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In July 2011, a massive cheating scandal in the Atlanta public education system shocked the nation and became fodder for critics of federal education programs. Governor Nathan Deal ordered an investigation that eventually implicated one hundred and seventy-eight teachers and principals, alleging that they had systematically changed answers on standardized tests for more than ten years. Prior to the school district's exposure, Atlanta was thought to be advancing considerably: Atlanta's superintendent, Beverly Hall, was named Superintendent of the Year in 2009. The city was considered a model for the success of the No Child Left Behind Act[2] (NCLB) legislation, when in actuality, this reputation was largely falsified.[3]

Atlanta's failure is one unfortunate example of the problems associated with federal education mandates like NCLB; it also demonstrates how such mandates can be a violation of federalism and may even encroach on sacrosanct constitutional boundaries.[4] The Supreme Court has ruled repeatedly that public education is with-

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1 An undergraduate student double majoring in Political Science and French Studies, Ryan has ambitions to work in international business and politics. He would like to give a special thank you to the editors who worked tirelessly on this article, including Brock Laney, Camila Trujillo-Medina, Jon Bird, Kurt London, Stephanie Corine, and Stephen Richards.

2 No Child Left Behind Act 115 § 1425 (2002).

3 *See* Are They Learning? Rampant Cheating by Teachers in Atlanta's Schools Hurts Students and Destroys Trust, N.Y. Times, July 17, 2011, at SR11; *see also* Kim Severson, A Scandal of Cheating, and a Fall From Grace, N.Y. Times, September 7, 2011, at A16.

4 *See The Role of Federal Mandates in Intergovernmental Relations: A Preliminary ACIR Report*, U.S. Advisory Comm'n on Intergovernmental Relations (Feb. 16, 2012 11:00 AM), http://www.library.unt.edu/gpo/acir/Mandates.html.

in the domain of the state,[5] but the reality is that under the current system states are mostly reliant on federal funding to support their schools. Accordingly, federal funds have essentially become an instrument of control used alternatively for reward and punishment. This reliance on federal funds provides the federal government with significant latitude in its legislative power and scope. In fact, federal funding is often a sufficient incentive for states to accept federal programs which may or may not be properly under federal jurisdiction.

This "carrot-and-stick" approach is problematic in two key ways: first, mandates frequently do not include enough funding for states to accomplish the federal government's goals. These unfunded mandates place undue burden on the states and directly oppose the "general welfare" intended by the Spending Clause.[6] Second, even when federal mandates are sufficiently funded, the importance of the attached funding creates a situation where the mandate supersedes state education law; thus, it blurs the line between mandate and legislation.[7] Essentially, the federal government legislates under the guise of funded mandates. The constitutionality of this practice is unclear and will be the primary issue addressed within this article.

Federally funded, and by extension unfunded, mandates have the force of law and therefore should be subject to constitutional constraints. This article examines recent Supreme Court decisions that discuss the role of the federal government in public education. Recent court challenges regarding NCLB offer an excellent case study concerning the validity of federal mandates. These cases indicate that federal mandates have the force of law due to the

5 United States v. Lopez, 514 U.S. 549 (1995) In the majority opinion, Justice Rehnquist argued that if Congress has power to regulate both crime and education, as they seem to be implying, then there is no end to their power under the Commerce Clause. Thus, he affirmed the decision of The Fifth Circuit Court of Appeals finding that in banning guns from school areas Congress had exceeded its constitutional power.

6 U.S. Const. art. I, § 8, cl. 1 (James Madison noted that the General Welfare Clause is exceptionally broad and may be used to increase or centralize power. Most often a statute is considered the general welfare if it is universally applicable as well as generally supported).

7 Connecticut v. Spellings, 453 F.Supp.2d 459 (2006).

exceptional leverage created by federal funding. In most cases, the consequence of non-compliance is a withdrawal of funding for key programs, effectively debilitating the state's education programs.[8] If federal mandates have the force of law, it follows that federal mandates ought to operate within the Constitution similar to standard law. Therefore, federal mandates should not be acceptable with respect to education.

