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A Case of Unconstitutional Immigration: The Importation of England's National Curriculum to the United States

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NOTES

A Case of Unconstitutional Immigration: The Importation of England's National Curriculum to the United States

ABSTRACT

The decline in the quality of the American educational system continues to spawn debate and criticism across the nation. Despite many suggestions and arguments on how to improve American schools, such as voucher systems, smaller class size, and higher teacher qualifications, the concern, while deeply felt, appears to be empty rhetoric. Teachers' low salaries, the disparity in funding among schools, and the lack of parent and community involvement demonstrate America's apathy towards education reform. To effectuate meaningful changes in education, American communities must reach consensus on education's purpose and importance.

The failure of schools requires America to take action. State and local governments appear slow to reform, and national studies reflect little improvement in the quality of education, especially for minority students. To expedite change, the U.S. Congress faces the question of whether to take the lead in educational reform. Faced with a myriad of potential education models, Congress may decide to follow England's lead and implement a national curriculum.

Congress may choose the English model because the United States' system of education is closely tied both historically and philosophically to England's system. Both British and U.S. educational systems originally operated on a strictly local level and discriminated against student groups. The two countries' national governments interceded to prevent racial discrimination in the United States and class discrimination in England. This national involvement has only continued to increase. In fact, Parliament's efforts at creating an equitable education recently culminated in the passage of a national curriculum. Although the United States has yet to make such a bold move, Congress' passage of education legislation and recent

educational debate by the presidential candidates demonstrates America's willingness to seriously consider education as a federal issue. The U.S. Constitution, however, presents a serious obstacle to Congress' ability to federalize education and adopt England's national curriculum model.

This Note provides an overview of the legal development of United States and England's educational systems and the increased involvement of the national governments in these educational systems. Additionally, this Note compares the United States and England's legal and cultural differences and how these differences affect the costs and benefits of adopting England's model. Finally, this Note examines the federalist structure of United States government and Congress' constitutional powers, specifically under the Spending Clause and the Commerce Clause, to determine Congress' authority to federalize education.

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I. INTRODUCTION: EDUCATIONAL CRISIS AND RESTRUCTURING

Over the past fifty years,[1] the greatest challenge to improving U.S. schools has been combating the apathy that a majority of

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1. In the past fifty years, a national consensus has developed over the declining state of education. The historic launching of the Soviet satellite, Sputnik, in October of 1957 marked the beginning of Americans' fear that the U.S. educational system lagged behind other industrial nations. Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 63 FORDHAM L. REV. 345, 353 n.48. (1994) [hereinafter *Goals 2000*]. Additionally, education's decline was blamed on the failure of the system to teach morals or provide any form of character training. *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991) (suggesting that education, a primary vehicle for transmitting cultural views, is part of the battle for the minds of young people, and positing that education has shifted from teaching students to be morally, upright citizens to focusing on obtaining material success). As an example, critics argue that European students read and study classics like Homer at an early age, whereas American students frequently do not read them until college. *See* ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND, 62-67 (1987) (suggesting that modern universities have lost touch with their traditional purposes and become mere trade schools in which bureaucracy encourages mediocrity). Finally, much criticism developed from the Supreme Court's involvement in altering education. Specifically, decisions during the 1960s prohibiting prayer and Bible readings in schools generated significant

Americans have towards the importance of education.[2] This apathy exists despite numerous reports,[3] statistics,[4] and daily news[5] stories about the deterioration of U.S. education.[6] Although U.S. citizens often claim to care about education,[7] their lifestyles, and their

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controversy and have spurred numerous proposals to amend the Constitution. *See, e.g.*, Abington v. Schempp, 374 U.S. 203 (1963) (prohibiting Bible reading and recitation of the Lord's Prayer in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (holding that prayer recitation violates the First Amendment Establishment Clause). Debate continues over recent decisions, raising questions about what should be taught and encouraged in schools, and who should decide. *See, e.g.*, Mozert v. Hawkins Cty. Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (holding that the basic reader series chosen by school authorities was Constitutional and did not violate students' exercise of their religion).

2. *See* Benjamin R. Barber, *America Skips School: Why We Talk So Much about Education and Do So Little*, HARPER'S MAGAZINE, Nov. 1993, at 39, 41 (delineating Americans' apathy towards education through statistical and cultural evidence).

3. *See, e.g.*, NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, U.S. DEP'T OF EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983) [hereinafter NATION AT RISK] (chronicling the problems of education and calling the nation to stop the "eroding . . . tide of mediocrity that threatens our very future as a Nation and a people."). This report documents how the Commission found that nearly forty percent of seventeen-year-olds could not draw inferences from written materials. *See id.* at 4. Numerous scholars also report the decline of education. *See generally, e.g.*, CHESTER E. FINN, JR., WE MUST TAKE CHARGE: OUR SCHOOLS AND OUR FUTURE 235-37 (1991) (arguing in favor of restructuring of educational services since past reform efforts have failed); JONATHAN KOZOL, ILLITERATE AMERICA (1985) (documenting illiteracy in America and its social and economic effects); THE EDUCATIONAL REFORM MOVEMENT OF THE 1980S: A COMPREHENSIVE ANALYSIS IN THE EDUCATIONAL REFORM MOVEMENT OF THE 1980S, PERSPECTIVES AND CASES (Joseph Murphy, ed., 1990) (discussing public schools' shortcomings in educating youth and the 1980s attempts to restructure education).

4. Leading educational indicators demonstrate a decline. *See* Michael Heise, *School Choice: Journal of Law & Politics Symposium on Equal Education under the Law*, 14 J. L. & Pol. 411, 419 [hereinafter *School Choice*]. In particular, "the average verbal and math SAT scores declined over fifty and almost forty points, respectively, between 1963 and 1980." *Id.* (citing NATION AT RISK, *supra* note 3, at 8-9).

5. School violence has become an American epidemic. *See* Joanna Firestone, *Parents Must Stay in Tune With Their Kids*, DETROIT NEWS, Mar. 1, 2000, at A1, A6. Between October 1997 and December 1999 nine separate incidents of school shootings occurred across the nation in which students were injured or killed. *See id.* Among these was the Columbine high school shooting which took the lives of fourteen students, including the two perpetrators and one teacher. *See id.* Twenty-three other students were wounded. *See id.*

6. The definition and manner of measuring "actual learning" is a subject of much controversy. Universities commonly utilize standardized tests as a measure of "actual learning," but experts often question whether such tests are a valid means of determining academic ability and knowledge. *See, e.g.*, DAVID W. GRISSMER ET AL., STUDENT ACHIEVEMENT AND THE CHANGING AMERICAN FAMILY 20-23 (1994); Charles Murray & R. J. Herrnstein, *What's Really Behind the SAT-Score Decline?*, 106 PUB. INT. 32, 32-36 (1992).

7. According to one scholar, problems with American education originate from Americans' propensity to continually complain about issues without truly debating or devising real solutions. *Cf.*, JEAN BETHKE ELSHTAIN, DEMOCRACY ON TRIAL 12 (1995)

priorities reveal a different reality.[8] A recent Department of Education report commissioned by Congress, found that the quality of education in the United States is steadily declining.[9] The report found that over ninety million Americans lack simple literacy.[10] Less than twenty percent of the students surveyed were able to compare two metaphors in a poem.[11] Four percent of students surveyed could not compute the cost of carpeting a room with a given size at a given price, even with the aid of a calculator.[12] The survey also found that a total of twenty-five percent of U.S. students fail to finish school.[13] In some urban districts, almost half of the enrolled student body drops out before the end of every school year.[14] Another major educational problem that the United States has failed to address is the continued racial discrimination and disparity in the treatment of minority students, particularly in under-funded urban public schools.[15]

(calling Americans to enter into a new social covenant). Americans have become so isolated within their busy personal lives and come from such overwhelmingly different backgrounds, beliefs, values, and lifestyles that conversation is necessary for democracy to survive. *See id.* at 15-22.

8. *See* Barber, *supra* note 2, at 40 (describing how Americans do not really care about education). Benjamin Barber colorfully illustrates how critics blame students, teachers, and schools; yet these individuals merely reflect the lack of importance American society places on education and learning. *Id.* Cleverly, the "Real-World Cultural Literacy" test demonstrates that Americans propagate the message through the media and that learning and gaining understanding is really not important. *Id.* Rather, the test illustrates that achieving economic success, fame, and appearance are of greater value than knowing about famous events and people, reading good literature, or understanding principles of science or math. *Id.* at 41-42.

9. *Id.* at 39 (citing to the Department of Education Statistics, Sept. 8, 1993).

10. *Id.*

11. *See* Barber, *supra* note 2, at 39.

12. *Id.*

13. *Id.* More than 3,000 students drop out every day and about 600,000 no longer attend school over the course of a normal school year. *Id.*

14. Dropping out of school influences students' lifestyles and limits their opportunities. *Id.* Many students who drop out end up in prison. *Id.* Statistics indicate that one out of four African-American males "will pass through the correctional system, and at least two out of three of those will be dropouts." *Id.*

15. No one denies that discrimination has continued since the Civil War. *See* RICHARD KLUGER, SIMPLE JUSTICE 55-73 (1975) (tracing the tragic history of Supreme Court decisions enabling racism from *Dred Scott* to *Plessy v. Ferguson*). One of the most tragic areas of discrimination against African-Americans following the Civil War was in the area of education. *See generally* JAMES D. ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935 (1988). As damning as any of the Jim Crow laws was the federal government's affirmation of segregation. *Id.* at 72-74. *Plessy v. Ferguson* marked an era of increased segregation and active disadvantaging of African-Americans by states providing inferior educational opportunities. *See id.* Despite *Brown v. Board of Education*'s implicit reversal of *Plessy*, racial discrimination continues, and much debate rages over the best way to eliminate the disparity. *See* Shelby Steele, *The New Sovereignty: Grievance Groups Have Become Nations unto Themselves*, 285 HARPER'S MAGAZINE, July 1992, at 47-49 (challenging the notion of

There are no easy solutions to the multitude of problems facing educators.[16] Discussions centered around vouchers, tracking, mainstreaming, equality in funding all schools, curriculum changes, higher standards, more qualified teachers, and greater parental involvement all seem to suggest overwhelming public concern. Yet the studies reveal that concern for the education of all students, not just one's own children, exists only in theory.[17] In reality, few Americans have organized themselves in an attempt to improve local schools or hold teachers, administrators, and principals accountable for improving the U.S. educational system.[18]

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collective entitlements for blacks and women, and positing a return to the goals of "democracy, integration, and developmental uplift"); ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY 79-104 (3d ed. 1998) (arguing the importance of a school curriculum in which American schools promote common values, language, and ideas, and criticizing ethnocentric curriculums); Cameron McCarthy, *Multicultural Education, Minority Identities, Textbooks, and the Challenge of Curriculum Reform*, 172 J. EDUC. 118, 128 (1990) (arguing that school curriculum must depart from its current Eurocentric views and textbooks must be restructured to provide students "a genuinely emancipatory multicultural experience in schooling"); James Traub, *Can Separate Be Equal? New Answers to an Old Question about Race and Schools*, HARPER'S MAGAZINE, June 1994, at 36-47 (discussing the financial disparity between suburban, white schools and the inner-city, minority populated schools).

16. Educators have numerous challenges in addition to teaching information. *See* KIMBERLY KEARNEY, TEACHER EMPOWERMENT OF AT-RISK STUDENTS 23-25 (English Language Arts and the At-Risk Student NYSEC Monographs) (1993) (recommending that educators treat "all students as individuals who are or are possibly at-risk"). Adolescents face personal issues such as developing autonomy and personal identity, looking for acceptance by peers, addressing issues of emerging sexuality, etc. *See id.* These issues combined with a number of complex social, economic, and moral issues further complicate students' lives and influence educators to treat all students as "at-risk." *Id.* The many efforts to reform education demonstrate that the answers to improving education are not easy. *See* FINN, *supra* note 3, at 235-37 (suggesting that previous reform efforts have amounted to mere "Band-Aids"); *see also* Barber, *supra* note 2, at 40 (noting that the poorer school districts seem "almost beyond help: children with venereal diseases or AIDS (2.5 million adolescents annually contract a sexually transmitted disease), gangs in the schoolyard, drugs in the classroom, children doing babies instead of homework, playground firefights featuring Uzis and Glocks.")

17. Theoretically, concern for "education" and for "all students" exists. Yet, state legislatures' procedures for funding public schools and their attempts to prevent inequality of educational opportunity tell a different story. *See* Traub, *supra* note 15, at 47 (quoting a teacher, "surveying the farcical deliberations of Connecticut's voluntary process, says sadly, 'There's not enough good will to go around.'"). An enormous gap exists between the academic achievement of minority and non-minority students. *See* JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICAN SCHOOLS 4 (1990) (noting that the twentieth century emergence of the public school system hurt ethnic minorities).

18. *See* Traub, *supra* note 15, at 47. Local communities attempt to reform education in Dade County, Florida and Chicago, Illinois. *See Goals 2000*, *supra* note 1, at 369 n.192.

The quality of education will only improve if the United States makes it a priority. First, U.S. teachers must receive compensation equivalent to other professionals, such as accountants, architects, doctors, lawyers, engineers, and judges, in order to attract the brightest and most dedicated persons.[19] The United States has poured more money into education than any other country;[20] yet teachers' salaries in many U.S. cities are lower than many other cities outside the United States.[21] Second, U.S. students need to spend more time in an educational setting. Statistics indicate that students in the United States spend 900 hours in school per year;[22] many hours less than their counterparts in other countries.[23] Additionally, U.S. students spend between twenty-five to fifty percent more time watching television (an estimated 1,200 to 1,800 hours a year) than they spend in school.[24] Third, the United States must place greater emphasis on the value of learning for the sake of learning.[25] Few

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19. Barber, *supra* note 2, at 39.

20. The increase in expenditures on a federal, state, and local level have not ameliorated the educational crisis. *Goals 2000*, *supra* note 1, at 350. "The United States spent more than $200 billion on public elementary and secondary schools education during the 1990 school year." *Id.* United States spending accounted for 3.8 percent of the 1991 United States Gross Domestic Product; whereas Japan spent 2.8 percent. *Id.* American students' poor performance is particularly interesting, because the United States spends more per-pupil than most other nations. *Id.* at 351. United States per-pupil expenditure for elementary and secondary students is $5,780, compared to $1,768 in Belgium, $1,982 in Ireland, $2,405 in Spain, $3,559 in the United Kingdom, and $3,785 in France. *Id.* Data on educational expenditures and student achievement in the United States indicate that funds could be spent more effectively. *Id.*

21. Barber, *supra* note 2, at 39-40 (noting that teacher salaries are higher in Berlin, Tokyo, Ottawa, and Amsterdam than in New York or Chicago).

22. *Id.* at 41. American children only attend 180 days of school per year; whereas many children in Europe and Japan attend upward of 240 days out of the year. *Id.* at 40.

23. *See Goals 2000*, *supra* note 1, at 349 n.24 (citing from Lewis D. Solomon, *The Role of For-Profit Corporations in Revitalizing Public Education: A Legal and Policy Analysis*, 24 U. TOL. L. REV. 883, 886-87 (1993), that the average school year is 180 days in the United States, 220 days in the United Kingdom, and 243 days in Japan).

24. *See* Barber, *supra* note 2, at 41.

25. *Id.* at 42 (commenting on how children's illiteracy mirrors society's since America implicitly teaches that "there is nothing in Homer or Virginia Woolf, in Shakespeare or Toni Morrison, that will advantage them in climbing to the top of the American heap"). Americans seem to agree that "schooling in and of itself is for losers—Bookworms and Nerds." *Id.* This Note's previous discussion of education's decline leads to the natural conclusion that the vast majority of students and parents alike really do not recognize or genuinely value the pursuit of knowledge. *See supra* notes 1-6. It is the author's opinion that if parents and students found learning to be valuable, they would work to find ways for students to learn, regardless of the school's resources and environment. Public libraries would be full rather than movie theatres. School and work conversations would include meaningful discussions about health care reform, immigration policies, social improvements, politics, and quality writers.

Americans extol the virtues of students' learning for the purpose of becoming well-rounded, open-minded, conscientious, and effective members of society.[26] Fourth, students in the United States should learn how to be responsible citizens and active participants in a democratic system.[27] For the most part, the public no longer views schools as places of intellectual learning and character development, but rather as stepping stones to employment and professional success.[28] Thus, while Americans claim to place great value on education, their behavior demonstrates that much of the concern over the quality of education in the United States is empty rhetoric.

Although scholars, policymakers, legal theorists, educators, and politicians disagree on the methods necessary to improve education in the United States,[29] they generally agree that education must be

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Instead, conversations about last night's sitcom and the most recent scandal monopolize the public forum.

26. *See generally* Barber, *supra* note 2, at 41 (arguing that the overwhelming numbers of Americans only view education as an ends to career goals and further education). Education was once viewed as more than "merely acquiring information" or "improving one's mind." ELSHTAIN, *supra* note 7, at 86. Rather, education involved an invitation to explore one's world and self and to discover one's role in society and the democratic process. *Id.* at 87.

27. *Id.* at 42-43. *See also* John I. Goodlad, *Making Democracy Safe for Education*, EDUCATION WEEK, July 9, 1997, at 56, 40 (positing that the purpose of schooling in a social and political democracy is to nurture students' "dispositions for personal efficacy" as well as their abilities "to attend to the well being of others"). Americans should not look to education as a solution to problems, because "schools mirror society; they do not drive it." *Id.* at 56. Education should help students learn more about themselves and how to transcend themselves, and relate with the rest of humanity rather than focus on schools as merely providing jobs and solving problems of crime, injustice, or poverty. *Id.*

28. *See generally* ELSHTAIN, *supra* note 7, at 13 (discussing society's emphasis on material possessions, which relegates everything else to secondary importance). Americans should not be surprised at reports of inner city youth robbing, beating, and killing in order to steal expensive sneakers or gold chains, nor that suburban youth frequently shun school and studies or participation in volunteer organizations in order to take part time jobs to buy extra clothes and consumer goods. *Id.*

29. *See, e.g.*, David Tyack, *Ways of Seeing*, 46 HARV. EDUC. REV. 14 (1976) (discussing five different explanatory models that explain the development of compulsory schooling in the United States and illustrating how one's view of education's purpose influences what changes one supports); Barber, *supra* note 2, at 43 (advocating a shift in Americans' priority in education and a change in classrooms from "merely a trade school" to teaching democracy and civility). Methods to improve schools typically include "well-educated and well-paid teachers, small classes, good materials, encouragement at home and school, summer academic programs, protection from drugs and crime . . . , and higher expectations of satisfying careers after graduation." Diane Ravitch, *Multiculturalism: E Pluribus Plures*, 59 THE AM. SCHOLAR, Nov. 3, 1990 at 337, 349 (arguing in favor of pluralism rather than particularism (the theory that students from different religious and racial backgrounds must be isolated in order to preserve appreciation of heritage and differences) in the school curriculum). Additionally, states are exploring new solutions, such as vouchers and privatization, to reforming educational systems; however, First Amendment issues preventing religious schools from receiving government funds and controversy over

reformed on a large scale.[30] Experts generally agree that school systems should improve the quality of education across the nation. They agree that improvement is necessary because they recognize the great importance of education. The Supreme Court in the landmark opinion of *Brown v. Board of Education*,[31] heralded education's importance and the many functions of schools when ruling:

> Today, education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed services. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms.[32]

Despite the widely recognized need for high quality educational systems, the United States has experienced many educational movements that emphasize differing values.[33] Additionally, different states and communities believe in different ways of improving educational quality.[34] Consequently, in light of this disagreement,

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which students should have access to funds make such potential solutions complex. *See* Heise, *supra* note 4, at 414-15.

30. This general consensus for a change in education appears to have arisen in response to the 1983 *Nation at Risk* report, which alerted Americans to potential economic crisis if education did not improve. *See Nation at Risk*, *supra* note 3.

31. 347 U.S. 483 (1954) (ending the tradition of legal segregation of schools).

32. *Id.* at 493.

33. *See* A. V. KELLY, NATIONAL CURRICULUM: A CRITICAL REVIEW 23 (1990) (identifying the difference between "what education may be seen to be *for* and what it *is*"). The distinction between the definition and purpose of education is important because it clearly defines the policy goals of education. *See* CHARLES B. MYERS & LYNN K. MYERS, AN INTRODUCTION TO TEACHING AND SCHOOLS 288-93 (1990) (discussing the importance of the nature and value of educational philosophy and how clarification, justification, interpretation, and systematization are necessary processes for teachers to educate conscientiously). For instance, trends in education in the United States have shifted from teaching students the "basics" to developing the "whole child." *Id.* Depending on cultural trends, however, the definitions of these terms and how teachers should go about achieving these ends will vary from teacher to teacher unless a shared understanding of what education is develops. *Id.; see also generally* DAVID TYACK & LARRY CUBAN, TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM (1995) (describing the educational trends of the twentieth century and how the 1890s, 1950s, and 1980s signified conservative times in education where schools returned to teaching the basics because of competition with the Germans, the Soviets, and the Japanese, respectively).

34. Experimentation with different educational programs benefits the country by helping different regions learn which programs are most advantageous. As Justice Brandeis noted in his dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), "it is one of the happy incidents of the federal system that a single courageous State may,

many questions arise as to how the United States should attempt to reach a national consensus on improving the quality of education.

Congress has become increasingly involved in education through federal funding and legislation, such as the recently enacted Goals 2000: Educate America Act.[35] The recent involvement of Congress in education adds a new dimension to the question of who should define education.[36] The role of schools has reached a pinnacle in socializing, influencing, and broadening students because other traditional institutions, most notably the American family, have been weakened.[37] The decline of the influence of churches, synagogues, and community organizations has also increased the need for schools to socialize and educate youth.[38] These problems, combined with the increasing apathy of the American public, require that schools play an even greater role in helping Americans reach consensus in order to ensure the continued vitality of American democracy.[39] Within this context, the purpose of this Note is to determine whether Congress may take the lead in helping reach this consensus. More specifically, this Note will assess whether Congress can constitutionally implement a national curriculum similar to England's[40] 1988 Education Reform Act.

