eliminating comprehensive high schools in favor of establishing academic high schools” (p. 8). Further, these reports called for the creation or development of “alternative schools for youth incapable of fitting into academic settings and emphasis on mastering basic skills” (p. 8). The reports also supported “reducing the age of compulsory school attendance and the length of the school day” (p. 8). Finally, the reports advocated for “public funds to be allocated to businesses and industry to support training adolescent youth for work and other alternatives to schooling” (p. 8).

During this period, a dual educational system in the U.S. came into fruition through the “creation of segregated, specialized area or county vocational schools” (p. 9). In contrast, “other advanced democratic nations were adopting the comprehensive school model while these schools were being established in the U.S.” (p. 9). In addition, during this period, U.S. states were instituting “minimum competency testing while reducing the school curriculum to emphasize the lowest level of basic skills” (p. 9). During the 1970s and early 1980s, the National Assessment of Education Progress (NAEP) highlighted declines in students’ abilities to reason and apply scholastic knowledge (Tanner, 1986). The significance of this is that these declines were directly attributed to the back-to-basics movement and emphasis on state minimum competency testing (Tanner, 1986). As a result, “error-oriented teaching” began to dominate the U.S. education landscape and a “new emphasis on teaching to think was treated as a special skill to be incorporated into the school curriculum” (p. 9).

During the post-Sputnik period, some U.S. citizens held the view that military components were essentially the greatest threat to America's national security (Marsh & Willis, 2007). However, by the 1980s, a majority of Americans began to believe that economics specifically international economic competition were the biggest threat to U.S. national security (Marsh & Willis, 2007). In response to this perceived threat, the National Science Board of the National Science Foundation (NSF) in 1983 "proposed a multi-billion dollar investment to revamp America's school curriculum in science, mathematics, and technology" due to the "Japanese assault on our world industrial and technological markets" (Tanner, 1986, p. 9). Further, the National Commission on Excellence in Education (NCEE) in 1983 issued a report known as *A Nation at Risk: The Imperative for Educational Reform* which highlighted America's decline in industrial productivity and placed responsibility for this crisis squarely on the shoulders of U.S. schools (Tanner, 1986). Specifically, the NCEE charged that U.S. schools "failed to measure up to those of other nations on international comparisons of student achievement" (p. 10).

As a result of the NCEE's report, many observers concerned with the state of public education in the U.S. advocated for an expansion of federal financing for schools (Tanner, 1986). In fact, this call for increased federal funding for public education happened at a time when the policy position of the Executive branch of the federal government was essentially to support reducing federal financing for public education in the nation (Tanner, 1986). From a political

standpoint, the NCEE's report *A Nation at Risk* created such a strong public reaction that the Reagan Administration "found it more politically advantageous to embrace the report than to abolish the Department of Education which had commissioned the report" (Marsh & Willis, 2007, p. 57).

Many of the initiatives by individual states during this period had a profound impact upon education reform (Tanner, 1986). The impact of this effort by states to "increase the years of required study of certain academic courses for high school graduation" is reflected in data from the National Center for Education Statistics' *Digest of Education Statistics* 2002. When one examines the "average number of Carnegie units earned by public high school graduates in various subject fields by student characteristics," the National Center for Education Statistics' data indicates that during this period of the 1980s, students were graduating with more academic courses and less vocational ones (Snyder & Hoffman, 2003, p. 160).

The NCEE's *A Nation at Risk* report essentially "set the tone for national debates about education since 1983" (Marsh & Willis, 2007, p. 62). During the period of the 1990s into the 2000s, public sentiment has been consistently in support of the NCEE's recommendations (Marsh & Willis, 2007). In the 1990s, there were efforts to establish national curriculum priorities along with discussions concerning the "establishment of a unified curriculum for the nation as a whole" (p. 317). Throughout the 1990s, the federal government proposed a set of national goals that became known as *America 2000* which was published in 1991 (Marsh & Willis, 2007). The *America 2000* initiative originated from an "education summit conference of state governors convened by President George H.W. Bush in September 1989" (p. 317).

There were six national goals to be attained by the year 2000 that were at the core of the *America 2000* initiative (Marsh & Willis, 2007). First, the initiative proposed that “all children in the U.S. should start school prepared or ready to learn” (p. 317). Second, *America 2000* proposed that “high school graduation rates should increase to at least 90 percent” (p. 317). The third national goal was that “U.S. students should complete grades four, eight, and twelve having demonstrated competency in challenging subjects such as English, mathematics, science, history, and geography” (p. 318). Fourth, *America 2000* advocated for “U.S. students to be first in the world in science and mathematics achievement” (p. 318). The fifth national goal was for “all adult Americans to become literate and acquire knowledge and skills to compete in a global economy” (p. 318). Finally, the sixth national goal was for “all U.S. schools to be free of drugs and violence and offer a disciplined environment conducive to learning” (p. 318). In addition to these goals, President Bush in April 1991 proposed that “new world-class standards in the five core subject areas of history, mathematics, science, geography, and English along with a voluntary national testing program in these subjects would commence in September 1993” (p. 318). Further, the National Assessment of Educational Progress (NAEP) in May 1991 “endorsed the setting of basic, proficient, and advanced national levels of achievement in basic academic subjects” (p. 318).

In the late 1990s, there were increasing calls for more national testing partly due to support from the Clinton Administration (Marsh & Willis, 2007). The emphasis placed on national testing increased to its highest level in 2001 when George W. Bush became President (Marsh & Willis, 2007). President Bush very early in his administration proposed federal legislation aimed at increasing federal funding for public schools particularly in areas that were

economically depressed (Marsh & Willis, 2007). The NCLB Act was passed by Congress with bi-partisan support in late 2001 (Marsh & Willis, 2007). The NCLB law requires U.S. schools to test American students' in certain grade levels for proficiency in mathematics and reading (Marsh & Willis, 2007). If schools don't meet adequate yearly progress (AYP) by showing sufficient improvement in students' test scores within two years, they are categorized as failing schools and can be reorganized or closed by respective state education officials (Marsh & Willis, 2007).

Further, students from disadvantaged backgrounds who attend these schools are provided options to transfer or receive private tutoring (Marsh & Willis, 2007). In 2004, the Bush Administration required that under the provisions of the NCLB law, "yearly standardized testing be extended to include almost all grade levels and to add science as a subject to be tested" (p. 319). As it relates to education reform efforts and school curriculum, there is currently a move towards establishing a unified curriculum for states through the Common Core State Standards Initiative (CCSS) with states incorporating these provisions by 2013.

When one examines the education landscape in the U.S. since World War II, it is quite evident that sociopolitical, socioeconomic, and historical contexts or conditions have had a profound impact on the development of curriculum policy and overall efforts to achieve education reform. The U.S. public, government officials, education professionals, and interest groups advocating for education reforms have been prompted to support or enact education policies in reaction to social, economic, and political conditions both at domestic and international levels. Most significantly, as it relates to education reform efforts today, the

NCEE's 1983 *A Nation at Risk Report* appears to be the watershed development that has most influenced the current debate over the direction education reform should take in the U.S.

In assessing how the NCLB provision may evolve in the future as an education policy, it is useful to first examine the inherent characteristics of the measure and how it has evolved since its enactment. When one examines the first decade of the twenty-first century, it becomes clear that the reform ideas that were essentially at the forefront of American education were accountability and school choice (Ravitch, 2010). These reform ideas were central to President George W. Bush's NCLB initiative (Ravitch, 2010). The NCLB law "made standardized test scores the primary measure of school quality" which "changed the nature of public schooling across the nation" (p. 15). In fact, performance on tests in the areas of reading and mathematics became the most important variable or component for evaluating "students, teachers, principals, and schools" (p. 15). An evaluation of the characteristics of the measure reveals that what was clearly missing from NCLB was specifications of what students should actually learn (Ravitch, 2010). While the measure gave the federal government increased power over education, it essentially "left the heart of education and curricula in the hands of localities and states" (Kosar, 2005, p. 195).

In examining the characteristics of the NCLB law and how it was implemented, some scholars contend that the law essentially "bypassed both curriculum and standards" (Ravitch, 2010, p. 15). While there are those who argue that the measure was a natural progression of the standards movement, many suggest it actually evolved instead into a testing movement (Ravitch, 2010). For example, while the law required schools to achieve higher test scores in basic skills

areas, it did not require a curriculum or raise standards (Ravitch, 2010). The NCLB measure ignored critical subject areas such as “history, civics, literature, science, the arts, and geography” (p. 16). Although the NCLB law did eventually require respective states to test or evaluate students in the area of science, “the science scores didn’t count on the federal scorecard” (p. 16). Many observers concerned with improving K-12 public school education in the U.S. argued that the new reforms associated with the NCLB measure were primarily centered upon “structural changes and accountability” as opposed to the actual “substance of learning” (p. 16). These proponents of education reform hold the view that a preoccupation with accountability is not a sensible or logical stance if the larger goals of education are eventually undermined (Ravitch, 2010).

Further, those concerned with the improvement of K-12 public school education suggest that testing and accountability essentially became the driving forces behind school reform efforts because many “elected officials became convinced that measurement and data would fix the schools” (p. 16). In short, these advocates for school reform argue that the “nation got off track in its efforts to improve education because the standards movement was replaced by the accountability movement” (p. 16). Moreover, they suggest that efforts to improve education quality in K-12 public school settings essentially turned into an accounting strategy that measured and then issued punishments or rewards (Ravitch, 2010). The result of this strategy was obedience among respective educators but also an educational environment of fear (Ravitch, 2010). The result was often the generation of higher test scores for schools but many argued that this was not truly education (Ravitch, 2010).

As a result, many proponents of education reform embrace the viewpoint that any required tests that have come into fruition as a result of the implementation of NCLB “should be based on the curriculum” and therefore follow it (p. 16). Further, supporters of education reform suggest that these tests “should not replace or precede the curriculum” (p. 16). These advocates for education reform hold the view that American students should acquire “a coherent foundation of knowledge and skills” and “learn how to think, debate, and question” (p. 16).

President George W. Bush essentially made education reform his highest priority when he was elected in 2000 and brought with him the Texas plan emphasizing both testing and accountability (Ravitch, 2010). In fact, President Bush’s NCLB measure complemented well the key component of the Clinton Administration’s *Goals 2000* program which allowed “states to set their own standards and select their own tests” (p. 21). The terms of the NCLB measure specified that any schools “not demonstrating adequate progress toward the goal of making every student proficient in mathematics and English by 2014 would be subject to onerous sanctions” (p. 21). However, it is important to note that it was essentially left to the states to decide or determine what proficiency actually meant (Ravitch, 2010). Therefore, states were allowed to determine “what U.S. children should learn and how well they should learn it” despite the fact that they had “vague and meaningless standards” (p. 21). The states were basically “asked to grade themselves by creating tests that almost all children could eventually pass” (p. 21). As a result of the NCLB provision, accountability based upon testing as opposed to standards became America’s national education policy (Ravitch, 2010). In short, the nation lacked a true “underlying vision of what education should be or how one might improve schools” (p. 21).

What the NCLB measure essentially introduced was a new concept or definition of school reform that was approved by both Republicans and Democrats (Ravitch, 2010). As a result of the NCLB provision, school reform in America became “characterized as accountability, high-stakes testing, data-driven decision making, choice, charter schools, privatization, deregulation, merit pay, and competition among schools” (p. 21). Many observers contend that it was certainly “ironic that the largest expansion of federal control in the history of American education” occurred under a conservative Republican president (p. 21). Moreover, they also note that it was equally ironic that Democrats ultimately embraced “market reforms and other initiatives traditionally favored by Republicans” (p. 21). Those who were Democrats were drawn to the measure because it involved an “expansion of the federal role in education” while Republicans were attracted to the NCLB law’s “support for both accountability and choice” (p. 95). However, the NCLB law “did not allow students to take their federal funding with them to private schools” which was then supported by many Republicans (p. 95).

The NCLB measure which was closely aligned with the Texas model used by George W. Bush, was quite complex and contained numerous programs (Ravitch, 2010). The measure’s accountability plan encompassed a number of important features. First, “states were expected to select their own tests, adopt three performance levels such as basic, proficient, and advanced, and decide how to define proficiency” (p. 97). Second, “public schools that received federal funds were required to test students in grades three through eight on an annual basis” (p. 97). When students reach the high school level, all students were required to be tested in the areas of reading and mathematics (Ravitch, 2010). Further, students’ test scores were to be “disaggregated or separated by race, ethnicity, low-income status, disability, status, and limited English

proficiency” (p. 97). The purpose for the disaggregation or separation of test scores was to “ensure that each group’s academic progress was properly monitored as opposed to hidden in an overall average” (p. 97). Third, states under the NCLB provision “were required to establish timelines indicating how all of their students would reach proficiency in the areas of mathematics and reading by 2013-2014” (p. 97). Fourth, “all schools and school districts were required to make adequate yearly progress (AYP) for every subgroup toward the goal of 100 percent proficiency by 2013-2014” (p. 97). The fifth feature of the NCLB provision was that “any school not making adequate progress for every subgroup toward the goal of 100 percent proficiency would be labeled a school in need of improvement or SINI” (p. 97). Those schools not making adequate progress “would face a series of onerous sanctions” (p. 97). For example, in the first year for failing to make adequate yearly progress (AYP), schools would essentially be placed on notice (Ravitch, 2010). For the second year, “schools would be required to offer all students the right to transfer to a more successful one” (p. 97). Further, the students’ transportation to the more successful school would be “paid from the district’s allotment of federal funds” (p. 97). During the third year, it would be mandatory for failing schools to offer free educational tutoring to students from disadvantaged backgrounds (Ravitch, 2010). This tutoring offered to low-income students would be paid for by districts with their federal funds (Ravitch, 2010). In the fourth year of not achieving adequate yearly progress (AYP), it would be mandatory for failing schools to “undertake corrective action which could mean curriculum changes, staff changes, or a longer school day or year” (p. 97). If for five consecutive years a failing school does not reach its respective targets for improvement for particular subgroups, the school would be required to undertake a restructuring process (Ravitch, 2010).

Any school required to engage in restructuring essentially has five options. The first option available to a failing school was that it could convert to a charter school (Ravitch, 2010). Second, the school not reaching targets for improvement could “replace the principal and staff” (p. 98). A third option available to a failing school is that it could “relinquish control to private management” (p. 98). Fourth, schools could essentially “turn over control of their institution to the state” (p. 98). Finally, schools could also turn over “any other major restructuring of the school’s governance” (p. 98). In actuality, a majority of states and districts opted to choose the fifth alternative in hopes of avoiding the other prospects (Ravitch, 2010).

The NCLB provision also “required all states to participate in the federal National Assessment of Educational Progress or NAEP” (p. 98). This test would essentially “assess students in mathematics and reading in the fourth and eighth grades in every state every other year” (p. 98). Before the NCLB measure went into effect, participation in the NAEP was strictly voluntary (Ravitch, 2010). In fact, many states elected not to participate in the assessment at all (Ravitch, 2010). Moreover, the NAEP mathematics and reading tests before the implementation of NCLB were not administered every other year (Ravitch, 2010). These NAEP test scores “which had no consequences for any student, school, or district, essentially served as an external audit to monitor the progress of states in meeting their goals” (p. 98).

While it is clear that the NCLB law contained a number of programs and priorities, “the central focus of the law was accountability” (p. 98). The issue of accountability pertaining to the law was the key component that actually brought both Democrats and Republicans together in support of the measure (Ravitch, 2010). In fact, many observers contend that “had there not been

bipartisan agreement on the issue of accountability, the NCLB measure would never have become law” (p. 98). It is clear that both political parties held the view that accountability was the key to raising achievement for the nation’s schools (Ravitch, 2010).

Many of the initial criticisms directed toward the NCLB law’s requirements centered around the issue of funding (Ravitch, 2010). A number of states essentially complained that the federal government did not provide adequate funding in order to implement what was actually required by the law (Ravitch, 2010). For example, during the initial years of NCLB, the level of federal funding that was provided for both elementary and secondary school programs increased by almost 60 percent (Ravitch, 2010). However, Democrats were highly critical and argued that this increase was “well below what was needed and what the U.S. Congress had authorized” (p. 98).

In assessing the characteristics and basic components of the law, it becomes evident that some of the NCLB remedies essentially did not work effectively (Ravitch, 2010). For one, some observers note that while students were offered the opportunity or choice to transfer out to a more successful school, many of them were not accepting this offer (Ravitch, 2010). In addition, students attending failing schools were also offered opportunities for free tutoring but some 80 percent or more of them turned down this educational assistance (Ravitch, 2010). The tutoring component of the NCLB law did provide substantive profits for tutoring companies because there were enough students that did enroll to make the services profitable for participating companies (Ravitch, 2010). Overall, the law did generate large revenues for both tutoring and testing services and this became a sizeable industry (Ravitch, 2010). However, “while companies

that offered tutoring, tests, and test preparation materials were making billions of dollars annually from federal, state, and local governments, the educational advantages to the nation's students were not obvious" (p. 101).

Aside from some of these shortcomings concerning the remedies offered by NCLB, an examination of the characteristics and components of the law reveals that clearly the most problematic flaw in the law is "its legislative command that all students in every school must be proficient in mathematics and reading by 2014" (p. 102). According to the law, all students are required to reach proficiency in these subject areas including students with special needs, those who speak English as a second language, and students facing social challenges such as poverty (Ravitch, 2010).

The notion of proficiency as it concerns the law is not considered the same as the concept of minimal literacy (Ravitch, 2010). In fact, "the term proficiency as it relates to the NCLB law has been used since the early 1990s by the federal testing program, the National Assessment of Educational Progress (NAEP), where it denotes a very high level of academic achievement" (Ravitch, 2010, p. 102). The actual federal assessment itself basically refers to four levels of achievement (Ravitch, 2010). The lowest level of "below basic" indicates that a student is essentially unable to meet standards for their grade level (p. 102). The next level of achievement is denoted as "basic" and this level indicates "that a student has partially mastered grade expectations" (p. 102). The level denoted as "proficient" basically "indicates that a student has fully mastered grade standards" (p. 102). The highest level of achievement is "advanced" which indicates "superior achievement" by students (p. 103).

When one examines recent statistics, it becomes clear that the NCLB law's requirement that all students should be proficient in reading and mathematics by 2014 is quite questionable. For example, "on the 2007 NAEP for fourth grade reading, some 33 percent of the nation's students were below basic, 34 percent were basic, 25 percent scored proficient, and 8 percent were advanced" (p. 103). In addition, during this same year, "28 percent of eighth grade students were reading at the proficient level while an additional 3 percent were designated as advanced" (p. 103). In short, "only one-third of students in the nation were meeting federal standards for proficiency" and this is why many who are concerned with improving K-12 education in the U.S. view the goal of having all students reach proficiency by 2014 with much skepticism (p. 103). Therefore, given these statistics, many observers have concluded that this goal of 100 percent proficiency is unattainable (Ravitch, 2010). In fact, many contend that the only way to even come close to such a goal is to essentially "redefine the term proficiency to mean functional literacy, minimal literacy, or something comparable to a low-passing mark" (p. 103).

There are also those concerned with the quality of K-12 education in the U.S who suggest that there are clearly inherent consequences of mandating that all students be proficient in the critical subject areas of mathematics and reading by 2014 (Ravitch, 2010). For one, some argue that "mandating such an unattainable goal may undermine many states that have been doing a reasonably good job of improving their schools" (p. 103). Further, they contend that it is not a sensible approach to education policy to impose remedies to supposedly improve K-12 education in the nation "that have never been effective and to make the assumption that these remedies will produce better than reasonably good results" (p. 103).

However, some argue that the most damaging possible effect of this goal of 100 percent proficiency by 2014 is that it can clearly be interpreted as a “timetable for the demolition of public education in the U.S.” (p. 104). There are those supporters of school reform not necessarily aligned with NCLB who contend that “the goal of 100 percent proficiency places thousands of public schools at risk of being privatized, converted into charter schools, or closed” (p. 104). In fact, those who hold this particular view note the number of schools closed in cities such as Chicago, New York City, Washington, D.C., and other districts due to the fact that “they were unable to meet the unreasonable demands of NCLB” (p. 104).

Because of the fact that the NCLB law essentially requires respective states to pledge that they will reach a goal of 100 percent proficiency by 2014 which many view as unreasonable, states have adopted timetables to reach a goal that is clearly unreasonable (Ravitch, 2010). In fact, most agree that no matter how hard school educators and administrators try to reach these educational milestones, it is highly unlikely that they will achieve 100 percent proficiency by 2014 (Ravitch, 2010). Moreover, many schools and districts have basically extended their timetables essentially “putting off the biggest gains for the future in order to stave off their inevitable failure” (p. 104). However, as the target year for total proficiency looms ever closer, more U.S. schools fall short of making adequate yearly progress (AYP) and are labeled as failing schools (Ravitch, 2010). What critics of the NCLB law also note is that although “some states lowered the cut scores or passing marks on their tests to make it easier for schools to meet their target, many of them failed to make adequate yearly progress (AYP) toward 100 percent proficiency for every subgroup” (p. 104). Further, they also highlight the fact that even in

instances where states managed to maintain high standards and refrained from lowering cut scores, “even more schools fell behind” (p. 104).

An actual unintended consequence of the NCLB law was that there was a reduction in the classroom time available for educators to teach other subjects besides mathematics and reading such as “history, science, the arts, and geography” (p. 107). The areas of reading and mathematics were the only subjects that were relevant in terms of schools attaining adequate yearly progress (AYP), but even in these areas, quality instruction was sacrificed for “intensive test preparation” (p. 107). For schools and school districts, achieving high test scores essentially “became an obsession”, and “many school districts invested extensively in test-preparation materials and activities” (p. 107). In short, as a result of the NCLB law’s requirements, “test-taking skills and strategies took precedence over the attainment of knowledge” (p. 107).

While the NCLB law encompassed “a great deal of rhetoric when it was passed,” an evaluation of the characteristics or key components of the measure reveals that the law’s remedies clearly did not work and its sanctions were ineffective (p. 110). The implementation of the law did not result in “high standards or high accomplishment” for schools or school districts (p. 110). In fact, critics of the law contend that any “gains at the state level were essentially the result of educators teaching students test-taking skills and strategies” as opposed to the attainment of knowledge and comprehension (p. 110).

In examining some of the inherent characteristics of the measure, it becomes clear that NCLB “was essentially a punitive law based on erroneous assumptions about how to improve schools” (p. 110). In short, the law was based upon a number of flawed assumptions about how

to successfully reform U.S. schools (Ravitch, 2010). For one, the law was based upon a faulty assumption that “reporting test scores to the general public would basically be an effective level for school reform” (p. 110). Further, the law also assumed that any changes in governance would ultimately result in improvements for schools (Ravitch, 2010). The NCLB law also assumed that labeling schools as failing that were unable to improve their test scores every year would result in the eventual attainment of higher scores (Ravitch, 2010). In addition, the law assumed that low test scores were the result of incompetent school personnel such as teachers and principals that should be “threatened with the loss of their jobs” (pp. 110-111). Finally, the NCLB law was predicated upon the flawed assumption “that higher test scores on standardized tests of basic skills are synonymous with good education” (p. 111). This particular assumption of the law is often criticized by those concerned with school reform who argue that “testing is not a substitute for curriculum and instruction” (p. 111). These supporters of school reform hold the view that a strategy of testing children, exposing school personnel for what is believed to be their incompetence, and closing schools will not necessarily result in quality education (Ravitch, 2010).

In examining the school reform efforts of today, it is clear that many of the existing policies currently being pursued may be unlikely to actually improve schools (Ravitch, 2010). In fact, some observers suggest that many of these policies could result in schools becoming less effective and actually “degrade the intellectual capacity of our nation’s citizenry” (p. 224). Further, they argue that given the emphasis on testing, schools will surely fail if educators merely focus upon teaching what is on high stakes tests and how to take them as opposed to developing critical thinking and reasoning skills (Ravitch, 2010).

There are a number of measures advocates of school reform recommend in order to improve reform efforts under the current law. In terms of how the NCLB measure may evolve in the future particularly if the law is reauthorized, many advocates of school reform contend that the best way to reform schools is “to improve curriculum and instruction along with the conditions in which teachers work and students learn” (p. 225). These proponents of school reform suggest that this is more important than constant debates over “how school systems should be organized, managed, and controlled” (p. 225). They essentially hold the view that the issue is not the organization of schools but the “lack of sound educational values” that is hurting our nation’s schools (p. 225). Basically, these proponents of school reform believe that any future reauthorization of the law should incorporate or embrace these components.

Further, many advocates of school reform contend that any future reauthorization of the law should address the issue of too much “intrusion on the part of elected officials into the pedagogical territory of professional educators” (p. 225). They argue that pedagogy or how to teach should always remain the professional domain of individual teachers (Ravitch, 2010). Many contend that what has happened since the introduction of the law is that the curriculum of schools has often been “a political negotiation among people who lack substantive knowledge about teaching” (p. 226). In addition, they suggest that any evolvement of the law should ensure that “curriculum is determined by professional educators and scholars acting with authority vested in them by schools, districts, and states” (p. 226). As it concerns school curriculum, supporters of school reform recommend broadening the focus beyond reading and math to include other subjects such as the liberal arts which are considered “essential elements of a good education” (p. 226). Finally, proponents of school reform looking beyond test results as a

“primary means of evaluation and accountability” for “students, teachers, principals, and schools” (p. 226).

With the election of Barack Obama as the nation’s President in 2008 and the appointment of Arne Duncan as Secretary of Education, it is likely that NCLB will evolve in such a way that there will be improvements in the law (Ravitch, 2010). In fact, President Obama is already allowing greater flexibility for states to qualify for potential waivers from some federal mandates provided that they establish and maintain high educational standards. Further, some legislators have been proposing changes to the law such as “off-level testing and additional accommodations for English as a Second Language (ESL) students” (Breslin, 2009, p. 7). Some of the proposals for modification of the NCLB law have called for “more substantive testing accommodations” (p. 7). Moreover, as evidenced by the “Sixth Circuit’s decision to hear the case brought by school districts in the states of Vermont, Michigan, and Texas along with the National Education Association (NEA) arguing that the federal government failed to provide sufficient funding for the law’s testing requirements,” it is clear that in the future more “educators, politicians, and judges may recognize the failure and discriminatory nature of the NCLB law” (p. 7).

The Standards Movement from 1989 to the Passage of NCLB: A Critical Assessment

In assessing various accounts of the standards movement since 1989, it is clear that there are some distinctions or differences in relation to the weight that these accounts give to various institutions, organizations, and levels of government involved in this process. Kevin R. Kosar (2005) in *Failing Grades: The Federal Politics of Education Standards*, links the emergence of

the idea of national standards and its inclusion “on to the federal systemic agenda” to the national “Education Summit held in Charlottesville, Virginia in September of 1989” (p. 90). This national education summit was attended by President George H.W. Bush and the governors of respective states and all in attendance saw the summit as an “opportunity to capture the issue of education from the opposing side and earn votes on the next election” (p. 90).

During this national education summit in 1989, President Bush and state governors essentially made a commitment to “establishing national education goals and reporting annually on the state of U.S. education” (p. 90). In January 1990, President George H.W. Bush announced six national goals for the American education system: 1. “All children in America will start school ready to learn” (p. 90); 2. “The high school graduation rate will increase to at least 90 percent” (p. 90); 3. “American students will leave grades, four, eight, and twelve having demonstrated competency in challenging subject matter including English, mathematics, science, history, and geography” (p. 90); 4. “U.S. students will be first in the world in science and mathematics” (p. 90); 5. “Every adult American will be literate and possess the knowledge and skills necessary to compete in a global economy and exercise the right and responsibilities of citizenship” (p. 90); 6. “Every school in America will be free of drugs and violence and will offer a safe, disciplined environment conducive to learning” (p. 90).

By February of 1990, the National Governors Association (NGA) proposed twenty-one additional objectives to these six national goals (Kosar, 2005). The majority of these various objectives were “focused on resources that governors thought would be necessary to reach the six national goals” (p. 90). The governors of respective states reached an agreement to produce

an annual national report card measuring the progress made to reach these national education goals that were to be reached by the year 2000 (Kosar, 2005). Further, state governors established the National Education Goals Panel (NEGP) in order to implement these measures (Kosar, 2005).

While it can be argued that neither the Bush Administration nor respective state governors were calling outright for national standards, it is clear that from 1989 to 1990, the groundwork was clearly laid for national education standards to emerge (Kosar, 2005). An assessment of the landscape during this period reveals that leaders from the federal and state level agreed that the curriculum for schools needed to be more challenging (Kosar, 2005). Further, they held the view that students across the nation “needed to learn at higher levels” (p. 90). These leaders argued that the achievement of most American students in general was lacking and that U.S. schools across the board needed to “adopt more rigorous curricula and assessments” (p. 90). As a result, leaders established a national goal for “all children to demonstrate competency in five subject areas of challenging material” (Kosar, 2005, p. 90).