I will organize the article as follows: (I) First, I examine federal mandates and explain why constitutionality ought to be the primary consideration of their legality. This will include the argument that federal mandates can gain the force of law. (II) Next, I demonstrate that NCLB is an example of a coercive federal mandate, since the opt-out was unrealistic and in most cases would have been debilitating to local education systems. (III) I then apply several recent decisions to the question of the constitutionality of federal education mandates (specifically NCLB), showing that significant judicial support exists for the position that education is strictly a state issue. (IV) Finally, I consider certain implications of this position on both federal funding as well as future court decisions concerning federalism and education policy.

I. Federal Mandates:

For many years, the Federal Legislature has used federal mandates to implement national policies and programs. These mandates are similar to law in their construction and passage and are obeyed as law with few exceptions. Federal mandates are passed as a part of legislative bills or joint resolutions and are intricately tied with decisions made by the Appropriations Committee.[9] Mandates are a func-

8 South Dakota v. Dole, 483 U.S. 203 (1987) In the few cases where states have not fully complied with federal mandates, the consequences have most often been financial. The exception is when the federal government grants a waiver to that state such as in the recent case of President Obama granting 10 state waivers concerning the No Child Left Behind Act.

9 Clark G. Radatz, *Funding State and Federal* Mandates, Legislative Reference Bureau, http://legis.wisconsin.gov/lrb/pubs/ib/96ib3.pdf (Last visited Feb. 2, 2012).

tion of budgets and are frequently made a prerequisite for receiving funding.[10] Federal mandates have steadily increased in number since 1960. In January 1996, the Advisory Commission of Intergovernmental Relations (ACIR) observed "more than 200 separate mandates… involving about 170 federal laws reaching into every nook and cranny of state and local activities." In a separate report, they identified "3,500 decisions involving state and local governments relating to more than 100 federal laws…."[11] Mandates have become an intricate part of federal oversight although they are technically not law.

Federal laws and mandates are very similar in both their method of passage and their power; the principal differences between them are the consequences associated with noncompliance. For instance, if a state were to disregard a federal law, the matter would likely go to a federal court which then decides whether to enforce it (often by force) or to support the state.[12] On the other hand, the federal government cannot forcibly compel a state to uphold such a federal mandate; they only have the power to withdraw the associated funding.[13] There are two types of mandates: unfunded mandates are those law-like institutions and statutes, which are given to the states without compensation or funding but may be attached to other program funding (such as federal highway provisions), and funded mandates, which are given with the necessary funding to carry out the proposed action.

10 *Id.* at 3.

11 *The Role of Federal Mandates in Intergovernmental Relations: A Preliminary ACIR Report*, U.S. Advisory Comm'n on Intergovernmental Relations (Feb. 16, 2012 11:00 AM), http://www.library.unt.edu/gpo/acir/Mandates.html.

12 Wiley A. Branton, *Little Rock Revisited: Desegregation to Resegregation*, 52 The Journal of Negro Education 3 (1983) (After the landmark supreme court case Brown v. Board of Education, Dwight D. Eisenhower ordered the national guard to compel the admittance of nine black students to a Little Rock High School. On their first day, the students attended class under armed guard).

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

Unfunded mandates must be accompanied by legal justification as to why there is an absence of funds, except when the mandate is an enumerated federal power. For example, in *United States v. Lopez*,[14] the Court ruled that Congress had not provided "sufficient justification" of a substantial relationship between the Gun-Free School Zones Act[15] and congressional commerce power, thus showing that the courts still enforce constitutional compliance. This tradition was later codified in the 1996 Mandate Reform bill[16] in which Congress sought "to end the imposition, in the absence of full consideration by Congress, of federal mandates on State, local, and tribal governments without adequate federal funding."[17] In cases where the funded or unfunded mandate is not an enumerated federal power, states must be given the necessary funds to carry out the federal program.

Although federal mandates themselves are not binding, they are often part of legislative acts such as bills and joint resolutions.[18] State and local governments have in the past, been able to 'opt-out' of federal mandates. However, because they are connected in appropriations to significant funding, sometimes unrelated to the law in question, states rarely attempt noncompliance. When such attempts are made, however, federal mandates may carry considerable repercussions. For example, in 1987 the state of South Dakota sued the federal government over the loss of federal highway funds. This punishment was administered in response to the state's refusal to change the minimal drinking age to 21 as was required by federal statute.[19] Ultimately, the courts upheld the federal mandate because

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

15 Gun-Free School Zones Act of 1990, H.R. 3757, 101st Cong. § 1702 (1990).

16 Unfunded Mandate Reform Act (UMRA), 2 U.S.C. § 1501 (1995).

17 *Id* at 2.