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if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* at 311 (Brandeis, J., dissenting). The variety of programs, however, also raises the problem of continually shifting educational policies, providing no stability for students. These shifts occur because local communities often lack a unified consensus or vision of what they expect their educational system to deliver. *See* Benjamin Levin & Jonathan Young, *The Origins of Education Reform: A Comparative Perspective*, Paper Presented at the Annual Meeting of the Canadian Society for the Study of Education (June 6, 1997), ERIC, ED 424 641, EA 029 407 [hereinafter *Education Reform*] (chronicling the unending series of educational reform proposals). North Carolina has implemented four very different programs between 1984 and 1995. *Id.* at 30. Even more dramatically, South Carolina changed educational programs three times between 1984 and 1991. *Id.*

35. *See generally Goals 2000, supra* note 1.

36. *See* William B. Senhauser, *Education and the Court: The Supreme Court's Education Ideology*, 40 VAND. L. REV. 939, 940-43 (May 1987) (describing how the definition of education's functions and goals is a pressing societal problem).

37. *Id.* Contributing to the decline of the American family is the doubled divorce rate between 1965 and 1979. *Id.* at n.2 (citing Price-Bonham & Balswick, *The Noninstitutions: Divorce, Desertion, and Remarriage*, 42 J. MARRIAGE & FAMILY 959 (1980)).

38. *Id.* at n.3 (citing from Purpel & Ryan, *Moral Education: Where Sages Fear to Tread*, 56 PHI DELTA KAPPA 659, 660 (1975) that "roughly 40 percent of Americans have virtually no contact with congregations or worship entities").

39. *Id.; see also* ELSHTAIN, *supra* note 7, at 30-36 (discussing the need for a new social covenant in order to break the cycle of mistrust and cynicism and calling Americans to recognize their civic identity).

40. Throughout this Note, "England" is used for the purpose of simplicity. Although England is a part of the United Kingdom of Great Britain and Northern Ireland, Parliament's adoption of the national curriculum has only affected England

Part I will demonstrate the need for educational reform. From there, however, this Note will argue that Congress does not have the power to enact a national curriculum either under the traditional interpretation of the Spending Clause or the Commerce Clause. Part II of this Note examines the relationship between law and education in the United States and England. Part II also discusses the United States' gradual movement towards a more centralized educational system. Part III distinguishes governmental and ideological differences between the United States and England. It also discusses the costs and benefits of adopting a centralized curriculum and delegating curriculum power to state and local authorities. Part IV addresses whether Congress could adopt and develop a national curriculum similar to England's. Specifically, Part IV examines whether the Spending Clause and Commerce Clause permit Congress to enact legislation federalizing education. Finally, Part V concludes that the United States' educational crisis should be resolved by changes implemented at the state and local levels.

II. THE DEVELOPMENT OF EDUCATION IN ENGLAND AND THE UNITED STATES

England's educational system has continually served as a practical model for the United States. Besides the convenience of shared traditions,[41] language,[42] and legal principles,[43] many of the same educational thinkers influenced the foundation of both the

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and Wales. It is the topic for another Note to delineate the relationship of the different regions (primary Scotland, Northern Ireland, and England) of the United Kingdom and their control over their region's educational policy. Thus, this Note will only address the island area of England and Wales.

41. Since the United States originated as English colonial territory, Americans' religious beliefs, philosophies, holiday celebrations, and values often resemble those of England. Austin Swanson, *Educational Reform in England: The Significance of Contextual Differences*, 4 INT'L J. OF EDUC. REFORM 4, 4 (1995) (stating that the United States has great interest in English reforms because of the similar cultural heritage and common language).

42. *Id.* The importance of sharing a language cannot be emphasized enough. *See generally* N'GUGI WA THIONG'O, DECOLONISING THE MIND (1989) (addressing how one's language cannot be separated from one's culture since it shapes one's thoughts as much as it mediates them). The United States' diversity is much greater than England's due to the comparative size of the countries. Thus, while English remains the primary language, depending on where one lives, a wider assortment of other languages will be found.

43. After the American Revolution, most of the states adopted English common law into their state constitutions. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 32 (1998). Thus, the law of England was the basis for much of American jurisprudence. *Id.* Ironically, the ideas of many of the main legal theorists, such as William Blackstone, influenced America to break with England. *Id.*

United States and England's educational systems.[44] As a result, the two nations share a number of similar educational philosophies,[45] schooling trends,[46] and policies.[47]

During the nineteenth and twentieth centuries, both the United States and England created greater access to education for larger numbers of students. In the United States, reform centered on greater access for African-American and females, while England attempted to increase access to students from lower socio-economic classes.[48] The national governments of England and the United States became increasingly involved in eradicating the discriminatory principles embedded in their educational systems. In England, national Parliamentarian laws have helped persons from lower socio-economic classes obtain access to quality education and have culminated in the recent development of a national curriculum.[49] Schooling in the United States initially evolved through state laws and state constitutions that gradually established and funded public schools.[50] The United States federal government, however, through

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44. During the eighteenth and nineteenth centuries, many of the educational thinkers that helped shape the current system of education in England and the United States emerged. *See* MYERS & MYERS, *supra* note 33, at 254-58. Prior to the Enlightenment Era, also known as the Age of the Reason, European education was limited to the elite and wealthy. *Id.* at 253. As thinkers, Jean-Jacques Rousseau and John Locke, however, wrote about the importance of education and challenged traditional notions of education. *Id.* at 255-57. Also, "a number of European educational thinkers who lived between 1500 and 1900 developed ideas about schooling that have direct influences on schools today." *Id.* at 257-59. These thinkers include: Johann Amos Comeius who contributed to the notion of developmental stages, Johann Heinrich Pestalozzi who supported an interactive learning environment, Johann Herbart who believed education should include moral development and interrelating of subjects; Friedrich Froebel who developed the idea of kindergarten, and Maria Montessori who viewed teachers as guides and recommended self-motivated learning. *Id.* at 257-59.

45 *Id.* at 294-315 (discussing the different educational philosophies and movements that have historically evolved and developed including idealism, realism, pragmatism, existentialism, reconstructionism, futurism, behaviorism, perennialism, evangelicalism, Marxism, and essentialism).

46. David L. Silvernail, *The Impact of England's National Curriculum and Assessment System on Classroom Practice: Potential Lessons for American Reformers*, 10 EDUC. POL'Y at 46-62 (1996) (examining education in the United States and England and comparing the similar movements in both countries).

47. *See generally* Levin & Young, *Education Reform*, *supra* note 34.

48. *See* MYERS & MYERS, *supra* note 33, at 268 (noting that the movement toward free public schools for all children was the most significant trend in the United States during the nineteenth and twentieth centuries).

49. *See* DUNCAN GRAHAM, A LESSON FOR US ALL: THE MAKING OF THE NATIONAL CURRICULUM 118 (1993) (praising the national curriculum for creating a level playing field for all children regardless of socio-economic class).

50. *See* MYERS & MYERS, *supra* note 33, at 268 (discussing the evolution of schools in the United States). *See generally* Pace Jefferson McConkie, Symposium, *The Dilemma of American Federalism: Power to the People, the States, or the Federal Government?: Civil Rights and Federalism Fights: Is there a "More Perfect Union" for*

both the federal courts and Congress, has increasingly become involved in shaping educational policy in the last fifty years. Most notably, in *Brown v. Board of Education of Topeka,* the U.S. Supreme Court sought to end racial segregation in the American educational system.[51] Congress has additionally begun passing more comprehensive federal legislation, such as the Smith-Hughes Vocational Educational Act of 1917 and the G. I. Bill of Rights.[52]

A. *England's Development of a National Curriculum*

England's modern educational system can be traced back to the late seventeenth century, where control was exercised by private individuals and institutions, mainly churches.[53] Even in the nineteenth century, however, the opportunity to attend school largely depended on a family's financial status and its area of residence.[54] England's schools reflected the country's divided class structure.[55] The public-grammar school tradition trained and developed wealthy

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the Heirs to the Promise of Brown?, 1996 BYU L. REV. 389, 389-394 (1996) (discussing how state power supported efforts to preserve slavery and how the current debate to shift power to the states in areas such as education has racial implications).

51. *See Goals 2000, supra* note 1, at 365 (commenting on the role of federal courts in promoting equal educational opportunities regardless of race).

52. *Id.* at 364-65. Special Education laws, such as the Education of the Handicapped Act of 1975, have also provided a great increase in the amount of federal legislation. *See, e.g.,* Pub. L. No. 94-142, 89 Stat. 773 (1975).

53. *See* H.G. BARNARD, A HISTORY OF ENGLISH EDUCATION: FROM 1760 2 (1961). The exact emergence of education in England is difficult to pinpoint. Factors such as the Protestant Reformation, the rise of the middle class, and the development of modern nation-states in Europe led to a reorientation of schooling in the sixteenth and seventeenth centuries. *See* MYERS & MYERS, *supra* note 33, at 253. After the Protestant Reformation, churches viewed schools as a necessity in order to teach individuals how to read so that they could read the Bible. *Id.* at 253-54. *See generally* CURTIS & BOULTWOOD, AN INTRODUCTORY HISTORY OF ENGLISH EDUCATION SINCE 1800 Ch. 1 (1960) (tracing English educational development through charity schools, schools of industry, Sunday schools, monitorial schools, private schools, ragged schools, grammar schools, public schools, etc.).

54. *Id.* at 1. Schools were unevenly distributed throughout England and children living in southeastern England had a better chance of attending school than people who lived in the North or West, where the areas were more rural. *Id.* Additionally, in areas where schools were plentiful, many poor families could not afford to send their children to school because children at the ages of six or seven had to work in factories or mines to supplement family incomes. *Id.*

55. England's class structure did not allow for individuals to change classes. DENIS LAWTON, CLASS, CULTURE AND CURRICULUM 1 (1975) [hereinafter CLASS]. Historical ownership of land often defined who were the wealthy in England and how much land one's family had. *See* ELY, *supra* note 43, at 10. This rigid class structure did not exist in the United States since there was so much land that could be acquired for very cheap prices. *See id.* at 11. In fact, most colonies developed "headright systems" in which approximately fifty acres of land (one colony especially eager to encourage immigration gave away one hundred and fifty acres) was given to all settlers. *See id.*

boys to become "Christian gentleman."[56] Since these boys were to become England's future leaders, they received character training and elitist knowledge that would reinforce and bolster their exclusive social rank.[57] In contrast, the English elementary schools trained the "low orders" and supplied England's workforce with the skills necessary for factory production jobs.[58] These low order children learned to read simple written instructions, understand their place in society, act obediently, and respect the property of their betters.[59]

Despite the desire of England's middle class to limit the education of the poor,[60] the government showed some concern about the educational conditions of these children. In the nineteenth century, England enacted educational laws to regulate the health and morals of children who were apprentices at industry schools.[61] Additionally, the English government set forth its first educational

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56. LAWTON, CLASS, *supra* note 55, at 1 (acknowledging how England's upper class required a distinct education that was restricted to persons with money who would become the managers in industry and the district officers of the colonies). The "grammar-public school" tradition was distinct from the "elementary school" tradition. *See id.* Both traditions initially involved church and private individual sponsors. *See* BARNARD, *supra* note 53, at Chs. 1, 2. Great variance occurred within both traditions in terms of cost. *See* LAWTON, CLASS, *supra* note 55, at 2. School funding, however, arose predominantly from the private sector. *See id.* The class division in England, automatically, defined which students would attend which type of school. *See id.* A conscious effort was made by the upper class to keep the lower class in their place. *See id.* Interestingly, however, Rugby, a school to which a grocer left an endowment, developed with the intent of operating as a 'glorified' grammar school with no fees. *See* BARNARD, *supra* note 53, at 13. This division in class structure has continued into the twentieth century with many heralded English writers and thinkers supporting a division in classes. *See, e.g.*, T.S. ELIOT, NOTES TOWARDS THE DEFINITION OF CULTURE 103-04 (1948) (favoring a small, governing, leisured ruling class).

57. The public-grammar school's curriculum was based on Greek and Latin classical foundations. *See* LAWTON, CLASS, *supra* note 55, at 1.

58. *Id.*

59. *Id.* at 1-2.

60. *Id.* at 2 (quoting an early elementary school advocate's statements reassuring the middle class that poor children would not be taught to "elevate their minds above the rank that they are destined to fill in society"). Many scholars endorse the view that only certain students should receive a specialized, high level of education. *See* KELLY, *supra* note 33, at 30. Some scholars support Plato's idea that "education is really an initiation into 'the best that has been thought and said,' and this is interpreted as once it was, as Classical literature . . . ." *Id.* at 31. Thus, many students cannot pursue this type of education for a variety of reasons even if they are willing to. Another theory, dubbed the "democratic view," however, suggests that "every child is entitled to the fullest educational provision from which he or she is capable of profiting." *Id.* at 32.

61. *See* BARNARD, *supra* note 53, at 63-64. The Health and Morals of Apprentices Bill passed in 1802 and was limited in application to children sent from workhouses to be employed in larger mills and factories. *Id.* This act helped the narrow group of apprentices by limiting their work to twelve hours per day, requiring employers to have proper work conditions, and mandating education (i.e. reading, writing, and basic math) into the apprentice's day. *Id.* at 64.

grant in 1833 because of the overwhelmingly small number of students receiving quality education.[62] This educational grant instigated debate over England's national involvement in education.[63] England developed subsequent grants, educational commissions, and legislation over the nineteenth century, all focused on the nation's economic goals and the need for a trained labor force.[64]

The English educational system slowly changed, however, causing some elementary skills training schools to come very close to providing higher-level secondary education.[65] The Education Act of 1902 and 1944 laid the foundation for England's national curriculum, which was officially introduced by the 1988 Education Reform Act. The Education Act of 1902, while by no means revolutionary in regards to the educational system's class division, gave local educational authorities the power to provide non-elementary educational opportunities to students.[66] This controversial Act allowed students with high aptitude to attend secondary schools even though their parents could not afford tuition.[67] The 1902 Act created a more organized and better-structured system of education that proved necessary for future national control.[68] While its effects would not be fully realized for years, the 1902 Act completely changed

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62. An 1833 investigation of the availability of schools and school attendance revealed: "out of every ten children of school age, four went to no school at all, three to Sunday Schools only, two to inefficient dame schools or private schools, and only one received a satisfactory education." *Id.* at 98.

63. The 1833 educational grant provided £20,000 to be paid to the National Society and the British and Foreign School Society in order too supply half the cost of building new school houses. *Id.* at 82-83. Since the government's grant of funds increased the government's participation in education, debates emerged over the religious education of the teachers and whether the students should receive any religious training. *See id.* at 14-15 (discussing the religious difficulty arising from the Church of England and its dissenters).

64. *See* KELLY, *supra* note 33, at 33 (discussing the "conflicting views in the development of state education" that led up to the national curriculum).

65. *See* LAWTON, CLASS, *supra* note 55, at 2 (discussing how one progressive school's attempt to provide students with higher education level was declared illegal in the *Cockerton* case).

66. *See* CURTIS & BOULTWOOD, *supra* note 53, at 167 (noting that this act was the first time Parliament addressed both elementary and secondary education together).

67. *Id.* (noting that opening the door for disadvantaged children to attend secondary schools based on academic achievement acted as the initial step for allowing this type of education for every child—both boys and girls). *See also* BARNARD, *supra* note 53, at 214 (discussing the great opposition to this Act because of strong objections to providing money, or "rate aid," to voluntary schools).

68. *See* S. J. CURTIS & M.E.A. BOULTWOOD, AN INTRODUCTORY HISTORY OF EDUCATION SINCE 1800, 167-68 (4th ed. 1957) (commenting on how the 1902 Act simplified the educational structure by shifting control from 2,559 School Boards and approximately 800 School Attendance Committees to 330 local education authorities—called L.E.A.'s).

English education.[69] The Act encouraged schools to focus on the development of children as individuals,[70] whereas the schools' prior focus centered only on the student's ability to contribute to a stronger national economy.[71] Thus, Parliament codified the principle that students are more than just a means to a [national] economic end.[72] As a result of the 1902 Act and the subsequent legislation it spurred, English law recognized the principle that all students should have an equal opportunity to receive education. Scholars suggest, however, that the law did not reflect the reality of a divided and unequal educational system.[73]

The 1944 Act helped the two traditions of elementary and secondary education to merge by abolishing the centralized control over curriculum and regulations in secondary schools.[74] Throughout the 1940s and 1950s, however, a dual system of education still existed

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69. *See* BARNARD, *supra* note 53, at 216-17 (delineating how Morant—an educational advocate who was knighted for his efforts in 1907—used this act to enact further legislation that changed "the conception of elementary education . . . for ever").

70. The 1902 Act reorganized education on a municipal basis and gave county and country borough councils responsibility for their areas' education, and examining the needs of their particular region's students. *Id.* at 209.

71. *Id.*; *see also* DENIS LAWTON, THE POLITICS OF THE SCHOOL CURRICULUM 18 (1980) [hereinafter POLITICS] (describing how the 1902 Act required more secondary schools be made available).

72. *See* BARNARD, *supra* note 53, at 209. The 1902 Act, also known as the Balfour Education Act, gave more students access to secondary schools and local authorities, individualizing curriculum to meet students' needs. *See id.* The division between the elementary and secondary schools, however, sharpened since students still received an inferior education in elementary schools. English leaders only promulgated regulations for the secondary schools since they were not concerned with the education of those beneath the "middle class." *See* LAWTON, POLITICS, *supra* note 71, at 18.

73. *See* LAWTON, CLASS, *supra* note 55, at 3 (recognizing that education still existed as a divided system that matched different curricula with groups of students depending on their measured ability); *see also* KELLY, *supra* note 33, at 35 (discussing that the aim of the 1944 Act was to produce a more democratic society that would provide greater opportunity to children and youth, regardless of socio-economic status). Despite the many attempts at instituting an egalitarian system, England made relatively few changes in its educational system. *See id.* at 35-37. In the 1950s many English schools still used the bipartite system where students attended different schools after age eleven based on their "aptitude." *See* LAWTON, CLASS, *supra* note 55, at 3-4. Even as recently as the 1960s when child-centered education dominated, England's increase in comprehensive schools maintained separate systems. *Id.* at 4. The equality in education and pupils' equal chances to receive same training existed only in theory. *Id.* Although the separate educational tracks purported to be equally prestigious, the reality was that the distinct tracks led to occupational placements which differed in status. *Id.*

74. *Id.* at 3; *see also* LAWTON, POLITICS, *supra* note 71, at 19. The 1944 Act eliminated the School Certificate Examinations that required all students to pass five tests to show the students' knowledge of a core curriculum. *Id.* The reason for the abolition of these tests and the regulations of the secondary schools was that no one knew what type of curriculum should be provided for all students. *Id.*

in which "grammar schools [were] for roughly the top 20 per cent of the ability range and secondary modern schools for the rest, who were inevitably seen as non-academic or less able."[75] In the twenty-five years preceding the national curriculum, England attempted to create greater equality through comprehensive schools and curriculum experimentation.[76] Despite these reforms, however, England's goal of equal education for all students has never been fully realized.[77]

The 1988 Education Act combines England's traditional educational purpose of producing a properly trained workforce with its more recent concern for equal access to education. By requiring all students to learn the same subjects, specifically selected for their economic and utilitarian value, the national curriculum theoretically gives all students the opportunity to reach their full potential.[78] The national curriculum requires that students reach certain prescribed educational goals and learn predetermined information at the key ages of seven, eleven, fourteen, and sixteen.[79] The students must demonstrate a mastery of requisite knowledge within the subjects of mathematics, English, science, technology, modern languages, history, geography, art, music, and physical education.[80] Thorough analysis of the national curriculum's impact must be postponed until a full generation of students has completed the full eleven-year

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75. *See* LAWTON, CLASS, *supra* note 55, at 3-4 (delineating the "development of the equality ideal" through the decades in England).

76. *Id.* (commenting on the problems of England's goal to develop an egalitarian framework because equality requires a common culture, which is not necessarily desirable).

77. *Id.* (discussing how a bipartite system of education continued in the 1940s and 1950s). The controversy over England's attempt to create more educational opportunities for all students stems from the different theories of why education exists. *See* KELLY, *supra* note 33, at 30-33. Kelly discusses the theory that schools should identify students that show capability in economically useful areas, and that schools should help and support those students develop their capabilities. *Id.* at 31-32. A great majority of the English appear to have accepted this view of education and continue to endorse it since the educational structure uses standardized tests to evaluate students at early ages and place them in programs of study. *Id.* at 39 (discussing how the national curriculum has continued England's elitist system by creating the technical-vocational and academic divide).

78. The national curriculum has finally leveled the playing field by providing children "an entitlement to a high-grade education whatever the school and wherever they live." GRAHAM, *supra* note 49 at 118. *See also* Ann Lewis, *Entitled to Learn Together*, *in* THE CURRICULUM CHALLENGE, 223, 230 (Rob Ashdown et al. eds., 1991) (arguing that only through a national curriculum can students with special education needs be fully integrated and have the same educational opportunity). *But see* KELLY, *supra* note 33, at 39-41 (criticizing the national curriculum as a return to the pre-1944 Act conception of education as directed at producing an equipped labor force).

79. *See* GRAHAM, *supra* note 49, at 24.

80. *Id.* at 25.

curriculum.[81] The statute's purpose, its immediate implications for teachers and students, and its controversial nature,[82] however, all demonstrate the difficulties of nationally legislating a system that requires the cooperation of so many diverse groups (students, teachers, parents, administrators) in order to effect change.

The national government's involvement in education in both England and the United States arose primarily due to financial and equality issues. The expenditure of federal funds[83] increased the U.S. federal government's involvement in educational issues.[84] Furthermore, the U.S. Supreme Court began interpreting the Constitution in a way that would provide Congress with the power to pass legislation granting greater educational opportunity to African-

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81. *See* KELLY, *supra* note 33, at 43. (noting that the first group of pupils to complete the eleven-year program will finish in the year 2000 and concluding that any evaluation is inadequate at this point in time).

82. *See* Silvernail, *supra* note 46 (discussing problems of the British system and the alienation of teachers that has occurred); FIONA CARNIE, FREEING EDUCATION: STEPS TOWARDS REAL CHOICE AND DIVERSITY IN SCHOOLS (1996) (questioning whether the national curriculum has helped diversity in England); Swanson, *supra* note 41, at 4 (noting British academics' critical assessments of the impacts of their reforms—particularly with regard to equity issues).