Given the fact that a set of national education goals had been established, there was a need to adopt some means of measuring progress in achieving them (Kosar, 2005). This was essentially the impetus behind the NEGP’s creation or adoption of “a national report card to measure the nation’s progress toward education goals” (pp. 90-91). The purpose of this national report card was to establish some means to “measure the nation’s progress toward these goals” (p. 91). It also served somewhat as a mechanism to rally the American public around the idea of having national education goals (Kosar, 2005). Further, leaders at this time held that a national

report card would aid in elevating the “public’s expectations concerning the quality of education provided by public schools” and in turn “raise academic expectations for students” (p. 91). They also advocated for a national report because they believed that this would meet the requirement for higher achievement called for by *A Nation at Risk* (Kosar, 2005).

In relation to various institutions, organizations, and the levels of government involved in the standards movement since 1989, Kosar’s (2005) account gives weight to the role of state governors, the President of the U.S. serving at that time, and organizations. For example, Kosar’s (2005) account emphasizes the involvement of the executive level of government with President George H.W. Bush’s participation in the movement towards national standards at the 1989 Education Summit and the involvement of the state level of government with governors involved in the process to institute national standards. In addition, Kosar (2005) also gives weight to the role of organizations in this process by highlighting the relevance of organizations such as the National Governors Association (NGA) and the National Education Goals Panel (NEGP) founded by governors to create an annual national report card to measure progress in the national standards movement.

An assessment of Kosar’s (2005) account also reveals that while he notes the relevance of levels of government and organizations in the emergence of the idea of national standards, he also highlights the role institutions such as Congress played in offering some early resistance to the movement. In 1989, President George H.W. Bush faced a Democratic-controlled Congress and the relationship between the President and Congress began poorly and grew increasingly contentious over time (Kosar, 2005). In April of that year, the Bush Administration presented the

Educational Excellence Act of 1989 which essentially was a move towards increasing the federal role in education (Kosar, 2005).

The Education Excellence Act provided some \$400 million in funding that went beyond what had been authorized by a revised Title I (Kosar, 2005). Further, this act was essentially based upon the view that “public schools were failing to adequately educate America’s children” (p. 91). The Education Excellence Act’s aims or goals were to encourage schools to become more innovative through the creation of magnet schools and provide schools with additional funds as a reward when their students showed large gains in academic achievement (Kosar, 2005). The idea behind this effort was to create an environment of merit schools (Kosar, 2005). In addition, through the creation of alternative principal and teacher certification programs, professions could be invigorated with new personnel (Kosar, 2005).

In terms of the influence of certain institutions, Kosar’s (2005) account reveals that while the Senate “responded favorably and actually passed the bill,” House Democrats embraced an opposing position and rejected the bill (p. 91). The Democrats eventually proposed their own legislation that in a sense, essentially “conceptualized the problem of American public schools as a matter of money” (p. 91). In short, House Democrats held the view that because of insufficient state spending, the nation’s schools clearly experienced a period of “malaise” (p. 91). The House Democrats’ bill was known as the “Equity and Excellence in Education Implementation Act (EEEIA)” which called for some \$5.7 billion in additional funding that would be allocated to both Title I and Head Start (p. 91). However, a shortcoming of this legislation offered by the House Democrats is that it did not really offer anything to institute school change (Kosar, 2005).

Kosar's (2005) account highlights how institutions and levels of government attempted to constructively interact to achieve education reform. For example, the Bush Administration made efforts to work in tandem with the U.S. Congress on the EEEIA in order to obtain a substantive bill "that was both fiscally practical and fostered innovation in the schools" (p. 92). However, Kosar (2005) notes that President Bush faced challenges as both the House and Senate at this time were controlled by the Democrats. During this period, "Democrats outnumbered Republicans 56 to 44" in the U.S. Senate (p. 92). In addition, the "Democrats outnumbered Republicans 267 to 167 in the U.S. House of Representatives" (p. 92). In short, President Bush in his first year of office was in a deadlock with the institution of Congress concerning the issue of education (Kosar, 2005).

According to Kosar's (2005) account, the relationship between the Bush Administration and the institution of Congress grew increasingly more contentious from 1989 through 1990. Kosar (2005) notes the role that certain groups played in the national standards movement such as national goals panels that were proposed by Democrats in response to President Bush's announcement in January 1990 of "national education goals" (p. 92). What clearly contributed to this level of tension was the fact that "the Bush Administration and Democrats in Congress were essentially philosophically far apart" (p. 92). For example, in March of 1990, hearings were held by the House Subcommittee on Elementary, Secondary, and Vocational Education in order to assess the value of the National Assessment of Educational Progress (NAEP) and the issue of national testing (Kosar, 2005). Most who gave testimony during these hearings were quite apprehensive about the prospect of using "federal examinations to raise educational achievement" (p. 92). In fact, Kosar's (2005) account indicates that there were members from

both parties that were highly critical of “expanding national tests and using them as a tool for raising achievement” (p. 92).

There were even those members of Congress who according to Kosar’s (2005) interpretation of the standards movement viewed this advocacy for national testing as an “effort to almost privatize the public educational system” (p. 93). Some congressional members held the view that privatizing the public educational system would “diminish opportunities for the economically disadvantaged” (p. 93). Kosar (2005) contends that when one examines these congressional hearings in 1990 to discuss the potential impact of the National Assessment of Educational Progress (NAEP) and the merits or value of national testing, it becomes clear that “any federal education policy proposal coming from the Bush Administration would likely have faced a number of objections” (p. 94). First, there was the objection that as a matter of policy, what was being proposed for education reform simply would not work (Kosar, 2005). Second, there was clearly a philosophical disagreement between levels of government and institutions (Kosar, 2005). For example, the Bush Administration and Democratic members of Congress disagreed philosophically over the “extent of federal power and local control” as it concerned education (p. 94). Third, there was clearly a concern relating to the issue of equity in that testing would be disproportionately unfair to “children who were poor, minority, or attended underfunded schools” (p. 94). Finally, there were what Kosar (2005) refers to in his account of the standards movement as “conspiratorial concerns” that the national testing was part of an “effort to privatize the public educational system” (pp. 93-94).

Despite his efforts, by the end of his second year, President Bush was unable to secure victory in the area of education policy (Kosar, 2005). Kosar's (2005) account reveals that although the Democrats attempted to coerce President Bush to sign a "compromise version of the Equity and Excellence in Education Implementation Act, conservative Republicans killed the bill on a parliamentary maneuver" (p. 94). In his assessment of the standards movement, Kosar (2005) highlights the high level of congressional partisanship that existed during this period from 1989 to 1990.

In a similar vein as Kosar (2005), Maris Vinovskis (2009) in *From A Nation at Risk To No Child Left Behind: National Education Goals and the Creation of Federal Education Policy*, brings to the forefront in his account the existing tensions between the institutions of Congress and the executive branch concerning education reform. While Kosar's (2005) account primarily focuses upon this contentious relationship between governmental institutions in the area of education policy from 1989 to 1990 leading up to *America 2000*, Vinovskis's (2009) account provides a more in depth overview of dynamics occurring at the cabinet levels of government. For example, prior to the introduction of *America 2000*, Vinovskis (2009) highlights how the national media portrayed then Secretary of Education Lauro Cavazos as ineffective which further fueled widespread dissatisfaction with the Bush Administration's policies concerning education reform. In fact, due to these perceptions of his ineffectiveness, Vinovskis's (2009) account reveals that Cavazos was terminated after just 27 months of serving as Bush's Secretary of Education. Vinovskis's (2009) account reveals how it is best for cabinet officials to ideally possess political experience and knowledge concerning how to work constructively with government institutions such as Congress in addressing policy areas such as education. In

December 1990, former Governor of Tennessee Lamar Alexander was appointed to the position of Secretary of Education for the Bush Administration and in contrast to the previous appointee, was enthusiastically received due to his success with education reform efforts in his home state (Vinovskis, 2009).

The value of Vinovskis's (2009) account concerning the history of the standards movement is that he highlights the stark difference in how members of institutions such as Congress perceived Secretary Alexander compared to his predecessor. In March of 1991, Secretary Alexander introduced to President Bush a new education strategy referred to as *America 2000* (Vinovskis, 2009). Secretary Alexander "organized this new strategy for education around six education goals" (Vinovskis, 2009, p. 44). Vinovskis (2009) notes that this new strategy emphasized having local communities play a more vital role "with some targeted but limited assistance from the federal government" (p. 44). The idea conveyed in this new education strategy was that "state governments, local communities, and parents should have the primary responsibility for the education of children" (p. 44). Vinovskis's (2009) account conveys the fact that this strategy viewed the role of President as an institution should be to "persuade Americans to solve their education problems at the state and local levels rather than waiting for additional federal programs" (p. 44).

President Bush gave Secretary Alexander approval to proceed with *America 2000* and in April of 1991, he announced the new education strategy (Vinovskis, 2009). In terms of institutions, organizations, and levels of government concerned with the standards movement and issue of education reform, Vinovskis (2009) reveals that many of these entities reacted

favorably to the new strategy. For example, his account indicates that conservative groups or organizations such as the Heritage Foundation offered praise for the concept of *America 2000* (Vinovskis, 2009). However, these more conservative organizations did indicate some concern that the “education establishment would strip forthcoming legislation of key provisions such as school choice” (p. 45). The immediate reaction from the institution of Congress was supportive but there were still some reservations about certain aspects of the plan (Vinovskis, 2009). For example, Vinovskis (2009) reveals that prominent members of Congress such as Senator Kennedy were somewhat critical of the plan as they suggested it “emphasized private school choice” without “devoting enough attention to school readiness or providing new resources for education” (p. 45). In fact, as the “specifics of the legislation became more clear” to congressional leaders and the likelihood of its enactment a more realistic possibility,” there was increasing criticism from those who were vehemently opposed to “radical changes introducing public and private school choice” (p. 46). Some members of Congress who had previously supported the plan withdrew their support (Vinovskis, 2009). Vinovskis (2009) notes that legislators such as Metzenbaum “made it quite clear that they would oppose legislation for *America 2000* if it continued to support funds for private school choice” (p. 46).

Despite an encouraging start, in the end, efforts to solidify support for the *America 2000* initiative “fared poorly in Congress” (p. 46). Upon closer evaluation, Vinovskis’s (2009) review of the standards movement and education reform efforts during this period reveals that “only a few of the more peripheral components of this education strategy were passed in 1991 or 1992” (p. 46). In terms of institutional response, the 102nd Congress, which was Democratically

controlled, “was content with federal compensatory education programs that already existed such as Chapter 1 and Head Start” (p. 46). In fact, Vinovskis’s (2009) account of the standards movement reveals that some Democrats and Republicans saw these existing programs as effective interventions or solutions and saw no “particular need to develop new K-12 initiatives” (p. 46). Rather, members of both parties who saw no need for the development of new programs called for additional funding for the current program (Vinovskis, 2009). Further, Vinovskis (2009) highlights the fact that Congress in general as an institution was hesitant about the Bush Administration’s *America 2000* program particularly if this meant “funding public and private school choice” (pp. 46-47).

From a political standpoint, both Kosar (2005) and Vinovskis (2009) convey the significance that politics played in this process as they indicate that with an election year looming in 1992, Democrats in Congress obviously did not want to give President Bush legislative victories in the area of education that would benefit him in a bid for reelection. While the Bush Administration’s proposals were reintroduced to both the House and Senate in 1992, Vinovskis’s (2009) account of the history of the standards movement reveals that they “attracted very little political attention and support in Congress” (p. 47). However, Vinovskis’s (2009) overview does reveal that an impact that the *America 2000* proposals had was setting “much of the agenda for congressional debates and prompting Democrats to develop additional programs to support disadvantaged children” (p. 47).

Vinovskis's (2009) overview of the standards movement also indicates that upon close examination, it becomes clear that the *America 2000* strategy actually "emphasized both state and local activities many of which could be undertaken without congressional approval" (p. 49). Because it anticipated some congressional "opposition or inaction," the U.S. Department of Education focused on the six national education goals while seeking to implement *America 2000* by working directly with states and local communities (pp. 49-50). However, congressional Democrats "sought to limit the ability of the Bush Administration to use federal funds for these purposes" (p. 50).

By the summer of 1991, several states such as Colorado and Oregon began to embrace the Bush Administration's *America 2000* strategy (Vinovskis, 2009). Vinovskis's (2009) account shows that with the support of two respected Democratic Governors, Roy Romer of Colorado and Barbara Robert of Oregon, who were attracted to the initiative's statewide approach, "the initiative was assured of bipartisan support and the number of member states grew rapidly" (p. 50). In fact, many states "agreed to adopt the six national education goals, and pledged to help communities develop goal-achievement strategies" (p. 50). They also helped communities develop a report card system to measure academic progress and provide support for what was referred to then as "break-the-mold" schools (p. 50). Vinovskis's (2009) overview of the standards movement indicates that overtime, some "44 states became formal partners in the *America 2000* program" (p. 50).

The emphasis on the involvement of communities in improving education by America 2000 was according to Vinovskis (2009) the "single most important component of the Bush

Administration's education reforms" (p. 50). However, Vinovskis's (2009) account reveals that the "nature and extent of community involvement or participation has not been thoroughly assessed" (p. 50). While some communities made a serious commitment to *America 2000* communities, there were others that did not follow through on all commitments (Vinovskis, 2009).

In examining the history of the standards movement, a particular strength of Vinovskis's (2009) account is that he provides a detailed synopsis of the role organizations played in the standards movement. For example, he highlights in detail how organizations such as the New American Schools Development Corporation (NASDC) played a critical role in supporting the *America 2000* strategy of developing break-the-mold schools to provide quality education (Vinovskis, 2009). In fact, Vinovskis (2009) notes that "while the scale and pace of this school movement has been smaller and slower than initially envisioned in *America 2000*," work continues in this particular area (p. 51).

During the spring of 1991, the issues of content standards and testing requirements became important components of the Bush Administration's *America 2000* program (Vinovskis, 2009, p. 52). A group or organization that Vinovskis (2009) indicates was significant in the movement toward national standards was the National Council on Education Standards and Testing (NCEST). The 24 member NCEST was essentially created in response to the mandate of "providing advice on how to establish standards and a voluntary national examination system" (Vinovskis, 2009, p. 52). In January of 1992, Vinovskis's (2009) account reveals that the NCEST released a highly anticipated report of recommendations concerning standards. This

report in essence reinforced a gradual “shift away from measuring and reporting the six national education goals toward developing and implementing national content and performance standards and assessments” (p. 53). In addition to calling for student content and performance standards, the NCEST also supported school delivery standards (Vinovskis, 2009). Vinovskis’s (2009) account reveals that the NCEST did in fact allow states some control in the area of criteria. For example, the NCEST allowed states to “select the criteria that they found most useful for the purpose of assessing a school’s capacity and performance” (pp. 53-54).

In examining the work of the NCEST as an organization and its role in the standards movement, it is clear that reactions were somewhat mixed as there were those who were not content with the organization’s recommendations (Vinovskis, 2009). In fact, Vinovskis (2009) reveals that Congress as an institution was “split over the merits of NCEST’s recommendations (p. 54). For example, while the Senate included many of the NCEST’s recommendations in its legislation, many Democrats in the House “continued to question the legitimacy of the existing goals panel and the work of the NCEST” (p. 54). In his overview of the history of the standards movement, Vinovskis (2009) notes that during three public hearings on the NCEST’s report of its recommendations, the House Subcommittee on Elementary, Secondary, and Vocational Education expressed concerns that “more attention had been paid to content standards than to school delivery standards” (p. 54). As did Kosar (2005) in his account, Vinovskis (2009) brings to the forefront in his overview of the standards movement that many liberal Democrats had concerns that national testing would harm socioeconomically disadvantaged students who traditionally underperformed on these assessments of academic competency.

The recommendations of the NCEST as an organization involved in the standards movement proved to be quite important or significant for the Clinton Administration (Vinovskis, 2009). The NCEST's "suggestions for systemic reforms and opportunity to learn standards" became a key component of the Clinton Administration's *Goals 2000* initiative (pp. 54-55). However, Vinovskis (2009) notes how the issue of service delivery standards divided those supporting national education goals. In fact, he suggests that the division over this issue "even threatened the existence of the National Education Goals Panel (NEGP) itself" (p. 55). Vinovskis (2009) suggests in his account of the history of the standards movement that this was due to the NEGP "becoming closely identified or associated with NCEST's recommendations" (p. 55). As a result, Vinovskis (2009) suggests that the NEGP and the NCEST as organizations played significant roles in the standards movement and essentially "paved the way for the Clinton Administration's revisions of Bush's *America 2000* legislation" (p. 55). While these organizations paved the way for these revisions, Vinovskis (2009) argues that they also "triggered fights over Clinton's *Goals 2000* legislation and contributed to some political opposition to both national education goals and the NEGP as an organization" (p. 55).

In a similar vein as Kosar (2005) and Vinovskis (2009), Patrick McGuinn (2006) in *No Child Left Behind and the Transformation of Federal Education Policy, 1965-2005*, also brings to the forefront some of this political opposition evident when one examines the history of the standards movement. McGuinn's (2006) key argument is that in order for education reformers to be able to craft more effective national roles and policies concerning school reform, they must first develop a thorough understanding of the special or "unique dynamics of federal education politics" (McGuinn, 2006, pp. ix-x). This dynamics of federal education politics is clearly

evident when one examines how Clinton and his administration approached the issue of education reform and their efforts to reform *America 2000* and initiate *Goals 2000*.

McGuinn's (2006) overview of the history of the standards movement brings to the forefront the fact that Bill Clinton used the issue of education reform politically to increase his overall appeal to more moderate voters. In light of the demise of the New Deal and Reagan coalitions, McGuinn (2006) suggests in his account that Clinton essentially made education reform a primary focus in an effort to "craft more politically appealing public philosophies for his political party" (p. 4). McGuinn (2006) argues that President Clinton used the issue of education reform to stress his political party's new commitment to "opportunity over entitlement" and to disassociate that party from many of the "discredited policies of the welfare state" (pp. 4-5).

As did Kosar (2005) in his account of the history of the standards movement, Lorraine McDonnell (2005) in *No Child Left Behind and the Federal Role in Education: Evolution or Revolution* places emphasis on the role organizations such as the National Governor's Association (NGA) and levels of government with state and federal leaders involved in the Charlottesville Summit played in the standards movement. This emphasis on the role of organizations and levels of government can be seen in McDonnell's (2005) account of Clinton's approach to education policy.

McDonnell's (2005) overview of the standards movement reveals that Bill Clinton's "approach to education policy was highly influenced by his experience as governor of the state of Arkansas and his chairmanship of the National Governor's Association (NGA)" (p. 29). In the

late 1980s, McDonnell (2005) reveals that the NGA had proposed that states “ease their regulation of local school districts in exchange for greater local accountability for effective student learning measured by improved scores on standardized tests” (p. 29). The Clinton Administration was a strong advocate for standards-based reforms that were based on the idea that establishing high academic standards and expecting teachers and students to meet them could serve as a mechanism to improve the overall quality of K-12 education (McDonnell, 2005).

According to McDonnell’s (2005) account, although the Clinton Administration’s strategy “took a variety of forms at the federal, state, and local levels, it was essentially characterized by four components” (p. 29). First, the administration’s strategy was focused upon student achievement (McDonnell, 2005). Second, their strategy placed an emphasis upon “challenging academic standards that specified both the knowledge and skills students should acquire and the levels at which they should demonstrate mastery of the material” (p. 29). Third, the administration embraced the goal of extending these standards to all students including “those for whom expectations had been traditionally low” (p. 29). Finally, the Clinton Administration also stressed “a heavy reliance upon achievement testing in order to spur reforms and monitor their impact” on K-12 education (p. 29).

The Clinton Administration’s policy to promote this approach or strategy to achieve education reform was the *Goals 2000: Educate America Act* which was passed by the U.S. Congress in 1994 (McDonnell, 2005). Given the difficulties the Bush Administration’s *America 2000* proposal faced in dealing with the Congress, Kosar (2005) suggests that one might have

expected that the “nebulous powers of the national standards council and the creation of a commission to develop opportunity-to-learn (OTL) standards would provoke disdain from conservative congressional members” (p. 115). However, this did not occur partly due to the absence of three key conservative congressional members (Kosar, 2005). In fact, in order to navigate the “dynamics of federal education politics” that McGuinn (2006) stresses in his account of the standards movement, Kosar (2005) highlights how the Clinton Administration “altered the bill to accommodate concerns of both Democrats and public school interest groups who were highly concerned with resources in educational achievement and Republicans criticizing the administration for what they viewed as an “encroachment on local control” (McGuinn, 2006, pp. ix-x; Kosar, 2005, p. 117). In short, it is clear that politics played a significant role in the process leading to the passage of *Goals 2000* in 1994 and these accounts of the history of the standards movement offered by McGuinn (2006) and Kosar (2005) highlight this fact.

The Clinton Administration’s *Goals 2000* initiative was significant in that it “codified a set of national education goals and authorized federal funding for modest grants to states to encourage them to adopt voluntary content and performance standards” (McDonnell, 2005, p. 29). In fact, the initiative by the administration was “the first significant embodiment in federal legislation of the standards-based approach which already defined much state education policy” (pp. 29-30). In her overview of the standards movement as it relates to the Clinton Administration’s efforts with *Goals 2000*, McDonnell (2005) like McGuinn (2006), and Kosar (2005) acknowledges the significance of the dynamics of politics when she notes that the administration’s initiative was “vulnerable to shifting political priorities” (p. 30). A particular

strength of McDonnell's (2005) account is that she reveals the challenge the federal government faced in attempting to embrace a standards-based approach to improving secondary education in the U.S. McDonnell (2005) highlights the fact that "if the federal government desired to realistically and consistently embrace a standards-based approach, this strategy would need to be reflected in its Title I program" (p. 30).

The Improving America's Schools Act (IASA) was passed in 1994 and standards-based reform with the idea of high standards for all students in the nation became the focus of the federal government's education program (McDonnell, 2005). Most importantly, McDonnell's (2005) account indicates that the significant development that occurred was that Title I aid became conditional. The IASA specified that "as a condition for obtaining Title I funds, states would need to ensure that students receiving Title I services were taught the knowledge and skills embodied in the state's content standards" (p. 30). Further, the students would be expected to meet these standards and should be provided with the means to accomplish these goals (McDonnell, 2005). Moreover, McDonnell's (2005) overview reveals that all of the "learning goals, expectations, and curriculum opportunities for Title I students had to be the same as for all other students" (p. 30). While Title I students could receive some forms of supplemental educational instruction, the new IASA required schools to "ensure that these students were a part of the core instructional program" (p. 30). In addition, the act required that schools be held accountable for the academic progress of Title I students however states held them accountable for the academic achievement of other students (McDonnell. 2005).

While the IASA was viewed at this time as an extensive revision of the ESEA, there was also realization that under the IASA, “states and localities were essentially gaining greater flexibility in Title I program operations in exchange for grounding them in high standards and accountability for student outcomes” (pp. 30-31). McDonnell (2005) notes that many schools had more flexibility in relation to how they served students eligible for Title I. Further, federal regulatory requirements were waived for some states “in exchange for an approved comprehensive improvement plan” (p. 31).

In terms of the emphasis she places on various institutions, organizations, and levels of government involved in the standards movement, McDonnell (2005) in her account highlights the role the institution of Congress played in the implementation of the IASA leading to standards-based reform. McDonnell (2005) reveals that Congress essentially “allowed states to implement key components of the IASA over a period of six years” (p. 31). As a requirement, states had to establish both “content and performance standards by the 1997-1998 school year” (McDonnell, 2005, p. 31). Further, they had to align any final assessments with those standards by the 2000-2001 school year (McDonnell, 2005). McDonnell’s (2005) overview of the history of the standards movement indicates that while “most states were able to meet the stated deadline for adopting content standards, very few of them met the 1997 deadline for developing a set of performance standards” (p. 31).

In tracing the history of the standards movement, it becomes evident that there was clearly considerable variation in terms of how respective states interpreted other aspects of the IASA (McDonnell, 2005). For one, McDonnell’s (2005) account shows that in relation to the

issue of performance standards, “states had significantly different expectations about the proportion of students who would need to meet the state’s definition of proficiency” (p. 32). For example, some states expected 90% to 100% of the students in each school to meet the state standard of proficiency while some schools established a goal of 50% reaching proficiency (McDonnell, 2005). There was also variance in terms of proposed time lines to meet proficiency as only 14 states had specific time lines (McDonnell, 2005). An examination of the history of the standards movement also reveals that some states “used different methods for defining adequately yearly progress (AYP)” (p. 32). McDonnell’s (2005) overview reveals that while some states required their schools to meet an absolute performance target, other states only required relative improvement on a yearly basis or reductions in the achievement gap between respective subgroups of students. Further, some states resorted to utilizing a combination of these various approaches to raising standards (McDonnell, 2005).

In examining the standards movement it is quite evident that a major point of contention between institutions, organizations, and levels of government involved in the process of moving forward with the passage of the Clinton Administration’s *Goals 2000* bill was the area of national examinations or assessments (Ravitch, 1995). In *National Standards in American Education: A Citizen’s Guide*, Diane Ravitch’s (1995) account of the history of the standards movement also captures some of the political dynamics involved in the process that McGuinn (2006) referred to as “federal education politics” (pp. ix-x). Ravitch’s (1995) overview highlights the tension over developing a national system of examinations for students that existed between members of Congress and congressional committees. For example, Ravitch (1995) reveals how both the House Education and Labor Committees opposed student testing while House

Democrats had concerns about issues of fairness for socioeconomically disadvantaged students. The concern expressed here was that “the playing field needed to be leveled” before imposing both standards and assessments (pp. ix-x).

In the final version of the *Goals 2000* bill that passed Congress, the issue of assessment posed a major challenge and also qualifications (Ravitch, 1995). For example, Ravitch’s (1995) account reveals that if “states used federal funds to develop new assessments, they could be used in the determination of graduation, grade promotion, or retention of students only on the condition that the students have been prepared in the content for which they are being evaluated” (pp. 157-158). Further, “if states desired to have their assessments approved by the National Education Standards and Improvement Council (NEISC), they were not allowed to use their assessments for high-stakes decisions and had to submit reports on the viability and reliability of the tests” (p. 158).

Ravitch’s (1995) overview of the standards movement highlights the fact that the Clinton Administration’s *Goals 2000* initiative did not “create a national examination system” (p. 158). Under this provision, each state develops their own examinations based upon their established standards (Ravitch, 1995). However, this “may or may not be approved by the NEISC” (p. 158). Ravitch (1995) indicates that the shortcoming here is that “there is no way to know whether the performance standards and assessments are comparable across all states” (p. 158). Most significantly, Ravitch (1995) brings to the forefront that fact that there was strong opposition to national testing from key interest groups. Therefore, creating voluntary national standards at the

time was as much as could be expected in a short period of time given this level of resistance (Ravitch, 1995).

After President Clinton's two terms of office and his administration's efforts at instituting standards-based reforms, George W. Bush came into office in January 2000 and released his education agenda, the NCLB initiative at the very beginning of his first term (Vinovskis, 2009). Vinovskis (2009) reveals that rather than altogether abandoning a federal role in education, Bush's goal was to essentially attempt to close the achievement gap by "mandating accountability, high standards, and annual academic assessments" (p. 163). Further, Bush proposed that schools should face consequences for failing to adequately educate socioeconomically disadvantaged students (Vinovskis, 2009). President Bush advocated for greater flexibility concerning the use of Title I funds and a reduction in bureaucracy for categorical programs (Vinovskis, 2009). Through his NCLB initiative, Bush also called for "more informed parental choice and improved teacher quality" (p. 163). As he did as governor of Texas, Bush stressed placing an emphasis on reading reforms and advocated for "improved early reading instruction throughout the nation" (p. 163).

In terms of the reactions towards Bush's NCLB measure, Vinovskis's (2009) account reveals that the reaction from political institutions such as Congress was rather favorable. There were initially some positive sentiments that a bipartisan agreement could be reached on legislation to actually improve American schools (Vinovskis, 2009). However, when Bush's NCLB measure was initially introduced, there were some policymakers who questioned the necessity of testing all children every year in grades 3 to 8 (Vinovskis, 2009). In addition, many

congressional Democrats opposed Republican support of allocating federal money for vouchers to attend private schools (Vinovskis, 2009). Moreover, Vinovskis's (2009) overview of the standards movement brings to the forefront the fact that some conservative Republicans had concerns over "how to mandate accountability without permitting too much federal intrusion in state and local education" (p. 163).

In relation to the weight he gives to the various institutions, organizations, and levels of government involved in the standards movement, Vinovskis's (2009) account of the early stages of NCLB primarily centers upon the Bush Administration's role in the process at the executive levels of government and the role of Congress as an institution in the move towards reauthorization of ESEA leading to NCLB. Vinovskis's (2009) overview highlights how the Senate experienced a lengthy debate over the reauthorization of ESEA resulting in NCLB. In fact, both Democrats and Republicans ultimately concluded that some compromise needed to be reached "due to an even partisan split" (p. 164). Further, there were some 250 amendments filed during the Senate debate before the Senate eventually approved the bill (Vinovskis, 2009). On the House side, Vinovskis (2009) shows that there were some observers who believed that the Republican House would act faster than the Senate given that it had passed segments of the ESEA reauthorization in both 1999 and 2000. However, a change in leadership in the House Education Committee made many question the direction Republicans would take given that some leaders had opposed the Department of Education (Vinovskis, 2009). The bill eventually passed by a wide margin but as indicated by Vinovskis's (2009) account, compromises were certainly a necessity.