18 *Id* at 3.

19 National Minimum Drinking Age Act, 23 U.S.C.S. § 158 (1984).

they considered it to be in the general welfare.[20] In order to keep millions of dollars of necessary funding for their highways, South Dakota was forced to accept the federally mandated change although it was against the wishes of the state.[21]

This case marked a turning point in the way in which Congress created and administered statutes, ushering in the age of federal mandates. Since *South Dakota v. Dole*, there have been hundreds of federal mandates and, most noteworthy, almost uniform compliance. As one of the scholastically worst school districts in the nation, the Atlanta school district had little chance for success within the federal system. Poor testing and dropout rates would have resulted in school closures and significant funding cuts. Why would the state willfully enter into such a losing system? Why would they sacrifice probity for the appearance of improvement rather than customizing a state system? The answer is the same as in the *South Dakota* case: there is no reasonable alternative funding outside of the related federal mandate. The financial consequences of noncompliance are simply too great.

Significantly, the 1996 Mandate Reform Bill does not provide any meaningful restriction for federally funded mandates. In fact, in the last several decades funded mandates have grown significantly in proportion to statute. Additionally, the implementation of funded mandates has often been upheld by the courts, as in *South Dakota v. Dole*. In one noteworthy part of the majority decision the judges state that, "economic coercion could be a factor that invalidates an otherwise legitimate exercise of the spending power."[22] Despite ruling in favor of the government, the judges recognized that the price of non-compliance could be high enough to be considered compul-

20 South Dakota v. Dole, 483 U.S. 203 (1987). The secretary of transportation Elizabeth Dole. The petitioners alleged that this statute violated the spending clause found in U.S. constitution article 1 section 8 clause 1. In their decision, the appellate court upheld the defendants saying that this statute was constitutional pursuant to the "general welfare" of the several states.

21 *Court Backs Law Withholding Highway Funds*, Houston Chronicle News Service, Jun. 23, 1987, at A4.

22 South Dakota v. Dole, 483 U.S. 203, 533-534 (1987).

sion, although this threshold was never explicitly created. In *United States v. Butler*, Judge Owens, in the majority opinion stated that, "The power to confer or withhold unlimited benefits is the power to coerce or destroy."[23] Ruling on agricultural subsidies, the reasoning of the court was as follows: "If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin."[24] Again, the courts concluded that funded mandates have the potential to reach compulsory levels.

Despite the possibility of becoming *de facto* legislation, federally funded mandates are rarely challenged or relinquished. Thus, there has been little need for the federal government to justify its use of mandates, except in cases where they are unfunded and non-enumerated. This is likely the case because federal funding has become increasingly vital to state government functionality. That is, although federally funded mandates have become more and more compulsive, the states are less and less inclined to challenge them due to the risk of losing millions—and in some cases billions—of dollars in federal funding. There is nothing constitutional which prohibits federal coercion of state law via economic or other incentives. On the other hand, the courts have made it clear that there exists a point at which federal incentives essentially gain the force of law.[25] In individual cases, this happens when rejecting payments may lead to "financial ruin;"[26] for states, these conditions are the same. If rejecting federal funding as a result of *opting out* of a federal program cripples or threatens ruin on the state system, then such a mandate has gained the force of law.

The deficiency in past court rulings is that there is no definitive estimate of the threshold where a funded federal mandate becomes compulsive. However, there have been several cases which dem-

23 US v. Butler, 297 U.S. 1, 71 (1936). In this decision, Owens clarifies that while Congress may tax and apportion funding for the 'general welfare', they may not use taxation as a means of control over state powers.

24 *Id.* at 71.