83. *See Goals 2000, supra* note 1, at 363-65 (discussing the increase in the federal government's role in education and noting federal funds as necessary to state school systems' survival). Traditionally, the federal government's role in education was limited to discrete groups of students. *Id.* at 364. By 1980, however, Congress administered approximately five hundred educational programs in schools throughout the United States. *Id.* States have become dependent on federal educational funds and grants. *Id.* at 365. Federal support has increased dramatically in recent years. *See* Charles F. Faber, *Is Local Control of the Schools Still a Viable Option?*, 14 HARV. J.L. & PUB. POL'Y 447, 453 (1991) (remarking that most states cannot afford to turn down the federal government's funds). *See infra* note 337 and accompanying text (discussing the increase in federal monies in states).

84. Inevitably, explaining the U.S. transformation from a society and government predominantly concerned with maintaining local control and preventing the creation of large, unrestrained federal government, to one that readily accepts the federal government's role and regulation of purely local issues is difficult. The transformation has frequently been attributed to the late 1930s environment in which the perceived emergency situation of the Great Depression led society to accept and support Franklin Roosevelt's federal measures. *See* ELY, *supra* note 43, at 119-35 (tracing the transformation of U.S. law and property rights through the New Deal Era). Following the New Deal Era, the American public clearly accepted the Supreme Court's decisions that expanded the scope of Congress' regulatory power. *See generally* Jonathan R. Macey, *Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and "Other" Rights Under the United States Constitution*, 9 SOC. PHIL. & POL'Y 141 (1992) (discussing reasons why the Court gave less protection to individuals' economic liberties). This increase in the federal government's regulation of economics appears to be what opened the door for support of a large federal government. After all, innate self-interest causes society to depend upon benefits and programs from the federal government, while at the same time expect less interference with economic liberties.

Americans and to students with disabilities.[85] Despite federal legislation and federal court intervention, however, control over the educational curriculum has remained in local hands.

B. *The U.S. Movement Toward Federalized Education*

1. A Historical Perspective

Traditionally, schools in the United States developed under local and state control.[86] The first colonial schools were started by church groups to meet local educational needs.[87] During the Revolutionary period, states took responsibility for education through their constitutions.[88] Additionally, the states adopted the federal Constitution in 1789, which gave Congress no power to regulate education.[89] The states ratified the Tenth Amendment, which among other things, implicitly confirmed their power to control education.[90] The tradition of state regulation of education has continued with forty-nine out of fifty state constitutions containing "variously worded education clauses, some more explicitly rights-based than others."[91]

Unlike English schools that were divided based on the students' socio-economic class and future anticipated employment, U.S. schools were open to almost all white students for the purpose of forming

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85. First, the Civil Rights Act of 1964 strengthened federal efforts to help minority students receive equal educational opportunities. *See* Pub. L. No. 88-352, 78 Stat. 241 (1964). Congress passed the 1965 Elementary and Secondary Act, which sought to help inner city at risk students receive a better education. *See* Pub. L. No. 89-10, 79 Stat. 27 (1975). The Education Act of 1972 prohibited gender discrimination in federally-assisted educational programs. *See* Pub. L. No. 92-318 Sections 901-07, 86 Stat. 773 (1972). Students with disabilities also received special attention in the Education of the Handicapped Act of 1975. Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified in scattered sections of 20 U.S.C.).

86. MYERS & MYERS, *supra* note 33, at 268.

87. *Id.*

88. *Id.*

89. The states adopted the Constitution between 1788 and 1790. *See* 29 ENCYCLOPAEDIA BRITANNICA 217 (15th ed. 1999). The federal Constitution makes no mention of education and refrains from delegating Congress the power to regulate educational system. *See generally* U.S. CONST. Thus, the states' adoption of the Constitution reinforces their control over education.

90. *See* U.S. CONST. amend. X: "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." *Id.* The states completed ratification of the first ten amendments on December 15, 1791. *See* 29 ENCYCLOPAEDIA BRITANNICA 217 (15th ed. 1999).

91. Rosemary Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 173 n. 11 (1996) (noting that Mississippi is the only state not to provide for education in its state Constitution).

civic-minded "Americans."[92] Due to an increasing number of immigrants, schools emphasized the importance of education for citizenship over employment.[93] Elementary school curriculums remained fairly consistent throughout the United States from the mid-nineteenth century through the first half of the twentieth century.[94] Elementary schools focused on teaching basic skills, such as reading, writing, and arithmetic for the primary grades, while the upper grades learned "a combination of advanced basic skills and increasing amounts of science, history and geography, art, music, and physical education."[95]

Education in the United States has been affected by social, political, and historical events. Beginning in the 1950s, education shifted from the child-centered progressive approach[96] to a more rigid, authoritarian style based on the nation's concern over competition with the Soviet Union.[97] By the mid-1960s, however,

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92. America's early common school reformers viewed education as a "primary vehicle for defining ourselves as a nation." *Id.* at 169. American schools' inclusionary practices and student attendance from all economic classes have long been heralded. *See* ELSHTAIN, *supra* note 7, at 78-90 (discussing the components of American democratic education and the Jeffersonian tradition of creating a natural aristocracy through education). In fact, by 1900, more than fifty percent of all children between ages six and thirteen years old attended school. MYERS & MYERS, *supra* note 33, at 268. The opportunities for African-American children, however, particularly in the South, were appalling. *Id.* at 186 (commenting on how the dual-school systems developed not for educational reasons but out of hate and racism); *see also id.* at 270 (noting that "black" and other non-white students were relegated to separate schools). The so-called "separate but equal" status of segregated schools represented a known façade in which local districts could divide resources unevenly. *See id.* at 178-80 (discussing the status of "disadvantaged" poor, minority, and handicapped children and efforts to reform division). By 1984, nearly forty million, or ninety-sever percent of school-aged children attended elementary or secondary schools. *Id.* at 9.

93. *Id.* at 267-78 (discussing how both the new democracy and the diversity in citizenship with a large immigration population required citizenship lessons); *see also* Salomone, *supra* note 91, at 169 (noting that the "common school experience, offered to all regardless of social class or ethnic background, would assimilate the hordes of immigrants coming to our shores and meet the emerging needs of industrialization.").

94. MYERS & MYERS, *supra* note 33, at 271.

95. *Id.* at 271-72.

96. The progressive education movement arose primarily from the thinking of John Dewey and such pragmatists as William Heard Kilpatrick. *Id.* at 305. Progressive education characterizes much of the teaching in the United States and England since the 1900s. *See id.*; Salomone, *supra* note 91, at 178 (describing how progressive education had widespread appeal in the early 1900s). Progressive education is usually viewed in opposition to traditional ideas of a rigid, authoritarian, dogmatic, and absolutist type learning environment. MYERS & MYERS, *supra* note 33, at 271-72. Rather, the following pedagogical principles generally makeup a progressive educational environment: "(1) a classroom centered on the child, (2) a curriculum based on interests, (3) a methodology oriented toward discovery, (4) a school focused on life, and (5) an environment shaped by corporation." *Id.*

97. *See* Salomone, *supra* note 91, at 178. Competition with the Soviet Union became particularly intense after the Soviets launched Sputnik, a communications

states initiated a shift from traditionalism[98] back to progressive education.[99] An emphasis on educating the "whole child" emerged out of the anti-war movements and the War on Poverty.[100] States challenged the traditional views of schooling, finding them overly competitive and goal-oriented.[101] During the 1970s, however, experts viewed declining test scores, increased drop out rates, and rising student violence as products of progressive education. This view led to an educational movement[102] known as a shift "back to basics."[103] This movement, greatly influenced by the 1983 publication of *A Nation at Risk*,[104] focused on students' mastery of core academic subjects.[105]

These trends are significant because they demonstrate how culture and education are intertwined.[106] Although the educational foundation and general structure remain the same in the United States, the trends illustrate how Americans expect education to serve

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satellite in October of 1957. *See Goals 2000*, *supra* note 1, at 352 n.48. For instance, President Eisenhower signed the National Defense Education Act of 1958 in response to cries for educational changes because many Americans believed that the nation was lagging behind in science education. *Id.*

98. Traditionalism in education is generally viewed as the antithesis to progressive education because it focuses on an authoritarian environment in which the teacher, not the student, is at the center of the educational process. *See, e.g.*, MYERS & MYERS, *supra* note 33, at 305.

99. *Id.* at 13 (stating the philosophy of the 1960s grew out of "reactions to earlier times in which schools were more achievement oriented.").

100. *Id.* (describing how the 1970s brought individual instruction that was extremely flexible and focused on helping children develop their self-concept).

101. *See* Salomone, *supra* note 91, at 179.

102. *Id.*

103. "Back to basics" refers to "a view of education that emphasizes the study of basic academic subjects such as English, history, mathematics, science," and it "stresses literacy and the study of great literary works. MYERS & MYERS, *supra* note 33, at 608.

104. *See* NATION AT RISK, *supra* note 3. This report, popularized by then-President Ronald Reagan, was the first of its kind and stirred much discussion about education across the nation.

105. *See* Salomone, *supra* note 91, at 178-79. Students had to become more serious about their academic subjects because schools standards for passing students to the next grade became stricter, and schools prevented students from playing sports if their grades were not high enough. *Id.*; *see also* MYERS & MYERS, *supra* note 33, at 13 (explaining that the shift back to basics was a more achievement-oriented time and how this period marked a decline in school time spent on vocational subjects and electives).

106. Culture, in its broadest sense, involves the patterns of human relationships that help humans define themselves as individuals and as a society. *See* JOHN DEWEY, *The Future of Philosophy*, *in* 17 JOHN DEWEY: THE LATER WORKS, 1925-1953 466, 467 (Jo Ann & Boydston ed., 1990). These relationships include language, religion, industry, politics, fine arts, and literature. *Id.* Since education is a part of culture, Americans should expect its goals and purposes to fluctuate in accordance with American values.

different purposes depending on current political and social events.[107] Thus, the United States seems unlikely to implement meaningful educational reform, beyond the shifting of educational approaches, until U.S. culture develops a true concern for the quality of education.

2. Goals 2000

In March 1994 President Clinton signed Goals 2000: Educate America Act (Goals 2000) into law. The purpose of this Act was to end mediocrity in American education.[108] The roots of Goals 2000 began in 1989 when President Bush held an Educational Summit with the nation's fifty governors "to establish a set of national educational goals and to reallocate educational policy responsibilities among the federal, state, and local governments."[109] Goals 2000 emerged after years of incorporating the goals from the 1989 Education Summit meeting[110] into statutory language. Goals 2000 has dramatically increased the role of the federal government in making educational policy.[111]

Goals 2000 is unique[112] because it goes further than previously

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107. These trends demonstrate that the pendulum consistently changes directions in American education. These shifts, however, have not greatly altered the United States' overall educational structure. The author draws two inferences from the American educational movements. First, the American educational foundation and structure remains similar to England since both are based on the same European tradition. After all, the colonists brought the same European religious and cultural values, which have similarly evolved. Additionally, the philosophies of John Locke, Claude Helvetius, and Jean-Jacques Rousseau, Tom Paine, and Mary Wollstonecraft influenced the English and the U.S. foundations of educational theory. Second, education's contemporary purposes and trends reflect what Americans value. Therefore, in order for education to develop responsible, knowledgeable citizens, Americans must truly value responsibility, information, and citizenship.

108. *See Goals 2000, supra* note 1, at 351; *see also* Goals 2000: Educate America Act, 20 U.S.C. §§ 5801-6804 (2000).

109. *Id.* at 347.

110. The Education Summit Meeting has been deemed the advent of education federalization in the United States. *Id.* at 354. The meeting consisted of President Bush and the nation's governors from all fifty states. *Id.* They gathered to announce their commitment to education and to promulgate goals for the nation's educational system. *Id.* at 354-55. Again, this expressed concern for education raises questions about the nation's true commitment when few state and local laws are passed to meet these lofty national goals. *Id.* (stating the goals of the summit, which included students arriving ready to learn, graduation rates of ninety percent, and adult literacy).

111. *Goals 2000, supra* note 1, at 356-68 (explaining the reasons Congress provided for increasing the federal government's role in education).

112. Prior to the 1900s Congress rarely involved itself in education. The federal government linked the property lines of the Land Act of 1785 and the Northwest Ordinance of 1787 to the creation of schools. *Id.* at 364. Additionally, Congress required states to include the right to education in their state Constitutions, beginning

passed legislation to impact local educational systems.[113] Previous federal educational laws traditionally delegated funds within narrowly defined areas, whereas Goals 2000 seeks to create a "coherent, nationwide, systematic education reform."[114] Goals 2000 encourages states to voluntarily adopt opportunity-to-learn standards[115] and to apply to the federal government for certification in an effort to develop a national curriculum.[116]

To oversee the structuring of the educational criteria, Goals 2000 established the National Education Standards and Improvement Council (NESIC).[117] This Council works with states to ensure that they receive federal certification for their educational content and opportunity-to-learn standards.[118] Congress also sought to test students in grades four, eight, and twelve to ensure their competency over challenging subject matters.[119] Congress employed its traditional method of seeking state compliance with federal legislation in education[120] by conditioning federal grants upon the states' adoption of Goals 2000.[121]

Although Goals 2000 presents a more vague and "voluntary" national system which differs greatly from the rigid uniformity of England's national curriculum, the Act demonstrates a definite step towards the English system. Goals 2000 seeks to establish a national consensus for educational improvement through the National

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with the admission of Ohio to the Union. *Id.* In the early 1900s Congress' involvement increased with a primary focus on higher education. *Id.* Congress, however, also designated some funds to high schools. *Id.* After the 1930s federal involvement greatly expanded as Congress made more money available to schools on the condition that the schools use the funds for certain programs and goals. *Id.*

113. *See supra* notes 86-88 and accompanying text.

114. *See Goals 2000, supra* note 1, at 348 n.20.

115. The opportunity-to-learn standards appear in Title III of the Act and are ideals discussed at the Educational Summit meeting. *Id.* at 370-71. These standards include ensuring that all students arrived ready to learn. By codifying the Educational Summit meeting's broad goals, the federal government ignores the "cumbersome, lengthy, and potentially expensive" efforts that local school boards will be forced to undergo. *Id.* If federal funds do not cover the expenses of implementing the opportunity-to-learn standards, then states' participation will be contingent upon the states' abilities to raise additional funds. *Id.*

116. *Id.* at 357-58. The state and local agencies that agree to participate in Goals 2000 activities will be eligible to receive the optional certification from the NESIC. *Id.* at 369. Acquiring certification will entitle schools to obtain greater amounts of federal funds. *Id.*

117. *Goals 2000, supra* note 1, at 358.

118. *Id.*

119. *Id.*; *see also* Pub. L. No. 103-227, §§ 301-19, 108 Stat. 125, 157-87; Goals 2000: Educate America Act, 20 U.S.C. §§ 5801, et seq. (2000) (including testing, teacher continuing education, school readiness, parental involvement, etc.).

120. *See Goals 2000, supra* note 1, at 365 (explaining that the states do not technically have to accept the funds if they want to be free from implementing Congress' condition; yet, realistically, the schools have little choice).

121. *See id.* at 359.

Education Goals Panel (NEGP), an independent agency created by the Act, which implies that this law is just the first step towards increasing the federal government's role in education.[122] Furthermore, Goals 2000 calls for an international educational program to study the educational systems of foreign countries and develop an exchange with educators internationally.[123]

Given the similar educational movements and philosophies in the United States and England, the United States seems likely to continue to follow England's lead.[124] Public disillusionment with the current educational system has created the opportunity for Congress and future presidents to seek a national solution to the complicated state educational crisis.[125] Thus, Goals 2000 is likely the first step towards the United States creating a national curriculum modeled after England's national curriculum. Questions arise, however, over the policy and legal ramifications of a U.S. national curriculum, and most importantly, whether Congress has the power to create and implement such a curriculum.

III. COMPARING THE UNITED STATES AND ENGLAND: THE POTENTIAL EDUCATIONAL AND LEGAL IMPLICATIONS OF ADOPTING ENGLAND'S SYSTEM

The United States and England, due partly to the unique historic relationship between the two,[126] share common philosophies in education.[127] Historical, social, and economic events have caused the two nations to look to each other for support and guidance in many areas, particularly education.[128] England has already implemented most of the United State's current reform ideas,[129] although England's recent centralization of education raises separate issues due to the two countries' differences in government structure and ideology. This section discusses how these differences influence the ability of the United States to follow England's lead in educational

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122. *Id.* at 358-59.

123. *Id.* at 359.

124. *See supra* note 48 and accompanying text.

125. *See supra* Part I (discussing Americans' current disillusionment with the educational system). *See also Goals 2000*, *supra* note 1, at 363 (noting that state legislative educational reforms waned in the 1990s due to lack of funds and increases in executive agencies' powers).

126. *See supra* notes 41-43 and accompanying text.

127. *See supra* note 44 and accompanying text (discussing the shared philosophies in education between the United States and England).

128. *See* Levin & Young, *supra* note 34, at 8.

129. Silvernail, *supra* note 46 (concluding that American education reform is similar to England's past reforms).

reform.[130] Furthermore, the advantages and disadvantages of centralization as well as the benefits and problems of local and state control of curriculum will be analyzed. Ultimately, the U.S. federal government will continue to play a role in education.[131] Yet, U.S. governmental structure and ideology require that states maintain ultimate substantive control educational reform.[132] Therefore, the role of Congress should be limited to providing funds under the Spending Clause,[133] and the federal courts should interpret the Constitution in such a way that honors state autonomy and the fundamental concept of federalism.[134]

A. *How Governmental and Ideological Differences Impact Education Law*

The U.S. government emerged from direct opposition to England's control over the colonies. As a result, the United States developed a contrasting governmental structure, while still maintaining strong cultural ties with England.[135] The Mother County's cultural and social influences on the United States as well as the countries' consistent economic and intellectual relationships continually influence the nations' consanguinity, which helps explain

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130. *See* Levin & Young, *supra* note 34, at 10 (noting the importance of a nation's ideology to the shaping of its educational system).

131. The states have become dependent upon the federal government because Congress supplies such large amounts of money. *See* Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 86 n.7 (citing Garcia v. San Antonio Metro. Transit Auth., 469, U.S. at 552-53) ("[i]n the past quarter-century alone, federal grants to States and localities have grown from $7 billion to $96 billion" and "now account for one-fifth of state and local government expenditures.").

132. *See* Alan N. Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1038-39 (1988) (advocating the "virtues of state regulation" and noting that Congress' displacement of local authority causes individuals to lose the benefits of state government).

133. While Congress has the power to provide states with funding for education under the Spending Clause, Congress cannot condition the funds upon an unconstitutional condition. *See* McCoy & Friedman, *supra* note 131, at 87 n.11. For example, if Congress is without regulatory power to achieve an end, then Congress cannot threaten to withhold a benefit from states if the states fail to comply with a regulatory objective. *See id.* at 87 (stating that this dilemma is the essence of *South Dakota v. Dole*).

134. To honor state autonomy, the courts should use functional analysis as a guide and recognize the limits placed on Congress by the federalist structure of the Constitution. *See infra* note 215, Part IIV.A. Courts should not, however, allow states to violate the Fourteenth Amendment's Equal Protection Clause in the name of honoring state autonomy. *See* Milken v. Bradley, 418 U.S. 717, 745 (1974) (holding that the all-black Detroit school system was a product of district lines and that the Court lacked jurisdiction to order a redrawing of the districts).

135. *See supra* notes 41-46 and accompanying text.

their exchange of ideas on educational policy.[136] Both nations based their educational systems on similar thinkers, such as Rousseau,[137] experienced similar educational movements,[138] and provided disparate educational opportunities.[139] Thus, the fact that both countries have adopted a "market approach" focusing on schools as training grounds for students' future jobs is not surprising.[140]

This educational focus, however, has different implications for the United States and England, because both have fundamentally distinct structures of government. The U.S. Constitution delegates limited powers to the federal government, while the states retain the majority of the power to regulate the health, welfare, and morals of individuals.[141] England, on the other hand, is the major administrative division of the United Kingdom, which is a constitutional monarchy.[142] Although the United Kingdom lacks a written constitution, it has approximately a thousand years of experience as a unified entity with authority derived from common law, practice, and statutes.[143] England's governmental structure makes creation of a centralized educational curriculum easy and politically palpable, because the bicameral Parliament simply passes

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136. *See* Angela Ferree, *Literature Instruction and Assessment: A Cross National Study*, Paper presented at the Annual Meeting of the American Educational Research Association, Chicago, IL (Mar. 21, 1997), http://orders.edrs.com/members/sp.cfm?AN=ED413346 (describing the usefulness of cross-cultural studies between England and the United States); *Literature Instruction and Assessment: A Cross National Study,* Paper presented at the Annual Meeting of the American Educational Research Association, Chicago, IL (Mar. 21, 1997), http://orders.edrs.com/members/sp.cfm?AN=ED413346 (discussing a cross-national literature study in schools in England and Texas and the literature standards of England's national curriculum).

137. *See supra* note 44 and accompanying text.

138. *See* Benjamin Levin & Jonathan Young, *Reshaping Public Education*, Paper Presented at the International Congress on Social Welfare (Jerusalem, Israel) (July 1998), http://orders.edrs.com/members/sp.cfm?An=ED424626 [hereinafter *Reshaping*] (noting the similar trends in education between many countries including the United States and England and the recent departure from a Post-War educational consensus).

139. England has maintained a divided system of education based on class. *See* LAWTON, CLASS, *supra* note 55, at 1-3. Similarly, the United States has continually discriminated against minorities, particularly African-Americans. *See supra* note 17 and accompanying text.

140. *See* Sally Power & Geoff Whitty, *Teaching New Subjects? The Hidden Curriculum of Marketized Education Systems,* Paper Presented at the Annual Meeting of the American Educational Research Association (Chicago, IL) (Mar. 24, 1997), ERIC, ED 406 757, EA 028 327 (documenting the shift of educational systems in England, United States, Australia, and New Zealand toward application of market forces).

141. *See* Greenspan, *supra* note 132, at 1021 (positing that states hold the majority of power to regulate health, safety, and welfare because they are more accountable, democratic, and responsive).

142. CIA, THE WORLD FACTBOOK (1999), *at* http://www.odci.gov/cia/ublications/factbook/geos/uk.html (last visited Mar. 23, 2001) (copy on file with the Vanderbilt Journal of Transnational Law) [hereinafter CIA].

143. *Id.*

whatever laws it deems appropriate.[144] For this reason, England's creation of a national curriculum does not raise the governmental power questions that the United States must face.