In relation to the Bush Administration's role at the executive levels of government, after the bill was passed and signed in January 2002, the administration faced a challenging task implementing the law primarily because of how ambitious the initiative was and the short deadlines for achieving goals (Vinovskis, 2009). Vinovskis's (2009) overview of the standards movement reveals that there were debates that erupted over the NCLB initiative during this period that threatened to "undermine the bipartisan coalition behind the original legislation" (p. 171). Further, with Democrats recapturing the House and Senate in 2006, the scheduled reauthorization of the NCLB measure in 2007, and the 2008 elections, Vinovskis (2009) suggests that there was indeed some "uncertainty about the future of the program" (p. 171).

McDonnell (2005) contends that NCLB can essentially be viewed "as both a direct descendent of its predecessor the IASA, and an attempt to fix Title I's past shortcomings" (p. 32). As is the case with the IASA, NCLB is also "grounded in standards-based education reforms" (p. 32). McDonnell (2005) suggests that because NCLB requires Title I eligible students to be "incorporated into state accountability systems", it essentially "moves Title I closer to the instructional core" (p. 32). Further, she contends through her account that with NCLB, there is a greater emphasis on educational outcomes with less focus upon "flexibility in program operations and the specifics of state standards and assessments" (pp. 32-33). McDonnell (2005) in her account of the standards movement places emphasis upon federal level influences as she argues that NCLB was essentially the federal government's "reaction to the slowness and variation in state implementation of IASA" (p. 33). Moreover, she emphasizes in her account these federal level influences as she notes how NCLB was the federal government's way of tightening regulations and "escalating the rate and level of change expected in individual schools" (p. 33).

McDermott and Jensen (2005) in *Dubious Sovereignty: Federal Conditions of Aid and the No Child Left Behind Act* also acknowledge federal level influences but emphasize in their account the institution of Congress and its influence on NCLB and the standards movement. McDermott and Jensen (2005) note the influence of Congress and the institution's use of its conditional spending power "to push states and localities into enacting particular kinds of testing and accountability policies" (p. 39). In short, as it relates to NCLB and the movement towards standards, McDermott and Jensen (2005) highlight Congress's "willingness to exert itself" as an institution in this process through "conditions it attached to federal financial aid" (p. 39).

Margaret Goertz (2009) in *Standards-Based Reform: Lessons From the Past, Directions For the Future*, places her emphasis on the role of groups in her overview of the standards movement. Goertz's (2009) analysis of the history of standards in the U.S. indicates that arguments used by groups today in support of the current national standards movement are consistent with those of the past. Goertz's (2009) overview shows that these arguments used by groups in support of national standards have consistently held that they should promote "democracy, equity, and economic competitiveness" (p. 201). Further, her account shows that arguments against national standards have also essentially remained consistent (Goertz, 2009). As in the past, current arguments against national standards suggest that they will lead to the establishment of a national curriculum that may not necessarily be conducive to the needs of all students (Goertz, 2009). In addition, her overview of the standards movement indicates that many opponents of national standards in the past and today contend that local communities as opposed to the federal government are in the best position to determine the educational needs of their students (Goertz, 2009).

In a similar vein as McDonnell (2005), Goertz (2009) also acknowledges federal level influences in the standards movement. For example, while she acknowledges certain consistencies, Goertz (2009) contends that the context of the current debate concerning national education standards differs from previous years from the standpoint of the federal government's extensive involvement in elementary and secondary education. A central problem raised by Goertz (2009) in her overview is the disparity that exists between National Assessment of Education Progress (NAEP) standards and state standards which has served as an impetus for the current national standards movement. Further, Goertz's (2009) account addresses central questions such as whose standards and what type of provisions should be adopted. Most significantly, Goertz's (2009) overview suggests that policymakers should reach some consensus concerning the "type, content, and specificity of standards and determine who will develop and facilitate their implementation" (p. 202).

In examining the history of the standards movement, it is evident that there are similarities and differences between various scholars in terms of the emphasis or weight they give to various institutions, organizations, and levels of government. For example, a particular strength of Vinovskis (2009) that distinguishes his account from others in the field is that he provides a more in depth overview of the dynamics at the cabinet levels of government and their role in the process concerning the standards movement. Vinovskis (2009) highlights challenges facing the Bush Administration's first Secretary of Education Lauro Carazos and how it is best for cabinet officials if at all possible to possess political experience and knowledge concerning how to work constructively with government institutions such as Congress in addressing policy areas such as education.

While Kosar (2005), Ravitch (1995), and McGuinn (2006) also note the involvement or influence of organizations in their accounts of the history of the standards movement in the U.S., a strength of Vinovskis's (2009) account is that he provides more depth in terms of the significance that organizations played in the standards movement. Vinovskis (2009) highlights for example in detail how organizations such as the New American Schools Development Corporation (NASDC) and the National Council on Education Standards and Testing (NCEST) were significant in the movement toward national standards.

A point of commonality for some scholars within the field in terms of their accounts of the history of the standards movement in the nation is their overview of the political dynamics involved in the process. This “dynamics of federal education politics” that is central to McGuinn's (2006) overview of education reform efforts is also reflected in Kosar's (1995), Vinovskis's (2009), and Ravitch's (1995) accounts of the standards movement (McGuinn, 2006, pp. ix-x). In contrast, rather than highlighting extensively the political dynamics involved in the process of moving toward standards, McDermott and Jensen (2005), McDonnell (2005) and Goertz (2009) focus more upon “the implications of NCLB for federalism and intergovernmental relationships in education governance” as well as the implementation and overall effect of the standards movement (McDermott & Jensen, 2005, p. 39).

In examining the standards movement in the U.S. from the standpoint of whether it was a federally driven or national movement, it appears that at least the initial stages of the movement were nationally driven particularly when you examine the idea behind pursuing a national education summit. For example, as highlighted by scholars in the field such as Kosar (2005), the purpose behind having a national education summit was to bring together governors from states

across the nation and the President to have a national dialogue about national education goals. This is an example of how in the early stages the standards movement can be viewed as a nationally driven process. However, at the same time, while the whole notion behind having a national education summit to discuss national education goals is an example of the standards movement being a nationally driven process, according to Kosar (2005), it was still an effort to get the idea of national standards and its inclusion “on to the federal systematic agenda” (p. 90).

As the standards movement evolved, one could certainly conclude that the movement became increasingly a federally driven process. McDonnell’s (2005) account provides a strong example of this in her assessment of the “slowness and variation in state implementation of the IASA and the NCLB being a federal reaction to what was happening at state levels (p. 33). In other words, the standards movement through NCLB at this stage in its history became increasingly federally driven from its origins during the period of the national education summit due to this slowness and variation in implementation of the IASA at state levels (Kosar, 2005; McDermott, 2005).

The Origins and Politics of NCLB and How It Evolved Into Law

In tracing the legal history of the NCLB Act of 2001, it is useful to examine the origins and politics of the NCLB and how it evolved into law. The roots or foundation of NCLB can essentially be traced back to the Elementary and Secondary Education Act (ESEA) of 1965 (Hollingsworth, 2009). The Elementary and Secondary Education Act (ESEA) is founded upon the principles that education is a critical component for social mobility and “schools serving students from disadvantaged backgrounds need to be equipped to cope with the unique needs of the student population” (p. 3). In the case of the ESEA, it was essentially the first time that the

government at the federal level was inclined to provide federal funds to enhance or improve public schools (Hollingsworth, 2009). Many policymakers who were advocates or supporters of education reform believed that while local governments should be primarily responsible for the governance of schools, public schools in impoverished areas needed federal assistance (Hollingsworth, 2009). In response to this concern, the ESEA was initiated to provide additional federal funds to impoverished areas to assist at-risk children as a component of Lyndon B. Johnson's War on Poverty (Hollingsworth, 2009).

A result of allowing federal funds to be used to improve public schools is that it increased the federal government's role in the area of education (Hollingsworth, 2009). Further, the government began to demand accountability by requesting evidence or proof that funds sent to public schools were being appropriately allocated (Hollingsworth, 2009). This movement towards accountability led to the development of a highly influential government commission report known as "The Nation at Risk" (p. 3). The significance of this report is that it laid the foundation for NCLB's need-blind rather than need-based approach to funding education (Hollingsworth, 2009).

This 1983 report advocated for higher educational standards and highlighted the fact that children in U.S. public schools were ill-prepared for a workforce emphasizing technology or a global economy (Hollingsworth, 2009). Further, the report indicated that children in the U.S. lagged behind in international comparisons of student academic achievement (Hollingsworth, 2009). The conclusion drawn from this indicator is that there were "systematic weaknesses in American school programs and a lack of talent and motivation among U.S. educators" (p. 3). Another indicator highlighted by this report was the decline in U.S. students' performance on

critical standardized tests such as the SAT, College Board Achievement tests, and the National Assessment of Education Progress (NAEP) along with the increasing costs of remedial education programs (Hollingsworth, 2009). As a result of these indicators, the report calls for U.S. schools to institute higher academic standards and adopt a more rigorous classic curriculum (p. 3).

President George H.W. Bush ran for election in 1988 four years after the initiation of The Nation at Risk Report supporting an education platform that advocated for school vouchers which allowed “publicly available money to be used for private K-12 education” (p. 4). This platform called for allowing parents to have the option of using government money to pay for private schools if they were not satisfied with public schools their children were attending (Hollingsworth, 2009). Republican supporters of the school voucher option believed that marketplace pressures would force public schools to improve (Hollingsworth, 2009). In contrast, Democrats were strongly opposed to the school voucher option because they held the view that critical financial resources would be diverted away from public school systems (Hollingsworth, 2009).

By 1992, the issue of education moved to the forefront becoming one of the top five most important issues for American voters (Hollingsworth, 2009). Bill Clinton defeated George H. W. Bush with support from the National Education Association, one of the nation’s most influential teachers’ unions (Hollingsworth, 2009). President Clinton faced enormous pressure to pursue education reform and as a result, urged states to “codify K-12 academic content standards in the 1994 Educate America Act which was also referred to as *Goals 2000* (Hollingsworth, 2009, p. 4). In 1996, when President Clinton faced reelection, his Republican challenger Senator Bob Dole of Kansas ran for the U.S. Presidency supporting a platform that called for the elimination

of the U.S. Department of Education (Hollingsworth, 2009). As a result of this policy position, Clinton was able to successfully cast Republicans as “anti-education or apathetic to education and children” (p. 4). Most significantly, it was the first time that education was essentially viewed as a federal election issue (Hollingsworth, 2009).

By the time of the 2000 election cycle, when George W. Bush ran against Vice President Al Gore, no public servant from either political party could afford to be viewed as being against reforming the nation’s education system (Hollingsworth, 2009). As a result, after George W. Bush’s election, there was extensive bipartisan support for the NCLB Act (Hollingsworth, 2009). Moreover, because of this consensus, Congress incorporated virtually all provisions offered by members of both political parties regardless as to whether some ideas were contradictory to each other (Hollingsworth, 2009). A number of measures such as charter schools, school choice, state-wide standards, mandatory or required testing, and school funding linked to performance became a part of education reform policy under President George W. Bush (Hollingsworth, 2009). In addition, it was determined that 2014 would be the target year for all students to be able to perform at or above required proficiency levels (Hollingsworth, 2009). As a result of what happened during the 1996 U.S. Presidential election, no public servant from either party could afford to be viewed as “anti-education” by voting against the Bush Administration’s NCLB Act (p. 4).

In 2000, education moved to the forefront as the top national issue for the U.S. electorate (Hollingsworth, 2009). There were extensive political debates about education reform in Congress that were well publicized leading up to the 2000 presidential election (McGuinn, 2006). When President Bush took office in 2001, there was growing political support for

increased federal education funding in “exchange for expanded accountability for school performance” (McGuinn, 2006, p. 165). In short, the political climate was conducive for generating bipartisan support for an education reform policy such as NCLB (McGuinn, 2006).

As indicated during his 2000 campaign, Bush made the issue of education the top priority of his administration’s domestic agenda (McGuinn, 2006). The NCLB Act was actually the first bill President Bush sent to the U.S. Congress and it became the focal point of early deliberations by the new legislature (McGuinn, 2006). Bush made two strategic decisions that proved to be quite beneficial in the long run towards getting a final NCLB bill passed (McGuinn, 2006). First, Bush decided to submit only an outline of his ideas concerning the education reform bill (McGuinn, 2006). This strategic decision allowed President Bush to retain flexibility for negotiation with different major players in the education reform debate (McGuinn, 2006). Second, another key strategic decision was that Bush opted from the very beginning to seek a bipartisan NCLB bill rather than attempt to force a partisan Republican bill through the U.S. Congress (McGuinn, 2006). The inherent advantage to this strategy was that it allowed Bush to claim credit for bipartisan negotiations, being willing to compromise from the outset, and ultimately claim credit for any future NCLB legislation approved by Congress (McGuinn, 2006). Despite President Bush’s involvement with the NCLB bill and bipartisan support of leaders from both political parties, Congressional deliberations over the bill were often times quite contentious in nature (McGuinn, 2006). In fact, several key components of the NCLB bill “were either defeated or narrowly survived the legislative process” (McGuinn, 2006, p. 173). A major point of contention with the Bush proposal was the reliance on school vouchers (McGuinn, 2006). However, President Bush’s desire to pass a bipartisan bill and strong Democratic and moderate

Republican opposition led to the removal of a voucher proposal early in the legislative process (McGuinn, 2006).

The final version of the NCLB legislation was clearly a compromise bill (McGuinn, 2006). In light of the intense disagreements over policy between members of both political parties during the 1980s and 1990s, passing a NCLB bill with bipartisan support was a major accomplishment (McGuinn, 2006). However, in order to achieve this goal, major concessions were made on both sides of the aisle (McGuinn, 2006). For example, Republican members of Congress dropped provisions for school vouchers while Democrats were willing to accept “extensive new federal mandates regarding teacher quality, testing, and accountability” (p. 177). A component at the center of the new NCLB bill passed by Congress was what some observers considered a basic trade-off (McGuinn, 2006). The newly passed bill essentially put into effect new mandates on both states and school districts, but if these new demands were met, states and school districts were allowed more flexibility in terms of how they could use additional federal funds (McGuinn, 2006). The most important requirements in the new NCLB law mandated states to “adopt academic standards to guide school curricula and also adopt a testing and accountability system that was aligned with those standards” (p. 178). The law requires states to test all students from third through eighth grade every year in mathematics and reading and also once in high school (McGuinn, 2006). The NCLB law requires that all students be able to meet established proficiency standards in mathematics and reading by the year 2014 (Sunderman, Kim, & Orfield, 2005).

Criticisms of the NCLB Law

The goal of NCLB is to “close or dramatically narrow the differences in achievement among American students that cross lines of skin color, ethnicity, immigrant status, and wealth” (National Conference of State Legislatures, 2005, p. 1). The measure attempts to “raise expectations for low-income students and achieve educational equity” (Liguori, 2006, p. 5). However, there are clearly mixed opinions as to whether NCLB has achieved substantial steps toward attaining these particular goals (Liguori, 2006). For example, education advocates and congressional members have been quite critical of NCLB focus on testing as a means for measuring or assessing school progress (Liguori, 2006). These critics of the measure contend that a reliance upon extensive testing “narrows the curriculum by prompting teachers to teach to the test” (p. 5). Further, they argue that focusing upon test preparation leaves less time available for “valuable academic and social activities” (p. 5).

Another criticism of NCLB is that the measure “provides incentives for states to create lower standards and simpler tests in order to make it easier to show progress” (p. 5). In addition, critics suggest that NCLB provides incentives for “states to allow underachieving students to leave or drop out of school” (p. 5). Because NCLB gives states the latitude to develop and utilize their own testing instruments, those critical of the law argue that this makes it difficult to make comparisons between respective states (Liguori, 2006). Some commentators concerned with education reform are also highly critical of the federal government in relation to monetary commitments to implementing the NCLB law (Liguori, 2006). These commentators hold the view that the federal government needs to “commit more money to implementing NCLB if the law is to be successful” (p. 5).

While it is true that NCLB does advance essentially the same policy goals as the education reform legislation of respective states, both local and state governments “give up some degree of control over their own public education systems under the law” (p. 6). It is because of this loss of control along with what many consider to be insufficient funding for the measure that “has led some observers to complain that the federal government is violating the NCLB’s own unfunded mandates provision” (p. 6). While states have been required to “develop testing systems and academic standards,” the federal government has not provided adequate funds to assist respective states in implementing the NCLB law’s required measures (p. 6). Although the federal government has vigorously rebuked these claims, “complaints from states have not abated” (p. 6).

Legal History of the NCLB Act

In tracing the legal history of the NCLB Act, it is useful to examine early attempts at education reform along with the history of relevant legal cases. Some three decades before the NCLB Act became law in 2001, in *San Antonio Independent School District v. Rodriguez* (1973), the U.S. Supreme Court essentially “turned education reformers away from the federal courts” in support of local control over school districts (pp. 2-3). As a result, education reformers turned to state courts for assistance concerning their school funding claims (Liguori, 2006). While they were more favorably received at the state court level, because the courts were institutionally structured as non-political branches of government, this hindered education reformers’ efforts to impact major change in education policy (Liguori. 2006).

The U.S. Supreme Court essentially held in *San Antonio Independent School District v. Rodriguez* (1973) that Texas’s school financing system was not in violation of the Equal

Protection Clause of the Fourteenth Amendment despite the state's system having a "disproportionate impact on public school students in low-poverty wealth districts in the state" (p. 3). In the *Rodriguez* case, the U.S. Supreme Court specifically held that the issue of wealth alone cannot be considered a "suspect classification entitled to strict scrutiny upon judicial review" (p. 3). In addition, the Court ruled in the *Rodriguez* case that "education is not a fundamental right afforded explicit protection under the U.S. Constitution" (Liguori, 2006, p. 3). Therefore, in its application of a rational basis review to the state of Texas's school financing system, the U.S. Supreme Court determined that the state's system was not a violation of the Equal Protection Clause of the Fourteenth Amendment due to the fact that it "reasonably furthered Texas's legislative interest in retaining control over the state's schools" (p. 3).

In its assessment as to whether or not the issue of wealth could be considered to be a suspect classification under the Equal Protection Clause of the Fourteenth Amendment, the U.S. Supreme Court did not accept the reasoning of the district court for determining wealth to be a suspect classification (Liguori, 2006). In "interpreting the Equal Protection Clause of the Fourteenth Amendment, the U.S. Supreme Court developed a multi-tiered approach for adjudicating allegations of government denial of equal protection laws" (Dayton, 2012; p. 268). These "graduated levels of scrutiny reflect the Court's determination that certain categories of government action such as discrimination based on race, national origin, or a fundamental right are inherently more suspect than others such as general social or economic regulation and merit heightened levels of judicial scrutiny along with greater levels of proof by government officials seeking to defend the differential treatment" (p. 268). Further, "under the Fourteenth Amendment, rights of federal citizenship supersede any state limitations on these rights" (Dayton, 2013; p. 2). The district court's reasoning was essentially that "because under

traditional school financing systems some economically disadvantaged students receive a less expensive education than more affluent students, the system engaged in discrimination on the basis of wealth” (p. 3). The U.S. Supreme Court determined that this finding essentially ignored two critical questions (Liguori, 2006). First, it ignored “whether it made a difference for the purpose of the issue being considered under the U.S. Constitution that this class of socioeconomically disadvantaged students could not be defined in equal protection terms” (p. 3). Second, the findings ignored “whether the relative as opposed to absolute nature of deprivation claimed by respondents was of significant consequence” (p. 3). In short, the U.S. Supreme Court responded affirmatively to both of these critical questions (Liguori, 2006).

In relation to the issue of whether socioeconomically disadvantaged students residing within low-property-wealth school districts represent a class that can be recognized in equal protection terms, the U.S. Supreme Court positioned itself against extending strict scrutiny to this class of students (Liguori, 2006). A key factor influencing or impacting the Court’s positioning itself against applying strict scrutiny was that sufficient proof had not been adequately provided “that the poorest families necessarily resided in school districts with the lowest levels of property wealth” (p. 3). Further, the U.S. Supreme Court also determined that “the Equal Protection Clause does not require absolute equality” (Liguori, 2006, p. 3). In addition, the Court also inquired as to whether or not education quality could be impacted by the amount of money or funds expended (Liguori, 2006).

With the U.S. Supreme Court determining in *Rodriguez* that students from socioeconomically disadvantaged backgrounds could not be classified as a suspect class and that “Texas’s interest in retaining local control over school districts survived rational basis review”,

the Court emphasized the importance or significance of local control (p. 3). The Court held that due to the principle of pluralism, schools have the liberty to experiment freely and citizens in turn can participate more directly (Liguori, 2006). Moreover, the U.S. Supreme Court stressed through its findings in *Rodriguez* that “ no area of social concern profits more from a multitude of perspectives and from a diversity of approaches than public education” (p. 3).

Since the case of *San Antonio Independent School District v. Rodriguez* (1973), the U.S. Supreme Court has not completely “closed its doors to equal protection cases pertaining to education” (Liguori, 2006, p. 3). For example, in *Plyler v. Doe* (1982), it was determined by the Court that the state of Texas could not deny undocumented immigrants a public school education without being in direct violation of the Equal Protection Clause (Liguori, 2006). However, rather than being extended to the area of educational inequity, these decisions in general have been “limited to absolute denials of education” (p. 3).

Given that federal courts became less receptive to claims centered upon educational inequity, proponents of education reform efforts turned to state courts in order to “challenge school funding schemes and education legislation at the state level that had a disparate impact or effect on minority and low income student populations” (p. 3). Most states’ highest courts have ruled on at least one school funding challenge (Liguori, 2006). In fact, many state supreme courts have often heard “protracted serial litigation” (p. 3).

In contrast to the U.S. Supreme Court’s response or reaction in *Rodriguez*, state courts in general have been more receptive to cases concerning school funding challenges (Liguori, 2006). What is significant is that state courts have “interpreted state constitutional guarantees of public education as essentially guarantees of educational opportunity as opposed to equal dollar

amounts per student” (p. 3). However, some plaintiffs or advocates for education reform have been able to successfully argue that existing “disparities in property values among local schools’ districts have led to unequal funding levels and ultimately inequitable distribution of critical resources among respective districts” (p. 3). Many plaintiffs or proponents for education reform have alleged “state constitution equal protection violations, state constitution education article violations, violations of Title VI of the Civil Rights Act of 1964, and violations concerning the issue of accountability under state legislative reform efforts” (p. 3).

A review of the relevant legal history concerning education reform efforts indicates that court decisions have clearly had profound “consequences for children, parents, schools, and also taxpayers” (p. 3). The result of school funding litigation has been funding changes such as tax increases and a redirection of vital resources (Liguori, 2006). While courts have been inclined to engage in some deference to legislative policies concerning school funding and taxation, courts have often viewed it as their responsibility to “interpret provisions of state constitutions and adjudicate the constitutionality of school finance systems” (p. 4).

Despite experiencing some successes at the state court level, these court victories by proponents of education reform have not resulted in extensive or even limited changes in existing inequities in education (Liguori, 2006). In short, merely declaring school funding schemes or systems as unconstitutional has not been enough to “substantially further education reform” (p. 4). In fact, declaring these school funding systems unconstitutional has mostly resulted in quite limited progress (Liguori, 2006). An assessment of the legal history of cases pertaining to education reform efforts indicates that it is difficult to achieve substantive reform without some sustained political will (Liguori, 2006).

Some legal scholars contend that the institutional structure of the courts impede them from being able to “determine and implement effective strategies to address school funding challenges” (p. 4). Further, there are also those who argue that judicial restraint places limitations on state courts (Liguori, 2006). For one, many contend judicial constraint prevents courts from introducing rights not “appearing explicitly in state constitutions” (p. 4). While all state constitutions do contain an education clause that mandates “some level of free public education”, the “duty imposed on the legislative or executive branches tends to vary from one state to another” (p. 4). In addition, this imposed duty often lacks clarity (Liguori, 2006). Even when state constitutions “explicitly require states to provide a quality education, judicial restraint causes courts to be hesitant before defining and ultimately enforcing the standard” (p. 4). Regardless as to whether or not states perceive themselves as lacking the expertise to develop and enforce standards, they have often been deferential to political branches in relation to these standards (Liguori, 2006). In instances where the courts have even determined a standard and found state school finance systems or schemes in violation of it, they have tended to offer no more than a set of limited remedies (Liguori, 2006).

Given the fact that courts tend to be deferential to both the legislative and executive branches, some legal scholars contend that it is unlikely that school funding litigation at the level of state courts will result in major or substantive education reform (Liguori, 2006). In fact, some legal scholars note that the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez* (1973) “questioned whether school funding was even related to student achievement” (p. 4). However, school funding litigation has continued to make its way through court systems (Liguori, 2006). Moreover, high-property wealth districts have continued to either maintain or increase education quality while low-property wealth districts have essentially failed to “generate

enough legislative support to overcome the political influences of high-poverty wealth districts” (p. 4).

Many legal scholars in the field suggest that in order to resolve school funding issues, it will be necessary in the long run to persuade the public that achieving the goal of an adequate education for all children is compatible with their own self-interest (Liguori, 2006). Further, these scholars argue that resources available to plaintiffs or advocates of education reform would be better utilized by lobbying legislatures and the electorate to address disparities in education between school districts as opposed to initiating school funding lawsuits (Liguori, 2006). Rather than stressing the unconstitutionality of the disparities, legal scholars suggest that advocates of education reform should incorporate in their arguments that this existing inequality in education harms the entire community (Liguori, 2006). These legal scholars hold the view that while it may be useful in bringing the issue to the attention of the general public, school funding litigation alone is not enough to bring about significant changes (Liguori, 2006). Most importantly, they argue that in order for educational disparities to be adequately addressed, proponents of education reform “must shift from the courts to the political process” to achieve an adequate education for all students” (p. 4). In addition, these scholars stress the importance of advocates for education reform building coalitions to achieve their goals (Liguori, 2006)

Many proponents of education reform have successfully shifted their cause to the political process and built effective coalitions (Liguori, 2006). In response, some state legislatures have “mounted large-scale reforms for their school finance systems” (p. 4). In fact, many state legislatures have pursued a more substantive role in “regulating and contributing to local school budgets” along with specifying a clear set of policy goals to improve public school

education (p. 4). This is a significant development because these efforts had been left primarily to local school districts (Liguori, 2006). In order to keep some aspect of local control intact, states have connected certain key policy areas associated with measures of accountability such as teacher evaluation, teacher education, academic standards, and testing to both incentives and sanctions (Liguori, 2006). This position was taken as opposed to mandating particular policy choices (Liguori, 2006). However, it is clear that accountability reforms have in a sense led to a reduction in the “discretionary decision-making authority of local school boards and administrators” (p. 4).

An assessment of the legal history of education reform efforts in the U.S. reveals that recent efforts to achieve school reform on the part of various state legislatures have not substantially altered existing inequities in education (Liguori, 2006). In fact, many legal scholars contend that efforts by state legislatures to achieve school reform have not been successful from the standpoint because they fail to impact or affect power relationships (Liguori, 2006). Further, these scholars also suggest that state school reform efforts have essentially failed because they have not “fundamentally changed schools’ accustomed practices and organization” (p. 4). However, despite these shortcomings, the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez* (1973) implied that certain positive factors such as “opportunities for experimentation and diversity of approaches provided by local control” outweigh any potential shortcomings (p. 4).

In tracing the history of relevant legal cases related to education reform efforts such as NCLB, it is constructive to provide an overview of the U.S. Supreme Court’s early spending clause cases. For decades, proponents of education reform in respective states filed new lawsuits

and developed key policies to address inequities in public school education (Liguori, 2006). After these decades of efforts on the part of supporters of education reform, the U.S. Congress “seized control of the education reform arena by enacting NCLB pursuant to its power to condition the states’ receipt of federal funds under the Spending Clause” (p. 7). In the case of *Connecticut v. Spellings* (2005), the state of Connecticut had concerns with federal policy and “alleged that the Secretary of Education exceeded her Spending Authority under the NCLB Act” (p. 7). However, in examining the legal history of relevant cases, it becomes evident that the state clearly faced long odds in winning a legal case against the federal government given that as far back as the 1930s, the nation’s highest court has in general had a tendency to uphold spending legislation (Liguori, 2006).