25 Connecticut v. Spellings, 453 F.Supp.2d 459 (2006).

26 Butler, 297 U.S. 1, 71 (1936) at 71.

onstrate that any system of federal funding that is contingent on a set of requirements, and which has no viable alternative, must be compulsive. On the other hand, would an alternative opt-in system which receives equivalent federal funding be any less compulsive? The answer is that federal funding in any form has the potential to create dependency. In the case of education, Elementary and Secondary Education Act (ESEA) and the subsequent No Child Left Behind Act provide hundreds of millions of dollars in federal funds to states each year. States that opt-out of this system would lose their funding, and this would seem to be in violation of the General Welfare Clause of the Constitution. In short, if a funded federal mandate is not inherently in the federal domain, and if it exacts debilitating penalties in case of non-compliance, then it becomes compulsive and thus non-constitutional. This will be discussed further in section IV.

II. No Child Left Behind:

One of the most important federal mandates for the U.S. education system is NCLB.[27] Conceived by the Bush administration, NCLB amended and reauthorized the already existing ESEA.[28] The purpose of NCLB was to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education."[29] NCLB is a "standards" based education reform, and accordingly requires all schools that receive federal funding to comply with national standardized testing and school evaluation. The federal government creates—and states administer—requisite standardized testing. School benchmarks are created by the federal government and administered

27 No Child Left Behind Act 115 § 1425 (2002).

28 The Elementary and Secondary Education Act 79 § 27 (1965). ESEA was renewed several times in the legislature, the most recent reincarnation being No Child Left Behind.

29 20 U.S.C. § 6301 (2001).

by the states.[30] Additionally, this act reauthorizes Title I funding,[31] mandates that teachers be "highly qualified," institutes a new reading program, redistributes education funding to focus on low income areas, and allows the schools greater leeway in their use of federal funds. All states were automatically required to implement this federal program in place of ESEA.[32]

Both the accolades and punishments in the program were implemented via financial incentives, much as other federal mandates. Unfortunately, the incentive structure ultimately had some negative consequences. In the Atlanta School District, teachers felt pressured to keep test-scores artificially high.[33] In this case, the schools and students were compelled to make improvements according to NCLB in order to extend and maintain their funding. As a result, they had to resort to cheating in order to keep their jobs and their schools open. It may be that fundamental change in a school's academic progress requires more than just an increase in funding and more than just a few years. The quality of an education system likely has to do with the socio-economic, cultural, and familial environment to which the child is exposed. If this is the case, then it stands to reason that education policy must be made and adapted to local circumstances. Educators and lawmakers in Georgia and other areas understood that NCLB would ultimately limit their funding whether they complied or not. Their actions epitomize the essence of NCLB, which is that it has the force of law. Not abiding by the requirements of this federal mandate, or opting out, would have resulted in the loss of significant funding; in most instances, a majority of state education funding. It is a case where the "power to confer or withhold unlimited benefits is the power to coerce or destroy."[34]

30 *Id.* (This act was initially accompanied by 42.2$ billion in funding which increased until about 2007 when there were significant spending cuts).

31 20 U.S.C. § 101 (2001) (Title I funding are moneys that are apportioned specifically to low-income children in order to equalize the educational experience).

32 Supra 27.

33 No Child Left Behind Act 115 § 1425 (2002).

34 Supra 23, at 71.

The financial incentives themselves are a systemic problem which applies to federal mandates in general; however, NCLB has had other significant problems since its inception. The principal problem as presented in appellate courts was the lack of funding for certain NCLB requirements. This has manifested itself in two ways: (1) Higher standards and specific tests required by the act were found by some states to cost more than the money allocated; and (2) many of the provisions were not funded at all, thereby increasing the burden on the states.[35] Ultimately this resulted in several lawsuits, of which none was more definitive than *State of Connecticut v. Margaret Spellings, Secretary of Education*.[36]

While many states simply accepted the No Child Left Behind Act because of the financial incentives or for other reasons, for many states it required significant reformation. Connecticut's educational system was one of the most successful in the country because of their high standards and state-specific testing. NCLB, however, required that the state make non-essential changes, for example implementing additional testing. Connecticut attempted to receive a waiver from the Secretary of Education, Margaret Spellings, because it already had its own standardized testing that ensured test scores well above the national average, but requests for waivers were denied. Thus, Connecticut became the first state to file a lawsuit against the federal government because it lacked the funding necessary to carry out the required annual testing for elementary schools. Connecticut's complaint was that the federal government had violated the unfunded mandates prohibition of NCLB by requiring Connecticut's schools to comply with unfunded standards.[37] Furthermore, the cost of noncompliance was significant. The federal government could have withheld $435,946,380; this represents a substantial portion of the state's education budget. This federal funding is tied to Title I funding, and was used as leverage to force the state to accept NCLB.[38]