Unlike England, the constitutional structure of the United States purposely maintains a system of checks and balances designed to prevent any one branch from exercising too much power.[145] Ironically, although this system emerged in opposition to England's rule of the colonies, it was built upon the ideas of English legal theorists such as William Blackstone and philosophers like John Locke.[146] The Founding Fathers were well aware of the existing regional differences and the necessity of maintaining the sovereignty of the individual states.[147] The general police power of the states has remained important in large part because of the size and population of the United States.[148] In contrast to England's thousand year existence and relatively homogeneous population,[149] the short history of the United States includes the integration of masses of immigrants with a wide range of ethnic, racial, religious, and cultural backgrounds.[150] This rich cultural diversity contributes to the practical difficulty of administering a comprehensive federal education program. Additionally, many regions of the United States appear to have developed their own personalities, and consequently attract persons of similar religious, ethnic, cultural, racial, or political backgrounds.[151] Thus, state laws on issues including family, criminal, and educational law can widely differ due to the divergent views and backgrounds of persons in the fifty states.[152] These differences in state law are generally considered one of the U.S. government's strengths because they provide for greater political

144. 4 W.S. HODSWORTH, A HISTORY OF ENGLISH LAW 186 (1924).

145. *See* ELY, *supra* note 43, at 42-51.

146. *Id.* at 26-31.

147. *Id.* at 50-51.

148. The United States' total area is 9,629,091 square kilometers, and it has a population of 272,639,606 (July 1999 estimate). CIA, *supra* note 142.

149. The United Kingdom's population is 59,113,439 (July 1999 estimate) of which England's population is a large part. *Id.*

150. America is comprised of a nation of immigrants and descendant of immigrants. Approximately, 83.5% of the population is white, 12.4% black, 3.3% Asian, and 0.8% Amerindian (1992). *Id.*

151. *See* Greenspan, *supra* note 132, at 1039 (noting the diversity of attitudes, values, and resources in different parts of the United States).

152. *Id.* (citing Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 854 (1979)) (stating that although media and twentieth century mobility homogenize American life, separate state and local governmental units allow for regional variations).

accountability,[153] public participation,[154] and experimentation.[155] Therefore, the geographical size, population, diversity, and regionalism of the United States reinforce state sovereignty and the need for Congress to consider these governmental differences when passing educational laws.

Besides governmental structural differences, the ideologies of the United States and England, while becoming more convergent, originated from separate premises. While defining any nation's ideology is difficult and requires many generalizations,[156] the educational system in the United States began with the primary goal of creating responsible, educated citizens who would participate in the democratic system.[157] As a new nation, the United States quickly developed a thriving middle class[158] and attracted diverse individuals from far off countries.[159] Therefore, the Framers and early educators circuited their enthusiasm for the new federal republic into the nation's educational ideology. As a result, schools helped develop a strong democratic tradition,[160] while evolving based on these republican ideals.[161] The schools groomed white students, regardless of economic or social class, to embrace a common, national ethos, while still maintaining their individualism.[162] England, on the other

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153. *Id.* at 1041 (discussing how state and local governments are more accountable to their constituencies because they are more accessible and information is more available).

154. Smaller government maximizes the opportunity for individual involvement in government. *Id.* at 1040.

155. *Id.* at 1042 (arguing that states can act as social laboratories without fear that the entire nation will be jeopardized, and that they can better respond to the idiosyncrasies of their population, economy, and geography).

156. *See* Levin & Young, *supra* note 34, at 10 (defining ideology as a "discussive space of meaning which provides us with perspectives on the world, with particular orientations or frameworks . . .").

157. *See* WILLIAM J. BENNETT, THE DE-VALUING OF AMERICA 44 (1994) (noting Jefferson's belief that the masses needed education to understand their rights, interests, and duties as citizens and as people). *See generally* ELSHTAIN, *supra* note 7, at 5-21 (advocating communitarian values).

158. *See* ELY, *supra* note 43, at 25 (noting that cheap land and high wages made America "the richest, poor man's country").

159. A mass of immigration occurred in the early 1900s due to the United States' availability of employment opportunities. *Id.* at 101.

160. *See* BENNETT, *supra* note 157, at 46 (seeking a return to the earlier educational systems that taught students to develop strong democratic values, such as patriotism, equality, freedom to practice one's faith, personal responsibility, and honesty).

161. The U.S. capitalist ideals have always been fettered by the republican form of government. *See* ELY, *supra* note 43, at 33. Republicanism is "the sacrifice of individual interests to the greater good of the whole." *Id.* (citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 53 (1969)).

162. *See* Senhauser, *supra* note 36, at 941 (recognizing the continuing conflict in America between integrating children into society and allowing them to develop as individuals).

hand, historically maintained divergent schools based on students' wealth and social status.[163] England's ideological focus was to produce educated individuals who could perform well within the career path that their aptitude dictated.[164]

Accordingly, Parliament recently passed the Education Acts of 1988 and 1993 to produce a market-like educational structure, which identifies "effective" schools.[165] Although the changing ideology of the United States has followed England's lead by adopting more competitive measures,[166] Americans appear ambivalent to the effect of this ideological transformation on democracy.[167] As debate in the United States escalates on issues of vouchers and school choice, the ideology of the United States appears on the brink of intersecting England's free market educational experiment.[168] While the United States' focus on producing a powerful economic workforce is undoubtedly important, Americans should not forget the traditional ideological goal of producing socially and politically responsible citizens.

B. *Advantages and Disadvantages of Adopting England's National Curriculum*

Two lines of reasoning support the adoption of a uniform national curriculum by the United States. First, society has an interest in creating a national education system that provides all students with equal educational opportunities.[169] By adopting a national curriculum, society has an objective standard by which to

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163. *See* LAWTON, CLASS, *supra* note 55, at 2.

164. *Id.*

165. *See* Power & Whitty, *supra* note 140, at 10. *See also* Norton Grubb, *Opening Classrooms and Improving Schools: Lessons from Inspection Systems in England*, Paper Presented at the Annual Meeting of the American Educational Research Association (Apr. 13, 1998), ERIC, ED 425 512, EA 029 422.

166. *See Education Reform*, *supra* note 34, at 6-9.

167. *See* Power & Whitty, *supra* note 140, at 6 (noting that critics of the market approach to education claim it "uproots communities and erodes ties to places and history.").

168. *Id.* at 9 (stating that the United States' rightward shift is likely to ensure a legislated curriculum that will draw on a partial and narrow selection of American culture).

169. The U.S. founding fathers' declaration that "all men are created equal" and the Fourteenth Amendment's Equal Protection Clause require Americans to make equality in education a reality. *See supra* note 17 and accompanying text. *See also* Swanson, *supra* note 41, at 8 (citing statistics on the great disparity in educational funding in school districts across the United States); Barber, *supra* note 2, at 44 (advocating the need for education of all citizens to secure democracy and prevent mob rule). Discrimination continues though the use of separate tracks, college preparatory and vocational, that place a disproportionate number of minority students in vocational tracks. *See generally* JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY (1985).

measure the quality of schools. This in turn fosters health competition. For this reason, England has implemented the national curriculum.[170] In England, national inspectors utilize standardized criteria for rating schools and identifying the school's strengths and weaknesses.[171] These evaluations then become public knowledge.[172] By identifying the ineffective schools, free market competition works either to eliminate or ameliorate those schools.[173] Thus, the national curriculum as well as student and school assessments work together to create incentives for schools to improve their overall quality and meet the national standards.[174]

This English competitive system in which some schools fail and others thrive has earned much criticism.[175] Specifically, the development of national standards by government agencies, often persons with little or no educational experience has generated much controversy.[176] Teachers, in particular, asserted that their position as educators and professionals was undermined.[177] Instead of focusing on student learning, flexibility, and student choice in material, standardized tests required full attention and often diverted resources away from other important educational programs.[178] Many educators also experienced dissatisfaction with the pressure of school inspection and preparing students of differing abilities for standardized tests.[179] These tests, as with most standardized tests, raise serious questions about their validity and about what they actually measure.[180] Overall, the competition between schools, which the national curriculum seeks to promote, asks society to determine whether identifying and singling out schools that fail to meet national standards promotes better quality schools. In the end, society must determine if the national standards, student assessments, and school

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170. *See* KELLY, *supra* note 33, at 30.

171. *See* Grubb, *supra* note 165, at 10 (explaining how inspectors identify schools' strengths and weaknesses by ranking every teacher that they observe).

172. *Id.* at 11.

173. *Id.* (noting that schools that fail inspection must improve and demonstrate changes upon inspection or else they may be taken over by the Secretary of State).

174. *Id.* at 11-12.

175. *See* Levin & Young, *Education Reform*, *supra* note 34, at 17 (noting that there were many divisions even within the Conservative Party over England's national curriculum). Swanson, *supra* note 41, at 10 (stating that critics believe the choice-policy has led to an inequitable and selective educational system).

176. *See* Grubb, *supra* note 165, at 18-33 (discussing that the National Curriculum and inspections amount more to regulation than school improvement measures due to the amount of paperwork, limited time, and limited expertise of the inspectors).

177. *Id.* at 25.

178. *Id.* at 31.

179. *Id.* at 14 (noting that most teachers find inspections to be enormously stressful).

180. *See* Barber, *supra* note 2 (questioning the accuracy of standardized tests).

inspections foster the type of learning environment in which students can develop intellectually as well as personally.

The second line of reasoning for adopting a standardized curriculum is national interest in creating a common ethos.[181] The standardization of education allows for all students to share a common cultural language because they have studied and examined the same materials.[182] This shared knowledge base spurs intellectual and social development by enabling everyone to fully participate in discussion of ideas.[183] Consequently, all students will have an equal ability to participate in the democratic process since no student will have an educational advantage from the material that their school taught.[184] If students, despite the diversity of their backgrounds, have a common educational experience, genuine communication is more likely to occur.[185] In addition to facilitating communication, a national curriculum may better represent interests of divergent groups.[186] Instead of local majority views controlling, the national standardization process would allow the views of minority groups to be included.[187] The question of whether minority views could ever be adequately represented, however, remains at issue.[188]

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181. *See* Salomone, *supra* note 91, at 177 (discussing the importance of using education to develop a national ethos and common understanding of citizenship). This view of schools helped millions of immigrants free themselves from communal isolation, low economic status, and high rates of illiteracy. *See id.*

182. Sharing a common language does not ensure effective communication. If Americans' share common experiences, however, such as reading certain books, then the likelihood of effective communication increases. For example, characters like Miss Havisham in Charles Dickens' *Great Expectations*, or Scrooge in Charles Dickens' *A Christmas Carol*, convey a persona and image that cannot easily be articulated without familiarity with the books. *See supra* note 42 and accompanying text.

183. *Id.*

184. *See infra* note 368 and accompanying text. Even if separate curriculum tracks are eliminated, however, teachers' use of the same curriculum is unlikely to result in equality unless methods similar to England's assessment and inspection are also employed.

185. Even though persons from widely divergent ideological groups will continue to disagree, school systems that emphasize commonality among differences will help increase the likelihood of true dialogue. *See* ELSHTAIN, *supra* note 7, at 65-90.

186. *See generally* Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552 (1999). Professor Cashin's arguments concerning "tyranny of the majority" when states control welfare are also applicable to the states' control of education. *See id.* at 555. She defines "tyranny by the majority" as the process "by which local prejudices go unchecked by any outside forces." *Id.*

187. *See id.* (advocating that national standards are the only way to preserve minorities' stake in the system).

188. *See supra* note 15 and accompanying text (discussing the controversy over school curriculum including minority perspectives).

C. *Advantages and Disadvantages of State and Local Control of Curriculum*

Ideally, local control of curriculum sends a message to teachers, administrators, parents, and students that they have a voice and role in making their local school the best it can be.[189] Local control also highlights the community's duty to be involved in ensuring that the school provides the type of education that is most in keeping with community values.[190] Local schools can encourage students, parents, and teacher to partake in school board meetings on the chose of curriculum, to learn about how their school spends funds on developing curriculum and textbooks, and to participate in local committees on school curriculum improvements.[191] This active involvement of community and school persons ensures that local standards help guide and invigorate teachers to maintain optimum classroom environments for their students.

This local control also helps to place students at the center of the learning process[192] and validates the roles of teachers as professionals who can best decide how to meet locally promulgated standards.[193] Since standards and curriculum are established on a local level, the public has more of an opportunity to voice opinions on the curriculum selection and to hold elected officials accountable.[194] Like schools with national curriculum, the students should be capable of demonstrating their knowledge through a fair testing or evaluation

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189. *See* Greenspan, *supra* note 132, at 1040 (explaining that individuals are more likely to become involved in local government because they develop a sense of loyalty and connection).

190. Communities' values differ. For example, the Supreme Court recognizes that what one community like Memphis, Tennessee, finds obscene may be perfectly acceptable in New York City, New York. *See* Miller v. California, 413 U.S. 15, 24 (1973).

191. *See* Greenspan, *supra* note 132, at 1040-41 (discussing the advantages of local control because of citizen participation and increased accountability).

192. *See* Silvernail, *supra* note 46 (discussing how national curriculum forces teachers to focus on preparing students for the assessment tests instead of helping students develop overall mastery of subject areas).

193. *See id.* (noting that England's national curriculum disempowers many teachers).

194. *See* Greenspan, *supra* note 132, at 1041 (stating that citizens know who to hold accountable on the local level, allowing them greater control). *See also Goals 2000*, *supra* note 1, at 381. Specifically, Professor Heise asserts that a national curriculum and legislation similar to Goals 2000 will not help improve student achievement. *Id.* Rather, he asserts that further centralization and homogenizing of curriculum will only hurt educational reform efforts because local governments need to tailor educational policies to meet their diverse populations. *Id.*

process; however, the tests should measure what the students learned from the classroom experience.[195]

While scholars generally consider experimentation and flexibility advantages of local control,[196] lack of stability and structure in curriculum can obstruct the delivery of consistently strong educational opportunities.[197] Politicians oftentimes advocate educational policy in order to gain attention and popularity without carefully weighing its implications or efforts on the current system.[198] The flexibility of teachers having choice in what they teach and how they teach it can be a disincentive to teachers to develop a highly structured or formalized classroom environment.[199] Students may also be disadvantaged if they transfer to another school district because they may not be prepared or may be forced to repeat material. Additionally, students who apply to colleges may be subject to disparate treatment based on their school system's curriculum and assessment methods, such as lack of advanced placement courses or deflated grading systems.

Even though local and state curriculum control prevents nationwide school comparison, the diverse school curriculums still enable and actually encourage competition. Schools and communities are likely to work diligently to design curriculum to earn such reputations because parents are attracted to areas with reputations for high quality schools. Additionally, many states use statewide tests to compare schools. These tests, however, have the advantage—over national tests—of comparing a smaller, more concentrated group of students. Thus, the test results are more likely to motivate students since they are more familiar with the school districts to which they are being compared and less likely to attribute their test scores to factors that they consider out of their control. Also, teachers, administrators, parents, and students have greater flexibility and control to restructure classes and curriculum as needed to improve these test scores.

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195. Instead of forcing teachers and students to focus solely on a prescribed curriculum and on passing the assessment exam, the teachers will have more flexibility to teach in more detail and beyond the scope of delineated curriculum. *See* Silvernail, *supra* note 46 (describing English teachers' complaints about their inability to run with the "teaching moment" and to teach areas of interest to the particular students in their class).

196. *See* Greenspan, *supra* note 132, at 1043 (positing that local governments can more effectively deal with complex social and political problems).

197. *See* Levin & Young, *Education Reform*, *supra* note 34, at 28 (noting that many states' educational systems have undergone an "unending series of reforms and changes over the last fifteen or so years").

198. *Id.* at 30 (stating that many politicians and lobbying groups promote educational programs to increase popularity since education is the by far the largest state expenditure).

199. *See* MYERS & MYERS, *supra* note 33, at 485-88, 568.

IV. IMPORTATION OF A NATIONAL CURRICULUM TO THE UNITED STATES

Unlike England, in which the Parliament has supremacy and can decide to pass whatever laws it so desires,[200] the U.S. Congress only has power to pass laws as provided by the federal Constitution.[201] Although a few scholars have made creative arguments for federal right to education,[202] neither the federal Constitution nor history establishes education as a systemic fundamental right.[203] Accordingly, the Supreme Court has found

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200. HODSWORTH, *supra* note 144, at 186.

201. Federalism as devised by the Framers delegated all power to the states and local governments except for those powers specifically delegated in the Constitution. In particular, Article I of the Constitution delineates the limited powers of Congress. *See* U. S. CONST. art. I. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (holding that Congress cannot regulate gun possession in a school zone based on Congress' Article I, Section 8 power to regulate commerce).

202. *See* Justin J. Sayfie, *Education Emancipation for Inner City Students: A New Legal Paradigm for Achieving Equality for Educational Opportunity*, 48 U. MIAMI L. REV. 913, 923 (1995) (arguing for the right to adequate education under the federal Constitution through a unique reading of *Rodriguez*). Sayfie asserts that the Court in *Rodriguez* explicitly reserved "the question of whether a minimally adequate education deserved protection." *Id.* (quoting *Papasan v. Allain*, 478 U.S. 265, 285 (1985)); *see also* Susan Bitensky, *Legal Theory: Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 553 (1992). Bitensky argues that the text of the Constitution supports an unlisted affirmative right to education based on "the Fourteenth Amendment's Due Process Clause and Privileges or Immunities Clause, the First Amendment's Free Speech Clause, and from another implied Constitutional right, the right to vote." *Id.* at 553-54. She claims that each of these theoretical bases would arguably be sufficient alone, yet the Ninth Amendment and the historical evidence of original intent would lend further substantiation of a federal right to education. *See id.* Despite her fervor and creativity, her premise seems flawed because the Framers simply did not structure the Constitution to give affirmative rights. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (noting that the Constitution contains no explicit right to education). *But see* Gerald Unks, *The Illusion of Intrusion: A Chronicle of Federal Aid to Public Education*, 49 EDUC. F. 133, 134-35 (1985) (arguing that the Preamble's call "to promote the General Welfare" supports federal intervention in education). Even the First Amendment is only a restriction on Congress not to regulate speech; it does not, however, grant an affirmative right for citizens to say whatever they want. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that speech that incites unlawful, imminent action is not protected by the First Amendment); *see also* Schenck v. United States, 249 U.S. 47, 52 (1919) (noting that "the most stringent protection of speech would not protect a man in falsely shouting fire in a theatre and causing a panic"). Bitensky uses Supreme Court cases to bolster her argument that education is a federal right; however, she misinterprets the Court's dicta. For example, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court holds that school teachers employed by the state have the fundamental right to speech; yet, she reads *Meyer* as also recognizing a "right to acquire useful knowledge." Bitensky, *supra*, at 564.

203. *Id.*; *see also* Greenspan, *supra* note 132, at 1021-30 (discussing the historical development of a federal police power through the Commerce Clause). Historically, the federal government possessed little power over local affairs since the

education to be a state benefit[204] and thereby, implicitly affirmed the state's power to dictate educational policy.[205] Nonetheless, legislation like Goals 2000 sets the precedent for Congress to mandate a national curriculum. Congress, however, must base such legislation[206] on either the Spending Clause[207] or the Commerce Clause.[208]

This section provides the legal context for interpreting the meaning of the Spending Clause and the Commerce Clauses and analyzes whether that grant of power enables Congress to mandate a

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Constitution explicitly granted states all power not enumerated. *See* U.S. CONST. amend. X. The Framers structured the Constitution in this way because a large federal bureaucracy cannot serve the communities' needs as well as states. *See* Greenspan, *supra* note 132, at 1021. States provide accountable, democratic, responsive leadership, which allows for local diversity. *Id.*

204. Education also cannot be declared a "federal right," since the Supreme Court has clearly held that education is a state benefit. *See Rodriguez*, 411 U.S. at 37 (holding that a Texas school district can use property taxes to fund public schools even if students at different schools receive disparate resources, as long as all persons are receiving the same benefit). Bitensky even acknowledges Justice Powell's reasoning in *Rodriguez* that education is not implicitly or explicitly guaranteed by the Constitution. *See* Bitensky, *supra* note 202, at 565.

205. Even before *Rodriguez*, the Court affirmed that the states have a choice as to whether to provide education. *See* Brown v. Board of Educ., 347 U.S. at 483 (stating that if states choose to provide education, then they have a duty to provide education on equal terms under the Equal Protection Clause). Furthermore, the Supreme Court has continued frequently to address the importance of state sovereignty in education. *See* Board of Educ. v. Dowell, 498 U.S. 237, 248 (1991) (stating that "local control over the education of children allows citizens to participate in decision making, and allows for innovation so that school programs can fit local needs"); Board of Educ. v. Rowley, 458 U.S. 176, 208 n.30 (1982) (commenting on the "States' traditional role in the formulation and execution of educational policy"). Notably, the Fifth Circuit commented on the need for local schools to retain control in order to address each child's individual needs. *See* Daniel R.R. v. State Bd. Of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989). The Fifth Circuit stated that "[a] congressional mandate that dictates the substance of educational programs, policies and methods would deprive the school officials of flexibility so important to their tasks." *Id.*

206. Section 8 of the United States Constitution limits the powers of Congress. U.S. CONST. art. I, § 8. Under these specified powers, the Spending Clause and the Commerce Clause are the only authority under which Congress would arguably have the power to regulate education. *Id.*

207. The "Spending Clause" or "tax and spend clause" refers to the following part of Article I, Section 8 of the United States Constitution: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." *Id.*

Congress passed Goals 2000 under the Spending Clause. *See* Goals 2000: Educate America Act, 20 U.S.C. §§ 5801, et seq. (2000).