A review of the history of previous relevant legal cases reveals that the U.S. Supreme Court in 1935 struck down a Spending Clause statute in *United States v. Butler* (1936) (Liguori, 2006). In fact, this was the first and only time that the Court took such actions (Liguori, 2006). The U.S. Supreme Court essentially held in *United States v. Butler* (1936) that “the Agricultural Adjustment Act, authorizing the Secretary of Agriculture to impose taxes on farmers, was unconstitutional” (p. 7). In this case, the U.S. Supreme Court held that the power of the U.S. Congress to authorize federal funds expenditures for public purposes “is not limited by the direct grants of power in Article I, Section 8 of the U.S. Constitution” (p. 7). However, what the nation’s highest court found was that the manner in which the tax “invaded the powers of the states through regulating agricultural production within respective states” was unconstitutional (p. 7). Given that the tax was a violation of the Tenth Amendment, it was not exactly a legitimate “exercise of the taxing and spending power” (p. 7). The U.S. Supreme Court would “later abandon the Butler case’s Tenth Amendment reasoning” (p. 7).

The U.S. Supreme Court eventually “reined in the Tenth Amendment implications of the Butler case in *Steward Machine Co. v. Davis* (1937)” (p. 7). In this particular case, the nation’s highest court upheld certain provisions of the Social Security Act that essentially “imposed taxation on employers that had eight or more employees” (p. 7). The petitioner in the case put forth the argument that this tax “coercively invaded the states’ autonomy and violated the Tenth Amendment primarily because particular provisions allowed employers to be entitled to a credit for up to 90% of the tax provided they made contributions to their states’ unemployment funds” (p. 7). This particular credit in turn led many states to eventually establish these programs (Liguori, 2006). In fact, most states did not have in place unemployment programs before the Social Security Act (Liguori, 2006).

In its response to this case, the U.S. Supreme Court took into consideration the “national scope of the unemployment problem at the time when the Social Security Act was passed” (pp.7-8). In addition, the Court considered as well the “states’ inability to address this problem sufficiently in light of their poor economic positions” (p. 8). The U.S. Supreme Court concluded that any provision which made allowance for a tax credit gave states a motive for developing unemployment funds (Liguori, 2006). In contrast, the Court did not view a provision allowing for a tax credit as “coercing states into developing unemployment funds” (p. 8). Further, the Court reasoned that giving states a motive for developing unemployment “was not inconsistent with the Tenth Amendment” (p. 8). However, in reviewing the legal history of this case, it is evident that the nation’s highest court did not completely “eliminate the possibility that states might be unconstitutionally coerced by some future exercise of spending power” (p. 8).

A review of the relevant legal history reveals that in the period following the cases of *Butler* and *Steward Machine Co.*, the U.S. Supreme Court appears to be significantly deferential to Congress as an institution concerning the issue of “reviewing challenges to exercises of the spending power” (p. 8). In fact, this was evident as the U.S. Congress started to impose conditions on grants to both local and state governments (Liguori, 2006). For instance, in the case of *Oklahoma v. Civil Service Commission* (1947), the Court “upheld a provision of the Hatch Act” (p. 8). The Hatch Act essentially “granted federal funds to respective state governments with the condition that states adopt civil service and also limit government workers’ political activities” (p. 8). The U.S. Supreme Court concluded that congressional power to establish a set of “conditions for the receipt of federal funds is broad” (p. 8). In fact, the Court reasoned that this congressional power may even extend to areas where “Congress may not otherwise have the power to regulate” (Liguori, 2006, p. 8). Further, the nation’s highest court concluded that “the Tenth Amendment does not bar any exercises of such power because states can refuse to comply by declining conditioned federal funds” (p. 8).

In the case of *Pennhurst State School & Hospital v. Halderman* (1981), the U.S. Supreme Court opted to place some limitation on this power when it ruled that any established or set conditions on grants to local governments and respective states “must be expressly stated” (p. 8). The nation’s highest court held in *Pennhurst* that the state of Pennsylvania “which operated a petitioner-hospital, could not be held liable in a civil suit brought by a patient for violating a bill of patients’ rights included in the Developmentally Disabled and Bill of Rights Act” (p. 8). The Court ruled in this manner because the U.S. Congress “had not expressly required the states to follow the bill of rights as a condition for grants under the statute” (p. 8). The U.S. Supreme

Court's reasoning here was essentially that any "legislation enacted or placed into effect pursuant to the spending power is much in the nature of a contract" (p. 8). In short, states would agree to be in compliance with conditions that are federally imposed and in return, they would receive federal funds (Liguori, 2006). Therefore, whether or not the U.S. Congress's exercise of the spending power was constitutional was basically dependent upon "whether the state voluntarily and knowingly accepted the terms of this contract" (p. 8). In the *Pennhurst* case, the nation's highest court concluded that the state of Pennsylvania "had not so accepted the Bill of Rights" (p. 8).

In *South Dakota v. Dole* (1987), the U.S. Supreme Court essentially linked together earlier spending cases (Liguori, 2006). In the case of *Dole*, the nation's highest court "upheld a federal statute that made the receipt of federal highway funds conditional on the state's implementation of a minimum drinking age of twenty-one" (p. 8). Further, the Supreme Court "reiterated the position that incident to the Spending Clause, the U.S. Congress may attain objectives that are otherwise not considered within its enumerated powers by conditioning federal grants" (p. 8). However, it is important to note in this case that "the spending power is not unlimited" (p. 8).

In accordance, the nation's highest court states "five basic restrictions on the U.S. Congress's power to impose conditions of states in exchange for receiving federal funds" (p. 8). The first restriction on Congress's power stated by the Court is that Congress as an institution "must exercise the spending power in pursuit of the general welfare" (p. 8). The second restriction on Congress's power is that when the institution "conditions states' receipt of federal

funds, this must be done unambiguously” (p. 8). The third restriction is that any conditions imposed upon respective states “must be reasonably related to a federal interest in particular national programs” (p. 8). The fourth restriction on congressional power is that conditions imposed on states “must not be in violation of any other constitutional provision” (p. 8). Many legal scholars suggest that it is important to recognize that the Tenth Amendment “solely does not act as a constitutional bar” (p. 8). Rather, the U.S. Supreme Court articulated this restriction on Congress’s power as the “unexceptionable proposition that this power may not be used to induce states to engage in activities that would themselves be unconstitutional” (p. 8).

In terms of the U.S. Supreme Court’s fifth restriction on congressional power, it was more elusive in nature and was described by lower courts in later cases as the coercion theory (Liguori, 2006). The Court cited *Stewart Machine Co.* and made note of the fact that previous decisions had essentially recognized that the U.S. Congress’s “conditioning of federal funds might be so coercive in some situations that it may pass the point at which pressure evolves into compulsion” (p. 8). In these instances, the Court reasoned that the condition would in fact be a violation of the Tenth Amendment (Liguori, 2006). However, in the previous case, the U.S. Supreme Court found that the coercion theory was basically “more rhetoric than actual fact” (p. 8). The Court concluded the fact that states tended to comply with the minimum age condition to receive federal highway funds was not necessarily evidence of coercion (Liguori, 2006). Rather, the Court reasoned that the “minimum drinking age condition tended to be a relatively mild encouragement” (p. 8). The U.S. Supreme Court reached this conclusion primarily because “if any state refused to establish a minimum drinking age of twenty-one, they would only lose a small percentage of around five percent of federal highway funds” (p. 8).

In the *Dole* case, Justice O'Connor dissented as she found the minimum drinking age requirement or condition to be an unconstitutional attempt at regulating the sale of liquor as opposed to a condition on spending related to the expenditure of federal funds which was the position of the Court's majority (Liguori, 2006). However, Justice O'Connor did in fact agree with the "majority's articulation of the general restrictions on congressional spending power" (p. 8). Moreover, she also concurred with the majority's reasoning or determination that the "minimum drinking age condition did not violate the general welfare and unambiguous restrictions" (Liguori, 2006). However, despite her agreement with this aspect of the majority's reasoning, Justice O'Connor was not convinced by the Court majority's application of the reasonable relation condition" (Liguori, 2006).

Although the Court's majority essentially "held that congressional interest in safe interstate travel was sufficiently related to the minimum drinking age condition", Justice O'Connor contended that the condition was not adequately balanced in terms of inclusiveness (p. 9). Justice O'Connor's concern was that if the U.S. Congress had power or authority to "regulate activity within states that has only an attenuated relationship to federal interests, then the institution would have power to effectively regulate almost any area of a state's social, political, or economic life" (p. 9). However, despite Justice O'Connor's concerns, the U.S. Supreme Court has "repeatedly upheld Congress's spending power legislation" (p. 9). In fact, even the lower federal courts have often been reluctant to find this legislation unconstitutional (Liguori, 2006). An historical overview of these cases reveals that the federal courts of appeals have often been somewhat "wary of the challenges to Spending Clause legislation brought under the coercion theory" (p. 9).

A review of relevant legal case history reveals that there have been some rare instances where a court struck down a spending condition (Liguori, 2006). The U.S. Court of Appeals for the Fourth Circuit's en banc decision in *Virginia Department of Education v. Riley* (1997) is an example of this occurrence (Liguori, 2006). In the *Riley* case, the en banc court made the decision to reverse a ruling of a circuit panel and struck down a "condition imposed on the state of Virginia for receipt of funding under the Individuals with Disabilities Education Act (IDEA)" (p. 9). It is important to note that "a provision of IDEA requires states to provide disabled students with a free appropriate public education" (p. 9). The state of Virginia ultimately adopted a policy where it ceased providing this type of education to disabled students who had been suspended or expelled for circumstances or reasons that were not related to their disabilities (Liguori, 2006). In response to the state's actions, the Secretary of Education took the position to withhold the state of Virginia's entire IDEA grant if its policy was not amended (Liguori, 2006). However, the Fourth Circuit ruled that "the plain language of IDEA did not even implicitly condition the receipt of IDEA funds on the provision of education to suspended and expelled students" (p. 9). Therefore, it was determined that the Secretary of Education was in violation of *Dole's* second restriction requiring that conditions on federal funding should be unambiguous when a threat was made to withhold the state of Virginia's funds (Liguori, 2006).

While the court did not hold on the *Dole* case's coercion theory, six judges moved to adopt a dissenting panel opinion of Judge Luttig who discussed Tenth Amendment implications concerning the condition imposed by the Secretary of Education (Liguori, 2006). Judge Luttig held the view that if the coercion theory has any relevance, it is certainly a legitimate Tenth Amendment claim in instances where the federal government decides to "withhold the entirety of a substantial federal grant on the basis that a state refuses to fulfill its federal obligation in some

insubstantial respect” (p. 9). It was particularly troubling to many legal observers that the state of Virginia faced this type of penalty due to the fact that it essentially “refused to acquiesce in federal policy for school discipline” (p. 9). Judge Luttig cited Justice O’Connor’s dissent in the *Dole* case, and “suggested that the condition in this particular case might not only be impermissible coercion, but also regulation that is unconstitutional in the guise of a spending condition” (p. 9).

As recent as June 2006, the nation’s highest court issued a major ruling or decision that indicated that the U.S. Supreme Court “may begin interpreting the reach of Congress’s Spending Clause laws in a more narrow sense” (p. 9). In this 2006 ruling on a case involving a federal education statute, the U.S. Supreme Court “found that it lacked the degree of notice required by the clear statement rule” (Caffrey, 2010, p. 5). In the case of *Arlington Central School District Board of Education v. Murphy* (2006), the U.S. Supreme Court “held that parents prevailing in actions brought against school districts under IDEA may not recover the costs of experts used for litigation purposes” (p. 9). The Court emphasized that the decision it reached was essentially “guided by the fact that IDEA was enacted pursuant to the Spending Clause” (p. 9). What the U.S. Supreme Court focused upon was “whether IDEA provided some clear notice to respective states that they must compensate parents for the cost or expense of experts as a condition to receiving IDEA funds” (p. 9). The nation’s highest court ultimately decided that “IDEA did not provide such notice” (p. 9). The Court focused upon the text of the actual statute and determined that it “indicated that the costs of experts were not recoverable” (p. 9). In addition, the Court reasoned or ruled as it did because “it had so interpreted similar provisions in prior cases” (p. 9). The respondents in the case put forth the argument that a particular statement within a congressional conference committee report was proof that the U.S. Congress had the intention

for respective states to be responsible for compensating prevailing parents for the cost of experts (Liguori, 2006). However, the U.S. Supreme Court in the case eventually reasoned that “legislative history was not sufficient to provide the notice required by the Spending Clause” (p. 9).

Some legal observers suggest that the Supreme Court’s decision in *Murphy* “indicated a turn or shift because the Court Majority could have reached the same result without even considering the Spending Clause question” (p. 9). In fact, Justice Ginsburg made this same observation in her concurrence (Liguori, 2006). In addition, Justice Breyer concluded in his dissent that the U.S. Supreme Court “had not under *Pennhurst’s* and later *Dole’s* clear statement rule required the U.S. Congress to identify specifically all conditions in a Spending Clause statute” (p. 9). According to Justice Breyer, the key issue or question was not whether IDEA actually provided some clear notice to respective states (Liguori, 2006). Rather, the critical question was whether various states “would have accepted IDEA funding had they only known about the actual condition to compensate parents who prevailed in their claims for expert costs” (p. 9). Therefore, there was a lack of agreement between the Justices concerning “how rigorously the Spending Clause doctrine should actually be applied” (p. 9). In this particular case, the prevailing Justices were those who supported or favored a more rigorous interpretation of the doctrine (Liguori, 2006).

In providing a comprehensive review of the legal history of NCLB, it is also important to examine post-NCLB litigation concerning Limited English Proficient (LEP) students (Kihuen, 2009). The NCLB law is essentially the “first federal education statute to disaggregate achievement data for racial and ethnic minorities, low-income students, students with disabilities,

and English Language Learners (ELLs)” (p. 2). The critical NCLB provisions impacting LEP students are Title I and Title III (Kihuen, 2009). While the NCLB measure has brought to the forefront “disparities in educational outcomes among K-12 students particularly the poor academic achievement of LEP students, NCLB has had limited success in closing the existing achievement gap for ELLs” (p. 2). In fact, “a lower percentage of ELL’s achieved proficient scores on NCLB state tests than any other student subgroup” (p. 2). Given students’ low performance, it is clear that “states’ efforts to implement language instruction programs for ELL students have not proven to be very effective” (p. 2). As a result, many “educators, community leaders, elected public officials, and civil rights organizations are somewhat divided over the issue of whether NCLB is actually accomplishing its intended objectives” (p. 2).

A review of post-NCLB litigation reveals that since NCLB was passed, “just three groups of ELL advocates have had success in challenging a state’s or school district’s compliance with the Equal Protection Opportunities Act (EEOA) of 1974 at the federal level in regards to ELLs” (p. 2). In the case of *Flores v. Arizona* (1992) which was filed before NCLB was actually enacted, the Ninth circuit ruled that NCLB’s passage did not alter the state of Arizona’s basic obligations to be in compliance with the EEOA (Kihuen, 2009). Further, the Ninth Circuit also held that this did not “render the Castaneda framework obsolete” (p. 2). In short, what the Ninth Circuit’s ruling meant was that “mere compliance with NCLB academic benchmarks did not necessarily mean that the state had satisfied the requirements of the EEOA” (p. 2). What the court essentially did was to interpret the EEOA as an “equality-based civil rights statute” (p. 2). It interpreted NCLB “as a program for overall, gradual school improvement” (p. 2). What the court emphasized was the “explicit language of NCLB which provides that courts should not essentially construe Title III in a manner that is inconsistent with federal laws guaranteeing a

civil right” (p. 2). Whereas NCLB “does not contain an express private right of action”, the EEOA does in fact contain such a provision (p. 2).

A review of the legal history in this area reveals that the state of Arizona “struggled for over fifteen years to comply with part two of the Castaneda test” (p. 3). In fact, in 2000, the U.S. District Court for the District of Arizona ruled “that the state’s funding level for ELLs was both arbitrary and capricious” (p. 3). Further, the court held that this funding level was insufficient to ensure that ELL students attained essential skills” (p. 3). By July 2008, the state of Arizona had “failed to comply with court orders despite extensions for compliance and fines for noncompliance” (p. 3). As a result of the “state’s noncompliance with the EEOA, there were two schools from the school district failing to meet adequate yearly progress (AYP) benchmarks under the NCLB provision in the 2004-2005 academic year” (p. 3).

In examining the legal history concerning this area of the NCLB law, during the post-NCLB period, “advocates for ELLs have not experienced much success advancing the educational landscape for ELLs at the state level” (p. 3). An example is the case of *Coachella Valley Unified School District v. California* (2009) where “advocates for ELL who were dissatisfied with the state of California’s implementation of ELL assessments under the NCLB provision unsuccessfully argued that California’s failure to comply with the measure violated state law” (p. 3). The U.S. District Court for the Northern District of the state of California ruled that “NCLB did not create a private right of action” (p. 3). In addition, this U.S. District Court “remanded the case to state court” (p. 3). However, on remand, the Superior Court for the City and County of San Francisco, “ruled that it did not have legal authority to issue a writ of mandate commanding that the state be in compliance with NCLB because the duties of the state are

discretionary” (p. 3). Further, “as a matter of law, the state’s assessed method was not considered an abuse of discretion” (p. 3). However, the superior court eventually dismissed the case in February of 2008 but plaintiffs appealed and are awaiting some type of resolution (Kihuen, 2009).

A review of the legal history of the NCLB law aids in obtaining a better understanding of what changes should be made in a future reauthorization of the law. Some of these changes proposed by legislators include “off-level testing and additional accommodations for English as a Second Language (ESL) students” (Breslin, 2009, p. 7). There is also a “proposal for a modification of the law that will allow for more substantive testing accommodation” (p. 7). When the NCLB law was passed by the U.S. Congress in 2002, it “purported to be the answer to all of the inherent problems in public education” (p. 7). However, the “result of the law has not really been to increase the standards and performance of students in public schools” (p. 7). What the law has created is a “complicated and counter-intuitive set of regulations and requirements that vary across states and essentially put the educational rights of students such as those with disabilities at risk” (p. 7). A future reauthorization of the law should result in the creation or establishment of a “system in which all students can both thrive and be challenged by their own unique abilities” regardless of their background or circumstances (p. 7).

Previous Research

In examining current literature in the field, most of the research examines how NCLB is being implemented, issues raised by current law, and implications the law has for minority and low-income students (Sunderman, Kim, & Orfield, 2005). In *NCLB Meets School Realities: Lessons From the Field*, Gail L. Sunderman, James S. Kim, and Gary Orfield present the results

of original research concerning the implementation of NCLB (Sunderman, Kim, & Orfield, 2005). Sunderman, Kim, and Orfield's (2005) research examines across federal and state levels of government along with districts and schools to assess how NCLB is being implemented. In addition, the researchers also examine some of the issues the NCLB law raises, and implications of the statute for low-income and minority students (Sunderman, Kim, & Orfield, 2005).

Sunderman, Kim, and Orfield's (2005) study involves the six states of Arizona, California, Georgia, Illinois, New York, and Virginia. Within each state, two school districts were examined with the exception of Illinois where the researchers only chose the Chicago Public Schools (Sunderman, Kim, & Orfield, 2005). There were a total of eleven school districts that were studied (Sunderman, Kim, & Orfield, 2005). There were essentially four basic criteria for selecting these six states included in the study (Sunderman, Kim, & Orfield, 2005). First, these particular states were chosen because they are geographically and politically diverse (Sunderman, Kim, & Orfield, 2005). Second, each of these six states has a large proportion of minority students (Sunderman, Kim, & Orfield, 2005). Third, there is variance in the degree of state control over local education policy across the states with Virginia characterized as highly centralized, Arizona as highly decentralized, and California, Georgia, Illinois, and New York positioned somewhere in between these extremes (Sunderman, Kim, & Orfield, 2005). Finally, these states were chosen based upon where they were in the actual process of education reform as it related to the new federal requirements of the law (Sunderman, Kim, & Orfield, 2005). For example, some states' education policies were initially more closely aligned with federal NCLB requirements than others (Sunderman, Kim, & Orfield, 2005).

The researchers propose several policy recommendations to improve upon the current NCLB statute. For example, Sunderman, Kim, and Orfield (2005) contend that teachers and students must be given appropriate materials to teach or opportunities to learn in order to fairly be held accountable. They also argue that assessments need to go beyond performance on standardized tests (Sunderman, Kim, & Orfield, 2005). Sunderman, Kim, and Orfield (2005) suggest that an assessment system is needed “that reflects the difference schools make for their students in relationship to a standard that reflects achievement gains” (p. xxxv). In short, they support the need to broaden the concept of what constitutes school progress beyond scores on standardized tests. These researchers recommend strong incentives rather than sanctions to encourage good teachers to remain in challenged schools attempting to reform (Sunderman, Kim, & Orfield, 2005). If supplemental services are funded, Sunderman, Kim, and Orfield suggest that these services be closely tied to schools’ curricula, be accountable for results, and emphasize one-to-one tutoring coordinated with classroom instruction (Sunderman, Kim, & Orfield, 2005). Finally, they argue that the “impact of reform should be evaluated over a time cycle or period that reflects the time necessary to achieve deep reforms rather than an arbitrary one-year deadline” (Sunderman, Kim, & Orfield, 2005, p. xxxvi). Overall, Sunderman, Kim, and Orfield’s (2005) study is a significant contribution to the field because they highlight the need for an open and honest debate concerning the impact of the NCLB law and what measures should be pursued to achieve the statute’s goals of insuring the educational well-being of all children.

In a similar vein as Sunderman, Kim, and Orfield (2005), Patrick J. McGuinn (2006) in *No Child Left Behind and the Transformation of Federal Education Policy, 1965-2005*, examines the political dynamics in the process that allowed the NCLB law to pass. Overall, McGuinn’s (2006) study is a “political analysis of the evolution of federal elementary and secondary

education policy between 1965 and 2005” (p. vii). McGuinn’s (2006) study shows how the tension over how the federal role in education reform should be defined was a central influence in “national electoral politics and political party debates during both the 1980s and 1990s” (p. viii).

McGuinn (2006) examines the factors that allowed the federal government to play a more active role in education policy given the nation’s tradition of local control over the area of education. The researcher highlights factors that led to members of both political parties eventually supporting provisions such as federal standards, choice reforms, and accountability when they were previously resistant to such measures (McGuinn, 2006). McGuinn’s (2006) research is an important contribution to the field because he analyzes the historical evolution of the federal government’s role in education and “places it within the context of broader institutional and political changes in American politics” (p. viii). He argues that in order to better understand a policy change such as the NCLB law, a historical approach is required that examines “political forces in a policy area over time” (p. viii).

In Pain and Gain: Implementing No Child Left Behind in Three States, 2004-2006, Brian M. Stecher, Scott Epstein, Laura S. Hamilton, Julie A. Marsh, Abby Robyn, Jennifer Sloan McCombs, Jennifer Russell, and Scott Naftel (2008) examine specific strategies that states, districts, and schools are currently using to implement standards-based accountability. As did Sunderman, Kim, and Orfield (2005), these researchers structured their study as state-specific case studies (Stecher, Epstein, Hamilton, Marsh, Robyn, McCombs, Russell, & Naftel, 2008). The researchers collected education related data from the states of California, Georgia, and Pennsylvania every year for three years starting with the 2003-2004 academic year until the

2005-2006 academic year (Stecher, Epstein, Hamilton, Marsh, Robyn, McCombs, Russell, & Naftel, 2008). These respective states were chosen due to their “diversity in terms of geography, demography, and their approaches to implementing NCLB” (p. xv). These researchers found that although the demands made by the NCLB law on states, districts, and schools tend to be quite significant, the law does give educators flexibility in terms of what measures to employ

to reach required goals (Stecher, Epstein, Hamilton, Marsh, Robyn, McCombs, Russell, & Naftel, 2008).

Based upon these findings, the researchers argue that NCLB’s success is somewhat “dependent on how districts and schools implement the law and what policies and strategies they rely on to improve student academic achievement” (p. xv). This study is a significant contribution to the field because its research findings show the importance of taking into consideration local conditions (Stecher, Epstein, Hamilton, Marsh, Robyn, McCombs, Russell, & Naftel, 2008). The study’s findings suggest that “efforts to reform schools may be more effective if they are responsive to local conditions” (p. xix).

In *The Challenges of No Child Left Behind: Understanding The Issues of Excellence, Accountability, and Choice*, E. Jane Irons and Sandra Harris (2007) assess how the NCLB legislation has affected public education in the U.S. Irons and Harris argue that it is crucial for educators to “create a learning environment or community emphasizing success for all students” (p. 2). In addition, they contend that educators need to have some understanding of both the political background and actual components or provisions of the NCLB Act (Irons & Harris,

2007). Irons and Harris (2007) hold the view that having this knowledge or understanding is critical for educators to be successful in terms of “leadership, decision-making, communication, and implementation” (p. 2). The author’s research is valuable because it reveals that in the move towards higher standards, educators should undertake measures to ensure that these efforts don’t limit the educational curriculum or force some students altogether out of the school system (Irons & Harris, 2007).

Given some of the controversies surrounding its implementation, many scholars in the field have openly challenged the law. Thomas S. Poetter, Joseph C. Wegwert, and Catherine Haerr (2006) in *No Child Left Behind And The Illusion of Reform: Critical Essays by Educators*, openly challenge the NCLB law and critically examine the impact of the law on both children and educators. The most important observation Poetter, Wegwert, and Haerr (2006) make is that by overemphasizing measuring academic achievement through testing, the law undermines quality teaching. The significance of their research is that they show how this overreliance on testing has essentially resulted in schools merely using “content standards” as the actual curriculum rather than developing one that moves beyond the set standards required by the law (p. 3).

In a similar vein as McGuinn (2006) who utilizes a historical approach to analyze the federal government’s role in education, William Hayes (2008) in *No Child Left Behind: Past, Present, and Future* provides a historical perspective concerning the evolution of NCLB legislation. Hayes (2008) offers an examination of the history of the law, and an assessment of the law’s current status. Further, he provides some projections about the future of the law particularly as it relates to the law’s possible reauthorization by the U.S. Congress (Hayes, 2008).

As did McGuinn (2006), Hayes's (2008) research indicates that the role of the federal government in education is likely to increase as "society becomes more diverse and equity more valued" (p. viii). Hayes's (2008) research is a significant contribution to the field because he provides a substantive perspective concerning the future of the law particularly if Congress moves forward with reauthorization of the law.

Gail Sunderman's (2008) *Holding NCLB Accountable: Achieving Accountability, Equity, and School Reform*, provides a substantive assessment of the issues of accountability, capacity, and school reform. In addition, she offers a valuable evaluation of the NCLB law's implications for minority and low-income students (Sunderman, 2008). An important aspect of Sunderman's (2008) research is that she assesses the limits of the NCLB performance-based system particularly as it relates to improving the academic performance of at-risk students. Sunderman's (2008) research is a valuable contribution to the field as she proposes a set of improvements to the NCLB law that may potentially mitigate drawbacks of the statute.

In a research approach similar to McGuinn (2006) and Hayes (2008), John Heintz (2006) in *Political Currency and Hard Currency: The No Child Left Behind Act Turns Three*, examines the recent history of NCLB as it relates to the areas of "accountability, teaching, and testing" (p. 2). Heintz's (2006) research evaluates the NCLB Act's requirements particularly their inherent strengths and weaknesses. Heintz (2006) argues for a much "broader definition of highly qualified teachers, rigorous national standards, and more local control of assessment" (p. 2). Further, Heintz (2006) is a proponent for the federal government playing a greater and more assertive role in national education policy. However, the aspect of Heintz's (2006) research that makes it of great value to the field is that he highlights the area of special education and some of

the “conflicts between the act and special education law” over issues such as special test accommodations and alternate assessment programs for students with disabilities (p. 2).

Erin G. Frazor (2006) in *No Child Left Behind In Need Of A New IDEA: A Flexible Approach To Alternative Assessment Requirements*, highlights in her research some of the same problems as Heintz (2006) concerning the issue of alternative assessment programs for disabled students as it relates to the requirements of the NCLB law. Frazor (2006), similarly to Heintz (2006), also criticizes the NCLB law’s underlying premise that “one standard fits all students” (p. 9). The value of Frazor’s (2006) research is that it highlights the urgency for greater flexibility by the U.S. Department of Education while respective states develop alternative assessment programs to meet students’ needs.

Frederick M. Hess and Chester E. Finn, Jr. (2007) in *No Remedy Left Behind: Lessons From A Half-Decade of NCLB* present an objective analysis of how the NCLB law is succeeding in some areas but failing in others. Specifically, Hess and Finn (2007) examine how options such as supplemental educational services, public choice, and the law’s restructuring provisions are unfolding in states like Michigan, California, New Jersey, and Colorado. The authors also assess educational developments in respective districts and schools across the U.S. and present a set of conclusions concerning the development and implementation of the law’s remedies (Hess & Finn, 2007).

In *No Child Left Behind and the Reduction of the Achievement Gap: Sociological Perspectives on Federal Educational Policy*, Alan R. Sadovnik, Jennifer A. O’Day, George W. Bohrnstedt, and Kathryn M. Borman (2008) also provide an assessment of how the NCLB law is fairing in U.S. schools. A distinguishing characteristic of the authors’ research is that it is

grounded in a sociological perspective providing an analysis of federal education policy (Sadovnik, O'Day, Bohrnstedt, & Borman, 2008). In an approach similar to McGuinn (2006), Hayes (2008), and Heintz (2006), these scholars evaluate the history of federal education policy in the U.S. (Sadovnik, O'Day, Bohrnstedt, & Borman, 2008). Their research makes a valuable and distinctive contribution to existing work in the field because they attempt to put the NCLB law into "a larger sociological and historical context" (Sadovnik, O'Day, Bohrnstedt, & Borman, 2008, p. xi). This use of a sociological analysis is helpful to understanding the overall limitations of the law (Sadovnik, O'Day, Bohrnstedt, & Borman, 2008).