35 Larry Abramson, *Funding Stagnant for No Child Left Behind Program*, NPR, (Last visited Feb. 16, 2012).

36 Connecticut v. Spellings, 453 F. Supp. 2d 459 (2006).

37 *Id*. at 474.

38 *Id*. at 473.

Thus, in August 2005, Connecticut challenged the federal government's use of the Spending Clause.

The underlying question was whether the spending clause justified this educational program which would otherwise be left to the states generally. *Connecticut v. Spellings* is a persuasive example of the devastating consequences of non-compliance with a federal mandate. Here the federal government had attempted to coerce a state, in lieu of compelling them with statute, to act contrary to its own will by withholding funds. The text of NCLB specifically states that the state would not have to pay for implementation of the Act. However, the federal government did not fund up to $41 million of the actual cost.[39] Additionally, non-compliance would have taken away federal funding which had existed previously, essentially a tax on the state. Despite this apparent contradiction, the federal government continued to justify the use of federal mandates in NCLB with the Spending Clause.

In order for the federal government to justify NCLB pursuant to the Spending Clause, it should be required to demonstrate that NLCB is providing for the "general welfare" of the states.[40] Connecticut needed to either show that this mandate violated the 1996 Unfunded Mandate Law or that it had become coercive in accordance with *South Dakota v. Dole*.[41] As discussed in section one, appellate case law offers no definition as to how many federal dollars must be at stake in order to qualify as undue coercion. The Fourth Circuit, however, has acknowledged that the theory of coercion is

39 William J. Mathis, *The Cost of Implementing the Federal No Child Left Behind Act*, Peabody Journal of Education http://www.schoolfunding.info/news/ federal/3-14-05ctnclbstudy.php3 (Feb. 2, 2012).

40 U.S. Const. art. I, § 8, cl. 1. (The General Welfare Clause, as was previously discussed, includes the power to tax, pay debts, and provide for the common defense and general welfare of citizens of the United States. Congress has often used this to justify unfunded and funded mandates since they are supporting the states and providing funds for public goods. This was used as justification in several of the NCLB court cases).

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

viable and that its explanation is persuasive.[42] As such, it is an argument well-grounded in the Tenth Amendment's reservation "to the States respectively, or to the people" of those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States."[43] The State of Connecticut may very well be the first state filing suit to have reached the phantom threshold between funding and coercion.

Connecticut did not win the case[44] because they did not adequately show that NCLB lacked required funding. However, the decision showed that the education mandate had coercive force because it carried significant consequences in case of non-compliance. The Court's action also makes it clear that they considered NCLB the equivalent of law. Similar cases followed the Connecticut ruling which further substantiated the limitations inherent in federal mandates. *Pontiac v. Spellings* claimed that NCLB was simply an unfunded mandate.[45] The plaintiffs, the National Education Association along with several school districts from Michigan, Texas and Vermont, alleged that although NCLB promises to cover all related costs, the states are forced to assume a significant financial burden. On the other hand, the cost of non-compliance was even greater. These cases exemplify the debilitating tax which many federal mandates would incur in the case of non-compliance. Using federal mandates, Congress has the ability to circumvent the frontiers of its jurisdiction.

42 West Virginia v. U.S. Dep't of Health and Human Services, 289 F.3d 281, 286 (4th Cir. 2002).

43 U.S. Const. amend. X.

44 Connecticut v. Spellings, 549 F. Supp. 2d 161, 161 (U.S. Dist. Ct. for the Dist. of Conn. 2008).

45 Sch. Dist. v. Spellings, No. 90-345, 2005 U.S. Dist. LEXIS 29253, at 2 (E.D. Mich. Nov. 3, 2005) (addressing the legitimacy of the funding status of the No Child Left Behind Act), rev'd 584 F.3d 253 (2009).