208. The "Commerce Clause" authorizes Congress, "[t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." *Id.* Congress has yet to pass legislation regulating education under the Commerce Clause. The Supreme Court's broader interpretation of the Commerce Clause in the past forty years, however, supports the possibility that Congress could use its commerce power to regulate education directly. *See supra* Part IV.C.2.

national curriculum in public schools.[209] Determining the meaning of the Spending and Commerce Clauses requires analysis of their language,[210] the historical and traditional interpretation of the clauses by the Court and scholars,[211] the current, applicable Supreme Court jurisprudence,[212] and functional analysis.[213] Before interpreting the clauses, this Note will discuss the federalist structure[214] of the Constitution because this structure illuminates the constitutional powers of Congress and the limitations of those powers. The Spending Clause, under which Congress has already passed federal education legislation, will also be discussed. Finally, the constitutionality of Congress passing a national curriculum under the Commerce Clause will be analyzed. Although Congress has not yet attempted to regulate education under the Commerce Clause, it is

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209. Chief Justice Rehnquist's majority opinion in *United States v. Lopez* provides a well-structured analysis of how to determine whether Congress' regulation of an activity falls within its constitutional Commerce Clause power. *See* United States v. Lopez, 514 U.S. 549 (1995). First, the Court notes the importance of the separation of powers between the states and federal government as well as how the Constitution's delegation of enumerated powers restricts Congress' power. *See id.* at 552; *see also id.* at 575 (Kennedy, J., concurring). Second, the Court looks to the text of the Constitution and examines, briefly, the historical definition of the Commerce Clause. *Id.* at 552-59. Third, the Court provides a timeline of its most recent decisions that define the scope of the Commerce Clause and clarifies the parameters of the Constitutional question. *See id.* at 559-63. Finally, the Court analyzes the arguments provided by both sides with this structural-historical framework in mind. *See id.* 563-68. This method may also be applied to determine Congress' constitutional power under the spending clause.

210. *See infra* notes 252 and 347 and accompanying text.

211. A basic overview of the historical changes in the clauses' interpretation provides an essential context for the formation of current day Supreme Court jurisprudence and also provides more in-depth analysis of how the Supreme Court should interpret the clauses. *See infra* Parts IV.B.1, IV.C.1.

212. The Supreme Court's authority is binding and due to *stare decisis* is unlikely to change. *See* U.S. CONST. art. III.

213. *See infra* notes 374-83 and accompanying text. Several authors support the use of functional analysis in determining the meaning of the Commerce Clause. *See* Deborah Jones Merritt, *The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems*, 66 GEO. WASH. L. REV. 1206, 1210 (1998) (arguing that functional analysis dictates that the Commerce Clause should extend to activities that the states cannot regulate themselves); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 594 (1995); Ana Cramer, Note, *Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271, 289 (2000) (explaining how functional analysis is a "practical approach to law . . . [that] asks what roles states and national government should play in the Constitutional system").

214. *See infra* Part IV.A.1. Federalism is defined as the "interrelationships among the states and the relationship between the states and the federal government" in the United States. BLACK'S LAW DICTIONARY 612 (6th ed. 1990). *See also* Denis J. Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 AM. J. COMP. L. 537, 539 (1996) (explaining how federalism is "subject to a spectrum of definitions and narrowing the concept to include: a division of powers, independence or sovereignty within each sphere that is not necessarily equal").

likely to prefer use of the Commerce Clause to the Spending Clause because it provides Congress greater freedom to impose mandatory regulations. Under the Commerce Clause, Congress would not have to provide money to the states or limit its regulations to those that the states accept as a condition to receiving federal funds.

A. *Federalism: U.S. Government's Structure and its Importance to Constitutional Interpretation*

Federalism, the dual sovereignty between the states and the federal government, serves as the foundation of the U.S. government's structure.[215] The Framers, noting their dissatisfaction as former colonists with England's control, created a federalist system.[216] They wanted to ensure that the government's structure delegated control to the people and ensured protection from tyranny.[217] Thus, when the Framers constructed the Constitution to replace the Articles of Confederation, the states retained all powers not specifically delegated to Congress.[218] The Framers decided to limit the power of the federal branches to narrow areas that required uniformity and to reserve the remainder of the powers to the states.[219] James Madison best described the states and federal government's relationship when he wrote:

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215. The entire country is made up of a Union of separate state governments [and] the states and their separate institutions are left to perform their separate functions in their separate ways .... The concept [of federalism] does not mean blind deference to 'states' rights' any more than it means centralization of control over every important issue in our national government and its court .... What the concept does represent is a system in which there is sensitivity to the legitimate interests of both state and national governments.

McCoy & Friedman, *supra* note 131, at 88 n.15 (quoting Justice Black in *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

216. *See* ELY, *supra* note 43, at 26-31 (describing the concerns among the former colonists to create a government that protects individual liberties).

217. *See* Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1513-16 (1991) (discussing how the Framers designed the federalist form of government to create "ordered liberty" and preserve a true democracy); *see also* Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 855 (1979) (asserting that the fundamental purpose of the federalist structure is to "enhance and protect individual liberty").

218. *See* THE FEDERALIST No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) (stating that the Constitution "leaves to the several states the residuary and inviolable sovereignty").

219. *See* ELY, *supra* note 43, at 42 (explaining the Framers' support for a "more vigorous national government that could protect property rights, promote commerce, establish credit by paying the public debt, and suppress insurrection"); *see also* McCoy & Friedman, *supra* note 131, at 88-89 (asserting that, while the Framers had no choice but to maintain the states' power if they wanted ratification of the Constitution, many advantages arose out of the federal system).

> The powers delegated . . . to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . The powers reserved to the States will extend to all the objects which, in the course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[220]

The Framers considered this federalist structure of government to be such a powerful mechanism for preserving liberty that the Bill of Rights was only a controversial afterthought that some Framers viewed as superfluous and dangerous.[221] Since the Constitution not only divided power between the states and federal government, but also limited each branch of the federal government to specific enumerated powers,[222] the Framers were confident that this system of checks and balances would preserve a representative democracy.[223]

The Framers actually relied upon this tension between the state and federal governments to create a checks and balances system that prevents abuse.[224] In fact, James Madison concluded that "the different governments will control each other; at the same time each will be controlled by itself."[225] This intentional conflict, between the sovereign, independent governments, works to Americans' advantage.[226] In *Gregory v. Ashcroft*,[227] Justice O'Connor delineated the following roles and advantages of a federal system:

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220. THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed. 1961).

221. *See* Brown, *supra* note 217, at 1514-15 and n.7 (commenting on how some of the Framers opposed the Bill of Rights because they found it superfluous and dangerous).

222. As Justice Story says: "The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers." United States v. Butler, 297 U.S. 1, 66 (1935) (Roberts, J., quoting Justice Story in majority opinion).

223. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Brown, *supra* note 217, at 1515 n.8 (quoting THE FEDERALIST No. 47, 313 (J. Madison) (Modern Library ed., 1937) and explaining the great number of Supreme Court opinions mentioning Madison's concept, while simultaneously failing to take his view seriously).

224. *See* Michael W. McConnell, *Federalism: Evaluating the Founder's Design*, 54 U. CHI. L. REV. 1484, 1504 (1987) (discussing why diffusing power is necessary to protect liberty).

225. THE FEDERALIST No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

226. *See* Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419, 1420-1421 (1991) [hereinafter *Federalism*] (highlighting the benefits of a federalism and quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) 'that the "principal benefit of the federalist system is a check on the abuses of government"').

227. Gregory v. Ashcroft, 501 U.S at 452.

> [It] assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in the democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the states in competition for a mobile citizenry.[228]

These benefits provide adequate reason for the preservation of the federalist framework. Thus, when interpreting the Constitution, courts must respect this purposeful division of powers between state and federal governments.

While federalism has always generated much controversy,[229] the relationship between the federal government and the states has increasingly blurred.[230] Over time, the federal government has gradually displaced the political and legal authority of the states.[231] Admittedly, many unavoidable political, constitutional, technological, and economic changes led to a more centralized government in which society affords less deference to the states' powers.[232] Although states have retained some powers and still maintain sovereignty, dual-sovereignty federalism has waned, despite its presence in theory.[233] Instead, the concept of "cooperative federalism"[234] emerges to justify and explain the increased role of the federal government.[235] Consequently, Americans have become increasingly comfortable looking to the federal government for solutions to local problems.

Recently, the Supreme Court has appeared interested in revitalizing the dual-sovereignty federalism model.[236] This interest is

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228. *See Federalism, supra* note 226, at 1420-21 (quoting *Gregory v. Ashcroft*).

229. There was much debate at the time of ratification between the federalists and anti-federalists as to whether a federal government was a good idea at all. *See* ELY, *supra* note 43, at 45-49. *See also* Pace Jefferson McConkie, *Civil Rights and Federalism Fights*, 1996 BYU L. REV. 389, 391 (asserting that the sovereignty of the states was "born of efforts by Southern delegates to preserve and protect slavery"). Admittedly, the federalist division of powers at the birth of the Constitution only gave power to white males. *See* Ely, *supra* note 43, at 47.

230. *See Federalism, supra* note 226, at 1421-22 (discussing that the federal government is increasingly overpowering the states' sovereignty, resulting in decreased political accountability).

231. *See* John P. Dwyer, *The Role of the State Law in an Era of Federal Preemption: Lessons from Environmental Regulation*, 60 L. & CONTEMP. PROBS., 203, 213-14 (1997) (discussing the erosion of the states' power in light of federal assertion of superior authority).

232. *Id.* at 210-11. Examples of changes include the passage of a direct federal income tax, the programs generated by the Great Depression, and the internet.

233. *Id.* at 203-05.

234. Cooperative federalism is "the concept of shared political and legal authority with the federal government as the dominant partner." *Id.* at 205. This model has become dominant in inter-governmental relations. *Id.*

235. *Id.*

236. *See* GERALD GUNTHER & KATHERINE M. SULLIVAN, CONSTITUTIONAL LAW 142 (1997).

of great significance since the Court interprets the meaning of the Constitution for the other branches of government and its interpretation may limit Congress' law-making ability.[237] In struggling to resolve power disputes between the state and federal governments, the Court has developed two doctrinal constructs.[238] The first concept is the traditional "delegated powers" construct, which narrowly defines the powers of Congress to those areas the states are ill-equipped to handle.[239] The second doctrine, the "enclave" construct, recently emerged and broadly characterizes the federal government's power to include all areas that the states have not traditionally regulated.[240] The Court's decision in *Garcia v. San Antonio Metro Transit*[241] must be read as a return to the delegated power construct if the Framers' idea of federalism is to retain any meaningful presence in U.S. domestic affairs.[242] Using the delegated power construct, the Court determines whether regulation was properly within the national government's power.[243] This determination would be based upon "an assessment of the national interest in the object of the regulation, the extent to which the object of the regulation involves interstate independence, and the appropriateness of the object for national uniform regulation."[244] As a result, courts have recently recognized the interest of states in

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237. The Supreme Court gradually established itself as the ultimate interpreter of the Constitution. *See* Marbury v. Madison, 5 U.S. 137 (1803); Cooper v. Aaron, 358 U.S. 1 (1958); United States v. Nixon, 418 U.S. 683 (1974).

238. McCoy & Friedman, *supra* note 131, at 91-97 (explaining the Court's use of the 'delegated powers' construct and the more recent yet unused 'enclave' construct).

239. The delegated power construct is supported by the text of the Constitution in which Congress receives only limited enumerated powers. U.S. CONST. art. I. The Tenth Amendment also clearly says that powers not delegated to the national government remain in the states' hands. U.S. CONST. amend. X.

240. The enclave construct arose out of Justice Rehnquist's opinion in *National League of Cities v. Usery*. McCoy & Friedman, *supra* note 131, at 93. Instead of viewing the federal government as limited to its narrowly defined Constitutional limits, the enclave construct seeks to "carve out areas of 'traditional government functions' where state freedom from national intervention would be paramount." *Id.* This theory fails on three counts: (1) the difficulty of defining the traditional and essential state function, (2) the lack of Constitutional support since the Constitution calls for a delegation construct, and (3) the inability to protect individuals when the federal government seeks to regulate them, even though the regulation involves a state police power and not a delegated Congressional power. *Id.* at 94-96.

241. Garcia v. San Antonio Metro. Transit Auth., 469 U.S 528, 531 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), and stating that Congress can regulate the states when they are acting as individuals and not using their regulatory power).

242. *See* McCoy & Friedman, *supra* note 131, at 97.

243. *Id.*

244. *Id.* On the one hand, the federal government needs to play an increased role in regulating our highly industrialized, technological society. *Id.* Yet, on the other hand, certain areas, like education, require local values, control, accountability, and experimentation. *Id.*

preserving local democracy by making more officials accountable, allowing for experimentation, and promoting local values.[245]

In determining whether a law falls within Congress' power, courts should employ federalism's delegation construct. The Supreme Court's recent broad reading of the Spending Clause and the Commerce Clause is logical in light of the increase in industrialization and technology, as well as an array of historical, political, and economic factors.[246] The initial design of government, however, conveyed through the Constitution, requires that every statute's validity be scrutinized within the federalist framework.

B. *Does Congress Have the Power Under the Spending Clause to Create a Federalized Education Plan?*

The Spending Clause has generated much controversy since its inception.[247] The core theory of the Spending Clause, however, remained consistent until the Supreme Court's decision in *South Dakota v. Dole*.[248] Under this expansive interpretation of the Spending Clause, Congress passed Goals 2000 education legislation.[249] To date, no party has challenged the constitutional validity of this legislation in Court. Despite the successful passage of Goals 2000 under the Spending Clause, this Section asserts that the passage of education legislation under the Spending Clause is unconstitutional. Additionally, this Section maintains that the Supreme Court should reverse its holding in *South Dakota v. Dole*[250] and return to the traditional interpretation of the Spending Clause espoused in *Butler v. United States*.[251]

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245. *Id.*

246. *See infra* Parts IV.B.2, IV.C.2 (delineating how the Supreme Court's interpretation of the Spending Clause expanded in 1987 and how the Court's interpretation of the Commerce Clause broadened in the late 1930s).

247. United States v. Butler, 297 U.S. 1, 65 (1936) (stating that "[S]ince the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of [the Spending Clause]").

248. McCoy & Friedman, *supra* note 131, at 85, 101 (noting that *South Dakota v. Dole* marked the first challenge to the core theory of the Spending Clause describing how the case was unprecedented).

249. Goals 2000: Educate America Act, 20 U.S.C. § 5801 seq. (1994).

250. South Dakota v. Dole, 483 U.S. 203 (1987). This case marked a great turn from precedent and appears inconsistent with prior Spending Clause cases and the unconstitutional conditions doctrine. McCoy & Friedman, *supra* note 131, at 101-17 (discussing *Dole*'s departure from precedent and its inconsistency with the unconstitutional condition doctrine of *Sherbert v. Verner*).

251. Butler's holding represents the traditional interpretation of the Spending Clause because it preserves the Framer's intent to create a federal system of government in which states maintain sovereignty over local matters. McCoy & Friedman, *supra* note 131, at 116.

1. Traditional Reading of the Spending Clause

The Spending Clause in Article I, Section 8, Clause 1 of the Constitution provides: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."[252] This Clause spawned debate as far back as 1817 when President James Madison vetoed the Internal Improvement Bill.[253] He believed that the Spending Clause did not authorize Congress to spend money to build roads and canals.[254] Rather, Madison narrowly construed Congress' power to spend for the "General Welfare" as limited to expenditures under the enumerated powers in Article I, Section 8 of the Constitution.[255] The other interpretation of this Clause, advocated by Alexander Hamilton, construed the Spending Clause as an independent power, authorizing Congress to tax and make expenditures to promote the national welfare for matters beyond the scope of their other powers.[256] Ultimately, the Supreme Court rejected Madison's view in *United States v. Butler* and explicitly adopted the Hamiltonian theory.[257]

While Hamilton and Madison disagreed about the breadth of the Spending Clause,[258] they both accepted that the federalist government structure of the United States imposed significant limitations on the Spending Clause.[259] Even Hamilton, who led the advocacy for a broad interpretation of the Spending Clause, never purported that this Clause authorized Congress to usurp the federalist structure and enable Congress to regulate local state issues.[260] Regardless of the Spending Clause's controversy, all parties' interpreted the Spending Clause as consistent with the Framers' original intent to delegate few and defined enumerated

252. U.S. CONST. art. I, § 8, cl. 1.

253. Anthony B. Ching, *Traveling Down the Unsteady Path: United States v. Lopez, New York v. United States and the Tenth Amendment*, 29 LOY. L.A. L. REV. 99, 124 (1995).

254. *Id.*

255. *Id.; see also Butler*, 297 U.S. at 65 (stating, "Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section . . . .").

256. *Butler*, 297 U.S. at 65-66.

257. *Id.* at 66 (deciding that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution").

258. *Id.*

259. *Id.* at 67 (discussing how the power to tax is not unlimited because Congress' "powers of taxation and appropriation extend only to matters of national, as distinguished from local welfare").

260. *Id.* at 77.

powers to the federal government and to abide by the Tenth Amendment.[261]

In *United States v. Butler*, the seminal Spending Clause case, the Supreme Court held the Agricultural Adjustment Act of 1933 (AAA) unconstitutional.[262] The AAA mandated processors of agricultural goods to pay a tax.[263] Additionally, the AAA provided that this processing tax revenue compensated farmers who entered into agreements with the government to farm less of their land.[264] Through this scheme, Congress sought to stabilize market prices for farm goods by controlling their supply.[265] Although the Court affirmed Congress' broad power to tax and make expenditures for the general welfare,[266] the *Butler* Court distinguished this tax and spend scheme from constitutionally valid schemes: "There is an obvious difference between a statute stating the condition upon which moneys shall be expended and one effective only upon the assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."[267]

The Court concluded that the Spending Clause's scope may not exceed the limitations imposed by the federalist structure and the Tenth Amendment.[268] Thus, Congress may not attempt to regulate local governmental issues by indirectly "taxing and spending to purchase compliance."[269] Even though the AAA would now be acceptable under the Commerce Clause,[270] the *Butler* Court's holding that the AAA was an unconstitutional regulation and not spending should stand.[271]

Another seminal Spending Clause case, *Steward Machine Co. v. Davis*,[272] further illuminates the distinction between a valid taxing

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261. *Id.* at 77-78; *see also* Kristian D. Whitten, *Conditional Federal Spending and the States "Free Exercise" of the Tenth Amendment*, 21 CAMPBELL L. REV. 5, 7-8; 14-16 (1998) (discussing the limits of the Spending Clause).

262. *Butler*, 297 U.S. at 74.

263. *Id.* at 58-59.

264. *Id.*

265. *Id.* at 63-64.

266. *Id.* at 66.

267. *Id.* at 73.

268. *Butler*, 297 U.S. at 74-75 (explaining how Congress cannot usurp the states' power to regulate local activities by using the Spending Clause "for total subversion of the governmental powers reserved to the individual States").

269. *Id.* at 74.

270. McCoy & Friedman, *supra* note 131, at 107-08 (discussing how Congress' Commerce Clause power has expanded and that Congress today has the power to pass a regulation like the AAA under the Commerce Clause).

271. The expansion of the Commerce Clause, however, does not invalidate the reasoning of the *Butler* Court that the Spending Clause only authorizes Congress to attach conditions on how states are to spend funds and not to promulgate regulations that are beyond its power. *Id.*

272. 301 U.S. at 548 (1937).

and spending scheme and an unconstitutional regulatory measure in the guise of the Spending Clause. In *Steward*, Congress passed a federal unemployment compensation program under the Social Security Act (SSA).[273] This scheme mandated that employers pay a tax whereby the revenues generated from the tax would be paid to the unemployed.[274] The SSA, however, also provided that employers would not have to pay the federal tax if their State enacted an unemployment compensation program that met federal guidelines.[275] The plaintiff, an individual taxpayer, protested claiming that the federal tax was unconstitutional.[276] While this case appears similar to *Butler* at first blush, *Steward* involves a genuine tax and appropriation scheme instead of a regulatory scheme in disguise.[277]

In *Butler*, Congress wanted to regulate the market on farm goods by coercing farmers into not using all their land.[278] Congress conditioned the farmer's receiving the federal monies upon their agreement to leave their land fallow.[279] If Congress had taxed only the processors and appropriated funds to farmers, then the scheme would appear consistent with the traditional meaning of the Spending Clause.[280] Congress' attachment of the condition that farmers reduce the acreage of the land they use to receive the federal monies demonstrated that Congress used the taxing and spending scheme to regulate the local farmer's activities.[281] This local regulation, which Congress clearly did not have the power to enact, differs from the legislation in *Steward*.[282]

In *Steward*, Congress used a tax and appropriation scheme to provide unemployment compensation.[283] Congress not only had the power to tax employers and appropriate funds to the unemployed, but also had the power to attach the condition that it would not double-tax employers who paid a similar tax in states with a similar unemployment compensation scheme.[284] In that case, the plaintiff

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273. *Id.* at 574.

274. *Id.* at 588-89.

275. *Id.* at 574.

276. *Id.* at 573.

277. McCoy & Friedman, *supra* note 131, at 109-13 (distinguishing *Steward* from *Butler* and explaining why *Dole's* reliance upon *Steward* and *Butler* was faulty). *See also supra* notes 283-87and accompanying text.

278. *Butler*, 297 U.S. at 58-59.

279. *Id.*

280. In such a case, Congress would, arguably, not be regulating the local farmer's activities.

281. McCoy & Friedman, *supra* note 131, at 106 (explaining how the AAA was a regulation).

282. *Id.* at 108-10.

283. *Id.* (explaining how the unemployment compensation scheme was not a regulation and valid under the Spending Clause's traditional interpretation).

284. *Steward*, 301 U.S. at 574 (describing the federal unemployment compensation scheme); *Id.* at 582-83 (holding that Congress has the power to tax the

only challenged the federal government's ability to tax him, failing to also challenge the condition upon which the exemption of the tax was based.[285] (Note that Congress' enactment of the employment compensation scheme did not attempt to regulate a group of individuals like the farmers in *Butler* or even the states themselves.[286] Congress merely sought to provide a uniform unemployment compensation scheme which states could choose to enact or leave in the hands of the federal government.)[287]

The Spending Clause provides Congress with the broad authority to spend federal funds for any purpose that Congress reasonably believes contributes to the general welfare of the nation.[288] This broad power also enables Congress to designate how funds should be spent and attach certain conditions to ensure that the federal monies are spent in the manner that Congress envisioned.[289] Congress, however, may not overstep the federalist structure of government and use its spending power to regulate local activities by attaching conditions that are independent from Congress' designation of federal money expenditures.[290] Even when Congress uses the taxing and spending power in form, the Court must examine whether Congress is truly allocating monies to contribute to the national welfare or attempting to require compliance with a regulatory scheme that is outside its powers to enact.[291]

2. Recent Supreme Court Jurisprudence: The *South Dakota v. Dole* Tragedy

South Dakota v. Dole marked the Supreme Court's departure from the traditional interpretation of the Spending Clause.[292] In this case, Congress enacted the National Minimum Drinking Age (NMDA)

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employers); *Id.* at 586-90 (holding that Congress had the power to spend monies for unemployment compensation and discussing how the scheme involves no coercion or regulation).