Michael A. Rebell and Jessica R. Wolff (2009) in *NCLB at the Crossroads: Reexamining the Federal Effort to Close the Achievement Gap*, reveal that by requiring that public schools ensure that all students are proficient in math and reading by 2014, NCLB has put tremendous pressure on educators to pay greater attention to the achievement of traditionally neglected or underserved students. Further, their study brings to the forefront the fact that at the midpoint of the law's timeline, faith appears to be waning in the law (Rebell & Wolff, 2009). Rebell and Wolff's (2009) study shows that the NCLB law is significantly behind schedule in meeting its goals for student performance, teacher quality, academic standards, and other critical school improvement measures. Moreover, their research reveals that there is little evidence that the law has actually closed the achievement gap (Rebell & Wolff, 2009). Rebell and Wolff's (2009) study also shows that the number of schools identified as needing improvement under the law has continued to grow each year and will increase as 2014 nears.

Rebell and Wolff (2009) contend that a key question for the Obama Administration to address is why is NCLB not achieving its vital aims or goals? The Campaign for Educational

Equity at Teachers College, Columbia University invited leading experts on NCLB to address several critical questions concerning the law. First, these scholars examine “what does the evidence suggest about our public educational system’s ability to help all children achieve at high levels by 2014?” (p. ix). Second, “which policies, practices, and resources” would actually “close our nation’s academic achievement gaps?” (p. ix). Finally, these scholars assess “to what extent does NCLB move us toward these policies, practices, and resources?” (p. ix).

The result is a collection of cutting-edge analyses of the various components of the law written by some of the leading researchers and thinkers in the field of educational equity (Rebell & Wolff, 2009). These authors’ essays collectively present the scope of the national challenge to reduce inequities that have caused and perpetuated academic gaps and the actual potential of the NCLB law to effect change (Rebell & Wolff, 2009). Rebell and Wolff’s (2009) work is a valuable contribution to the field and is significant because the authors tackle the challenging or difficult questions concerning how to ensure meaningful educational opportunities for all children rather than shirking such questions in favor of discussion of politically palatable issues or quick-fix solutions. Further, Rebell and Wolff’s (2009) work speaks not only to debates during NCLB’s reauthorization period, but also to future directions of U.S. education research, policy, and practice as the nation is forced to come to grips with obstacles or impediments to universal school quality and student proficiency.

In *To Educate A Nation: Federal and National Strategies of School Reform*, Carl F. Kaestle and Alyssa E. Lodewick (2007), examine federal education policy specifically “federal-state-local relationships in the governance of education and education reforms taking place within this federalist context” (p. 1). Kaestle and Lodewick (2007) highlight the “institutions,

traditions, and processes that determine who gets a voice in policy making and how various groups participate” (p. 1).

Kaestle and Lodewick (2007) bring to the forefront the “stresses within the federalist system of shared governance” in the U.S. that have become “more numerous, visible, and turbulent” as the “federal government has increasingly become more active in asserting its role in policy for elementary and secondary schools over the past five decades” (p. 1). They show that federal policy in a nation that is as large and diverse as the U.S. is clearly a challenge as all fifty states and the numerous school districts across the country each have some claim to decision making in education (Kaestle & Lodewick, 2007). What Kaestle and Lodewick (2007) find from their research compilations is that “state and local contexts matter and there is much local and state variation” (p. 1).

Further, they determine that a number of “factors have contributed to an increasing complexity in the education policy process in the U.S.” (p. 1). For one, as is evident in most democracies, “there is a system of checks and balances across the U.S. executive, legislative, and judicial branches” with “tensions flaring between the authorities of these branches” (p. 1). Moreover, they find that conflict is also evident within each respective branch (Kaestle & Lodewick, 2007). For example, Kaestle and Lodewick (2007) note that the “U.S. Supreme Court reviews appeals from lower federal courts or cases from the states and in some instances, overturns decisions made by other courts” (p. 1). In addition, they highlight the fact that “the very essence of Congress is contestation between two major parties” (p. 1). Kaestle and Lodewick (2007) also highlight the fact that there has been a “resurgent private sector in

education in the U.S.” with many policy advocates longing to expand that sector in order to improve education (p. 1).

Finally, Kaestle and Lodewick’s (2007) compilation of research advances six major themes concerning education policy making in the nation. First, they suggest that “the education polity has become increasingly fluid over the past five decades” (p. 6). For example, they note that fifty years ago, there were durable alliances between interest groups, government agencies, and legislatures that essentially dictated policy making in various policy sectors (Kaestle & Lodewick, 2007). However, they bring to the forefront the fact that “recent years have witnessed the development of shifting alliances among diverse groups and joint actions by some groups who briefly cooperate on focused topics that are of mutual interest” (p. 6). In fact, their research reveals that there is no longer a clear liberal or conservative view of education policy in the U.S. (Kaestle & Lodewick, 2007).

A second theme Kaestle and Lodewick (2007) advance is that “the proliferation of policy proposals in education reflect a marked increase in the number and variety of education-related interests groups over the past thirty years” (p. 6). In fact, their findings indicate that “the increase in the number of groups since 1950 is dramatic even if controlled for population growth” (p. 6). Further, they conclude that this “increase was essentially driven by a proliferation of purposes among actors in the education polity” (p. 6).

Third, Kaestle and Lodewick's (2007) findings "reinforce the importance of local contexts" when it comes to education policy (p. 7). Their research reveals that "education policy in the U.S. has become more centralized in recent decades with evidence of growth in both state and federal influences (Kaestle & Lodewick, 2007). However, Kaestle and Lodewick (2007) show that both federal and state policy makers have consistently been forced to relearn that top-down policy will not be successful without certain degrees of flexibility and negotiation. Fourth, their research shows that "policy implementation can often times trigger unintended consequences" (p. 7). For example, they note that these consequences can potentially occur when policy groups or actors set out to reform educational practice from above (Kaestle & Lodewick, 2007). Most importantly, they note that the primary intent of the policy may be undermined resulting in frustrating advocates of the original policy (Kaestle & Lodewick, 2007).

A fifth theme raised by Kaestle and Lodewick (2007) is that "timing and sequence can clearly make a difference in the overall prospects of an educational policy proposal" (p. 7). They note that successful policy adoption often requires that a particular set of developments happen or occur in a certain sequence (Kaestle & Lodewick, 2007). If not, they suggest that "the policy outcome may be nil or different" (p. 7). Further, Kaestle and Lodewick (2007) reveal that in some instances, "a necessary prerequisite to successful policy adoption is missing" (p. 7). In these cases, supporters of the given policy are forced to wait for "a more propitious window of opportunity" (p. 7).

A sixth theme somewhat related to their fifth is essentially that the past or previous policy efforts do matter (Kaestle & Lodewick, 2007). Kaestle and Lodewick (2007) suggest that "policy makers in general don't begin a policy debate with a roster of untried policies choosing among

them”(p. 7). Rather, they contend that policy makers consider whether new policy options are better than previous approaches that have been pursued for some time (Kaestle & Lodewick, 2007). Further, they suggest that some degree of reform can occur if the public along with decision makers can be persuaded that the existing or reigning policy is a failing one (Kaestle & Lodewick, 2007). They note that existing policies often enjoy certain advantages because both practitioners and the public at large can often grow accustomed to pursuing policy solutions a particular way (Kaestle & Lodewick, 2007). Moreover, in many instances, both constituents and beneficiaries often organize “to protect their turf” along with policies becoming associated with “widely accepted ideological rationales (p. 7).

In a similar vein as Kaestle and Lodewick (2007), Joshua M. Dunn and Martin R. West (2009) in *From Schoolhouse to Courthouse: The Judiciary’s Role in American Education* examine the impact judicial institutions have had on policy making concerning education in the U.S. Dunn and West (2009) highlight the fact that when one examines the American education landscape over the past sixty years, judicial involvement in education has grown exponentially during this time period. They note that aspects of education policy such as race, speech, religion, school funding, special education, and test-based accountability have been addressed in the nation’s courtrooms (Dunn & West, 2009). Further, they bring to the forefront the fact that schools and districts across the country regularly face lawsuits over issues such as discipline policies, personnel decisions, and holiday celebrations (Dunn & West, 2009).

Dunn and West (2009) present a collection of research by experts on law, political science, and education to consider the implications of greater judicial involvement in education in the U.S. The significance of this research presented is that it examines both areas in which

judicial involvement shows signs of waning (Dunn & West, 2009). For one, this research examines areas such as desegregation, school finance, special education, and high-stakes testing (Dunn & West, 2009). In addition, it examines areas where litigation may significantly shape education policy in the future such as boundaries on religious freedom and school choice (Dunn & West, 2009).

In *Leadership for Social Justice: Making Revolutions in Education*, Catherine Marshall and Maricela Oliva (2010) focus upon key issues in social and justice and school leadership and the impact of the NCLB law in the face of poverty in the U.S. Marshall and Oliva (2010) present research that shows that with the passage of the federal NCLB Act of 2001, many educators across the nation have embraced the notion or idea of student achievement “that is narrowly defined by scores on standardized tests” (p. 66). In fact, the research they provide indicates that for many school leaders, having access to regular testing data provides some guideline for better managing a school’s educational program to meet improvement benchmarks (Marshall & Oliva, 2010). While schools today across the nation are likely to make decisions based upon data, Marshall and Oliva’s (2010) compilation of research reveals that there is essentially a “close relationship between poverty and poor academic achievement that leads to a sense of powerlessness” (p. 66). This research presented suggests that this is because “impediments to improved test scores often seemed rooted in contexts beyond the direct influence of the school” (Marshall & Oliva, 2010).

Further, Marshall and Oliva’s (2010) research also shows that as has been seen with previous studies of the implementation of earlier policy measures to achieve accountability and from some states such as Texas that have embraced accountability systems similar to what is

required by the NCLB provision, “equally strong potential exists for both positive and negative effects of such a policy approach on educational equity” in the U.S. (p. 260). Marshall and Oliva (2010) along with other scholars within the field conclude that “given the overall complexity of the system and the number of individual sites in virtually every state, district, and school, there have been and will continue to be both positive and negative equity effects that are associated with the implementation of NCLB” (p. 260). In addition, based upon research results, they determine that the “work of school leaders is vital or critical in linking the intent of accountability policies to equity outcomes in local contexts” (p. 260).

William P. Wanker and Kathy Christie (2005) in *State Implementation of the No Child Left Behind Act*, examine information the Education Commission of the States (ECS) has presented and many of the insights they have gained since first assessing state policy enactments pertaining to NCLB. Wanker and Christie’s (2005) findings indicate that while the “ECS found NCLB to be an important first start”, it also “concluded that even more needs to be done” to reform education in the nation (p. 72). Further, they show that the ECS has essentially brought to the forefront key issues that demand immediate attention and provide a series of recommended actions for political leaders to improve education in the U.S. (Wanker & Christie, 2005). Wanker and Christie’s (2005) research reveals that the “ECS has found that not only do states have the primary responsibility for developing high performance systems which ensure that their children receive a first-rate education” (p. 72). They show that respective states also have a primary responsibility to ensure that all students receive what those systems planned to provide (Wanker & Christie, 2005). Most significantly, Wanker and Christie (2005) highlight the fact that in many instances, “what is planned is often less than what all students are actually receiving” (p. 72).

What their research reveals is that states must respect the NCLB legislation but continue efforts to make it more effective (Wanker & Christie, 2005).

Further, Wanker and Christie's (2005) research indicates that states are moving forward to implement NCLB provisions, but efforts have been uneven at best. However, they argue that the progress that has been made by states to implement the law has been particularly impressive (Wanker & Christie, 2005). In fact, Wanker and Christie (2005) contend that states are making concerted efforts to implement NCLB "in ways not seen since the mid-1970s when they undertook measures to implement the Individuals with Disabilities Act (IDEA) and Title IX of the Educational Amendments of 1972 which essentially prohibited gender discrimination" (p. 72). However, they suggest that the real test for NCLB is whether or not leaders at both the state and national levels essentially succumb to existing pressures to retreat from the goals of the law which some consider to be overly ambitious, or rise to the challenge of bringing these goals into fruition (Wanker & Christie, 2005).

Within the field of education policy and law, there is a debate as to whether the NCLB Act is "fully funded" (Mathis, 2005, p. 90). In *The Cost of Implementing the Federal No Child Left Behind Act: Different Assumptions, Different Answers*, William Mathis (2005) explores this issue and concludes that "the claim that the law is fully funded because funding has increased by a large percentage is based upon a set of faulty assumptions" (p. 113). Mathis (2005) reaches this conclusion because he suggests that those who contend that the law is fully funded "evades the question of added costs" (p. 113). Further, he suggests that the claim of "unspent money being left on the table" being some "indication that the law is overfunded does not withstand the

scrutiny of both federal accounting procedures and spending rules” (p. 113). In addition, Mathis (2005) contends that “this claim is not a needs-based argument” (p. 113).

What Mathis (2005) considers to be important is evaluating the true costs of reaching the goals of the law. He suggests that “comparing federal appropriations with authorization levels along with comparing appropriations with necessary funds as defined by the law, do not adequately evaluate these true costs” (p. 113). However, Mathis (2005) holds the view that any “added new administrative costs and certain costs to teach children do require close needs-based scrutiny” (p. 113). Most significantly, Mathis’s (2005) research is valuable as he sheds light on the debate concerning whether NCLB is truly an unfunded mandate. He reveals that some observers argue that NCLB is not really an unfunded mandate “because states can decline the funds” (p. 115). However, Mathis (2005) highlights the shortcomings of this perspective by noting that states can incur “penalties for actually refusing to accept funds” (p. 115). Moreover, if the objective is to meet the ambitious goals of the law, Mathis (2005) contends that “about 29% of additional funds or \$144.5 billion is needed for administration, teaching, and support services with most of this new funding focused on students with the greatest needs” (p. 115).

A review of current literature in the field reveals that a significant trend in educational governance is the expansion of gubernatorial control over education reform (Fusarelli, 2005). Lance Fusarelli (2005) in *Gubernatorial Reactions to No Child Left Behind: Politics, Pressure, and Education Reform*, examines how federal authority conveyed in the NCLB Act impacts this “significant growth and expansion of gubernatorial control over education reform” (p. 120). Fusarelli’s (2005) work is a valuable contribution to the field as he outlines the history of

gubernatorial activism as it concerns the education reform movement in the nation, and examines the reaction of governors to NCLB. Specifically, he highlights “their opposition to specific provisions of the legislation” (p. 120). Fusarelli (2005) finds that despite some degree of opposition, the endorsement of the NCLB law’s goals by a large majority of the nation’s governors can essentially be attributed to four factors. First, it can be attributed to the fact that state-level education reform initiatives had “some consistency of purpose” (p. 120). Second, this endorsement of NCLB goals by the nation’s governors can also be attributed to the fact that they used NCLB to “leverage change within the educational system” (p. 120). Third, the endorsement of these goals by many governors across the nation can be attributed to “the relative newness and lack of public awareness of the law itself” (p. 120). Finally, Fusarelli (2005) suggests that this endorsement is due in part to the “fears of retribution from federal officials” (p. 120).

In relation to the NCLB law’s prospects for actually successfully addressing the existing achievement gap between students, there are those within the field who argue that any serious discussion must include the “voices of local school superintendents” (Cohn, 2005, p. 156). Carl Cohn (2005) in *NCLB Implementation Challenges: The Local Superintendent’s View*, argues that the perspectives of local superintendents are critical to any discussions concerning NCLB because they “are charged with implementing many of the disparate elements of the law’s main provisions” (p. 156). A central theme in Cohn’s (2005) analysis is that our nation’s students “historically have not been well-served by the country’s public schools” (p. 156). Further, his research indicates that local superintendents have not been unanimous in their support for the NCLB measure (Cohn, 2005). For example, Cohn (2005) reveals that some superintendents view

the NCLB law “as a helpful and supportive part of an overall school reform strategy” to improve America’s schools that “builds upon state and local accountability initiatives” (p. 156). However, he highlights the fact that some superintendents view the law “as a punitive measure designed to build the case for vouchers and other private sector provided schemes” in response to supposedly failing public school systems (p. 156). Cohn’s (2005) is a valuable contribution to the field because he advocates for federal policy researchers in the future to focus attention and resources on questions of implementation associated with the NCLB law.

Some of the first major court challenges to NCLB arose over desegregation in southern systems (DeBray, 2005). In *NCLB Accountability Collides With Court-Ordered Desegregation: The Case of Pinellas County, Florida*, Elizabeth DeBray (2005) examines conflict that came to the forefront in 2004 involving a federal court’s oversight of desegregation and the implementation of public school choice provisions germane to the NCLB law in Pinellas County, Florida. DeBray’s (2005) study reveals that leaders within the school system essentially challenged the law on “grounds that it would likely disrupt a controlled-choice plan for achieving racial balance as part of a court settlement to its desegregation case” (p. 170). It was ruled that no changes could be made to a previous court order “mandating these balances through 2008” (DeBray, 2005, p. 170). DeBray (2005) assesses the county’s decision to seek protection through the court system and provides a substantive analysis of various conflicts. Most significantly, DeBray’s (2005) research brings to light how “dramatically federal priorities shifted during the George W. Bush Administration” (p. 170).

Some of the nation's key education organizations have essentially different approaches to the law (Koppich, 2005). Julia Koppich (2005) in *A Tale of Two Approaches: The AFT, the NEA, and NCLB* examines the responses of the National Education Association (NEA) and the American Federation of Teachers (AFT) to the early days of implementation of the NCLB law. Koppich's (2005) research reveals that while the two organizations are in agreement concerning what they perceive to be the inherent deficiencies of the law, they have taken divergent approaches in terms of efforts to secure statutory changes. For one, Koppich (2005) shows that the NEA's efforts have focused primarily upon "public denunciation of the law" while the AFT has taken "a more considered and less predictable approach" (p. 137). Most importantly, Koppich's (2005) research shows that these strategies are a reflection of these organizations' "reactions to education reform more generally over the last two decades" (p. 137).

Contributions To Existing Literature

This research is significant and contributes substantially to the current body of literature because there is clearly a need for more substantive research in the field of education policy that examines the policy implications of unfunded federal mandates for states given the persisting economic challenges many of them face in terms of funding K-12 education. In short, this research attempts to fill this void in the current body of research within the field. The scope or context of this research is not focused upon identifying or highlighting the ideal policy to achieve K-12 education reform in the U.S. This is outside the scope of this study. Rather, the study seeks to assess how states are managing to meet requirements to fund education related federal mandates pertaining to NCLB and identify policy implications for respective states of these mandates.

CHAPTER 3

The Case of *Connecticut v. Spellings* (2005)

In examining the number of legal cases that came into fruition in response to NCLB, it becomes evident that opposition to the law clearly increased between 2003 and 2004 (Dunn & West, 2009). As a result, state attorneys general began to consider whether to take legal action (Dunn & West, 2009). In the state of Wisconsin, Attorney General Peg Lautenschlager “issued an opinion holding that the state had no legal obligation to implement the law because Congress failed to adequately fund the testing and other actions the law required” (p. 216). But in the case of Connecticut, its state attorney general Richard Blumenthal filed suit in 2005 after very public contentions in the media between his state’s Education Commissioner Betty J. Sternberg and U.S. Secretary of Education Margaret Spellings (Dunn & West, 2009).

The state of Connecticut’s Education Commissioner Betty J. Sternberg had spent much of her career in the state’s education department developing state tests and held the view that nothing new would be learned about Connecticut’s schools by administering these new tests (Dunn & West, 2009). The state of Connecticut had given tests in 1984 and “had been administering them annually in grades four, six, and eight” (p. 216). However, the NCLB law “required that they be given also to grades three, five, and seven” (Dunn & West, 2009; p. 216). Sternberg argued that any money spent on added tests could be put to better use for education within the state (Dunn & West, 2009). The U.S. Secretary of Education Margaret Spellings

argued through media within the state that it was essentially “un-American for the state of Connecticut to resist a law that was meant to close the achievement gap between whites and blacks” (p. 216). Moreover, Secretary Spellings noted that the achievement gap in Connecticut was higher than the national average (Dunn & West, 2009). It took an intervention on the part of Connecticut’s Republican Governor M. Jodi Rell to diffuse some of the tensions between Secretary Spellings and Commissioner Sternberg (Dunn & West, 2009).

In the midst of these tensions, Connecticut’s Attorney General Richard Blumenthal, who was a Democrat filed suit against the federal government in August 2005 and received equivocal support from the state’s Republican Governor M. Jodi Rell (Dunn & West, 2009). Attorney General Blumenthal argued to a federal district court in Connecticut that Secretary Spellings was essentially violating a provision of federal education law (Dunn & West, 2009). He contended that this law dating back to 1994 initially authored by Republicans trying to protect state governments from unfunded mandates was reincorporated in NCLB (Dunn & West, 2009). In his arguments, Blumenthal made reference to a provision in the law that states “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” (p. 217). Further, he contended that Secretary Spellings had essentially denied “without any basis in scientific research Connecticut’s requests for three waivers pertaining to the federally prescribed testing regime” (p. 217).

The state of Connecticut advocated for the continuation of testing biennially instead of annually (Dunn & West, 2009). The state essentially wanted to phase in English Language Learners (ELLs) over a period of three years as opposed to testing them immediately “or within a

year in the case of language arts” (p. 217). In the case of students in special education, Connecticut preferred to test them at their instructional level as opposed to their grade level (Dunn & West, 2009). Attorney General Blumenthal also argued that the state could not just “opt out of NCLB or fail to comply without suffering severe penalties in the loss of federal funds” (p. 217). These funds amounted to about \$436 million a year or around 5.8 percent of the state’s education budget of \$7.5 billion (Dunn & West, 2009). In addition to the legal actions on the part of the state’s attorney general, the teachers unions within the state such as the Connecticut Education Association and the National Education Association (NEA) eventually filed amicus briefs on behalf of the state (Dunn & West, 2009). However, no other state attorneys general actually joined Blumenthal (Dunn & West, 2009). The U.S. Department of Education did receive support as the Connecticut State Conference of the National Association for the Advancement of Colored People (NAACP) intervened on behalf of Secretary Spellings (Dunn & West, 2009).

However, the state of Connecticut eventually lost this suit in two stages (Dunn & West, 2009). First, the state’s claims that there was a violation by the U.S. Secretary of Education of the unfunded mandate component of the NCLB act in as much as the state had yet to suffer penalties for noncompliance was dismissed in September 2006 by Judge Mark R. Kravitz (Dunn & West, 2009). Further, it was determined that the state was not at risk of losing federal funds (Dunn & West, 2009). In this case, Judge Kravitz concluded that “in the absence of enforcement measures that penalized the state, the court basically lacked jurisdiction” (p. 217). Judge Kravitz also determined that in this instance, Secretary Spelling’s decision to deny the state of Connecticut’s waiver requests was basically not reviewable because she did have the discretion to deny them (Dunn & West, 2009). However, Judge Kravitz did allow Connecticut to move

forward or proceed with its claim that “the U.S. Department of Education had acted arbitrarily and capriciously in denying the state’s request for waivers” (p. 217). This claim did not actually fall until spring 2008 with Judge Kravitz taking action to dismiss the state of Connecticut’s arguments in an opinion that was often critical of how the state presented its case (Dunn & West, 2009).

In examining the legal history of *Connecticut v. Spellings* (2005), it becomes clear that Judge Kravitz never ruled on the actual merits of what many observers considered to be the central or core questions which was the “import of the unfunded mandate provision” (p. 217). Judge Kravitz concluded that the Court was unable to rule on the question concerning the import of the unfunded mandate provision because “the State failed to adequately raise it” (p. 217). Further, he expressed regret that a year and one-half after a Motion to Dismiss Ruling the state of Connecticut was unable to reach some determination of this critical issue (Dunn & West, 2009). In May of 2008, Attorney General Blumenthal put forth an appeal with the Second Circuit “asking it to rule on the issue of unfunded mandates” (p. 218).

Connecticut’s Arguments Against NCLB’s Unfunded Mandates

An analysis of the state of Connecticut’s legal arguments indicate that the state sought “enforcement of the NCLB Act’s explicit provision requiring that any additional expenditures resulting from the federal government’s imposition of additional requirements based upon the law above and beyond the state’s recognized commitment to educational accountability and success must be paid by the federal government” (Westlaw, 2005; p. 2) In addition, Connecticut

also sought “a judicial determination that new federal requirements resulting in additional unfunded expenditures be waived as is fully contemplated by the NCLB Act” (p. 2).

The state of Connecticut essentially argued that Secretary Spellings refusal to acknowledge her legal duty to choose either having the federal government pay for additional expenditures resulting from the federal government’s imposition of additional NCLB testing requirements, allowing states to waive requirements, or a “suitable mixture of the two violates the meaning of the NCLB Act” (p. 2). Further, the state contended that Secretary Spelling’s position “contravened the federal government’s constitutional spending powers and the Tenth Amendment to the U.S. Constitution” (p. 2). The state argued that the federal government’s motion to dismiss its legal action “employed selective citations to law and fact and illogical construction of the relevant statutes” (p. 2). In addition, the state contended that this motion to dismiss its legal action by the Secretary of Education was an “attempt to avoid Congress’s stated commitment to Connecticut and all other states when they chose to participate in this federal program” (p. 2).

In their argument against Secretary Spellings, the state of Connecticut brought to the forefront that fact that “education has historically been the exclusive realm of the states” (p. 2). Further, the state in its argument against the federal government highlighted the fact that there is precedence for the U.S. Supreme Court in recognizing that education is “probably the most important or significant function of both state and local governments” stemming from cases such as *Brown v. Board of Education* (1954) and *Honig v. Doe* (1988) (p. 2). Moreover, the state argued that there is also precedence for the Court to be committed to state and local control

originating from the cases of *Epperson v. Arkansas* (1968) and *Board of Curators v. Horowitz* (1978) (Westlaw, 2005). The state of Connecticut also stressed in their arguments that “although educational rights are absent from the federal constitution, Connecticut’s state constitution grants children a free public elementary and secondary education, and directs the state legislature to implement this principle by appropriate legislation” (Westlaw, 2005).

In its arguments against the federal government, Connecticut argued that it along with their state legislature had taken the responsibility of education seriously (Westlaw, 2005). The state articulated in its legal arguments that it has “codified in its statutes the educational interests of the state which includes several concerns” (p. 2). First, “each child in the state must have an equal opportunity to receive a suitable program of educational experiences” (p. 2). Second, “each school district within the state must provide reasonable financial resources to accomplish this goal” of providing the state’s children with a suitable program of educational experiences (pp. 2-3). Third, each of the state’s school districts must “provide educational opportunities to reduce racial, ethnic, and economic isolation” (p. 3). Further, the state of Connecticut argued that “long before the federal government conceived the concept of accountability in education, it had already required annually public school students in grades 4, 6, 8, and 10 to take the Connecticut Mastery Test or CMT” (p. 3). This state test was designed “to measure both higher level thinking and communication skills” (p. 3). In terms of format, the CMT “utilizes short essays and written explanations along with multiple choice questions” (p. 3). The state argued that “over its twenty year history of student assessments, it has provided reasonable accommodations for any testing challenges faced by both special education students and English Language Learner (ELL) students” (p. 3).

The state also articulated in its argument against the federal government that the Connecticut legislature “directed substantial additional resources to school districts within the state that had high concentrations of students performing below proficiency” (p. 3). Further, the state argued that “since 1996-1997, it had spent over \$600 million in new funds on preschools, early reading instruction, afterschool programs, and a wide variety of instructional support programs” (p. 3). Moreover, Connecticut argued that its “extensive financial commitment to education along with a rigorous assessment scheme have produced results” (p. 3). The state noted that “its students are among the top performing students in the nation” (p. 3).

The state of Connecticut argued that “before the passage of the NCLB Act in 2002, the federal government’s role in education was generally limited to providing supplemental resources to certain targeted groups of disadvantaged students” (p. 3). These were “generally Title I students who had the most economic disadvantages such as high poverty and homelessness, and also special education students” (p. 3). In contrast, Connecticut argued that the “NCLB Act affected all students in the nation’s public schools and not just special education students or those in public schools that qualify for and receive Title I funding” (p. 3). In addition, at the heart of Connecticut’s argument was the fact that the NCLB Act greatly expanded federal involvement in the realm of education traditionally handled by states (Westlaw, 2005).