III. Enumerated Federal Education Powers?

Education is not a specifically enumerated power given to Congress.[46] Administration over a state scholastic system should fall under the authority of the Tenth Amendment.[47] However, other constitutional clauses have been used at various times to justify the use of federal education mandates, especially the General Welfare Clause and the Commerce Clause of the Constitution.[48] Such justification is acceptable so long as it is certified by the courts. The problem is that the technical difference between a law and a mandate has eliminated the need for constitutional oversight.

Laws have been justified most often under the Commerce Clause of the Constitution.[49] This justification has dramatically expanded federal power, but recent court decisions have also provided important insight into the defined limits of enumerated powers.[50] There are several cases which required the Courts to specify congressional legislating limits. Two of the most influential cases that have been

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

47 439 N.E.2d 359, 370 (N.Y. 1982) [hereinafter Levittown] (Fuchsberg, J., dissenting) (stating that "primary concern for education was to be that of the States rather than of the Union").

48 *See* Stephen Monroe, *Individuals with Disabilities Education Act: "Reasonable Measures" Giving "Due Deference" to School Boards' Decisions in Cases Involving the Individuals with Disabilities Education Act*, 5 Seventh Circuit Rev. 581, 581 (2010).

49 *See* P. John Kozyris, *Some Observations on State Regulation of Multistate Takeovers — Controlling Choice of Law Through the Commerce Clause*, 14 Del. J. Corp. L. 499, 511 (Spring, 1989).

50 U.S. Const, art. I, § 8, cl. 3. (the power given to Congress to regulate interstate commerce. This clause was not enacted very often in the first several decades of the United States; however, it has since been regularly used as a means of expanding congressional power. The Court has recognized that these powers must not infringe on the proper balance of federalism, although the history of the Court suggests a search for a defined limit on the powers enumerated in the Commerce Clause.)

centered on the Commerce Clause are *United States v. Lopez*[51] and *San Antonio School District v. Rodriguez*.[52] The decisions in these court cases both clearly state that Congress does not have constitutional authority over state education.[53] Therefore, this power should be left to the states under Tenth Amendment grounds.[54]

In the first case of *US v. Lopez*, Congress sought to extend its authority over certain aspects of education pursuant to the Commerce Clause. At stake was the Gun-Free School Zones Act of 1990[55] which prohibited an individual from knowingly possessing a firearm within school zone. In both the majority and minority opinion, the justices clarify that education is not a federal power.[56] The federal government was unable to show that the Gun-Free School Zones Act

51 Lopez, 514 U.S. at 549 (1995). (In 1992 Alfonzo Lopez Jr. was a 12th grade student attending Edison high school in the state of Texas. Lopez brought a loaded revolver with him to school and while at school Lopez was confronted by school authorities. Lopez was then charged with violation of Gun-Free School Act. Lopez appealed the charges brought against him, claiming the ruling exceeded Congress's power under the Commerce Clause. The Supreme Court upheld the Court of Appeals decision in favor of Lopez.)

52 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1993). (The lawsuit was filed against the school district of San Antonio and surrounding areas, by parents of the Edgewood Concerned Parent Association. The Supreme Court held that a school-financing system based on local property taxes was not an unconstitutional violation of the Fourteenth Amendment's equal protection clause. The majority opinion stated that the Apellees did not sufficiently prove that education is a fundamental right, that textually existed within the US Constitution, and could thereby through the 14th Amendment to the Constitution, be applied to the several States. The Court also found that the financing system was not subject to strict scrutiny.)

53 Levittown, 439 N.E.2d at 370 (Fuchsberg, J., dissenting) (stating that "primary concern for education was to be that of the States rather than of the Union").

54 *Id.*

55 Gun-Free School Zones Act of 1990, H.R. 3757, 101st Cong. § 1702 (1990).

56 *Id.*

was related to commerce, and without such a justification, the Court ruled that the government had exceeded its jurisdiction. This decision is a precedent for limiting government to strictly enumerated powers.

The second influential court case was *San Antonio School District v. Rodriguez*.[57] This court case was centered on the division of financial inequalities within the Texas public school system. The wealthy areas of San Antonio and across Texas were able to provide a better education to their students than poorer areas, such as in Edgewood, an area near San Antonio. The judges in this case found that the appellees did not prove sufficiently that education was a fundamental right. In other words, that the states have jurisdiction over the administration of their own education system, including the associated funding.