285. *Id.* at 578; *see also* McCoy & Friedman, *supra* note 131, at 109.

286. *Id.* at 109-10.

287. *Id.* at 110-11.

288. U.S. CONST. art. I, § 8, cl. 1.

289. McCoy & Friedman, *supra* note 131, at 103 (stating that "It is axiomatic that the power to spend carries with it the power to attach certain conditions to the expenditure").

290. *Butler*, 297 U.S. at 68 (concluding that the AAA invades the rights reserved to the states because it regulates and controls agricultural production, which is beyond Congress power under the Spending Clause).

291. *Id.* (finding that the Spending Clause cannot be used as "means to an unconstitutional end").

292. South Dakota v. Dole, 483 U.S. 203 (1987) (expanding the Spending Clause Power to enable Congress to regulate the national minimum drinking age).

amendment to the National Surface Transportation Act.[293] The NMDA directed the Secretary of Transportation to withhold up to ten percent of a state's federal highway funds from States that failed to mandate twenty-one years old as the minimum drinking age in their state.[294]

South Dakota, which had a nineteen-year-old minimum drinking age,[295] challenged the NMDA's constitutionality based on the Twenty-first Amendment and the Spending Clause.[296] The Court held that the Twenty-First Amendment did not bar Congress from conditioning federal highway funds on states' agreement to enforce twenty-one as the minimum drinking age.[297] Therefore, the Court had only to decide the constitutionality of the NMDA under the Spending Clause.[298] It held the NMDA constitutional.[299] It reasoned that the Spending Clause provided Congress the authority to purchase compliance by tempting states with federal funds in exchange for the states accepting the conditions attached to monies.[300] Even though the Court assumed Congress did not have the power to directly regulate the minimum drinking age that states set,[301] the Court found this "tax and spend" scheme valid because it did not coerce, but rather tempted, South Dakota into compliance.[302]

Clearly, the *South Dakota v. Dole* holding redefines the Spending Clause in a manner that ignores both the federalist structure of government and case precedent.[303] The Constitution purposely delegates only certain enumerated powers to Congress in order that the states may maintain autonomy and legislative power concerning all non-enumerated matters.[304] In *Butler*, the Court unambiguously declared in the following words that the Spending Clause should not

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293. McCoy & Friedman, *supra* note 131, at 98 (citing 23 U.S.C. § 158 (Supp. III 1985)).

294. *Id.*

295. *Dole*, 483 U.S. at 205 (stating that "South Dakota permits persons nineteen years of age and older to purchase beer containing up to 3.2 percent alcohol").

296. *Id.*

297. *Id.* at 206 (finding the Secretary of Transportation's argument that the Twenty-first Amendment grants state's broad discretion in sale of alcoholic beverages but does not give states the power to "permit sales that Congress seeks to prohibit" valid).

298. *Id.*

299. *Id.* (stating "we find this legislative effort is within the constitutional bounds even if Congress may not regulate drinking ages").

300. *Id.* at 211 (concluding that "mild encouragement," "motivation," and "temptation" are different from "coercion," which would be unconstitutional).

301. *Dole*, 483 U.S. at 212 (holding the statute valid "even if Congress might lack the power to impose a national minimum drinking age directly).

302. *Id.* at 211.

303. McCoy & Friedman, *supra* note 131, at 86-87.

304. U.S. CONST. amend. X.

be interpreted as a loophole for Congress to regulate activities beyond its scope:

> [T]hough the makers of the Constitution, in erecting the federal government, intended sedulously to limit and define its powers, so as to reserve to the states and the people sovereign power, to be wielded by the states and their citizens and not to be invaded by the United States, they nevertheless by a single clause gave power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed. The argument, when seen in its true character and in light of its inevitable results, must be rejected.[305]

The *Butler* Court concluded that there must be limitations on the Spending Clause or else Congress would be able to use the Clause to create regulations outside its power.[306] Implicitly, *Butler* places two limits on Congress' ability to use the Spending Clause.[307] First, Congress may not attach a condition to federal funds that requires states to enact regulations of individuals that Congress would not otherwise have the power to regulate.[308] Second, Congress may not attach conditions to federal funds that are independent of the states' spending of the funds.[309] *South Dakota* ignores this implicit common sense approach laid out in *Butler*.[310]

The *South Dakota* Court fails to analyze whether Congress offered states federal funds to promote a national objective, specifying how the state was to spend the federal funds, or whether Congress offered the funds to compel states to regulate individuals on a matter beyond Congress' power to regulate.[311] Rather, the Court reasons that the NDMA is constitutional because the scheme effectively motivates states to accept the minimum drinking age, but does not coerce states.[312] In fact, the Court rests its holding upon the amount of money that Congress offered the states.[313] Thus, under *South Dakota*, Congress may constitutionally condition federal funds upon state adoption of federal education policy, federal criminal law,

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305. *Butler*, 297 U.S. at 78.

306. *Id.*

307. *Id.* at 74-78. The Court concludes that Congress may not abuse the Spending Clause by making any regulations that exceed Congress' Power under the other enumerated powers and that the conditions attached to the funds must be directly related to the funds and not an independent contractual agreement. *Id.*

308. *Id.* at 74-75.

309. *Id.* at 75-78 (providing examples of how funds conditioned upon independent agreements are invalid).

310. McCoy & Friedman, *supra* note 131, at 101.

311. *Id.* (stating that the *Dole* holding rested upon the illusory "difference between coercing compliance and buying compliance").

312. *Dole*, 483 U.S. at 211.

313. *Id.* (finding that South Dakota's potential loss of five percent of its otherwise obtainable highway funds is not substantial enough to amount to coercion). *See supra* notes 265-69 and accompanying text.

federal zoning ordinances, and other matters traditionally falling within state government powers.[314] While Congress now has the power to purchase state compliance, Congress, ironically, must limit itself to only offering "small" financial inducements to the states to accept their regulations.[315]

3. Synthesis: Congress' Power to Further Goals 2000 and Create a National Curriculum Under the Guise of the Spending Clause

Congress passed Goals 2000 in 1994 under the Spending Clause.[316] While Goals 2000 does not mandate that states follow the same curriculum with the same rigidity as England's national curriculum,[317] Goals 2000 marks a bold step towards a uniform system.[318] Under Goals 2000 the federal government possesses the framework to shape the curriculum and policy effecting every student in every public school.[319] In fact, Goals 2000 allocates federal funds to a committee of nineteen members appointed by the President who work to establish national educational standards.[320] Additionally, Goals 2000 provides federal funds to states on the condition that they develop "state improvement plans" which meet the National Educational Goals.[321]

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314. McCoy & Friedman, *supra* note 131, at 125-27 (concluding that after *Dole*, "no regulatory objective realistically is outside Congress's ken through the use of taxation and spending").

315. The Court stated that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937). In other words, Congress may tempt, motivate, and encourage the states into accepting its terms so long as the inducement is not too large a sum. *Id.* Congress, however, ignores the current effect of federal tax upon states' ability to generate local revenue and fails to define what amount qualifies as too large an inducement. *See supra* notes 309-13 and accompanying text; *see also infra* note 337 and accompanying text.

316. *See* Goals 2000: Educate America Act, 20 U.S.C.S. §§ 5801-6804 (2000) (showing that the scheme of Goals 2000 relies on the Spending Clause by conditionally making grants available to non-profit organizations and states); *see also Goals 2000, supra* note 1, at 365 (discussing how the Spending Clause scheme presents the façade that states choose to accept the grants of their own accord and not out of desperation for funds).

317. *Goals 2000, supra* note 1, at 365. Goals 2000 states idealistic yet somewhat unrealistic goals and provides only vague guidelines as to how Congress plans to reach these goals. 20 U.S.C.S. § 5812 (providing the broad "National Goals").

318. *Infra* notes 108-25 and accompanying text. *Goals 2000, supra* note 1, at 348-49 (asserting that increased federalization of education is a natural consequence of Goals 2000).

319. *See generally id.* (detailing how Goals 2000 attempts to impact all students in public schools).

320. 20 U.S.C.S. § 5895 (2000); *Goals 2000, supra* note 1, at 358 (citing Pub. L. No. 103-227 §§ 211-21, 108 Stat. 125, 139-51 (2000)).

321. 20 U.S.C.S. § 5886 (2000).

Furthermore, Goals 2000 allocates federal funds to nonprofit organizations that provide information and training to parents.[322] This current comprehensive statute has yet to be challenged and sections of it may pass the constitutional muster even under the traditional *Butler* interpretation of the Spending Clause.[323] If Congress, however, decided to take Goals 2000 a step further and conditioned educational funds upon implementation of a national curriculum by the states, then such a regulation would be beyond Congress' Spending Clause power.[324]

Clearly, the Spending Clause grants Congress the authority to spend money on education and to direct how the states should spend the federal funds.[325] For instance, Congress may dedicate large grants to states that agree to use the federal monies to hire more teachers and reduce class sizes. Similarly, Congress may spend money to develop educational curriculum and provide federal funds to states that agree to implement such curriculum. These examples demonstrate Congress exercising its spending power and placing conditions upon how the states are to spend the funds. In contrast, Goals 2000's comprehensive scheme and the possible future promulgation of a national curriculum under the Spending Clause present a more difficult question as to their constitutionality.

Justice O'Connor's dissenting opinion in *South Dakota v. Dole* provides the following standard for evaluating constitutionality of a law under the Spending Clause:

> The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies the manner in which the money should be spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.[326]

Under this inquiry Goals 2000's "parental information and resource centers" section[327] would appear constitutional as Congress merely directs the nonprofit organizations to spend the federal funds for

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322. *Id.* § 5911.

323. *See* discussion *supra* notes 262-71 and accompanying text.

324. Although *Dole* suggests otherwise, *Butler*'s traditional interpretation of the Spending Clause confines Congress' power to taxing and spending in a non-regulatory manner. *See supra* notes 247-91 and accompanying text.

325. *See supra* notes 288-89 and accompanying text.

326. *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting) (quoting the National Conference of State Legislatures et al. as *Amici Curiae*).

327. 20 U.S.C. § 5911 (2000).

resource centers.[328] Goals 2000's "state improvement plans" section,[329] however, requires states that accept federal funds to develop and implement a state improvement plan that meets the National Education Goals.[330] The state improvement plans go beyond directing how the federal monies should be spent.[331] They require states to implement a comprehensive educational system.[332] To receive the federal funds, states must require state officials, including the governor, to participate in teaching students "core content areas," in adopting content standards and state student performance standards for all students, in assessing all students' performance regularly, and in meeting other numerous requirements.[333] Rather than directing how funds are to be spent, Congress appears to be granting federal funds "only upon the assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."[334] Such a grant violates the traditional interpretation of the Spending Clause, and therefore should be held unconstitutional.

Likewise, if Congress expands Goals 2000 and conditions federal funds upon implementation of a national curriculum, then states should challenge the validity of the statute and it should be found unconstitutional.[335] Currently, forty-seven states and the District of Columbia and Puerto Rico receive monies through Goals 2000.[336] As a result of the great increase in federal taxation in recent decades, states face great obstacles in raising local revenue from constituents who have less after-federal-tax income than in the past.[337] This lack

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328. *Id.* § 5911(b). In this section, Congress has allocated money for parental resource centers. There is no regulation. Rather, non-profit organizations accept the funds on the condition that they will use the funds to create parental resource centers. *Id.*

329. *Id.* § 5886.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Butler*, 297 U.S. at 72.

335. Naturally, a national curriculum would require states to commit to an even broader contractual arrangement in order to receive funds. Congress lacks the power to regulate education because the Constitution only grants Congress Article I, Section 8 powers and does not contemplate Congress using the Spending Clause to regulate matters that are traditionally matters of local concern.

336. The United States government expects complete compliance by the end of 2001 from all states. Executive Summary, Goals 2000: Reforming Education to Improve Student Achievement (Apr. 30, 1998), http://www.ed.gov/pubs/G2KReforming/g2exec.html.

337. McCoy & Friedman, *supra* note 131, at 86 (explaining how the large federal tax prevents states from raising there own revenue). Additionally, "[i]n the past quarter-century alone, federal grants to States and localities have grown from $7 billion to $96 billion' and 'now account for about one-fifth of state and local government

of funds forces states to rely upon federal grants.[338] The necessity of state funding further diminishes the ability of states to choose to reject the valid conditions or unconstitutional regulations that Congress attaches to the funds.[339] Although the states have less of a real choice, the general public still holds the states accountable for the programs that it implements on a local level.[340] Congressional conditioning of federal grants, therefore, creates serious political accountability concerns because the electorate no longer knows what branch of government to hold responsible for law and policy decisions.[341]

In light of *South Dakota v. Dole*, a national curriculum appears within reach for Congress to pass.[342] After all, the majority opinion labeled the withholding of "a small percentage" of federal highway funds "mild encouragement,"[343] even though Texas was threatened with a loss of $100 million and Florida with a loss of $73 million.[344] Although speculation about the possibility of the Supreme Court reversing its holding in *South Dakota v. Dole* is just that—speculation—the possibility is real. Only three members of the majority opinion remain on the bench: Chief Justice Rehnquist and Justices Stevens and Scalia.[345] Furthermore, decisions and public statements from the other sitting Justices demonstrate that they

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expenditures." *Id.* at 86 n.7 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552-53 (1985)).

338. W. Paul Koenig, Comment, *Does Congress Abuse Its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to State's Compliance with "Megan's Law,"* 88 J. CRIM. L. & CRIMINOLOGY 721, 749-50 (1998) (criticizing *Dole* and explaining how "the states often do not have a realistic choice other than to accept the federal government's condition upon the receipt of funds.").

339. *Id.*

340. McCoy & Friedman, *supra* note 131, at 124-25 (describing how the electorate will unlikely comprehend that the federal government is the institution branch insisting on the regulation but rather will view the law as imposed by the states); *see also Federalism*, *supra* note 226, at 1420-21 (discussing how federalism provides political accountability).

341. *Id.* at 1433-36 (discussing the need for citizens to recognize what branch of government is responsible for policy choices and how the Court's current interpretation of the Spending Clause "obfuscate lines of political accountability").

342. McCoy & Friedman, *supra* note 131, at 126.

343. *Dole*, 483 U.S. at 211.

344. *See* James V. Corbelli, Note, *Tower of Power: South Dakota v. Dole and the Strength of the Spending Power*, 49 U. PITT. L. REV. 1097, 1116 (1998) (criticizing the *Dole* Court's interpretation of "mild encouragement" and providing the amount of funds that states faced losing).

345. *See* Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL'Y 95, 102-03 (1998) (commenting on the likelihood that *Dole* may be overruled).

appear to recognize the fallacy of *Dole*.[346] Hopefully, if Congress provided funds to states that implemented a national curriculum, the Court would recognize that such regulation is beyond the scope of Congress and, therefore, unconstitutional.

C. *Does Congress Have the Power Under the Commerce Clause to Create a Federalized Education Plan?*

Congress has yet to pass education legislation under the Commerce Clause. Congress may, however, attempt to do so because the Commerce Clause would provide Congress greater regulatory freedom than the Spending Clause. Under the Commerce Clause, Congress would be able to require states to comply with mandatory educational programs without having to provide federal funds and attaching a state's acceptance of the funds to specific conditions. Although Congress may choose to federalize education, this Section explains why the Supreme Court should hold such legislation unconstitutional.

1. Traditional Reading of the Commerce Clause

The Commerce Clause in Article I, Section 8 of the federal Constitution provides Congress with the power "to regulate Commerce with foreign Nations, and among the several States and with Indian Tribes."[347] Congress, therefore, has the authority to regulate foreign and interstate commerce. This grant of power arose as a direct response to state interference with trade and the inability of the states to agree upon trade issues.[348] While little discussion occurred about the actual meaning of the Commerce Clause at the Constitutional Convention,[349] the Framers wanted to encourage trade with foreign nations and intended to prevent conflicting or competing

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346. *Id.* (noting Justice O'Connor's dissent in *Dole*, Justice Kennedy's public remarks that the Spending Clause is the major state's rights issue, Justice Scalia's dicta in *Printz*).

347. U.S. CONST. art. I, § 8.

348. *See* ELY, *supra* note 43, at 44. The colonies had needed to enact laws regulating the quality of goods shipped to the mother country. *Id.* at 21. These laws motivated the Framers to ensure the availability of national commerce laws because requirements, such as the 1747 Maryland Tobacco laws, fostered a positive trading reputation for the new country. *Id.* Also, the states were interested in their individual regions and crops; however, the Framers believed that giving Congress authority would help to dilute the factions and promote a national economy—necessary for United States' economic survival. *Id* at 38-41.

349. *See* Cramer, *supra* note 213, at 275 (noting that the Philadelphia Constitutional Convention included little discussion of the Commerce Clause).

state legislation.[350] The Framers, however, intended to limit Congress' power to areas in which the self-interest of the states could hurt the development of a national economy.[351] Thus, the Framers' federalist design of the Constitution and distrust of a large federal government provide support for a narrow reading of the Commerce Clause.[352]

Furthermore, the Supreme Court's earliest decisions supported a narrow interpretation of the Commerce Clause by limiting Congress' power to regulate only a narrow scope of economic activities.[353] While Congress' power to regulate foreign commerce remained unchallenged, disputes between the states required the Supreme Court to define the scope of the Commerce Clause and its limits on state police power.[354] The Court held that the Commerce Clause prevented some states from benefiting to the disadvantage of others,

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350. *Id.* (citing E. PARMALEE PRENTICE & JOHN G. EGAN, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION 2-9 (1898)) (confirming that despite the lack of discussion, historians found the Framers intended to enable Congress to make laws regulating imports and exports including legislation regarding navigation, tariffs, and prohibitions of states' imposing duties on sister states).

351. *Id.* The Framers had a great distrust for large, centralized government, and on two separate occasions, the full Convention passed language more explicitly stating the Framers' intent to limit Congress' power. *Id.* (citing from Notes of James Madison (May 29, 1787) *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., rev. ed. 1937)) (quoting the following twice approved Congressional grant: "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation")).

352. *Id.* at 276 (discussing how the Framers continually expressed that all power over internal functions were reserved to the states and providing sources that suggest the Framers primary purpose for the Commerce Clause was foreign commerce); *see also* David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 344-52 (1996) (examining how the Bill of Rights was considered both unnecessary and dangerous by many of the Framers and how history supports a narrow reading of Congress' enumerated powers).

353. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1443-54 (1987) (discussing how the Commerce Clause transformed after 1937); *see also* Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON L. REV. 5, 8 (1988). Epstein discusses how the Commerce Clause has two possible interpretations from the text of the Constitution. *Id.* The first definition, which he whole-heartedly supports, limits the Congress to only regulate "trade" as in the sale or exchange of goods and services. *Id.* The second definition, which he views as a polar opposite, allows Congress to regulate "all the varied kinds of productive human activities." *Id.* Epstein argues that the Supreme Court adopted this definition of the Commerce Clause in the earliest cases regarding the clause, which date back to 1824. *Id.* Additionally, he posits that only after the 1937 Constitutional revolution was the Commerce Clause redefined to grant Congress regulatory power in many traditionally state regulated areas. *Id.*

354. *See* ELY, *supra* note 43, at 71 (commenting that the increase in trade between states led to questions of state police power in the absence of congressional legislation).

thereby creating economic balkanization.[355] Congress did not pass laws under the Commerce Clause until after the Civil War.[356] Consequently, Commerce Clause jurisprudence, which developed during the United States' first one hundred years, only involved questions arising under the dormant Commerce Clause.[357] When the Supreme Court first faced controversies involving the affirmative Commerce Clause, the Court adopted a restrictive view and preserved extensive state control over business.[358]

Supreme Court jurisprudence began to change in the early 1900s.[359] Two judicial constructs emerged, defining Congress' affirmative power to regulate under the Commerce Clause.[360] The first interpretation involves any movement of goods or people across state lines, even if the movement fails to eliminate trade barriers between states or affect interstate business relations.[361] In fact,

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355. *See generally* Gibbons v. Ogden, 22 U.S. 1 (1824) (exemplifying the Supreme Court's earliest Commerce Clause interpretation, which limited states' regulation of trade and navigation between states). The Court in *Gibbons* struck down a New York law that gave two New Yorkers an exclusive franchise use of steamboats in New York waters. *See generally id.* The Court held that Congress' regulation of commerce extended beyond monitoring the crossing between New York and New Jersey water. *See generally id.* Rather, Chief Justice Marshall, writing for the Court held that Commerce Clause granted Congress the power to regulate interstate transactions, which naturally included the areas of navigation, inspection, and quarantine laws. *Id.* at 193-94. Specifically and of great importance, Marshall confined the power of Congress. *Id.* at 194. Marshall emphasized that the Commerce Clause did not include commerce "which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend or affect other states." *Id.*

356. *See* ELY, *supra* note 43, at 73 (positing that the explosive issue of slavery influenced Congress to avoid enacting legislation and affected the Court to read the Commerce Clause narrowly, respecting state police power). The first major affirmative law passed by Congress was the Interstate Commerce Act (1887) that "declared that charges for interstate railroads should be reasonable and just." *Id.* at 97.

357. The dormant, or negative, Commerce Clause refers to the restrictions on the states that exist via the delegation of congressional power. GUNTHER & SULLIVAN, *supra* note 236, at 258. The Supreme Court's interpretation of the Commerce Clause initially involved only negative restrictions on states. *See id.* at 261-68 (delineating the early Commerce Clause cases). This interpretation is consistent with the clause's original purpose to prevent states from sabotaging the growth of a national economy. *See id.* at 260 (noting that the Framers believed that protective state laws would hurt the nation politically and economically).

358. *See* ELY, *supra* note 43, at 97-98 (discussing the Supreme Court's holding in *Kidd v. Pearon*, 128 U.S. 1 (1888), which supports the states' power under the Commerce Clause to regulate manufacturing, mining, and agriculture).

359. The early 1900s marked the beginning of the Supreme Court upholding congressional legislation under the Commerce Clause that involved movement or transportation of anything. *See* Cramer, *supra* note 213, at 277 (noting that *Gibbons v. Ogden* sparked little controversy in comparison to the "cases that bombarded the Court in the early 1900s").