The state of Connecticut took issue with a number of the basic components or requirements of the NCLB Act. Aside from “dictating teacher certification standards”, NCLB required that all public school students be tested with the results of those assessments publicly reported (p. 3). The NCLB Act required that the test results by “subgroups within each public

school must satisfy incrementally-increasing benchmarks called Adequate Yearly Progress or AYP (p. 3). Further, NCLB embraced a “goal of 100% of the nation’s students reaching AYP by 2014” (p. 3). In particular, the state of Connecticut took issue with the severe consequences if a school failed to make AYP (Westlaw, 2005). These consequences for failure ranged from “mandatory tutoring and providing school choice, to dismantling schools that failed to meet AYP for a period of five years” (p. 3). Moreover, Connecticut expressed particular concern over the fact that “a school could fail to make AYP if just one subgroup of students in one grade failed to test to level” (p. 3).

The state of Connecticut in its argument against the federal government stressed that “what states and localities need to do in order to comply with the requirements of NCLB is both complicated and confusing resulting in extensive and repeated clarifications from the federal government to states and local school districts” (p. 3). For example, the state in its legal argument brought to the forefront the fact that “in the first two years after the NCLB Act’s passage, Secretary Spellings and her staff issued dozens of guidance documents, hundreds of letters, three sets of formal regulations, and several informal policy statements” (p. 3). Moreover, the state noted that these “extensive and repeated clarifications” occur continuously (p. 3). Further, Connecticut noted that “Secretary Spellings had reviewed accountability plans for the states which it contended were subjected to considerable negotiation, discussion, and amendment” (pp. 3-4). While the state did acknowledge that Secretary Spellings “had broad statutory authority to waive NCLB statutory or regulatory requirements,” it argued that she rejected many states’ requests for waivers “favoring a rigid one-size-fits-all approach to NCLB requirements” (p. 4).

A key component of Connecticut's argument against the federal government was that it contended that "Secretary Spellings's authority to implement the NCLB Act was subject to express statutory limitations" (p. 4). What was particularly relevant here was that the state argued that the Secretary was "prohibited from requiring any state or local government to spend any funds or incur costs not paid for under the NCLB Act" (p. 4). An analysis of this case reveals that what was at the core of this litigation by the state of Connecticut against the federal government was essentially a "fundamental disagreement between the parties regarding the meaning of the NCLB Unfunded Mandates Provision" (p. 4). In short, Secretary Spellings argued that it was within her boundaries to require states and localities to spend their own funds in order to be in compliance with requirements of the NCLB Act while Connecticut held that both the basic language of the statute and the operation of the federal constitution prohibited the Secretary from these requirements (Westlaw, 2005).

Further, an analysis of this case reveals that Connecticut's "understanding of the meaning of the Unfunded Mandate Provision was essentially reflected in its own statutory implementation of the NCLB Act" (p. 4). For example, when the state passed "Connecticut Public Act No. 03-168, the state legislature required that the Connecticut Mastery Tests be in conformance with the NCLB Act"(p. 4). This was to be the case "provided that any costs of such conformance to the state and local regional boards of education that were attributable to additional federal requirements of the NCLB Act be paid exclusively from federal funds received by them pursuant to the NCLB provision" (p. 4).

An assessment of this legal case reveals that in an effort to essentially harmonize Connecticut's "long-established and successful state assessment and accountability program with a relatively newly established federal program, the state requested waivers from the Secretary in a few targeted areas" (p. 5). The state also advocated for these waivers because it contended "that the allotted federal funds were insufficient to meet any additional federal requirements" (p. 5). For one, Connecticut requested that it be allowed to continue its "successful and long-standing program of administering annual tests in alternate grades" (p. 5). Second, the state requested that it be allowed "to provide special education students with the option of being tested at their instructional level as opposed to grade level" (p. 5). Third, Connecticut requested that it be allowed to "provide English language learner (ELL) students up to three years in U.S. school systems before being required to take any assessments" (p. 5). The state of Connecticut argued that "if the waivers were not granted, the federal funds would not be sufficient enough to meet the additional federal requirement" (p. 5). Further, the state contended that Secretary Spellings "categorically refused to entertain any waiver requests due to insufficient federal funding" (p. 5). As a result of the Secretary's refusal to grant these waivers, beginning in March 2006, students in the 3rd, 5th, and 7th grades attending public schools in the state of Connecticut were required to take the CMT (Westlaw, 2005). In addition, the state was forced to pay in order to "administer, score, and evaluate these assessments" (p. 5).

In analyzing the state's legal argument, it is evident that it attempted to stress the less than desirable consequences for a state if it opted out of NCLB requirements (Westlaw, 2005). The state of Connecticut argued that "although Secretary Spellings argued that a state's compliance with NCLB requirements are voluntary, the consequences for choosing to opt out of

NCLB requirements would resonate well beyond NCLB funding” (p. 5). For example, Connecticut in its argument highlighted the fact that “in response to an inquiry from the state of Utah concerning the issue of opting out of NCLB requirements”, Secretary Spellings took the position that “not only would Utah forfeit its NCLB funds, the state would also forfeit Title I funds” if it elected to opt out of NCLB requirements (p. 5). In addition, “any federal educational funding that utilized a Title I formula would also be forfeited” if the state exercised opting out of NCLB requirements (p. 5). In its argument against the federal government, the state of Connecticut was careful to point out that as a result of this position by the Secretary, “funding for federal education programs that had no connection with NCLB such as safe and drug free schools, afterschool programs, and literacy programs for parents would be completely eliminated” (p. 5). In the case of Connecticut, the state contended that if it exercised this course of action of opting out of NCLB requirements as imposed by the Secretary, it “would lose hundreds of millions of dollars in Title I funds and unrelated federal education funds” (p. 5).

The state of Connecticut claimed that in her motion to have its case dismissed, Secretary Spellings essentially “sought to avoid the NCLB Act’s express provisions that prohibited unfunded mandates” (p. 6). Further, the state argued the Secretary attempted to “assure flexibility by basically interposing meritless jurisdictional challenges, misreading clear statutory terms, and obscuring unequivocal legislative intent” (p. 6). In her argument in support of a motion to dismiss Connecticut’s case against the federal government, Secretary Spellings emphasized the point that she had a legal right to require the state of Connecticut and local school districts to spend their own funds to meet her views of what was required by the NCLB Act (Westlaw, 2005).

The state of Connecticut in its argument against the federal government suggested that it was essentially “caught between the Secretary’s illegal mandate to spend state funds and state law which prohibits spending state funds” for implementation of NCLB requirements (p. 6). The state pointed to its administration of tests to every grade in March 2006 as an example (Westlaw, 2005). Further, Connecticut argued that it essentially “lacked the luxury of postponing adjudication of these critical issues until money was expended and testing and educational programs had been administered” (p. 6). With the implementation of the NCLB provision, Connecticut contended that it had to bear the multiple responsibilities of obeying both federal and state law while dealing with the challenge of education its children, supporting schools, and imposing accountability (Westlaw, 2005). Moreover, the state argued that its public schools and children should not have to incur the harm of losing all federal education funds as a precondition to obtaining judicial relief from what they viewed as the Secretary’s violations of the NCLB Act (Westlaw, 2005).). In short, the state of Connecticut contended that it faced imminent harm and that its claims were valid (Westlaw, 2005).

The state in its arguments against the federal government challenged Secretary Spellings’ suggestion that it was “attempting to avoid the goals and requirements of the NCLB Act” (p. 6). The state of Connecticut argued that it only sought for the federal government to obey the law by paying the additional costs imposed upon it by Secretary Spellings’ inflexible and somewhat misguided interpretations of the NCLB Act (Westlaw, 2005). Further, the state argued that at the very least, the federal government should grant it the “flexibility it needed to meet NCLB’s goals and requirements within the federal funding provided” (p. 6). Connecticut argued that NCLB’s twin principles of accountability and flexibility were consistent with this interpretation (Westlaw,

2005). Most importantly, that state contended that “the NCLB Unfunded Mandate Provision compelled it” (p. 6). Connecticut was critical of the Secretary as it suggested that she had elected to implement what they considered to be a misreading of NCLB’s requirements “in violation of their plain meaning and the boundaries of constitutional conduct” (p. 6). Moreover, as it related to any legal ramifications, the state of Connecticut held that Secretary Spellings’ “actions were not exempt from judicial scrutiny and review” (p. 6).

In critiquing the federal government’s position in its legal arguments, Connecticut essentially argued that Secretary Spellings’ assertion that the Court lacked any subject matter jurisdiction over its claims fundamentally misconstrued the nature of their complaint (Westlaw, 2005). The state of Connecticut held that in arguing that it sought to challenge Secretary Spellings’ enforcement of certain statutory requirements before she had taken any enforcement action, the Secretary had incorrectly characterized this case as a pre-enforcement challenge to her authority to force Connecticut to comply with the requirements of NCLB if and when the state ceased to be in compliance (Westlaw, 2005). Further, Connecticut contended in its argument against the federal government that the issue was not its potential future noncompliance with NCLB requirements but with Secretary Spellings’ noncompliance at that time (Westlaw, 2005).

Further, the state argued that by “imposing federal mandates on it without providing the necessary funding to pay for them along with denying its requests for a waiver of these mandates, the Secretary was in violation of the requirements of the Unfunded Mandate Provision of NCLB and the Spending Clause of the U.S. Constitution” (p. 6). Moreover, Connecticut contended that these violations were not speculative concerns relevant to only a possible future

enforcement action on the part of the federal government (Westlaw, 2005). Rather, the state held that these were violations that had already occurred and further burdened it in its struggles to both educate children in its public school system and satisfy the unfunded federal mandates imposed by Secretary Spellings' inflexible interpretation and implementation of NCLB (Westlaw, 2005).

In responding to Connecticut's legal arguments, the federal government contended that "other provisions of the NCLB Act contradicted the state's interpretation of the Unfunded Mandates Provision" (p. 18). However, the state of Connecticut in response held that the federal government was ignoring the overall structure of NCLB and misrepresenting its claims (Westlaw, 2005). Further, Connecticut held that it was "not contending that the NCLB Unfunded Mandates Provision meant that the federal government must pay all education expenses in the state" (p. 18). In addition, the state held that it was "not even arguing that the federal government must pay something toward state goals on educational standards" (p. 18). Connecticut held that it was not even arguing that the federal government must pay for all of its testing expenses (p. 18). Rather, the state of Connecticut held that what it was arguing is that "by operation of the NCLB Mandate Provision, the federal government essentially obligated itself to pay all the additional expenses imposed upon states by NCLB requirements" (p. 18). Moreover, Connecticut argued that "other provisions of NCLB that addressed state expenditures and the level of federal funding did not negate its claims regarding the Unfunded Mandate Provision" (p. 18).

In its legal argument against the federal government, Connecticut pointed to "the statutory provisions for optional additional programs as a case-in-point" (p. 18). The state

highlighted the fact that the Unfunded Mandates Provision is in the “General Provisions” (Title IX) of the NCLB Act (p. 18). The state of Connecticut argued that it was as such, a “general rule applicable to all ten titles of the NCLB Act” (p. 18). Further, Connecticut held the view that “this did not mean that there were no exceptions to the general rule particularly for specific optional programs” (p. 18). Therefore, Connecticut argued to the Court that a requirement for state financial support for grants to start a family literacy program, a statewide telecommunications network program, or the Advanced Placement Incentive Program for example did not render the Unfunded Mandates Provision inoperative” (p. 18). Rather, the state contended that they were “optional programs with specific requirements that were apart and separate from the general requirements of the overall NCLB Act” (p. 18). Connecticut also noted “in a similar vein that having a completely separate private company testing program that is part of a separate statutory scheme such as the National Education Statistics Act where the federal government is required to fully fund costs does not negate or impinge upon the general federal requirement to cover all additional expenses applicable to NCLB by the Unfunded Mandates Provision” (p. 18).

Further, the state of Connecticut held in its legal arguments that the purpose of the NCLB Act was to actually increase available resources for education as opposed to decreasing them (Westlaw, 2005). In addition, the state contended that “the Unfunded Mandates Provision covered additional expenditures imposed by NCLB” (p. 18). Connecticut argued that “it was not intended to be an opportunity for states and localities to replace their state education budgets with federal funds” (p. 18). Therefore, the state in its legal arguments against the federal government held that “the statutory prohibition that precluded states and localities from cutting back on their level of education spending was not inconsistent with the state’s position” (p. 18).

Connecticut noted that “maintenance of effort” provisions or “non-supplanting” provisions were “common and routine provisions in federal funding statutes” (p. 18).

The state of Connecticut also argued before the Court the fact that “Congress provided an overall threshold funding requirement within the NCLB Act where no state would be required to commence or administer NCLB mandated assessments until Congress allotted a minimum level of funding” (p. 19). Connecticut in its legal arguments highlighted the fact that the “minimum funding requirement served as a check upon Congress by binding future legislative bodies to allot a threshold level of funds for the assessment piece of Title I of the ten titles in the NCLB Act” (p. 19). Further, the state argued that “it did not diminish or excuse the obligation the federal government had to administer all ten titles of the NCLB Act in a manner that ensured that no state or locality was directed how to allocate their resources, spend funds, or incur costs not paid for by the federal government” (p. 19).

Connecticut contended that the basic language of the Unfunded Mandates Provision essentially dictated that Secretary Spellings and her staff could not require states and localities to spend their own funds in order to meet costs and expenses associated with the NCLB Act’s requirements (Westlaw, 2005). Further, the state argued that “Secretary Spellings’ contention that the purpose was to limit the ability of federal officials to layer both expensive and burdensome requirements at the agency level on top of the broad conditions established by Congress” would essentially make the Provision somewhat redundant (p. 19). Moreover, the state held that Secretary Spellings had no authority outside her statutory confines and therefore, a statutory provision that precluded her from acting outside of her statutory authority was not necessary (Westlaw, 2005). Connecticut argued before the Court that Secretary Spellings’

“proposed interpretation bared no relationship to the actual statutory language” (p. 19). In addition, the state contended that her interpretation “failed to explain why Congress saw fit to prohibit any mandates, directions, or controls over state and local resources or impede the federal government from requiring a state or locality to spend any funds or incur costs” (p. 19).

Connecticut also held that Secretary Spellings’ interpretation “lacked any support in the relevant legal history” (p. 19). The state argued that Congress appeared to have no concerns over the U.S. Department of Education’s “piling onto the requirements of its federal statutory enactments” (p. 19). Rather, “Congress appeared to be committed to avoiding imposing federal statutory duties and requiring states to fund expenses incurred in complying with such duties”(p. 19).

The state of Connecticut in its legal arguments against the federal government referred to the U.S. Supreme Court’s landmark opinion in *South Dakota v. Dole* (1987) where the nation’s highest court “set forth the recognized limits on the federal government’s Spending Clause powers and basically reiterated that the financial inducements offered by the federal government to states to enlist their participation in certain federal programs could become so coercive as to violate a provision of the Tenth Amendment” (p. 22). This provision of the Tenth Amendment was that “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” (p. 22). Connecticut referred to the Court’s positioning in *West Virginia v. U.S. Department of Health & Human Services* (2002) where it held that “while Congress may use its spending powers to encourage the states to act, it may not coerce states into action” (p. 22). If the Congressional action amounted to coercion rather than encouragement, then the Court held that the action would not be a proper

exercise of the spending powers and would instead be a violation of the Tenth Amendment” (p. 22). An analysis of the legal arguments for this case reveals that in general, “judicial determinations as to whether the federal government may have exceeded its Spending Clause powers are often inextricably linked to judicial analyses of whether a Tenth Amendment violation has occurred” (p. 22).

The state of Connecticut argued that in “asserting that the Court should deny it the opportunity to prove its Spending Clause and Tenth Amendment claims, Secretary Spellings essentially acknowledged that conditions placed on the state’s receipt of federal financial assistance must be clear and unambiguous so that it may exercise knowing and reasoned choice in determining whether to participate in certain federal programs” (p. 22). The state also contended that Secretary Spellings “further acknowledged that federal legislation under the Spending Clause was essentially viewed by the courts as being in the nature of a contract with the states” (p. 22). However, while appropriately acknowledging these legal components, Connecticut in its legal arguments against the federal government essentially accused the Secretary of selectively choosing certain excerpts from the NCLB statutory scheme, the relevant case law, and potential evidentiary facts to reach what it believed was an unjustified conclusion that it did not warrant a hearing (Westlaw, 2005). In short, the state argued that the Court should decline to follow Secretary Spellings’ arguments for a dismissal of the case (Westlaw, 2005).

The state of Connecticut in its legal arguments against the federal government accused Secretary Spellings of putting forth two false premises (Westlaw, 2005). The first was the federal government’s contention that Connecticut “had refused to comply with the requirements set forth in the NCLB Act” (p. 22). The second was that Secretary Spellings “had correctly interpreted

and construed statutory provisions setting forth these requirements” (Westlaw, 2005; p. 22). The state of Connecticut argued that “in accordance with the basic meaning of these and other provisions of NCLB it had merely sought to have the federal government comply with the Unfunded Mandates Provision” (p. 22). Connecticut contended that this should be accomplished by either the federal government paying any extra costs incurred in the state’s compliance with the new NCLB mandates or granting it the waivers it requested “so as to prevent any expenditure of state funds to meet these new mandates” (p. 22).

Further, the state of Connecticut contended that its position was supported by all of the statutory provisions and therefore, while annual testing in all grades was the expectation in general, the state would not be required to expend any additional resources to be in compliance with any federal requirements “including annual testing” (p. 23). Moreover, the state argued that it “should always have an inherent right to seek waivers of any kind from federal requirements with the Secretary giving meaningful consideration of all requests on a case-by-case basis” (p. 23).

Secretary Spellings took the position that “in accepting federal funds under the ESEA as amended by NCLB”, Connecticut in effect “agreed to expend its own funds to comply with the new federal requirements” (p. 23). The state of Connecticut also noted before the Court that the Secretary “claimed that notwithstanding the existence of the waiver provisions of the NCLB Act, she acted within her statutory powers under the law in denying any meaningful, individualized consideration to repeated requests for waivers of particular provisions including annual testing” (p. 23). Further, the state argued that the Secretary made these claims despite its “unrefuted contention that compliance with such provisions would potentially disrupt and degrade its

historic and highly successful testing program” (p. 23). Further, Connecticut contended that it would be forced “to incur a substantial and unnecessary expenditure of its own funds” (p. 23). Moreover, the state argued that “if the statutes had the implausible meanings and constructions Secretary Spellings had ascribed to them, they would have clearly misled the state of Connecticut in violation of the Spending Clause limitations described in the case law” (p. 23).

Connecticut also noted before the Court that the federal government in its arguments against the state, attempted to use the fact that the state had signed “statement of assurances” to undermine the state’s legal arguments (p. 23). The federal government argued that Connecticut’s action was essentially “an unqualified commitment by the state to perform conditions established by the NCLB Act in order to obtain federal funding” (p. 23). However, the state of Connecticut contended that it “did not assure that it would comply with Secretary Spelling’s misguided construction of the various statutes which it claimed protected it by essentially ensuring it would not have to expend its own funds to comply with the new federal mandates” (p. 23). Connecticut also argued that the various statutes ensured that it would also “receive meaningful consideration of requests for waivers on any provision of the NCLB Act” (p. 23). Moreover, Connecticut argued before the Court that “given the extensive clarification and guidance pronouncements Secretary Spellings deemed necessary to instruct states on NCLB requirements, it could hardly be claimed that any conditions placed on its receipt of NCLB funds were absolutely clear and unambiguous” (p. 23).

Connecticut essentially contended in its legal arguments against the federal government that Secretary Spellings selectively cited only the part of the NCLB Act pertaining to the annual testing provision and basically ignored other relevant statutory provisions (Westlaw, 2005).

Further, the state contended that in a similar vein, the Secretary “ignored significant relevant case law particularly in relation to its Tenth Amendment claims” (p. 23). Connecticut essentially held that “these Tenth Amendment claims not only challenged the clarity of federal conditions, but also their coercive nature” (p. 23).

In short, Connecticut held that the statutory provisions pertaining to NCLB should be interpreted based upon the strict language of the statute (Westlaw, 2005). In other words, the state held firm to its position that the NCLB Act contained no unfunded mandates (Westlaw, 2005). In addition, the state argued that based upon the language of the statute, “meaningful consideration of requests for waiver of any provision of the law including the annual testing expectation is guaranteed” (p. 25). Connecticut contended that Secretary Spellings’ “interpretation of statutes and inflexible imposition of her requirements violated conditions under which it elected to participate in the program and was coercive” (p. 25).

The state of Connecticut in its legal arguments against the federal government held that Secretary Spellings sought to avoid judicial review of her illegal actions by essentially “asserting that the statute under which the waivers were sought left the decision as to whether to grant waivers solely to her discretion without any statutory or regulatory guidance” (p. 25). Further, even if this were in fact the case, Connecticut argued before the Court that the Secretary could not as she did in this instance refuse to exercise her discretion (Westlaw, 2005).

The state of Connecticut argued that one of the key “statutory benchmarks that provides the Court with judicially cognizable standards against which it could judge whether Secretary Spellings had properly exercised her discretion was provided by the Unfunded Mandates Provision” (p. 27). In making this claim, the state held to its position that “this provision assures

that any state participating in the federal program could not be required to expend state funds to meet NCLB's requirements" (p. 27). Further, Connecticut contended that while it was clearly in a legal dispute with the federal government as to the "meaning and applicability of this provision", it should be entitled to establish that the provision meant what it said (p. 27). Moreover, in light of Secretary Spelling's "misreading or misinterpretation of the provision", Connecticut argued that she had "failed to properly consider the provision's possible impact of its waiver requests" (p. 27). In fact, one of Connecticut's often stated essential claims in its legal dispute with the federal government was that "given the legal rule embodied in the provision, the Secretary was required by law to either waive the requirements that would force the state to expend state funds in violation of the Unfunded Mandates Provision and Connecticut state law or grant its waiver requests so as to ensure that state funds need not be expended in violation of both the federal and state laws" (p. 27).

Connecticut contended that not only was Secretary Spelling's "categorical refusal to meaningfully consider waivers on a principal provision of the law an obvious rejection of the complicated balancing of various factors such as monetary or educational components that are the hallmark of matters committed to agency discretion, these decisions stand for the proposition that in the realm of sound education policy and decision-making, state viewpoints and determinants should be honored and respected" (p. 28). Moreover, the state argued that based upon legal precedent, "courts must be careful to avoid imposing their view of preferable educational methods upon the states" (p. 28).

In analyzing the state's legal arguments against the federal government, it is clear that Connecticut's objective was to convince the court to deny the Secretary's Motion to Dismiss the

lawsuit against the federal government (Westlaw, 2005). In articulating its legal arguments, Connecticut articulated to the Court that the state was spending its own funds on NCLB federal mandates at that time and its “neediest school districts and students faced real immediate harm if they were denied judicial review” (Westlaw, 2006; p. 3). The state eventually amended its complaint allegations to basically “clarify that the first count simply sought a declaratory judgment from the Court on the meaning of NCLB’s Unfunded Mandates Provision” (p. 3). The state argued that its’ “claim for legal guidance from the Court on a critical term of a comprehensive federal statutory scheme clearly fell within the criteria for obtaining a declaratory judgment in the federal courts” and would face “substantial and immediate harm if it was denied access to judicial relief” (p. 3).

In contrast to previous litigants who sought judicial review in order to avoid compliance with the statutory scheme, Connecticut argued to the Court that it was and remained in compliance with the provisions of NCLB as interpreted by Secretary Spellings (Westlaw, 2006). The state articulated to the Court that it “sought neither to violate NCLB nor avoid the law’s requirements” (p. 3). Rather, Connecticut stressed that it was merely “seeking a declaratory ruling regarding the interpretation of the Unfunded Mandates Provision along with an order requiring Secretary Spellings to be in compliance with the Court’s ruling on that interpretation” (p. 3).

Connecticut held that Secretary Spellings “never represented that it could obtain some declaratory relief on the meaning of the Unfunded Mandates Provision through the administrative process” (p. 3). The state argued that the Secretary conceded that if any administrative hearing were held, it would only address whether it had violated the NCLB Act or

the state's assurances (p. 3). Further, the state pointed out that the "General Education Provisions Act (GEPA) lacked any existing procedural mechanism for it to even initiate any type of proceeding before the U.S. Department of Education's administrative law judges" (p. 3). Moreover, the state in its legal arguments noted that Secretary Spellings would have had to initiate an enforcement proceeding following some violation of the NCLB Act in order for a GEPA administrative process to be invoked (Westlaw, 2006).

Connecticut pointed out the fact that under Secretary Spellings' legal argument, "in order for states to obtain a judicial determination on the meaning of an educational statutory provision, and to correct the Secretary's possible misinterpretation or misapplication of that provision, the state must be willing to lose all of its federal funding at least temporarily or risk losing it permanently through an unreviewable sanction imposed by her" (p. 4). Moreover, Connecticut also noted in its legal arguments against the federal government that Secretary Spellings' administrative process did not even permit it to initiate a proceeding (Westlaw, 2006). Instead, the state highlighted the fact that the federal government essentially "required a state to violate the law as well as its assurances and wait for the Secretary to initiate an enforcement proceeding" (p. 4). The state argued that "neither cooperative federalism nor the rule of law requires such brinkmanship just to obtain a declaratory judgment on the meaning of a federal statute" (p. 4).

An analysis of the legal arguments for the *Connecticut* case reveals that there was also a clear dispute between the state of Connecticut and the federal government over the issue of funding levels (Westlaw, 2006). Connecticut held that "overall federal NCLB funding was insufficient to meet its overall costs of complying with the law's requirements" (p. 4). Most significantly, the state noted that Secretary Spellings was essentially silent on the issue

(Westlaw, 2006). Connecticut also argued that federal NCLB funding for assessments which at that time were \$5.8 million per year was insufficient to meet its annual costs for assessments at that time which were \$14.4 million as well as “its modified special education assessments” (p. 4). For example, the state brought to the Court’s attention that “for March 2006 assessments, the NCLB mandate was basically underfunded by some \$8.6 million” (p. 4).

During oral arguments, “the Court did ask the plaintiffs in the case to essentially amend their complaint to specify whether federal funding would be sufficient to meet the state’s costs if it were to adopt suggestions regarding simplified assessments” (p. 5). These suggestions offered by then Deputy Secretary Simon included “administering multiple-choice tests in grades 3, 5, and 7 with the approved Connecticut tests administered in grades 4, 6, 8, and 10” (p. 5). They also included “using multiple-choice for the NCLB science tests in grades 5, 8, and 10 along with replacing its writing assessments as its third academic indicator with daily attendance records” (p. 5). However, Connecticut argued that “even if it adopted these suggestions, the federal funding for assessments would still be insufficient to meet its expenses for assessments” (p. 5).

Further, the state argued that this particular scheme would significantly degrade its assessment process and potentially undermine the core purpose of NCLB (Westlaw, 2006). Connecticut pointed out that “NCLB repeatedly and consistently prohibited Secretary Spellings from mandating, directing, or controlling any state’s curriculum, standards or assessments” (p. 5). The state stressed that the “Secretary was expressly forbidden from requiring specific assessment instruments as a condition of the approval of a state plan” (p. 5). Connecticut brought to the attention of the Court that unlike the Deputy Secretary’s suggestion, its testing

programs at the time including a writing assessment were essentially processed through a peer review process (Westlaw, 2006). Further, the state noted that its testing programs were approved by the Secretary “as appropriate and within the scope of NCLB’s requirements” (p. 5).

Connecticut also argued before the Court that “Secretary Spellings notably did not hold that its plan, standards, and assessments were beyond the scope of the NCLB Act nor did she excuse it from complying with its submitted and approved plan” (p. 5). The state held the position that its “program as well as its waiver requests were fully consonant with the letter and purpose of the law” (p. 5).

Connecticut held that the federal government’s legal position that the Deputy Secretary’s suggestion before the Court constituted an approved option and that a minimalist approach was all that was required by the NCLB Act was essentially inconsistent with the language and purpose of the law (Westlaw, 2006). In addition, the state argued that it was inconsistent with Secretary Spellings’ unqualified approval of its plans (Westlaw, 2006). Moreover, even if it adopted the suggestions by the Deputy Secretary, Connecticut noted that “federal funding would still be inadequate” (p. 5).

The Federal Government’s Arguments Against The State

The federal government relied upon Connecticut’s persistent achievement gap in framing its legal arguments against the state (Westlaw, 2006). The central theme of the federal government’s argument to the Court was that Connecticut was essentially “failing its most disempowered children” (p. 2). The federal government noted that the “chasm that separated Connecticut’s affluent and primarily white schools from its poor and predominantly minority schools was vast” (p. 2). In fact, this level of disparity between primarily white schools and

predominantly minority ones was noted by the Connecticut Supreme Court's landmark decision in *Sheff v. O'Neill* (1996) "where the court found that public schools in Hartford, Connecticut were racially and ethnically isolated and that students attending these schools had not been provided with a substantially equal or adequate education as required by the Connecticut state constitution" (pp. 2-3). The federal government noted in formulating its arguments against the state that "although the court ordered Connecticut to remedy these constitutional violations, minority and poor students within Hartford and other areas of the state continued to receive an inadequate education" (p. 3).