These cases show that the Court has historically sided against education as a federal power. Such decisions suggest that the federal government has no power to legislate or impose regulations on the education system of the several states; this also has implications for federal funding. Although the implications of constitutionality of funding will not be fully considered in this paper, it is the author's opinion that federal funding of education is not a violation of any constitutional power so long as it is not conditional on unjustified federal programs. If funding is constitutional, or allowed under the General Welfare Clause, then all states ought to receive comparable funding.

IV. Eliminating Federal Mandates on Constitutional Grounds:

The important question in these cases is consistently related to federalism. In one such case, *West Virginia v. U.S. Department of Health & Human Services*,[58] the state of West Virginia sued the federal government claiming that the federal Medicaid program, which required states to adopt an estate recovery program to recoup Medicaid expenditures from deceased beneficiaries, violated the

57 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1993).

58 West Virginia v. United States Department of Health & Human Services, 289 F.3d 281, 1-2 (4th Cir. 2002).

Tenth Amendment because it was "unduly coercive."[59] Although the Fourth Circuit declined to recognize any such federal coercion, it acknowledged that when dealing with federal mandates the coercion theory was valid. In the majority decision the judges stated that, "A law or congressional policy which is unduly coercive may violate the Tenth Amendment if it deprives the State of any reasonable ability to regulate an area that is traditionally left to the State and outside the federal government's enumerated powers."[60] This is a clear statement that the federal government's powers are bounded. This decision also indicates that the deprivation of state power, whether because of law or otherwise, is a violation of the Tenth Amendment.

A second influential court ruling comes from the state of New York, in the case of *Arlington Central School District Board of Education v. Murphy*.[61] Theodore and Pearl Murphy were the parents of a special needs child who felt that the public high school of Arlington was unacceptable. Accordingly, they placed him in a private school, but the Arlington Central School District was unwilling to pay the related expenses. The question brought to the Fourth Circuit was whether or not the prevailing party ought to be reimbursed for expert witness fees. The parents claimed that this was implied in the federal Individual with Disabilities Act (IDEA) which stated that the prevailing party would be rewarded "reasonable attorneys' fees."[62] The courts reversed precedent and argued that the federal statute made under the auspices of the spending clause should be interpreted narrowly. This is another example of how the courts recognize that federal power ought to be restricted in cases where mandates are not based in constitutional law.

Several interesting things were considered in *Murphy* which are applicable to the present discussion. The Fourth Circuit in their

59 Michael J. Pendell, *How Far Is Too Far? The Spending Clause, The Tenth Amendment, and the Education State's Battle Against Unfunded Mandates,* 71 Alb. L. Rev. 519, 535 (2008).

60 *Id*.

61 Arlington Cent. Sch. Dist. Bd. of Educ. v .Pearl Murphy, 548 U.S. 291 (2006).

62 Individual with Disabilities Act 20 U.S.C. §§ 1400 (1990).

majority decision state that the conditions for federal funds must be set out "unambiguously."[63] In fact, they say that, "Legislation enacted pursuant to the spending power is much in the nature of a contract," and therefore, to be bound by "federally imposed conditions," recipients of federal funds must accept them "voluntarily and knowingly."[64] The courts here emphasize that federal mandates must be absolutely clear in their language both for the states and the courts who must enforce the agreement. However, although the language of the mandate may be contract-like, the state has little control over the terms of the agreement. Therefore, the only authority under which such a stipulation could be made under is constitutional. If this is not the case, then such an agreement may be excessively and unjustly burdensome to state functions and may be reviewed by the Supreme Court. [65]

The argument of this paper rests squarely on the back of the previously mentioned majority opinion by Judge Owens who said that "the power to confer or withhold unlimited benefits is the power to coerce or destroy."[66] Another notorious Court decision stated something similar, that "the power to tax is the power to destroy."[67] Clearly the idea of coercion as a form of enforcement has and continues to have broad application. Previous cases have shown that the federal mandate system, and more specifically the withdrawal of funds as a retributive act, can be excessively burdensome to states and individuals. Such cases have also demonstrated the destructive power of the withholding of federal funds for vital programs such as highway maintenance or school systems. Thus, it is up to the courts to act on precedent and more firmly establish the balance of federalism via creating a definitive threshold of coercive federal mandates.