360. *Id.*

361. *Id.*

Congress' regulation of movement even included regulation of typically local concerns like sexual relations and availability of lottery tickets.[362] The second interpretation concerns any activity that has a substantial effect on interstate commerce.[363] The imprecise, broad nature of this construct proves inconsistent with the Framers' delegation of enumerated powers.[364] Yet, its evolution in the wake of what historians commonly refer to as the "1937 constitutional revolution" [365] is hardly surprising.

While the Court's "substantially related to interstate commerce" construct is linguistically problematic,[366] the Court's decisions

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362. *See* Caminetti v. U.S., 242 U.S. 470, 485-86, 491 (1917) (holding that Congress could regulate the movement of women across state borders for immoral purposes); Champion v. Ames, 188 U.S. 321 (1903) (holding the transport of lottery tickets from one state to another to be interstate commerce that Congress can regulate and make a criminal offense).

363. *See* Cramer, *supra* note 213, at 277-78. This second construct arose out of a line of cases in which Congress began regulating employees' wages, hours, and ability to participate in unions. *See* Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding valid Congress' passage of the National Labor Relations Act of 1935, whereby the NLRB can investigate unfair labor practices and seek judicial remedies); U.S. v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act of 1938, under which Congress can regulate hours and wages of employees in a local manufacturing plant).

364. The states traditionally had the power to regulate all manufacturing, farming, and employee-employer relations. *See* Hammer v. Dagenhart, 247 U.S. 251, 268-77 (1915) (holding a congressional act, which barred the transportation of goods, invalid, since the measure really sought to limit the work hours of youth between the ages of fourteen and sixteen). The Framers undoubtedly intended states to have a broad police powers. *See supra* note 218 and accompanying text. The Court's new cooperative federalism model supports its broad interpretation of the Commerce Clause. *See supra* note 234-35 and accompanying text (noting the model's dominance in inter-governmental relations) The "substantially related to interstate commerce" construct, however, lacks consistency with the federalist structure of government because the imprecise language enables Congress to regulate areas belonging to the state's power. *See infra* Part IV.A.

365. The Constitutional Revolution of 1937 marks a great change in the U.S. government's structure. *See* ELY, *supra* note 43, at 120. After 1937 the federal government greatly expanded with the passage of the New Deal. *Id.* This period also marked the demise of "laissez-faire constitutionalism," which some historians credit as a result of President Franklin Rooselvet's court packing plan. *Id.* at 120-21 (positing that several justices shifted their positions and agreed to accommodate the New Deal's social and economic agenda after Roosevelt threatened to increase the number of justices on the Supreme Court). Immediately following the Court's shift, the new "close and substantial relationship" construct emerged. *See* Cramer, *supra* note 213, at 280. (discussing how Congress' power to regulate intrastate activities that held a "close and substantial relationship" to interstate commerce began in *Nat'l Labor Relation Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 40 (1937)).

366. *See supra* notes 363-64. The Court's language expresses a broader standard than the Court likely intended. Rather than constricting Congress' power to economic areas that require uniformity for the stability of economic markets, the Court opens the door for non-economic areas, such as family law, criminal law, and education to become regulated by Congress. This broad definition cannot be what the Framers

leading up to and including *Wickard v. Filburn*[367] can be reconciled with the Commerce Clause's meaning within the Constitution's federalist framework.[368] It is very likely that *Wickard* illustrates the furthest possible stretch of the Commerce Clause within the federalist framework.[369] In this case, Congress used the Commerce Clause to regulate the amount of excess wheat that a private farmer could grow on his farm.[370] The Supreme Court held that fining a dairy farmer for growing six extra bushels of wheat on his farm was constitutionally permissible since excess production of wheat "in the aggregate" would affect interstate commerce by changing the market price for wheat.[371] Although a local farmer growing six extra bushels of wheat to feed his livestock hardly seems to fit under type of regulation the Framers envisioned when delegating Congress the power to regulate "commerce,"[372] functional analysis provides a basis for the Court's decision.[373]

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meant because it eliminates the states' broad police power and along with it all the advantages of dual-sovereignty. *See infra* Part IV.C.1.

367. 317 U.S. 111, 129 (1942) (holding that the farmer's growing wheat for the farmer's personal use has a substantial effect on trade prices).

368. The main Supreme Court cases preceding and including *Wickard,* are consistent with the Commerce Clause's interpretation using the federalist structure for guidance. *See infra* Part IV.A (stating that Congress should only act when the nature of the activity makes the states ill-equipped or unable to regulate the activity). In cases like *Wickard* where the Court used the "substantially related to interstate commerce" test, Congressional regulation was necessary to prevent companies from relocating to states that designed more favorable policies for employers. Cramer, *supra* note 213, at 280 n.52. (discussing how the laws in Delaware favor corporations and cause the majority of corporations to take advantage of these laws by incorporating in Delaware).

369. *See* United States v. Lopez, 514 U.S. 549, 560 (1995) (stating that "*Wickard,* which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity . . . .").

370. *See Wickard,* 317 U.S. at 115 (stating that the Agricultural Adjustment Act was aimed at controlling the amount of wheat moving in interstate and foreign commerce to prevent surpluses and shortages that in turn affect prices).

371. *Id.* at 128-29 (noting that while the Ohio farmer Filburn may grow excess wheat and this growth by itself may be trivial, Filburn's action taken together with others similarly situated makes a substantial impact on commerce).

372. Besides farming's historical classification as a local activity, the fact that the farmer grew wheat for use on his own farm highlights the "localness" of the activity and makes the federal government's interest tenuous. *But see id.* at 125 (rejecting the determination of whether an activity is "local" as grounds for determining whether Congress has the power to regulate the activity since the activity's effect on interstate commerce is what should be questioned). Since the federal government's involvement is limited to regulating an economic activity, however, Congressional regulation appears justified since Congress' commerce power would seem to include promotion of a stable market. *Id.* at 125-26 (discussing how the United States would be much affected if the producers did not cooperate with the Agricultural Act and comparing the United States' regulation with other countries including Argentina, Australia, and Canada).

373. *See supra* note 213 and accompanying text.

Functional analysis refers to the analytical process of determining the meaning of a constitutional provision.[374] This process involves examining the logical reasons behind the provision and determining whether states alone can handle the problem.[375] The question therefore becomes whether the states are capable of regulating the activity or whether Congress' help is necessary because of a need for uniform regulation.[376] Thus, functional analysis requires courts to seriously examine the federalist structure of government and the benefits of dual-sovereignty.[377] Admittedly, the public may support and Congress may be able to effectively handle a large range of areas that affect the economy.[378] Functional analysis, however, prevents the current majority from eradicating the intended balance of governmental powers.[379] Considering the dire economic conditions of the 1930s and the emergence of an integrated national economy,[380] Congress needed to regulate the wheat market[381] because the regulation of the independent states would likely have proven ineffective.[382] The need for uniformity and the economic

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374. *See* Cramer, *supra* note 213, at 290.

375. *See* discussion *infra* Part IV.A (implying from the federalist structure that Congress should be limited to regulating activities that the states cannot handle).

376. *Id.*

377. *Id.*; *see also infra* Part IV.C.2 (noting the *Lopez* Court's discussion of federalism concerns).

378. *See* Cramer, *supra* note 213, at 290 (noting how "[f]unctional analysis helps sort out issues that actually need national attention from ones used to make Congress look responsive to public sentiments").

379. *See infra* Part IV.A.

380. The economic conditions of the 1930s are significant because the Great Depression affected the federal government's growth and increased the need for a multitude of majority-supported public programs. *See Wickard*, 317 U.S. at 126 (mentioning how the foreign production and import restrictions during the 1930s caused a major surplus in the amount of wheat and suggesting that Congressional regulation saved the livelihood of many farmers). The gravity of the situation and the inability of the states to address the situation individually meant the federal government had a legitimate interest in rectifying the situation. *Id.* at 129 (stating that Court defers to Congress' judgement about "the wisdom, workability, or fairness, of the plan"). Also, while the Constitution and Framers intent does not change, societal conditions do. For example, the Framers never anticipated or conceived of the role that the internet, television, phones, faxes, and overnight mail would have on creating a truly national economy and market. Consequently, Congress' role legitimately increases to meet the needs of a more integrated economy. *See* Dwyer, *supra* note 231, at 211 (quoting Professor Yoo's argument that culture, technology, and the economy have created the need for stronger national laws).

381. *See supra* note 371.

382. Congress' intervention was necessary for a stable national market in order to prevent states' self-interest from unfairly disadvantaging other states or their citizens. *See supra* note 368.

nature of the activity justified Congress' intervention in a local farmer's business.[383]

Unfortunately, the Court in *Wickard* held the statute constitutional by employing the "anything taken in the aggregate that is substantially related to interstate commerce" standard.[384] The Court has yet to explicitly refine the *Wickard* standard or use a standard that linguistically conveys a functional analysis limitation.[385] In fact, the Supreme Court broadened the *Wickard* construct when it upheld Congress' authority to enact the Civil Rights Act of 1964.[386] *United States v. Lopez*[387] and *United States v. New York*[388] question this expansive standard from *Katzenbach v. McClung*.[389]

2. Recent Supreme Court Jurisprudence: Barbecue, Guns, and Waste

Congress' power under the Commerce Clause rose to an entirely new level in the landmark case of *Katenbachk v. McClung*, better

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383. *Wickard*, 317 U.S. at 128 (discussing how Congress' regulation of the home-consumed wheat was necessary to stabilize the national market and prevent the increased prices).

384. The following statement by the Court explains that any activity, regardless of whether it is a local activity or whether it has a direct or indirect impact on interstate commerce can be regulated as long as the activity substantially affects interstate commerce:

> But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Id. at 125.

Additionally the Court's reasoning describes why, even though Filburn's action alone may be of little consequence, Congress can regulate local activities that taken in the aggregate would substantially affect commerce. *Id.* at 128-29 (explaining how home-grown wheat competes with wheat in commerce).

385. *Wickard* still presented questions as to the scope of the new standard for determining Congressional power to regulate the activity. For example, the question of whether Congress should be limited to regulating only economic activities that effect the national market. GUNTHER & SULLIVAN, *supra* note 236, at 191; *see also infra* Part IV.C.2 (discussing recent Supreme Court Jurisprudence).

386. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964). This statute first met a challenge in *Heart of Atlanta Motel v. United States*. Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964).

387. United States v. Lopez, 514 U.S. 549, 558-59 (1995).

388. New York v. United States, 505 U.S. 144 (1992).

389. Katzenbach v. McClung 379 U.S. 294, 304 (1964) (commonly known as "Ollie's BBQ," serves as the companion case to *Heart of Atlanta*).

known as *Ollie's Barbecue* (*Ollie's BBQ*).[390] In *Ollie's BBQ*, the Court reasoned that Congress had the power to regulate Ollie's Barbecue as long as Congress could reasonably conclude that the activity, taken in the aggregate, could affect commerce.[391] For thirty-one years, this standard enabled Congress to regulate even the most remote aspects of local activity.[392] The Court's interest in validating legislation,[393] aimed at eliminating discrimination, overruled federalist considerations of limiting the regulatory reach of Congress.[394] Unlike *Heart of Atlanta*,[395] the facts of *Ollie's BBQ*[396] and the Court's tenuous reasoning[397] enabled Congress to pass thousands of laws under the Supreme Court's broad interpretation of the Commerce Clause.[398]

Ollie's BBQ raised the question of whether the Commerce Clause granted Congress the power to regulate the customer service policy of a local, family-owned restaurant in Birmingham, Alabama.[399]

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390. GUNTHER & SULLIVAN, *supra* note 236, at 206 (noting that the Court's interpretation led to "very few limits on congressional resorts to the commerce power"). *Ollie's BBQ* had the effect of opening the door for Congress to regulate a much broader spectrum of activities because the statute at hand was regulating seating policy rather than an economic activity. *Katzenbach*, 379 U.S. at 296. Additionally, the Court's dicta suggested that the broadest deference should be granted to Congress in deciding whether an activity affected interstate commerce. *Id.* at 304-05 (explaining that direct evidence supporting the activity's effect on interstate commerce is unnecessary and stating that Congress' power is "broad and sweeping").

391. *Id.* at 303-04.

392. Cramer, *supra* note 213, at 283 (describing how *Ollie's BBQ* provided Congress the power to regulate any aspect of local activities even if the connection to interstate commerce was only hypothetical). The responsibility of preventing a runaway commerce power became vested in the hands of Congress. PAUL R. BENSON, JR., THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970, 21 (1970).

393. The legislation was "[a] long-heralded and noble piece of legislation, [and] it spawned intense pressure on the Court to find the law constitutional." Cramer, *supra* note 213, at 282-83.

394. Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 839-40 (1996).

395. The overall argument in *Heart of Atlanta Hotel* is weak since states can effectively regulate race discrimination or Congress could regulate it under the Thirteenth Amendment. At least in *Heart of Atlanta*, however, the motel served travelers nearby an interstate highway and the racial discrimination could have affected the flow of people and commerce through the area. Heart of Atlanta Motel, 379 U.S. at 258.

396. *Infra* notes 398-423 and accompanying text (describing the fact pattern of *Ollie's BBQ* and distinguishing its facts from *Wickard*).

397. *Id.* (describing the Court's tenuous reasoning that the serving of food that had traveled in interstate commerce subjected Ollie's BBQ to regulation).

398. Kathleen F. Brickey, *The Commerce Clause and Federalized Crime: A Tale of Two Thieves*, 543 ANNALS AM. POL. & SOC., SCI. 27, 29-30 (1996) (noting that the number of federal crime statutes has risen to 3000).

399. *Katzenbach*, 379 U.S. at 296 (noting that the restaurant has a seating capacity of 220 customers, caters to a family and white-collar trade, and is located

Specifically, the local restaurant only served African-Americans through a take-out service, while allowing whites to sit and eat.[400] McClung, the owner of Ollie's BBQ, challenged congressional authority to regulate local establishments.[401] He claimed that his seating policy did not affect interstate commerce or trade.[402] The district court agreed and held the statute unconstitutional.[403] The Supreme Court reversed, however, in an 8-1 decision.[404]

The Supreme Court's reasoning began by stating logical premises[405] and narrowly framing the issue.[406] Yet, the Court somehow drifted away from analyzing Congress' Commerce Clause power[407] to a finding of great deference for congressional regulations.[408] The Court eventually found that Ollie's BBQ had a

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eleven blocks from the nearest interstate highway and even further from railroad and bus stations).

400. *Id.* at 297. McClung argued, and the lower court found, that Ollie's would lose a substantial amount of business by changing its seating policy, which had existed since the restaurant's opening in 1927. *Id.* at 296-97.

401. *Id.* at 297. McClung challenged Title II of the Civil Rights Act of 1964 since the Act only regulates establishments that are either supported by state action or affect commerce. *Id.* at 298. Sections (b)(2) and (c) define establishments that qualify as affecting commerce to be restaurants that either: (1) serves or offers to serve interstate travelers or (2) have a substantial amount of food that it serves moves in commerce. *Id.*

402. *Katzenbach*, 397 U.S. at 297.

403. The district court did find that a substantial amount of food had moved in interstate commerce. *Id.* at 296-97 (noting that in the year preceding the Act, McClung purchased forty-six percent of his food from a local supplier who had purchased the meat from out of state). The district court, however, nonetheless found "no demonstrable connection between food purchased in interstate commerce and sold in a restaurant and the conclusion of Congress that discrimination in the restaurant would affect the commerce." *Id.* at 297.

404. *Id.* at 305.

405. The Supreme Court began its analysis by stating that the government makes no claim that interstate travelers frequented Ollie's BBQ or that the state of Alabama in any way supported the restaurant. *Id.* at 298.

406. The Court narrowly framed the issue to "whether Title II, as applied to a restaurant annually receiving about $70,000 worth of food which has moved in commerce, is a valid exercise of the power of Congress." *Id.*

407. The Court should follow its earlier precedent and continue to focus on whether the activity requires Congress' regulation because the federalist structure limits Congress' power. *See supra* notes 347-58 and accompanying text.

408. The Court discussed the "Congressional Hearings" in detail, and it found that the Congressional record demonstrated that Congress had the power to regulate this type of activity *Katzenbach*, 379 U.S. at 299-301. Additionally, the Court reasoned that Congress' presumption that racial discrimination affects commerce should be accepted since Congress' set forth criteria to prevent courts from deciding on a case-by-case basis. *Id.* at 302-03. The Court cited *Darby v. United States* for support of the proposition that the Court's only role is to determine whether the activity regulated or prohibited is within Congress' power. *Id.* (citing United States v. Darby, 312 U.S. 100 (1941)). Yet, the Court did not engage in analysis of whether Congress had the power to regulate racial discrimination under the Commerce Clause, but merely accepted the findings of Congress. *Id.* at 303-05.

"close tie to interstate commerce" because it served "food that came from out of the state."[409] The Court skirted the issue of how the discriminatory seating policy actually impacts commerce.[410] Rather, it determined that the seating policy did not have to directly impact commerce since the restaurant received food that moved in commerce.[411] The Court found that the Congressional Record amply described ways that discriminatory regulations affected commerce. Such regulations deter minorities from traveling out-of-state due to lack of restaurants, reduce the flow of food from out-of-state since more food would be ordered if the minority population could frequent the restaurant as well, and prevent new businesses or persons from moving to the area.[412] While these congressional findings are important to determining whether Congress' power extended to regulating Ollie's seating policy,[413] the Court's decision did not confirm that Ollie's seating policy had deterred minorities from traveling, reduced the flow of food, or prevented new businesses from moving to the area.[414] The Court did not address whether the seating policy affected commerce because it simply relied on Congress' judgement in promulgating the regulation.[415]

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409. *Id.* at 304. The Court neither mentioned that the activity being regulated was a seating policy, nor addressed whether the states could have just as effectively regulated this activity. *See generally id.*

410. The Court held that as long as Congress is "within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere." *Id.* at 305. The Court, however, failed to address why Congress' regulation of this activity fell within Congress sphere—other than to point to the Congressional record in which Congress had said that its within its sphere. *See generally id.*

411. *Katzenbach*, 379 U.S. at 304.

412. *Id.* at 299-301.

413. Congressional authority under the narrowly delegated power construct would still require a reason why the power belongs to Congress and not the states. *See infra* Part IV.A. At least, these discriminatory effects delineate an economic impact of the discriminatory policies, which supports a somewhat strained argument for Congress having the regulatory power. In order for the argument to be made, however, the government had a burden to show that the seating policy created an economic impact on commerce.

414. First, the Court began from the uncontested fact that no interstate travelers frequented the place. *Katzenbach*, 379 U.S. at 298. Therefore, the seating policy could not deter interstate travelers. *See id.* Second, the restaurant did serve African-Americans by carry out. *Id.* at 296. The Government did not prove that the amount of food consumed by minorities was reduced due to the seating policy. *See id.* at 296-98. Third, because the restaurant's seating policy reflected the prevailing attitude of Ollie's white customers, the lower court found that Ollie's business would have substantially decreased if the white-only seating policy changed. *Id.* at 297. Fourth, businesses and persons that did not condone segregation were unlikely to move to Birmingham due to prevailing racial attitudes and not because of the seating policy. *Id.*

415. *See generally id.* at 296-301 (demonstrating that the Court did not review whether the seating policy had a substantial economic impact on commerce).

The efforts of Congress to eliminate discrimination through the Civil Rights Act of 1964 and the Supreme Court's validation of congressional power to stop discrimination were admirable and long overdue.[416] The Thirteenth Amendment, however, would have served as the more proper venue to achieve the constitutional objective of eliminating discrimination in public places.[417] The use of the Commerce Clause by Congress ignores the federalist structure of the Constitution[418] and injures the protective mechanisms provided by this structure of government.[419] Since *Ollie's BBQ* holding rested on the interpretation of the Constitution,[420] the Supreme Court's affirmation of congressional power to regulate non-economic activities is particularly disconcerting.[421] Additionally, the Court upheld Congress' power even though the facts of the case failed to indicate any effects on interstate commerce or the national economy.[422] As a result of *Ollie's BBQ*, the Supreme Court's interpretation of the Commerce Clause to include any activity either "in" or "affecting" interstate commerce caused congressional power to remain virtually unrestrained until *United States v. Lopez*.[423]

United States v. Lopez has emerged as the leading and most controversial Commerce Clause case.[424] The importance of the 5-4

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416. *See* Cramer, *supra* note 213, at 282 (declaring the Civil Rights Act of 1964 to be "a long-heralded and noble piece of legislation").

417. *Id.* at 291 n.123 (explaining that the Thirteenth Amendment is better suited for the passage of Civil Rights legislation).

418. *Id.* at 287 (describing the proliferation of federal statutes that lower courts have upheld including the regulation of car jacking, blocking entrances to abortion clinics, committing violence against women, and manufacturing marijuana). *See infra* Part IV.A.

419. *See* Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 380-408 (suggesting that "tyranny prevention" and "providing of a space for participatory politics" are two important State functions that are likely to be endangered by an overreaching national government).

420. The issue called for a Constitutional definition of Congress' power under the Commerce Clause as opposed to a statutory interpretation. *Katzenbach*, 379 U.S. at 295 (stating that the constitutionality of Title II of the Civil Rights Act of 1964 was at issue).

421. Constitutional questions place an added burden on the Supreme Court to ensure that its interpretation holds true for future cases because Congress does not have the power to change the Supreme Court's interpretation of the Constitution (unlike in statutory cases). *See supra* note 237 and accompanying text. *Stare decisis* requires the Court to follow precedent, supporting society's faith in its ability as the ultimate constitutional interpreter. *Id.* With statutory questions, in contrast, Congress has the power to pass a new law or amend the old one. U.S. CONST. art. I, § 8.

422. The federalist structure of government requires the Supreme Court to honor state autonomy and regulation of local matters. *See infra* Part IV.A.

423. *See* GUNTHER & SULLIVAN, *supra* note 236, at 206.

424. *See* Cramer, *supra* note 213, at 287 (discussing how lower courts have interpreted *Lopez* in a variety of ways).