The federal government argued before the Court that the educational inadequacies outlined in the mid-1990s by the Connecticut Supreme Court were persistent not only in Hartford public schools both those throughout the entire state (Westlaw, 2006). For example, the federal government in framing its opposing arguments highlighted the fact that at the time of litigation, Connecticut ranked "last among states for its poor to non-poor achievement gap on measures such as the National Assessment of Educational Progress or NAEP" (p. 3). In addition, the federal government noted that these "inadequacies and the immense gap in achievement between groups of students were exemplified by remarkably disparate test scores that the state's students received on its Connecticut Mastery Test (CMT) a statewide proficiency examination" (p. 3; See Appendix 1). For example, the federal government highlighted compelling statistics and brought to the Court's attention the fact that "while 88% of white fourth-grade students were considered proficient in math, only 56% of African American students were considered proficient" in the subject (p. 3). Similarly, in the area of English, the federal government noted that "while 76% of white fourth-graders were proficient in the subject, only 41% of African American students

reached a level of proficiency in English” (p. 3). Further, the federal government noted that “these disparities persisted through eighth grade and into high school” (p. 3).

An overview of the *Connecticut* case reveals that there were groups and individuals who intervened in support of the federal government in its arguments against the state. For example, “the Connecticut State Conference of the National Association for the Advancement of Colored People (the Connecticut NAACP) along with three individual students enrolled in three of the state’s lowest performing public schools submitted a Memorandum of Law in support of a Motion to Intervene as defendants in this action brought by the state of Connecticut against the federal government” (p. 2). The Connecticut NAACP and these individuals as interveners in the case on behalf of the federal government “sought to protect their interest in the state of Connecticut’s full and complete compliance with the letter of the NCLB law” (p. 2). These interveners “sought to secure enhanced educational opportunities and outcomes that the U.S. Congress basically intended when it approved the NCLB Act with overwhelming bipartisan support in 2001” (p. 2). Further, these interveners in support of the federal government contended before the Court that “any tangible benefits would potentially be impaired if the state of Connecticut succeeded in its campaign to avoid responsibilities under NCLB” (p. 2). Moreover, they argued that “intervention was necessary to guarantee or ensure that these children’s interests as well as the interests of other children were fully and adequately represented in this suit” (p. 2). In short, these interveners held the view that their “Motion must be granted in order to give some voice to their special or unique concerns and to articulate and fully protect their rights under the law or statute” (p. 2).

An analysis of the *Connecticut* case reveals that the “individual interveners were essentially the intended beneficiaries of NCLB such as children and the parents of children attending public schools with a high percentage of low-income students” (p. 4). These were basically “public schools that received Title 1 funding and are subject to the requirements of the NCLB Act that Connecticut sought to evade” (p. 4). These educational institutions “included two elementary schools and one middle school that were among the lowest-achieving schools in the state of Connecticut. In fact, an assessment of the Connecticut case shows that “the entire school district of Hartford where these schools were located had failed to make adequate yearly progress or AYP” (p. 4). Moreover, these districts were identified by the state as “districts in need of improvement under Title 1” (p. 4). Those in support of the federal government’s position argued that “these particular children were recognized by the U.S. Congress as deserving explicit attention and academic acceleration by educators and were the beneficiaries of Title 1 funds” (p. 4).

These interveners in the *Connecticut* case in support of the federal government’s position argued that the “NCLB Act sought to accomplish its stated purpose which was ensuring that students receive a fair, equal, and significant opportunity to obtain a high quality education by establishing high-quality academic assessments and accountability systems so that students, teachers, parents, and administrators can measure progress” (pp. 6-7). They supported the statute because they argued before the Court that it “met the educational needs of low-achieving children in the America’s highest-poverty schools, English proficient children migratory children, and children with disabilities” (p. 7). Further, these interveners in support of the federal government’s position in the case contended that NCLB could “close the existing achievement gap between minority and nonminority students and between disadvantaged

children and their more advantaged peers while also affording parents substantial and meaningful opportunities to participate in the education of their children” (p. 7).

The interveners supporting the federal government essentially argued that NCLB “conferred tangible, concrete benefits on Connecticut’s children and their parents that would no longer be available should the state be excused from its obligations by the Court” (p. 8). Further, they noted that “for a child attending Connecticut public schools at that time, even one school-year of delay or noncompliance by the state could have far-reaching effects particularly with respect to students who were achieving below the state’s grade-level standards” (p. 8). Moreover, “the longer these students were denied the benefits of the NCLB Act and the longer they were forced to wait for their schools to improve,” the interveners supporting the federal government argued that “the further behind students will fall” in terms of academic achievement (p. 8). In short, these interveners contended that the “relief sought by the state of Connecticut was far-reaching and if granted by the Court, it would essentially deprive them of important educational benefits” (p. 8).

These interveners also expressed concern over the state of Connecticut seeking the “more generalized relief of being allowed to avoid any expenditure of state funds to comply with NCLB’s requirements” (p. 8). They essentially argued to the Court that “if this relief were granted, it could potentially implicate other provisions of the law in which they may also have a direct interest” (p. 8). The interveners noted that these included “provisions concerning the public reporting of school and district data, and the quality of teaching in high-poverty schools” (p. 8). Further, these provisions also included “the alignment of curriculum and instruction to state standards along with the duty of states to ensure districts and schools have the capacity to

comply with Title 1 requirements” (p. 8). In addition, allowing parents the right to transfer their children to better schools or obtain supplemental services was also a provision of the law (Westlaw, 2006). Finally, there was a “provision of assistance and resources to low-performing schools” including “the effective reconstruction of persistently low-performing schools” (p. 8).

With the support of these key interveners, the federal government was able to bolster its arguments against the state of Connecticut and contended that essentially the state’s claim was before the wrong court and was ill-timed (Westlaw, 2005). The federal government argued that the state had not failed to comply with NCLB’s conditions for assistance and accordingly, Secretary Spellings at that time had taken no steps or measures to enforce these conditions against it (Westlaw, 2005). If Secretary Spellings had taken measures to “enforce conditions through withholding program funds, the federal government argued before the Court that the U.S. Congress had determined that any challenge to the Secretary’s action must first proceed through a comprehensive administrative review process and then proceed directly to the United States Court of Appeals for the Second Circuit” (p. 2). Because it brought forth a pre-enforcement challenge, the federal government contended that Connecticut essentially sought to circumvent this review scheme (Westlaw, 2005). Moreover, the federal government argued that in light of the “clear benefits in the case of developing a record through the administrative review process and given that any withholding of program funds would potentially be stayed pending the Court of Appeals’ consideration, Connecticut’s claim was not ripe for adjudication” (pp. 2-3).

The federal government also argued that Connecticut’s second claim “that requiring the state to comply with the NCLB conditions of assistance in order to obtain federal funding

violates the Spending Clause of the Tenth Amendment if compliance involved the expenditure of state funds was equally unavailing” (p. 3). The federal government noted that the state of Connecticut’s “claim was essentially based on the premise that it was unaware when accepting federal funds that it would be required to comply with the statutory conditions of assistance” (p. 3). Further, the federal government contended that in light of the “unambiguous statutory language requiring compliance including language that expressly addressed Connecticut’s obligations if federal funding fell below a certain level, the state’s premise was clearly untenable” (p. 3). Moreover, the federal government in its arguments before the Court stressed that “compliance with the NCLB law’s conditions was unquestionably a prerequisite to federal assistance and noted the fact that Connecticut received more than \$750 million in federal funds based on its unqualified pledge that it would comply with them” (p. 3).

Finally, the federal government contended that the state of Connecticut’s third claim that Secretary Spelling’s denial of its waiver requests was “arbitrary and capricious” was non-justiciable (p. 3). The federal government argued before the Court that Connecticut “could not invoke the Administrative Procedure Act to obtain judicial review of agency actions that are essentially committed to agency discretion by law” (p. 3). Further, it held that the “U.S. Congress had left the decision to grant or deny waiver requests entirely to Secretary Spellings and the NCLB law provided no guidelines for how she should exercise her discretion” (p. 3). In addition, the federal government highlighted the fact that “the decision to grant or deny waivers involved complex questions of educational policy that are peculiarly within the agency’s expertise” (p. 3). Therefore, the federal government contended that “it constituted the type of discretionary decision that is exempt from any judicial review” (p. 3).

The state of Connecticut's legal claims were dismissed in 2006 (Dunn & West, 2009). It was determined by the district court that Secretary Spellings had discretion to deny the state's waiver requests (Dunn & West, 2009). Most significantly, the critical question of the Unfunded Mandate Provision was never resolved by the court (Dunn & West, 2009). Because this question was essentially left unresolved, Attorney General Blumenthal appealed on behalf of the state with the U.S. Court of Appeals for the Second Circuit in 2008. The Second Circuit concurred with the lower court's ruling that the lawsuit was premature (Dunn & West, 2009).

The U.S. Supreme Court's Response To Connecticut v. Spellings (2005)

After failing at the lower court levels, the state of Connecticut moved to get their case heard by the U.S. Supreme Court (Reitz, 2011). In February 2011, the U.S. Supreme Court refused to hear Connecticut's challenge to the NCLB law (Reitz, 2011). Blumenthal who was formerly state attorney general and later U.S. Senator argued in response to the Court's pronouncement that this underscored the need for strong action through the legislative process to reform education policy (Reitz, 2011). However, this strong action through the legislative process never came into fruition (Reitz, 2011). The U.S. Congress' failure to act to reauthorize NCLB and address the overall shortcomings of the law is what prompted the Obama Administration to put forth its waiver policy in February 2012.

The Case of Pontiac v. Spellings (2005)

Aside from *Connecticut v. Spellings* (2005), there was another suit "filed in the early wave of state and local resistance to NCLB that focused specifically on the issue of unfunded mandates" (Dunn & West, 2009; p. 218). During the spring of 2005, *Pontiac v. Spellings* (2005)

was brought forth by a “coalition of nine school districts in Pontiac, MI that were largely African American, Laredo, Texas that were mostly Hispanic, and Vermont that were primarily rural and white along with a mix of local and state chapters of the National Education Association or NEA” (p. 218). The NEA which was the largest teachers union in the nation with about 2.7 million members was the leader in the action to file suit and financed it (Dunn & West, 2009). The NEA attempted but failed to get a state government to join it as a plaintiff in the suit (Dunn & West, 2009).

In assessing the *Pontiac* case, it becomes clear that from the very beginning the case was all about money, the meaning of the Unfunded Mandates Provision, and also the meaning of the Spending Clause of the U.S. Constitution (Dunn & West, 2009). The National Education Association or NEA argued that NCLB was making education worse by causing state and local governments to divert funds away from critical education areas (Dunn & West, 2009). Further, the NEA complained that the Bush Administration failed to recommend appropriations to essentially match the authorizations in the NCLB Act (Dunn & West, 2009).

In analyzing the *Pontiac* case, it becomes clear that the district court did not assert as the court did in the *Connecticut* case that the plaintiff's lawsuit was premature and that they needed to exhaust administrative remedies (Dunn & West, 2009). This is because administrative remedies are essentially reserved for state governments considering litigation which was the situation in the *Connecticut* case. In contrast, the *Pontiac* case consisted of a grievance against the U.S. Department of Education by the NEA, a national teachers union without the involvement of a state government. In analyzing the *Pontiac* case, it is important to note that the NEA attempted but failed to get a state government to join in the lawsuit as a plaintiff (Dunn &

West, 2009). Therefore, because administrative remedies appear to be reserved for state governments, it was not an option for the NEA who litigated against the federal government without the involvement of a state government.

In the case of *Pontiac v. Spellings* (2005), the district court granted Secretary Spellings' motion to dismiss (Dunn & West, 2009). Further, the court found the federal government's argument convincing that the Unfunded Mandates Provision (Section 9527a) only barred unauthorized actions by federal officers or employees (Dunn & West, 2009). In short, it considered the requirement that states use their own funds to pay for federal mandates to be authorized actions and therefore within the proper boundaries of the law. This court also did not limit the obligation of states and school districts to comply with NCLB requirements whether or not the federal government paid the added costs (Dunn & West, 2009).

After the district court's decision to grant Secretary Spelling's Motion to Dismiss, the plaintiffs appealed to the Sixth Circuit (Dunn & West, 2009). In January of 2008, a three member panel ruled 2-1 in favor of the plaintiffs (Dunn & West, 2009). The plaintiffs relied upon previous Supreme Court interpretations of the Spending Clause relating to the Individuals with Disabilities Education Act or IDEA (Dunn & West, 2009). In these cases, states were told that they had to pay expert fees for parents of disabled children who had gone to court (Dunn & West, 2009). In short, they were not given what the court referred to as clear notice (Dunn & West, 2009). In a similar vein, the Sixth Circuit ruled that statutes enacted under the Spending Clause of the U.S. Constitution such as NCLB must provide clear notice to states of their financial liabilities (Dunn & West, 2009). The court essentially ruled that in this instance NCLB

failed to provide clear notice to states as to who would bear the cost of compliance and reversed the district court's decision (Dunn & West, 2009).

However, a majority of the circuit's judges voted to hear the case again en banc or with the full court which meant that their previous decision was vacated and the case was restored to the docket as a pending appeal (Dunn & West, 2009). The Sixth Circuit affirmed the lower trial court's decision with an 8-8 decision (Talbert, 2010). The plaintiffs attempted to take their case to the U.S. Supreme Court but it refused to hear the appeal of the case (Dunn & West, 2009). The justices basically left intact a lower court's decision that dismissed the lawsuit (Dunn & West, 2009). Former U.S. Solicitor General Elena Kagan and now U.S. Supreme Court Justice argued on behalf of the federal government that NCLB refrains from dictating funding levels and instead grants states and school districts what she termed as "unprecedented flexibility" to target federal dollars to meet state and local educational priorities (Walsh, 2010; p. 1). Further, Kagan also argued on behalf of the U.S. Department of Education that NCLB allowed local schools to use substantial additional federal dollars as they see fit in addressing local educational challenges in return for meeting improved benchmarks (Walsh, 2010).

NEA's Arguments Against NCLB's Unfunded Mandates

The NCLB Act "provided states with additional resources to use in ensuring that their students including those from traditionally disadvantaged groups made adequate academic progress"(Westlaw, 2006; p. 8). The U.S. Congress did in fact recognize that the "billions of dollars in federal aid were only a small fraction of the funds needed to actually achieve these educational goals" (p. 8). In accordance, the law gives states a high degree of flexibility in terms

of designing their programs, setting their own standards for academic progress, and actually selecting the means for evaluating it (Westlaw, 2006). This degree of flexibility “does not render states unaccountable for the implementation of plans they submit to secure a federal grant” (p. 8). Rather, the main purpose of the statute “is to establish accountability for student achievement across the student population” (p. 8). Nevertheless, the plaintiffs in the *Pontiac* case declared or argued that states and school districts were precluded from spending their own state funds to comply with the requirements of NCLB (Westlaw, 2006). Further, the plaintiffs also asked the Court to declare that “any failure to comply with NCLB must be excused if it is attributable to a refusal to spend state or local funds” (p. 8).

The plaintiffs in the *Pontiac* case brought forth a suit in the U.S. District Court of Michigan and sought a declaratory judgment that the NCLB did not require school districts to comply with the law’s educational requirements if doing so would require states to spend their own funds to cover the additional costs of compliance (Westlaw, 2009). Further, the plaintiffs in the case argued that the NCLB Act was “ambiguous as to whether school districts were required to spend their own funds and that imposing such a requirement would be a violation of the Spending Clause” (p. 6).

The plaintiffs also alleged in their arguments against the federal government that in the years following NCLB’s enactment, the U.S. Congress had failed to provide both states and school districts with sufficient or adequate federal funds to be in compliance with the measure (Westlaw, 2009). For example, in formulating their arguments against the federal government, the plaintiffs highlighted the fact that “for five years from fiscal year 2002 to fiscal year 2006,

the U.S. Congress appropriated \$30.8 billion dollars less for Title I grants to school districts than it had actually authorized in NCLB” (p. 6). The plaintiffs in the *Pontiac* case sought a declaratory judgment that would state that states and school districts would be precluded from spending non-NCLB funds to be in compliance with NCLB mandates (Westlaw, 2009). Further, the plaintiffs sought a judgment from the court that any failure on the part of a state or school district to be in compliance with these NCLB mandates did not provide a basis for withholding federal funds that they would otherwise be entitled to under the law (Westlaw, 2009). The plaintiffs in the case also sought an injunction that would prohibit the U.S. Secretary of Education from “withholding from states and school districts any federal funds to which they are entitled under NCLB because of a failure to comply with NCLB mandates that were attributable to refusing to spend non-NCLB funds to achieve compliance” (p. 6).

In formulating their arguments against the federal government, the plaintiffs in the Pontiac case took direct issue with how the U.S. Secretary of Education was actually portraying NCLB (Westlaw, 2006). The plaintiffs challenged the Secretary’s portrayal of NCLB as a statute or law that “granted states and school districts unprecedented new and great flexibility to implement a set of broad conditions on federal funding as states and school districts see fit” (p. 5). The plaintiffs noted in their arguments before the Court that the Secretary suggested that the NCLB law merely requires states to set their own academic standards and design and implement their own annual student assessments along with establishing whatever programs they prefer to ensure that school and districts make adequate yearly progress or AYP as respective states define the term” (p. 5). They also challenged the Secretary’s assertion that the NCLB law “merely

requires school districts to assure states that districts will undertake measure or steps to improve schools that fail to make adequate yearly progress (AYP) as defined by states” (p. 5).

The plaintiffs argued that in contrast to what was argued before the Court by the U.S. Secretary of Education, the NCLB mandates were actually far more rigorous and specific (Westlaw, 2006). The plaintiffs in the *Pontiac* case acknowledged that the NCLB law did “provide school districts with unprecedented new flexibility in their allocation of Title I funds” (p. 5). However, they challenged the Secretary’s assertion that “funding flexibility somehow translates into flexibility in complying with NCLB mandates” (p. 5). In fact, the plaintiffs noted that “the very House Report cited by the Secretary in arguments before the Court makes it quite clear that the NCLB law imposes strict accountability measures on both states and school districts” (p. 5).

In contrast to what was suggested by the federal government, the plaintiffs in the case argued that it was not their position that both “states and school districts should be excused from compliance with their own educational obligations” (p. 7). Further, the plaintiffs also asserted that it was not their position that “federal funds must pay for every activity listed in state plans even if the activity is one in which states would engage through their own choice absent any NCLB mandates” (p. 7). Rather, the plaintiffs argued that their position was “simply that the U.S. Secretary of Education may not require states and school districts to take actions mandated by NCLB that respective states and school districts would not undertake absent the law’s mandates if doing so would require states and school districts to spend any funds or incur costs not paid for under the NCLB law” (p. 7).

In support of their arguments, the plaintiffs in the case highlighted the fact that before the NCLB law's enactment, there were no school districts in the nation that were "administering reading, language arts, and mathematics tests to 95% of their entire student populations in grades 3 through 8 and in high school" (p. 7). Further, there were also no school districts in the country "grading schools based on the participation and performance of students on such tests both in the aggregate and by disaggregated NCLB subgroups" (p. 7). In addition, prior to NCLB's enactment, no school districts in the nation were "taking the actions required by the NCLB against schools that did not achieve adequate test results for each student subgroup" (p. 7). The plaintiffs' interpretation of the Unfunded Mandate Provision (Section 9527a) of NCLB was essentially that the U.S. Secretary of Education could "require school districts to comply with the new NCLB mandates but only to the extent that federal funding covered the costs of compliance" (p. 7).

An analysis of the legal arguments for the *Pontiac* case reveals that while the plaintiffs in the case agreed with the U.S. Department of Education's view that "NCLB was not a device for essentially enabling states or school districts to reduce their educational expenditure's at the federal government's expense," they firmly believed that "NCLB was not intended to force states or school districts to basically increase their educational expenditures to pay for activities that Congress had mandated but failed to fund" (p. 7).

The plaintiffs in the case also argued before the Court that their interpretation was in accord with the understanding of seven states, and the District of Columbia who had filed amicus curiae briefs in support of their suit (Westlaw, 2006). This interpretation was that these states and

the District of Columbia had agreed to participate in NCLB with the basic understanding that the Unfunded Mandate Provision (Section 9527a) meant that they would not be required to spend their own funds to comply with the mandates of the law (Westlaw, 2006). Further, the plaintiffs and their supporters held that their interpretation of the Unfunded Mandates Provision (Section 9527a) was reasonable and more consistent with the federal system than U.S. Secretary of Education's interpretation (Westlaw, 2006). For example, the plaintiffs and their supporters raised the issue that under the Secretary's view, states and school districts would be left "hostage to the vagaries of the Congressional appropriations process" (p. 7). Further, they argued that states and school districts in attempting to comply with NCLB would "divert resources from existing state and school district educational programs and priorities that they believe would be more helpful to their students" (p. 7). They viewed this to be the likely scenario particularly if NCLB funding began to wane or fall short and as the law's "mandates grew increasingly more expensive to implement" (p. 7).

The plaintiffs for the case also took issue with the federal government's argument that states and school districts could simply opt out of NCLB if the federal funding was inadequate (Westlaw, 2006). The plaintiffs found this assertion by the federal government to be inadequate "because states and school districts must invest significant resources up-front in overhauling their educational systems to meet the NCLB law's mandates" (p. 8). The plaintiffs contended that "having so invested, states and school districts can't opt out of NCLB and forgo the funding provided even if it may be inadequate without seriously damaging their educational systems and their ability to serve the most vulnerable and neediest students in those systems" (p. 8).

In contrast, the view held by the plaintiffs in the case and their supporters who filed amicus curiae briefs in support of their suit was to “preserve the right of the U.S. Secretary of Education to basically compel compliance with the new NCLB mandates to the extent that those mandates were funded” (p. 8). However, to the “extent that the U.S. Congress failed to fund the NCLB mandates,” the plaintiffs and their supporters advocated “reserving to states and school districts authority to decide whether to devote valuable state and local resources to NCLB compliance rather than to other state or local educational priorities” (p. 8). The plaintiffs and supporters of their litigation argued before the Court that this interpretation of the Unfunded Mandate Provision (Section 9527a) “ensures that the choices as to whether to comply with the unfunded mandates are essentially made by the appropriate decision-makers” (p. 8). These decision-makers would be the “states and school districts that must pay for those mandates and live with the consequences for their respective students and school systems” (p. 8).

There were a number of supporters of the plaintiffs who filed amicus curiae briefs on behalf of the litigation against the federal government in the dispute over the NCLB law’s Unfunded Mandate Provision. The states of Connecticut, Delaware, Illinois, Maine, Oklahoma, and Wisconsin along with the District of Columbia filed these briefs through their respective Attorneys General because they argued that they essentially had a significant interest in the outcome of the *Pontiac* case (Westlaw, 2006). In their support of the plaintiffs’ litigation, they noted that “education historically has been the exclusive realm or domain of the states” (p. 6). They also stressed in their arguments that the “U.S. Supreme Court has repeatedly recognized education as perhaps the most important function of both state and local governments” (p. 6). These states and the District of Columbia reiterated in their arguments that “although educational

rights are noticeably absent from the federal constitution, nearly every state constitution requires the state to provide its children with an adequate education” (p. 6).

The supporters of the plaintiffs noted in their arguments that before the NCLB Act was passed, the role of the federal government in the area of education was “generally limited to providing supplemental resources to targeted groups of disadvantaged students” (p. 6). These disadvantaged students were “Title I students who faced economic disadvantages such as homelessness and high poverty along with special education students” (p. 6). Further, the plaintiffs’ supporters noted that in contrast, the NCLB Act affected all students in America’s public schools not only special education students or those in public schools that qualify for and receive Title I funding” (p. 6). They also highlighted the fact that “although the federal government provides only some 5% to 8% of total educational funding, through the NCLB Act, the federal government began dictating educational policy on a variety of education related issues such as teacher qualifications and the timing of annual student assessments” (p. 6).

These states and the District of Columbia who filed amicus briefs supporting the plaintiffs in the *Pontiac* case “disagreed with the district court’s determination or assessment that the Unfunded Mandates Provision (Section 9527a) of the NCLB Act merely meant that federal officials with the U.S. Department of Education could not add any additional obligations beyond the requirements of the law” (p. 7). They argued to the Court that this was not their understanding when they initially opted to participate in NCLB programs (Westlaw, 2006). These states and the District of Columbia contended that their understanding when they opted to participate in NCLB programs was that “based on the plain language and statutory context of the

Unfunded Mandates Provision (Section 9527a), neither states nor local school districts would be required to spend their own funds to comply with the NCLB law's mandates" (p. 7). Further, they argued that their "understanding of the plain meaning of the Unfunded Mandates Provision (Section 9527a) was significant and should be given effect by the Court to avoid considerable constitutional difficulties raised by construing the NCLB law in a manner that undermines states' settled expectations" (p. 7).

These supporters of the plaintiffs in the case argued that the Unfunded Mandates Provision (Section 9527a) essentially meant that the "federal government must pay any costs imposed upon states and local school districts by NCLB" (p. 7). In short, they contended that the U.S. Secretary of Education and other federal government officials associated with the U.S. Department of Education could not implement the NCLB Act's requirements in a manner that required states or local school districts to spend their own funds or incur costs not paid for under the law (Westlaw, 2006).

In addition to several states and the District of Columbia, an amicus brief was also filed in support of the plaintiffs in the *Pontiac* case on behalf of the "American Association of School Administrators (AASA) which was a nationwide organization that represented over 13,000 public school administrators" (p. 4). This organization and its members which also included public school superintendents from across the country argued that they were firmly committed to ensuring that America's public schools provide children with the best possible education (Westlaw, 2006). This brief was filed on behalf of AASA in order to "provide the Court with the relevant context and everyday consequences of the federal government's decision not to abide by

its commitment to fully fund NCLB and instead require states and school districts to fill a widening gap between funds promised by the federal government to states and school districts to implement NCLB and funds it actually had delivered for that purpose” (p. 4).

The AASA in its brief agreed with the plaintiffs in the case that the Unfunded Mandates Provision (Section 9527a) “imposed a broad prohibition against requiring states and school districts to spend their own funds for NCLB compliance” (p. 4). In fact, AASA’s interpretation of the provision was that this would “include compliance with requirements that are imposed by the NCLB law itself” (p. 4). The federal government essentially argued that the Unfunded Mandates Provision (Section 9527a) “could not possibly mean what the plaintiffs in the case said it meant because if states and school districts were obligated to comply with the mandates of NCLB only to the extent that they received sufficient federal funds to do so, this could prevent full implementation of the law” (p. 4). Moreover, they contended that this in turn could basically undermine the statutory purpose of improving all students’ academic achievement” (p. 4).

However, the AASA in its amicus brief took issue with the federal government’s position concerning the law’s provision (Westlaw, 2006). The AASA concurred with the plaintiffs’ observations that in the NCLB law, the U.S. Congress had “imposed some extensive and costly new mandates on both states and school districts in exchange for significant new federal funding in order to implement these mandates” (p. 4). In addition, they noted that “Congress recognized that the primary responsibility for setting education policy and establishing educational programs and priorities essentially resides with both states and school districts” (p. 4). The AASA suggested that “in this context, it was eminently reasonable for the U.S. Congress to conclude

that the ability of states and school districts to pursue educational programs and priorities that they believed would best further the education of their students should never be dependent on whether Congress follows through with its commitment to fully fund new NCLB mandates” (p. 4). In short, the AASA held the view that Congress did not expect states and school districts to divert their resources to be in compliance with NCLB thereby cutting back on their own educational programs and priorities each time that a gap developed between funds required to comply with NCLB mandates and funds provided by the federal government for that purpose” (p. 4). The AASA in its amicus brief essentially argued that the plaintiffs’ interpretation of the Unfunded Mandates Provision (Section 9527a) “reflected a balanced approach to the implementation of the NCLB law where state and school district educational programs and priorities are not held hostage to the vagaries of the Congressional appropriations process” (pp. 4-5).

The AASA also noted in its amicus brief in support of the plaintiffs the inherent problem of a shortfall in federal funding for NCLB (Westlaw, 2006). The AASA brought to the Court’s attention that “in the six years since NCLB had been enacted, Congress had essentially appropriated (for FY 2002-2006) and President George W. Bush had proposed (for FY 2007) an aggregate total of only \$72.547 billion in federal funding for NCLB leaving states and school districts with a funding gap or shortfall of at least \$43.703 billion to fill” (p. 5; see Appendix 2). Most significantly, the AASA highlighted the fact that the “amount of the funding gap steadily grew from fiscal year to fiscal year as the NCLB mandates became increasingly more extensive and expensive” (p. 5). In fact, during that current fiscal year, AASA noted that “more than two-

thirds of school districts in the nation were receiving less in NCLB Title I funds than they previously did” (p. 5).

The situation deteriorated further over the next few years with “28 states and nearly two-thirds of school districts nationwide that received less Title I monies for FY 2006 than they received during FY 2005” (p. 5). In addition, some 41 states were slated to receive less Title I funds under President George W. Bush’s proposed budget for FY 2007 than they did in previous years (Westlaw, 2006). The AASA argued that this deterioration was essentially a reflection of the reality that instead of increasing appropriations for NCLB compliance each year as had been promised when the law was enacted, Congress had actually cut NCLB funding in FY 2006 and at that time was considering flat lining NCLB funding for FY 2007 at the previous year’s level (Westlaw, 2006).