63 Pennhurst State Sch. and Hosp. v. Halderman*,* 451 U. S. 1, 17 (1981).

64 *Id*. at 17.

65 Marbury v. Madison 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).

66 US v. Butler, 297 U.S. 1, 71 (1936).

67 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819) Ironically, this case was a ruling made in favor of a federal institution; however, the principle of taxation having destructive power is applicable in this case.

Having established that federal mandates have the potential to be compulsory even to the point of being as powerful as law, they ought to be under the same restrictions as law. In regards to legislative authority, Congress is strictly restrained by the Constitution, including federal amendments. The Tenth Amendment provides a clear division between federal and state jurisdiction; however, federal mandates effectively bypass this separation of powers. Congress' ability to enforce its will via financial sanctions effectively limits state sovereignty and extends federal oversight. Therefore, both funded and unfunded federal mandates, as acts of Congress, should be strictly limited to only those powers enumerated in the United States Constitution.

V. Conclusion:

The use of federal mandates began with the good intention of administering federal funding for vital state programs such as education, but is now become a means of managing anything considered a national issue.[68] In this article, the authority of congress to distribute federal funding is not in question. Rather, the primary issue is one of federalism. Given that federal funding can in some cases be so great as to be compulsory, and that the removal of this funding as a consequence of non-compliance can devastate state programs which have grown dependent on funding patterns, one is led to conclude that federal mandates have power similar to law. On the other hand, federal mandates are not restrained by constitutional limits as are statutes. As a result, federal mandates given by Congress have the theoretical power to circumvent the institution of federalism by imposing almost any sort of mandate on state governments using financial incentives.

The No Child Left Behind Act is one such case where the federal government mandated an action which as a law would have been outside of constitutional jurisdiction.[69] The subsequent legal action

68 *The Role of Federal Mandates in Intergovernmental Relations: A Preliminary ACIR Report* supra note 10 at 3.

69 No Child Left Behind Act 115 § 1425 (2002).

taken by Connecticut and others illustrates that, at least from a state perspective, the withdrawal of federal funding constitutes a destructive and therefore coercive act. It is for this that one must conclude that No Child Left Behind has the force of law. Using the means of federally funded mandates, the federal government has successfully circumvented the Tenth Amendment and is administering a state-level program.[70]

It is apparent that the judicial debate concerning the legitimacy of federal mandates has not gone far enough. The Unfunded Mandate Reform Act stipulated that federal mandates must cover the costs of the programs which they implement;[71] however, it has only been recent Court decisions which have recognized the possibility that federal funding could be coercive. Congress habitually administers programs via funded mandates which are not explicitly defined federal powers and which may or may not be welcome by the states. The cases highlighted in this article show that this has previously been a non-issue because there are very few states who would risk their funding by not accepting government mandates. For those states who have challenged these provisions, there has been only lukewarm success. Thus to preserve the fundamental role of federalism, there needs to be a new discussion in the courts which defines coercive funding and establishes a hard precedent for the use of federal mandates.

In the absence of a definitive threshold that discriminates between coercive and non-coercive federal mandates, the courts ought to recognize that coercive mandates exist. While funding may be provided by the federal government in accordance with the general welfare, there must be recognition that attaching a significant portion of federal funds to a mandate gives that mandate law-like properties. Additionally, taking away even trivial federal funding from states as a penalty creates inequality between communities, which is opposed to the "general" welfare. In short, federal mandates

70 U.S. Const. amend. X.

71 Unfunded Mandate Reform Act (UMRA), 2 U.S.C. § 1501 (1995), supra note 15; Gun-Free School Zones Act of 1990, H.R. 3757, 101st Cong. § 1702 (1990).

cannot be treated as contracts, or if they are, they must be considered as a legislative act. Therefore, it is the author's recommendation that federally funded mandates should be under the same constitutional restrictions as is federal law. Following such a standard will provide much needed clarity concerning federally mandated action and will reinforce the institution of federalism, especially as it pertains to education.