Lopez decision cannot be overstated.[425] The *Lopez* Court was charged with determining whether the Commerce Clause limits the ability of Congress to regulate all domestic issues without spending federal funds.[426] *Lopez* addressed the constitutionality of the federal Gun-Free Zone Act of 1990,[427] which prohibited all persons from knowingly carrying a gun within a school zone.[428] The Court held the statute invalid.[429] The Supreme Court found that possession of a gun within 1,000 feet of a school did not bear a substantial effect on interstate commerce in order for Congress to have the authority to regulate such activity.[430] Additionally, the Court found the statute to be a mere regulation of criminal activity, which is traditionally left to the state's domain.[431]

The Court first described the Commerce Clause's scope as an enumerated power[432] and summarized the standards from the previous Supreme Court jurisprudence.[433] It narrowly focused the issue to determine only whether possession of a firearm substantially affects interstate commerce.[434] The Court found that possession of a gun is distinguishable from other activities that Congress has the power to regulate.[435] It addressed and rejected the Government's three main arguments supporting the regulations' effect on interstate

425. *Lopez* was the first time the Supreme Court struck down a law for exceeding the commerce power in nearly six decades. *See* GUNTHER & SULLIVAN, *supra* note 236, at 141. Thus, *Lopez* affirms the start of a return to a truly federalist system. *See* Lopez, 514 U.S. at 557 (stating that "the interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of complex society, would in effect obliterate the distinction between what is national and what is local and create a completely centralized government.").

426. *See* Steven Christopher Likes, *Casenotes: Commerce Clause: An Utter Disregard for Precedent: Misconstruing Commerce Clause Precedent in* United States v. Lopez, 29 CREIGHTON L. REV. 811, 816 (1996).

427. *See Lopez*, 514 U.S. at 552.

428. *See* Gun Free School Zone Act, 18 U.S.C. § 922(q)(2)(A) (1988 Supp. V).

429. *Lopez*, 514 U.S. at 567.

430. *Id.*

431. *Id.*

432. *Id.* at 552.

433. The Court noted three broad categories of activity that Congress had the power to regulate. *Id.* at 558. The three categories the Court set forth are: (1) the use of the channels of interstate commerce, (2) persons or things in interstate commerce or the instrumentalities of interstate commerce, and (3) activities having a substantial relation to interstate commerce. *Id.*

434. *Lopez*, 514 U.S. at 559.

435. Possession of a gun is a criminal activity that has nothing to do with "commerce" or any sort of economic enterprise; thus, the regulation can be distinguished from regulations like the one in *Wickard*. *Id.* at 560.

commerce: (1) costs of crime,[436] (2) national productivity,[437] and (3) economic productivity.[438] Finally, it reasoned that, based on the federalist structure of the Constitution,[439] it must limit Congress' commerce power,[440] leaving some activities to state control.[441] For example, the Court found that Congress does not hold the power to "mandate a federal curriculum for local elementary and secondary schools."[442]

The Court's findings indicate a return to the traditionally accepted view that Congress's enumerated federal powers require a narrow reading of the Commerce Clause.[443] As a result, the Congress can no longer assert that the regulation impacts interstate commerce; rather the Court will insist that the Government prove that the regulated activity bears a substantial effect on interstate commerce concerns.[444] In his concurring opinion,[445] Justice Kennedy also reasoned that the Court never permitted Congress to exercise an

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436. Under the "costs of crimes" reasoning Congress could regulate "all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* at 564. The Court suggested that based on the traditional separation of powers between states and federal government, the Commerce Clause should not be defined so expansively. *Id.* Specifically, the Court noted that federal power should not include "areas such as criminal law enforcement or education where States have historically have been sovereign." *Id.*

437. The Government's "national productivity" argument is that, "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody)." *Id.*

438. *See id.* at 564-65 (rejecting the Government's argument that guns in school zones will handicap the educational process and in turn result in a less productive citizenry that will affect America's economy).

439. The Court began with a discussion of the federalist framework and the reasons why preserving this structure is so important. *Lopez*, 514 U.S. at 552. For example, the Court notes how a healthy balance in power between the states and federal government prevents tyranny. *Id.* The Court returns to this motif in its final reasoning. *Id.* at 565-67 (discussing how the enumerated powers' structure requires Congress' power to be limited).

440. *Id.* at 566 (explaining that Congress' power is limited because the enumeration of limited power presupposes that certain powers were not enumerated or granted to Congress).

441. *See id.* at 566; *see also id.* at 583 (Justice Kennedy, concurring) (noting the importance of states having power to experiment and exercise their judgement in areas that "states lay claim by right of history and expertise").

442. *Id.* at 565 (critiquing Justice Breyer's dissent and asserting that all areas of education cannot be reached); *see also id.* at 583 (Justice Kennedy, concurring) (stating that Congress' interference contradicts the federal balance that the Framers designed if only a weak connection to commercial concerns exists).

443. *Lopez*, 514 U.S. at 567.

444. *Id.* at 567. The Court refuses to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.*

445. *See id.* at 568 (Justice O'Connor joining).

unlimited police power.[446] Even more fervently,[447] Justice Thomas's concurring opinion rejects congressional power extending to criminal statutes.[448] Justice Thomas urges a return to the original meaning of the Commerce Clause[449] and recommends that the Court adopt a new test that reflects this.[450] While *Lopez* demonstrates a limit on Congress' commerce power,[451] the Court did not explicitly overrule earlier Commerce Clause precedent.[452] Thus, the extent of Congress' power still remains unclear.[453] Cases like *Lopez* and *New York v. United States*, however, demonstrate that Congress can overstep its bounds under the Commerce Clause[454] and that the Supreme Court remains concerned about state sovereignty within the federalism balance.[455]

Prior to *Lopez*, the Supreme Court affirmed another congressional commerce power limit in *New York v. United States*.[456]

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446. *See id.* at 575 (supporting workable standards that limit Congress' commerce power and preserve the separation of powers and checks and balances).

447. Justice Thomas expresses the strongest criticism of the Court's past jurisprudence. *Id.* at 584-602; *see also generally* Mayer, *supra* note 352, at 339 (describing Justice Thomas as the Justice most interested in faithfulness to the intent of the Framers and the text of the Constitution).

448. *Lopez*, 514 U.S. at 589 (suggesting Congress' power should be limited to less than everything that substantially affects commerce to prevent Art. I, Section 8 from functioning as surplusage).

449. *Id.* at 585 (looking to the "text, structure, and history of the Commerce Clause" as indicators of what the Commerce Clause includes).

450. *Id.* at 602 (concluding that Commerce Clause jurisprudence must be modified).

451. The Court set forth a three-part test that was a summary and culmination of Commerce Clause jurisprudence. *Supra* notes 436-38 and accompanying text.

452. Ironically, the Court neither mentioned *Ollie's BBQ* in the case nor whether the standard of anything that Congress could reasonably conclude has a substantial affect on interstate commerce was overruled. *Lopez*, 514 U.S. at 551-68. Additionally, the lack of a clear standard caused lower courts to react differently to *Lopez*. *See* Cramer, *supra* note 213, at 273 (commenting that lower courts frequently choose to ignore *Lopez* when construing the Commerce Clause or apply *Lopez* in a manner that finds statutes constitutional).

453. The legal community was unsure as to what exactly *Lopez* stood for and whether the Court actually decided the distinction between what is "truly national and what is truly local." Cramer, *supra* note 213, at 285 (quoting *Lopez*, 514 U.S. at 567).

454. In both *Lopez* and *New York*, the Court invalidated Congress' actions indicating that Congress' power has limits and referencing the enumerated, delegated power structure of the Constitution. *See infra* Part IV.B.2; *see also* GUNTHER & SULLIVAN, *supra* note 236, at 206 (expressing that *Lopez* and *New York* demonstrated that Congress' commerce power had limits for the first time since the early 1930s).

455. GUNTHER & SULLIVAN, *supra* note 236, at 224 (declaring that *Lopez* and *New York* "can best be seen as part of an antifederalism revival" of the 1990s).

456. *See New York*, 505 U.S. at 149. The Court concluded that Congress has substantial power under the Commerce Clause to encourage States to provide for disposal of radioactive waste generated within their borders, but that the Constitution does not grant Congress the authority to compel the States to dispose of the waste. *Id.*

The limit involves statutes that infringe on state autonomy.[457] In *New York*, Congress provided three incentives to encourage the states to dispose of the radioactive waste that was generated within the state's borders.[458] The Court invalidated the "take title" incentive,[459] because it mandated state action rather than simply encouraging states to follow a particular policy.[460] The Court reasoned that the relationship between the federal government and the states constrains Congress only to encourage state action with regard to local activities.[461] Congress, of course, has the power to regulate individual generators and disposers of radioactive waste;[462] however, the states cannot be held responsible if these individuals fail to follow federal regulations.[463]

Based on the *Lopez* and *New York* decisions, there are two principles that limit Congress' ability to regulate education. First, *Lopez* appears to implicitly overrule *Ollie's BBQ*,[464] or at a minimum, retreat from its broad holding.[465] After all, *Lopez* appears to limit

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457. The Constitution provides Congress the power to encourage the States to adopt certain legislation. *Id.* at 161 (citing to *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 for the proposition that Congress could not commandeer the states into enacting laws but could require states to consider federal standards). In other words, "Congress [cannot] require the States to govern according to Congress' instructions." *Id.* at 162. The Court explains how the federalist structure of government requires that states maintain their ability to regulate individuals free from Congress' control. *See id.* at 162-63.

458. *Id.* at 152-54 (discussing the following three incentives: (1) monetary incentives, (2) access incentives, and (3) the take title provision).

459. The "take title provision" required the states to take control of waste generated in its borders. *New York*, 505 U.S. at 175-77. The Court reasons that the statute is invalid because "whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure." *Id.* at 177.

460. *Id.* at 175.

461. *Id.* at 162-63. For example, the Court could regulate the states in activities where the state is functioning as an individual rather than as a state in its regulatory capacity. *See generally Garcia*, 469 U.S. at 558 (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that states can be regulated when they are functioning as employers and that state employers are, therefore, subject to Fair Labor Standards Act)).

462. *See New York*, 505 U.S. at 187.

463. *Id.* at 187-88 (stating that "[o]ne thing is clear: the Federal Government may not compel the States to enact or administer a federal regulatory program."). *Id.* at 188.

464. The Court notes that it will not simply infer that the activity has a substantial impact on commerce but rather that the record must indicate some evidence. *See Lopez*, 514 U.S. at 567-68. Justice Kennedy stressed that *Lopez* in no way overruled commerce clause precedent. *Id.* at 568 (Kennedy, J., concurring). *Lopez*'s majority opinion contradicts the Court's complete deference to Congress in *Ollie's BBQ*. *But see Katzenbach*, 379 U.S. at 303-04 (requiring no evidence connecting discriminatory restaurant service with flow of food in interstate commerce).

465. *See Lopez*, 514 U.S. at 567.

Congress' power only to economic activities[466] and it suggests that *Wickard*'s "substantially related to interstate commerce" standard serves as the furthest extent of Congress' power.[467] Second, *New York* requires that Congress only regulate commerce between the states.[468] These limits indicate that the passage of a mandatory curriculum in public schools would meet a strong challenge to the statute's constitutionality under the Commerce Clause.[469]

3. Synthesis: Congress' Power to Create a National Curriculum Based on the Commerce Clause

Congress may attempt to pass legislation that regulates local schools under the Commerce Clause.[470] If Congress passed a national curriculum modeled after the English system,[471] every teacher in every school in the United States would use the same set of standards and have the same academic objectives.[472] The academic standards would not, necessarily, require the teaching of the same books everywhere, but the same academic goals concerning certain core subjects would be implemented across the nation.[473] If this scheme is

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466. *Id.* at 555-56.

467. *Id.*

468. *See New York*, 505 U.S. at 177.

469. The limits from *Lopez* and *New York* demonstrate that the Court has regained interest and concern about preserving the federal balance between the states and federal government. *See* GUNTHER & SULLIVAN *supra* 236, at 242. Thus, even though the dissenters in these opinions are the younger members of the Court, the Court would likely consider the historical role of the states in conferring the service of public education.

470. The federal government is currently using the spending clause. *See supra* note 316 and accompanying text. Congress' spending power, however, like the commerce power, is an enumerated power that has limits. *See infra* discussion Part IV.B.

471. *See supra* notes 41-48 (showing the commonalties between the United States and England and supporting the likelihood of the United States following England's lead).

472. *See* Thomas Baker, *Who Should Control Teacher Education? Lessons from England*, Paper presented at the Annual Meeting of the Association of Teacher Educators (Feb. 15, 1998), http://orders.edrs.com/members/sp.cfm?AN=ED418924 (noting that the National Curriculum dictates about eighty percent of what is taught in primary and secondary schools across England); *see also* Kelly, *supra* note 33, at 5 (describing the specific elements of England's national curriculum and the assessment tests for which all students must prepare).

473. *See generally* Ferree *supra* note 136. The current National Curriculum that came into effect in September of 1995 under Sir Ron Dearing has had a controversial and stormy yet short history. *Id.* at 8. The English National Curriculum requires the following literature curriculum specifics: two plays by Shakespeare, two works of fiction by writers before 1900, two works of fiction published after 1900, poems by four major poets who were published before 1900, and poems by four major poets published after 1900. *Id.* at 9. These literature requirements are for students in key stages three and four (ages fourteen and sixteen), and the students must complete

adopted, its constitutionality must be examined in light of *Ollie's BBQ*, *Lopez*, and *New York*.[474] The ambiguities of Commerce Clause jurisprudence complicate the task of predicting how the Supreme Court would interpret the Commerce Clause power regarding mandatory curriculum.[475] A close examination of the Constitution's powers, however, combined with the early history of the Commerce Clause provides substantial support for how the Court should decide such a case.[476]

Predicting the Supreme Court's holding in a challenge to a congressional regulation of local schools requires a synthesis of *Lopez*, *Ollie's BBQ*, and *New York*.[477] *New York*'s holding, however, does not apply directly to Congress' regulation of education,[478] because *New York* addresses Congress' attempt to regulate the state's power to pass laws and regulate individuals. In this case, regulation by Congress of local schools would involve the regulation of a state distributing a beneficiary service to the public.[479] As a result, *New*

Standard Assessment Tasks at the end of these stages to ensure they adequately learned the material. *Id.*

474. These three cases best summarize the most recent Supreme Court jurisprudence on the Commerce Clause. *Ollie's BBQ* is important in that it shows the Court's most expansive reading of the Commerce Clause, whereas *Lopez* is the Court's most recent affirmative Commerce Clause decision, which incidentally indicates a narrower reading of the Commerce Clause. *New York*'s significance is that the Court continues to interpret the Commerce Clause in a more narrow fashion; however, the decision is limited to the Congress' regulation of a states' ability to pass laws governing individuals.

475. In *Lopez*, the Court cites *Heart of Atlanta Hotel* as an example of the first type of regulation that Congress can do under the Commerce Clause: regulation of the "use of channels of interstate commerce." *Lopez*, 514 U.S. at 558. Also in *Lopez*, the Court directly rejects and contradicts *Ollie's BBQ* standard that Court should defer to Congress's reasonable finding that an activity has an affect on interstate commerce. *See Katzenbach*, 379 U.S. at 299-301. Additionally, while the *Lopez* majority opinion directly addressed the issue of a mandated national curriculum, the result of the Court's reasoning was somewhat ambiguous. *See Lopez*, 514 U.S. at 565-66. The Court, specifically, criticizes Justice Breyer for his rationale that schools affect interstate commerce as being limitless. The Court qualifies this criticism with by stating that "Congress has authority under the Commerce Clause to regulate numerous commercial activities that affect interstate commerce and also affect the interstate commerce." *Id.* This qualification leaves the question of whether Congress can regulate schools' curriculum lingering, even though the Court says Congress cannot regulate every aspect of local schools. *Id.* at 566.

476. *See infra* Parts IV.A & IV.C.1 (explaining how the federalist system of government and the early constructions of the Commerce Clause indicate that Congress' should only regulate activities that the states cannot handle).

477. *See infra* notes 482-89 and accompanying text (discussing the contradictions of *Ollie's BBQ* and *Lopez*).

478. *See infra* note 481 and accompanying text (describing *New York*'s limit on Congress when regulating state's regulatory power).

479. The Supreme Court established education as a benefit, which the states had the option of providing to its citizens. *See San Ant. Indep. School Dist.*, 411 U.S. at 30.

York places no explicit limitation on Congress' ability to regulate local schools since the state's regulatory power is not at issue.[480] Yet, *New York* cannot be ignored because it addresses the relationship between the state and federal government and demonstrates the Court's concerns about maintaining a proper federalist balance and the Court's renewed interest in resurrecting the Tenth Amendment.[481]

Under *Ollie's BBQ*, Congress would seem to have the power to enact a mandatory curriculum under the Commerce Clause.[482] The dissent and majority opinions in *Lopez*, however, directly address this issue and disagree.[483] Adhering to precedent, *Lopez*'s majority opinion is controlling.[484] While the *Lopez* Court states three standards under which Congress' commerce power allows regulation of activities,[485] regulation of education by Congress would only involve the "substantially related to interstate commerce" test.[486] As a result of the Court's reasoning in holding the firearm statute invalid,[487] the Court would likely find a mandatory curriculum statute similar to the firearm statute.[488] The Court, therefore, would likely find that regulation of curriculum by Congress also has only a tangential relationship to interstate commerce.[489] The Government, however, would then be likely to submit evidence supporting a direct relationship between education quality and interstate commerce.[490]

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480. *See New York*, 505 U.S. at 162.

481. *See id.* at 162.

482. *See Katzenbach*, 379 U.S. at 299-301.

483. *See Lopez*, 514 U.S. at 565-66 (discussing the limits of Congress not to regulate every aspect of schools and criticizing Justice Breyer's reasoning). *Id.* at 629 (positing that "schools that teach reading, writing, mathematics, and related basic skills serve both social and commercial purposes.").

484. Following *Lopez*'s precedent would seem appropriate since the Court expressed the importance of interpreting the commerce power so as to limit Congress. *See* EVA HANKS, ET AL., ELEMENTS OF LAW 170-80 (1994) (discussing the theory of precedent and how precedent, despite some criticisms, creates fairness, predictability, efficiency, and legitimacy in the legal process).

485. *See Lopez*, 514 U.S. at 558-59.

486. Just as the Court dismissed the first two standards application to the firearm statute, it would also fail to apply it to a mandatory curriculum statute. *Id.* at 559. The Court found that the gun statute did not involve a regulation of "the channels of interstate commerce" (persons or goods ability to move in commerce). *Id.* Similarly, the Court found that the regulation did not involve an instrumentality of interstate commerce (a thing in interstate commerce). *Id.* Congress' regulation of the curriculum that schools use is like regulating the possession of firearms in a school zone because neither activities involving economics or movement of goods.

487. *See supra* Part IV.C.2.

488. *See Lopez*, 514 U.S. at 555-56. The fact that the Court used mandated curriculum as an analogy in reasoning about the firearm statute's validity would seem to indicate that the Court would find the two similar. *Id.*

489. *Id.* at 565.

490. Now, after *Lopez*, Congress will likely insert in all Commerce Clause-based legislation a recitation of the finding that the activity affects interstate commerce. *See id.* at 563 n.4. *Lopez*, however, demonstrates that the Court will not accept a recitation

Even with such evidence in the record, the Court is likely to hold the statute invalid for two reasons. First, the federalist concerns explicitly expressed in the majority and concurrent opinions would likely require the statute to be found invalid.[491] Secondly, the relationship between regulating education and commerce, like the criminal statute, requires the Court to make too many assumptions about complex cause and effect relationships between curriculum and interstate commerce,[492] especially since education is not an economic activity.[493] Leaving education to the states and local government prevents the federal government from overtaking all of the states' functions.[494] After all, education is one of the states' most important areas of regulation.[495]

V. CONCLUSION

Undeniably, America needs to restructure schools to provide all students with a better quality of education. Congress's efforts to improve the nation's educational system through Goals 2000 and the United States' historical and philosophical ties with England indicate that Congress will likely expand the current federal education legislation. England's concerns over greater equality in education and its desire for greater accountability are common themes that resonate as criticisms in the U.S. educational system. Thus, England's implementation of national curriculum and standardized assessments will likely serve as the model that Congress will follow when making new federal education laws.

From a policy perspective, implementing a national curriculum similar to England's would help promote a common ethos and help unify the educational experiences of students throughout the United

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without an in depth review of whether the activity Congress seeks to regulate does, in fact, affect interstate and foreign commerce. *See generally id.*

491. The majority opinion references the Constitutional structure of enumerated powers, cites Madison's famous quotation about the states retaining numerous and indefinite powers, and discusses the early federalist interpretations of the Commerce Clause. *Lopez*, 514 U.S. at 551-53. Justice Kennedy's concurring opinion stresses the importance of federalism from a functional point of view—providing stability and accountability through a dual-system of government. *Id.* at 575-78 (Kennedy, J., concurring). Justice Kennedy, however, also confirms *Ollie's BBQ* as good precedent and raises concerns about *stare decisis* and the need for flexibility due to the United States integrated and technologically advanced economy. *Id.* at 573-75. Justice Thomas' concurring opinion demonstrates his great support for a narrow reading of the Commerce Clause and the plenary power of the states. *Id.* at 590-93 (Thomas, J., concurring).

492. *Id.* at 560.

493. *Id.*

494. *Id.* at 565-66.

495. *See supra* notes 30-32 and accompanying text.

States. Additionally, greater accountability in schools would be possible because standardized national tests could be used to measure the effectiveness of teachers and schools in helping students master the same curriculum. Perhaps the national curriculum and national testing would promote a market in which competition would force schools and teachers to improve. Unlike England, however, Congress must not only weigh policy concerns but also honor the ideology and federalist structure of the United States government.

The Framers, through the Constitution, provided only limited, enumerated powers to the federal government, while the states maintained the majority of their police powers. As a result of regional diversity in the United States, state governments have the power to regulate matters concerning health, welfare, safety, and morals, such as education. The states must continue to maintain control over education in order to allow for experimentation, political accountability of leaders, citizenship involvement, and custom-made laws that reflect the states' individual values and priorities. Although Congress has and will continue to stretch its Constitutional powers, the Spending and Commerce Clause were not intended to give Congress power to regulate traditional, local, and police power matters like education.

In summary, the Constitution and the federalist structure of the U.S. government should prevent Congress from following England's national curriculum and enacting further federal education legislation. America's educational problems are not the result of state government's control over education. The quality of American education will continue to decline until Americans make education a priority by increasing teacher salaries and creating smaller-size classrooms. Most importantly, they must realize the value of learning for the sake of learning.

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