The AASA took the position in its amicus brief filed in support of the plaintiffs that “the fact that funds provided to states and school districts to comply with NCLB were declining at the same time that NCLB mandates were becoming more extensive and expensive indicated in and of itself that the funds provided by the federal government for NCLB compliance were insufficient” (p. 6). They pointed to a “mounting body of empirical evidence that confirmed that this was the case” (p. 6). In fact, to bolster their arguments before the Court, the AASA noted that since the enactment of NCLB, “no fewer than fifteen studies had been completed of whether states were receiving sufficient funding under the law to comply with its new administrative mandates and all but three of those studies had found that funding provided by the federal government fell significantly below the amount needed to comply even with just the state-level

administrative requirements of NCLB” (p. 6). Further, the AASA argued that “bearing in mind that state level administrative compliance costs were only a small part of the total NCLB administrative compliance costs, because the vast majority of those costs fell on school districts rather than states, and that the law’s compliance costs were by no means confined to administrative costs, but also included the very considerable costs of complying with the law’s mandate of bringing students up to federal mandated levels of proficiency by the 2013-2014 school year, it was clear that federal funding levels at the time covered just a fraction of what it had and would cost states and school districts to comply with the new NCLB mandates” (p. 6).

Finally, an analysis of the legal history of the *Pontiac* case also reveals that amicus briefs were also filed in support of the plaintiffs in the case on behalf of former Pennsylvania Governor Edward G. Rendell (D-PA) and “groups of state and local elected officials, teachers, education consultants, community activists, and parent of children enrolled in public schools in California”(Westlaw, 2006; Westlaw, 2006; p. 4). As “Governor of the nation’s sixth most populous state,” Rendell fully recognized and thus argued that “federal funding appropriated for the implementation of the NCLB law was insufficient and that additional resources would be essential to realize the vision of the law” (p. 4). In his support of the plaintiffs in the case, Rendell contended that “the imposition of the law’s requirements on a state such as Pennsylvania without sufficient federal funding to meet these requirements was in effect an unfunded mandate” (p. 4). Further, he argued that “despite sweeping changes sought by NCLB, federal funding in support of the law’s mandates at the time was woefully inadequate” (p. 4). Moreover, parties in the state of California who also filed an amicus brief in support of the case’s plaintiffs shared these concerns. They viewed the NCLB law’s requirements as “extremely costly to

implement” and also argued that the “federal government had not provided states with sufficient funds to meet the new requirements much less adequately educate their disadvantaged students” (p. 6).

The Federal Government’s Response To NEA’s Legal Claims

In response, the federal government found NEA’s arguments to be unconvincing (Westlaw, 2006). For one, the U.S. Department of Education held that a “state’s commitment to making academic progress under the standards set out in its plan was essentially the cornerstone of the NCLB Act” (p. 8). Moreover, the federal government also contended that “it could not be seriously argued that a state could refuse to spend its own money to assist its elementary and secondary school children become proficient in areas such as reading, mathematics, and science” (p. 8).

In response to NEA’s legal claims, the federal government also pointed out that as “unlikely as their contention may be, this was essentially the only issue that was even justiciable” (p. 8). The U.S Department of Education noted before the Court that although NEA’s suit “purported to adjudicate the obligations of states, there were no states involved in the litigation as either a plaintiff or as a defendant” (p. 8). Moreover, the federal government also contended that the plaintiffs had not asked the Court to address an ensuing “controversy concerning the implementation of a particular statutory provision” (p. 8). Rather, the U.S Department of Education highlighted the fact that NEA and its supporters in the suit had asked the Court for “a sweeping declaration that they argued would render states unaccountable for the commitments of their plans whenever their failures resulted from a refusal to spend their own funds” (p. 8). In

short, the federal government asserted to the Court that there was essentially “no legal basis for such a declaration as it was at odds with the statute’s text, structure, history, and purpose” and that the “judgment of the district court should be affirmed” (p. 8).

The federal government in its arguments before the Court noted that the primary purpose for the NCLB Act was to basically assist states in discharging what is mainly a state and local responsibility which is increasing the proficiency of elementary and secondary school students in the areas of reading, math, and science (Westlaw, 2006). They also highlighted the fact that while the U.S. Congress had appropriated some \$60 billion since the law had been enacted, it was fully understood that the federal government would ultimately provide only a small portion of the overall funding for elementary and secondary education in the nation (Westlaw, 2006). Moreover, they noted that rather than “condition receipt of funds on compliance with predetermined uniform standards,” Congress “asked participating states to essentially develop their own standards and means of assessing student achievement” (p. 9). The U.S. Department of Education stressed that “these measures must ensure that all students including those who are disadvantaged meet high academic standards” (p. 9). However, they highlighted the fact that “their content was determined by the states and not the federal government” (p. 9).

The U.S. Department of Education also noted that each state’s standards are contained in their own specific plan that they must submit in order to obtain a grant under Title I of the NCLB Act (Westlaw, 2006). They stressed to the Court that each state’s plan must demonstrate that it has “adopted challenging academic content and achievement standards in the areas of reading, math, and science with individual states left to create their own standards” (p. 9). Further, they

noted that these state plans “must also provide for annual student assessments to measure the extent to which these assessments are actually being achieved” (p. 9). However, they stressed to the Court that the “assessments like the standards themselves were designed by the states rather than the federal government” (p. 9).

In a similar vein, the federal government also stressed to the Court that while the state must essentially commit to be held accountable for ensuring that all schools and schools districts make adequate yearly progress (AYP) or implement appropriate measures, it is the job of the individual states in the first instance to define that progress and also set adequate or appropriate benchmarks” (p. 9). The U.S. Department of Education highlighted the fact that the “requirement of accountability was essentially the centerpiece of the NCLB Act” (p. 9). The idea here they noted before the Court was that the plans devised by respective states “were not merely statements of intentions” (p. 9). Rather, the federal government highlighted the fact that “it is a state’s commitment to be accountable for making academic progress as defined in the plan” (p. 9). Most significantly, the federal government was careful to stress that in committing to implement their plans, states did not cap their duties at some specified level of state or local spending (Westlaw, 2006). In addition, they contended that states’ obligations were not “contingent upon specified levels of federal funding” (p. 9). In fact, in the few cases or instances where Congress had intended a different result, the federal government argued that the institution had indicated this explicitly (Westlaw, 2006).

In analyzing legal arguments relevant to the *Pontiac* case, it is clear that the federal government took real issue with the plaintiffs in the case arguing in a similar vein as the

plaintiffs in the *Connecticut* case that all of the commitments in state plans are subject to some limitation because states and school districts are precluded from spending their own funds to comply with the requirements of NCLB (Westlaw, 2006). In short, “states would essentially make themselves accountable only in so far as the implementation of their plans would cost states no money” (p. 10). The way that the plaintiffs in the *Pontiac* case “framed the issue in their proposal for injunctive relief was that any state’s failure to be in compliance with NCLB must be excused if it can be attributed to a refusal to spend state or local funds” (p. 10).

The federal government took issue with these formulations on the part of the plaintiffs (Westlaw, 2006). It embraced the view that the implementation of plans developed by respective states could “loosely be characterized as compliance with NCLB” (p. 10). However, the federal government concluded that a more accurate characterization is that the “question whether a state implements its plan is simply a means of assessing a state’s implementation of its own academic curriculum” (p. 10).

Further, the federal government argued before the Court that “Congress plainly never intended to finance such an endeavor” (p. 10). For example, it highlighted the fact that the statute or law “explicitly provides that school districts may not receive any funds under the NCLB Act unless it is found to have maintained a specified level of fiscal effort in the preceding year” (p. 10). The federal government argued before the Court that the plaintiffs acknowledge and are therefore fully aware that “this maintenance of some fiscal effort is one of the rules that are applicable across the board to the interpretation and implementation of the statute” (pp. 10-11).

The U.S. Department of Education noted that while NCLB “clearly contemplates the expenditure of state funds to implement state curricula,” the plaintiffs in the *Pontiac* case argue that a provision of the law (Section 9527a) precluded them of any spending obligations (p. 11). However, the U.S. Department of Education in its legal arguments against the plaintiffs stressed that “as the district court previously explained this provision in the law restricted the authority of the federal government to impose certain additional conditions not contained in the statutes or state plans” (p. 11). In short, the federal government held the view that this did not affect or impact a “state’s duty to implement the plans they had submitted” (p. 11).

The federal government in its arguments against the plaintiffs highlighted the fact that the district court previously explained that this provision of the law “restricted the ability of agency officials to add to the statutory conditions but would not excuse a state’s failure to implement statutory conditions themselves” (p. 11). In short, the federal government argued that the language of the provision indicated that the “U.S. Congress clearly intended to prohibit federal officers and employees from imposing any additional unfunded requirements that were beyond those provided for in the statute” (p. 11). Further, they contended that this provision of the law “protected the flexibility that NCLB gave to states and school districts by ensuring that federal officials don’t micro-manage state educational systems by adding additional mandates such as curriculum or staffing directives or compelling certain expenditures such as per pupil spending, teacher salaries, or purchasing new equipment” (p. 11).

Moreover, in contrast to the plaintiffs in the *Pontiac* case, the federal government in essence did not view the NCLB law or statute as a “mandate” (p. 12). The U.S. Department of

Education argued before the Court that the U.S. Congress as an institution “fully understood that a law or statute that essentially imposes conditions on the receipt of federal funds is clearly not a mandate” (p. 12). Further, in order to bolster their arguments before the Court, the federal government highlighted the fact that the “Unfunded Mandates Act of 1995 expressly exempted conditions of federal assistance from the definition of federal intergovernmental mandates” (p. 12). The federal government argued that it was clear that the U.S. Congress understood this distinction when it enacted NCLB (Westlaw, 2006). For example, in presenting its arguments against the plaintiffs, it noted that “when House and Senate committees reported on NCLB, they presented the Congressional Budget Office’s conclusion that the NCLB law contained no mandates” (p. 12). The view supported here was that “the bill contained no intergovernmental mandates as defined in the Unfunded Mandates Reform Act because any costs incurred by state, local, or tribal governments would result from complying with conditions of aid” (p. 12).

The federal government asserted that the plaintiffs in the *Pontiac* case “may argue that states will naturally continue to spend money on education but that they can’t be required to spend their own state funds to be in compliance with the statute” (p. 15). However, the federal government noted in its arguments that “the cornerstone of the NCLB Act is essentially the achievement of adequate yearly progress or AYP under state plans” (p. 15). They argued that “even if the plaintiffs’ position did not render state plan commitments largely meaningless, it is unclear how a court could determine whether and to what extent a state’s failure to achieve adequate yearly progress was attributable to a lack of either federal or state funds as opposed to other factors such as curriculum implementation or teacher quality that could affect student achievement” (p. 15). In a similar vein, the federal government argued that it is largely “unclear

how a court could determine whether and to what extent broad progress failures could be characterized as failures to implement statutory requirements rather than systemic educational failures” (p. 15). The federal government held that “even on its own terms, the plaintiff’s requested declaration did nothing but set the stage for future litigation and ongoing judicial involvement in the educational process” (p. 15).

The U.S. Supreme Court’s Response To Pontiac v. Spellings (2005)

In examining the U.S. Supreme Court’s decision to deny certiorari or refusal to hear *Pontiac v. Spellings* (2005), it is clear that the nation’s highest court was swayed by the federal government’s arguments emphasizing flexibility. This argument emphasized flexibility for states in terms of how they could fund NCLB federal mandates such as securing additional funds to pay for the mandates through undertaking cuts in other state budget areas and “unprecedented flexibility” to target their federal dollars to meet both state and local educational priorities (Walsh, 2010; p. 1). In addition, the federal government’s argument that the NCLB law allowed local schools to use additional federal dollars as they saw fit in addressing local educational challenges in return for meeting improved benchmarks resonated with the Court (Walsh, 2010).

CHAPTER 4

Connecticut and Pontiac: A Comparison of the Legal Cases

In comparing and contrasting the *Connecticut* and *Pontiac* cases, it becomes evident that there are similarities and differences between these two cases. In terms of similarities, at the core of the litigation for both cases is the question of the Unfunded Mandates Provision (Section 9527a) of NCLB and whether or not states and school districts should be required to spend their own funds to implement certain requirements or mandates associated with the law such as testing requirements. In addition, when one examines the various entities that were involved in these cases as either plaintiffs or interveners in support of them, it is clear that teachers unions at state and national levels were heavily involved in both cases. For example, in the instance of the *Connecticut* case, a state level teachers union the Connecticut Education Association (CEA) along with the national teachers union the National Education Association (NEA) intervened in the case in support of the state of Connecticut by filing amicus briefs (Dunn & West, 2009). In the *Pontiac* case, the NEA essentially took the lead as plaintiff and even financed the litigation (Dunn & West, 2009).

While these two landmark cases concerning NCLB and the question of unfunded mandates for states are indeed similar, there are also some inherent differences. A key difference between the two cases is who was involved in the initiation of litigation as plaintiffs. In the *Connecticut* case, a state government was the initiator of litigation against the federal

government concerning the issue of NCLB and unfunded federal mandates for states (Dunn & West, 2009). In short, Attorney General Richard Blumenthal filed suit on behalf of the state of Connecticut taking the position that based upon a strict interpretation of the language of the Unfunded Mandates Provision (Section 9527a), states should be precluded from spending their own funds to pay for the NCLB law's mandates such as testing requirements (Dunn & West, 2009). In contrast, in the *Pontiac* case, as opposed to having the involvement of a state government in the initiation of litigation against the federal government, NEA the national teachers union led the litigation against the federal government (Dunn & West, 2009). An analysis of the case reveals that it was not without effort that a state government was not involved in initiating litigation as a plaintiff in the *Pontiac* case. In actuality, an analysis of the legal history surrounding the case reveals that NEA attempted to get a state government involved as a plaintiff but was not successful (Dunn & West, 2009).

An analysis of these two cases also reveals that there are differences between the cases over the issue of the applicability of administrative remedies. For example, prior to the *Connecticut* case being appealed to the nation's highest court, the district court essentially took the position that the lawsuit initiated by the state of Connecticut was premature because the state could have utilized the option of administrative remedies open to state governments to address their grievances with the NCLB law's mandate requirements (Dunn & West, 2009). In contrast, the administrative remedies option was not suggested by the district court in the *Pontiac* case because administrative remedies as an alternative to pursuing litigation tend to be applied to state governments which did not comprise the plaintiffs in this case. The plaintiff in the *Pontiac* case was the national teachers union or NEA. Therefore, the court in the *Pontiac* case in contrast to

what happened in the *Connecticut* case, did not take the position that the plaintiff's lawsuit was premature.

In both landmark cases, there was extensive debate over the meaning of the language in the NCLB law's Unfunded Mandate Provision (Section 9527a). Those who opposed the law's mandate requirements essentially engaged in a strict interpretation of the provision which they argued specifically specified that states are precluded from having to spend their own funds on the NCLB law's mandates such as testing requirements (Dunn & West, 2009). While the district court's interpretation of the language of the law's provision was somewhat ambiguous in the *Connecticut* case, an analysis of the legal history of these cases reveals that the district court in the *Pontiac* case attempted to provide some clarity over the meaning of the language in the law's provision.

The district court in the *Pontiac* case interpreted the language of the Unfunded Mandates Provision (Section 9527a) to refer only to unauthorized actions by federal officials (Dunn & West, 2009). These unauthorized actions referred to certain conditions not contained in the statute or state plans (Dunn & West, 2009). The court determined that these unauthorized actions not contained or included in the NCLB law were the ones restricted by the provision (Dunn & West, 2009). However, the district court determined that actions such as those contained in the statute requiring states to pay for mandates are considered authorized actions and therefore within the proper boundaries of the law (Dunn & West, 2009).

Finally, another major distinction between the *Connecticut* and *Pontiac* cases is how the courts ultimately handled the cases. For example, when the district court in the *Connecticut* case ruled that Connecticut's state government should have exhausted administrative remedies and

that their initiated lawsuit was somewhat premature, this was a definitive decision on the part of the court and no additional courts moved to rehear the case. In contrast, the appeals court in the *Pontiac* case “voted to rehear the case en banc vacating the panel’s previous decision and restored the case to the docket as a pending appeal”(Westlaw, 2009; pp. 6-7). In deciding to rehear the case en banc, the appeals court articulated that the threshold question was whether the case was even properly before them (Westlaw, 2009). In deciding to rehear the case en banc, the appeals court explained that “claims were not amenable to the judicial process when they are filed too early, too late, or when claimants lack sufficiently concrete and addressable interests in disputes” (p. 7). However, in moving to rehear the case en banc and restore the case to the docket as a pending appeal, the court concluded that the plaintiffs met these requirements for standing “based on their allegation that they had to spend state and local funds in order to pay for NCLB compliance” (p. 7).

Application of Theoretical Perspectives

In addressing the question of whether states should be required to use their own funds to pay for the NCLB law’s mandates such as testing requirements, this research embraces an advocacy participatory approach and advocates that given the existing shortfalls in federal funding states received for education over a number of fiscal years, states should receive more federal assistance to implement NCLB related mandates (Westlaw, 2006). This research is at the same time emancipatory because by advocating that states should receive more federal assistance to implement federal mandates pertaining to the NCLB law, this could in turn indirectly assist in freeing at-risk children from potentially being subjected to substandard school systems. Finally, when one uses a conceptual lens that examines the NCLB law as it is related to federalism, it is

clear that the measure has altered the relationship between federal and state levels of government over the issue of education (Shippy, 2006). This research shows that given the level of regulation imposed on states by the federal government due to the NCLB, it is clear that as some scholars contend “the very nature of federalism has been altered” by the measure (p. 2; McGuinn, 2006; p. 68).

Research Findings

This legal historical analysis of the *Connecticut* and *Pontiac* cases revealed that in terms of the question of what factors or variables influenced the U.S. Supreme Court to deny writs of certiorari and refuse hearing both cases, the Court clearly was swayed by the federal government’s flexibility argument. This study found that the reasoning behind the U.S. Supreme Court’s decision to refuse the *Connecticut* and *Pontiac* cases was that it concluded that states had “unprecedented flexibility” (Walsh, 2010; p. 1). The Court concluded that states had flexibility not only in meeting the funding requirements for federal mandates pertaining to NCLB such as testing requirements but also in targeting federal dollars to meet state and local educational priorities (Walsh, 2010). For example, the Court concluded that states could secure additional funds to pay for the mandates through undertaking or implementing cuts in other state budget areas (Walsh, 2010). This study found that the federal government’s argument that the NCLB law allowed local schools to use additional federal dollars as they saw fit in addressing local educational challenges in return for meeting improved benchmarks clearly resonated with the nation’s highest court (Walsh, 2010).

In terms of the question of how are states meeting these requirements that are mandates in light of the current economic challenges they face, this study found that some states have

secured the additional funds to pay for the mandate by cutting from other areas within their state budget. However, this study also found that with the Obama Administration's waiver policy that has allowed states to opt out of some of these mandates if they meet certain requirements, some states have elected to pursue this option as opposed to struggling to use their own state funds to pay for NCLB's mandates. This study found that those states who have been successful at securing waivers from the Obama Administration are "still required to essentially fulfill the NCLB law's mandate that they test students annually in grades 3-8 and once in high school in the areas of reading and mathematics" (Cavanagh, 2012; p. 2). However, these states securing the waivers would be "freed from having to meet the deadline for having all students reach proficiency by 2014" (p. 2). In addition, "school districts and schools would also be freed from any sanctions for not making adequate yearly progress or AYP under the law such as restructuring failing schools or implementing options for tutoring or public school choice" (p. 2).

When these states secure waivers, the Obama Administration expects them to essentially set new academic targets (Cavanagh, 2012). For example, these states can "establish certain goals that recognize the growth in student test scores over time" (p. 2). The federal government has often argued that "this has been made possible by advances in states' testing and accountability systems" (p. 2). This study found that "states will also be allowed to tailor interventions to meet the needs of individual schools and subgroups of students" (p. 2). However, if states are not granted waivers, the federal government expects them to comply with the existing law (Cavanagh, 2012).

This study also found that while some states have concerns about using their own state funds to pay for the law's mandates, they would rather undertake measures to secure additional

funds to pay for them than to pursue a waiver option that they view as no viable solution and equally problematic. This study found that what troubles some states such as Texas, Nebraska, Montana, and California is that those states who receive a waiver “must commit to several reforms dictated by the Obama Administration” (Scott, 2012; p. 1). These reforms include “establishing teacher evaluation and accountability systems and moving towards a set of standards to ensure that their students are college and career-ready” (p. 1). These states opting out of applying for the waiver contend that states granted the waiver may end up “pursuing one course of action only to have the U.S. Congress adopt a dramatically different policy” (p. 1).

This study found that officials from states deciding to opt out of the waiver policy “cited these concerns as part of their apprehension” to the measure (p. 1). Further, it also found that there is essentially “a philosophical divide as some states are uncomfortable with agreeing to requirements set by the federal government in exchange for flexibility” (p. 1). These states feel that there are “some strings attached” to receiving this waiver from the federal government (p. 1). For example, they point to states receiving the waivers having to “commit to college and career-ready standards and some view those parameters also included in Race To The Top requirements as a veiled endorsement of the Common Core State Standards” (p. 1). In short, many of these states that have elected not to seek the waiver are concerned that the waivers “indicate movement toward a more nationalized system by essentially establishing federal guidelines for academic standards and teacher evaluations which they are not comfortable with” because they view this as an unnecessary intrusion on the part of the federal government in an area they believe is a state domain (p. 1).

In terms of the questions of whether states should be forced to cover the costs of mandates given a provision in the NCLB measure that says states and school districts can't be forced to spend their own funds implementing the law's testing requirements or unfunded mandates and is there an inherent contradiction in the NCLB law over the issue of testing requirements that are unfunded mandates, this study found that while the district court's interpretation of the language of the law's Unfunded Mandates Provision (Section 9527a) was somewhat ambiguous in the *Connecticut* case, the district court in the *Pontiac* case attempted to provide some clarity over the meaning of the language in the law's provision. The district court in the *Pontiac* case determined that actions such as those contained in the statute requiring states to pay for mandates are authorized actions and therefore within the proper boundaries of the law (Dunn & West, 2009). Therefore, this study found that the district court determined that states could be required to use their own funds to cover costs of the law's mandates because this is in essence an authorized action contained in the statute (Dunn & West, 2009). In other words, it was within the proper boundaries of the law for states to be required to use their own funds to cover costs of NCLB's mandates such as testing requirements (Dunn & West, 2009). Moreover, the court determined that only unauthorized actions not contained or included in the statute were the ones restricted by the provision (Dunn & West, 2009). Therefore, it was determined by the district court in the *Pontiac* case on this basis that there was no inherent contradiction in the law (Dunn & West, 2009).

In relation to the question of why has there not been more litigation under the NCLB law, this study found that this can be attributed to the considerable financial costs and time commitment it requires to pursue litigation (Dunn & West, 2009). This study also found that despite the host or "range of issues embedded in the law that could trigger potential litigation, the

law has not generated a large volume of litigation” (p. 213). Many legal scholars find this somewhat perplexing given the litigious nature of American society along with the “length, complexity, and extreme controversy surrounding the NCLB law itself” (p. 213). In fact, this study revealed that there have only been about a dozen lawsuits but some of them have raised constitutional questions (Dunn & West, 2009). These lawsuits essentially fall in two groups (Dunn & West, 2009). The first group is those lawsuits that have “originated with the state and local governments and public employees that have borne the burden of meeting the NCLB law’s demands”(p. 213). The second group is litigation that originates with plaintiffs who make claims on behalf of the students who the law purports to benefit” (p. 213).

In addressing the question of how will states respond legally to the Obama Administration’s decision to allow greater flexibility in issuing waivers from federal mandates, this study found that states may be less inclined to litigate in the future at least over the question of unfunded federal mandates pertaining to NCLB. For one, there has already been sparse litigation in the country concerning issues relevant to NCLB (Dunn & West, 2009). Moreover, the cost and time commitment along with a track record where plaintiffs have not succeeded in winning lawsuits related to NCLB certainly serve as a deterrent for future litigation particularly over the question of unfunded federal mandates (Dunn & West, 2009). Further, the Obama Administration’s waiver policy has clearly been a game changer in terms of how states may respond legally to their concerns over NCLB. With the introduction of a waiver policy for states to opt out of some NCLB mandates, it is safe to reach the conclusion that those states who have concerns over NCLB mandates will most likely seek the waiver option as opposed to embarking upon costly and time consuming litigation to challenge the law.

Finally, in terms of how will this development result in states being less inclined to pursue litigation, this study found that the Obama Administration's waiver option will give states concerned with using their own funds that they argue is diverted away from critical areas for education at state and local levels the opportunity to avoid the mandates without having to incur the costs and extensive time commitment associated with pursuing litigation. However, this study also found that the potential for litigation still exists for areas other than the issue of unfunded mandates. In short, there is still some potential for future litigation given the language and nature of the NCLB law. For example, this study found that issues of concern pertaining to ELLs or English Language Learners, and special needs students and the use of their test scores in determining schools' status for adequate yearly progress (AYP) could certainly trigger future litigation outside of the dispute over unfunded federal mandates.

Significance of Research Findings

The significance of these research findings is that they offer some revelations concerning what may happen in the future concerning litigation. Given the Supreme Court's positioning in the *Connecticut* and *Pontiac* cases and the rulings from lower courts, it appears unlikely that the unfunded mandates question will be the focus of any future litigation. Further, the Obama Administration's waiver policy may reduce the likelihood of future litigation over unfunded mandates since states can apply to receive this waiver and opt out of having to use their own funds to pay for mandates such as testing requirements. However, there are still other aspects of the law that could spawn future litigation such as the use of EELs (English Language Learners) and special needs students' test scores in determining schools' AYP status. Given the controversies surrounding the law, there still remains the possibility of suits being filed on behalf

of student beneficiaries of the NCLB law (Dunn & West, 2009). However, this study found that these suits are “hardly more numerous than those on behalf of aggrieved state and local governments” and most significantly, “they have been no more successful” (p. 221). In the future, these types of suits outside the purview of unfunded mandates could potentially be filed by “advocacy groups that are sustained by foundation grants” (p. 221).

Future Research

As an extension of this research which applies several theories to the study of judicial institutions to interpret or critique their positioning on critical issues such as the funding of testing requirements relevant to the NCLB law, I plan to pursue a qualitative research project to determine what are some of the policy implications of unfunded federal mandates associated with NCLB for respective states? Further, I will seek to determine through this research what has been the initial impact of the Obama Administration’s recently initiated policy of allowing states to seek a waiver from particular requirements if they have in place comparable programs at the state level that have successfully maintained high education standards? The overall aim of this research will be to make a significant contribution to the existing body of literature as there is a need for more research in the field of education policy which examines the policy implications of unfunded federal mandates for states in light of the current economic challenges many of them face in funding K-12 education.

The methodological approach for this study will be qualitative in nature and will utilize results from semi-structured interviews with policy experts on NCLB associated with the National Conference of State Legislatures in order to determine what are some of the policy implications of unfunded federal mandates pertaining to NCLB for states? In addition, this study

will also use results from semi-structured interviews with officials in state level departments of education that sought and gained federal mandate waivers from the Obama Administration and those that opted not to seek the waiver option and instead, attempted to financially meet the requirements of the NCLB law's federal mandates to assess what has been the initial impact of this waiver policy.

This proposed research is significant and will make a contribution to the current body of literature because there is a need for more research in the field of education policy that examines the policy implications of unfunded federal mandates for states given the persisting economic challenges many of them face in terms of funding K-12 education. In short, this study attempts to fill this void in the current body of research within the field. In relation to its limitations, the overall scope or context of this study will not be focused upon identifying or bringing to the forefront the ideal policy to achieve education reform. This is outside the scope of this proposed study and is clearly an existing limitation. Rather, this study will seek to assess how states are managing to meet requirements to fund education related federal mandates pertaining to NCLB and identify policy implications for respective states of these mandates.

Appendix 1

CONNECTICUT'S ACHIEVEMENT GAP EXEMPLIFIED IN CMT SCORES

(2004)

MATH	ENGLISH
88% of White fourth-grade students were considered proficient	76% of White fourth-grade students were considered proficient
56% of Black fourth-grade students were considered proficient	41% of Black fourth-grade students were considered proficient
In math, these disparities persist through eighth grade and into high school	In English, these disparities persist through eighth grade and into high school

Source: (Westlaw, 2006; p. 3)

Appendix 2

AMOUNTS AUTHORIZED AND APPROPRIATED FOR NCLB TITLE 1 FUNDS FOR FISCAL YEARS 2002-2006 WITH RESULTING SHORTFALLS

Fiscal Years	FY02	FY03	FY04	FY05	FY06	FY07	Total
<i>Authorization</i>	13,500	16,000	18,500	20,500	22,750	25,000	116,250
<i>Appropriation</i>	10,350	11,689	12,342	12,740	12,713	12,713	72,547
<i>Shortfall</i>	3,150	4,311	6,158	7,760	10,037	12,287	43,703

Source: (Westlaw, 2006; p. 5)

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