The National Education Association, its affiliates in 10 states, and a ragbag of school districts have just filed a federal lawsuit alleging that No Child Left Behind (NCLB) is an unfunded mandate. If the NEA's complaints sound hauntingly familiar, it's because Americans have heard them before -- 40 years ago, when Southern segregationists did their best to evade the desegregation requirements of Lyndon Johnson's original law offering federal aid for education.

Then, recalcitrant school districts complained about an unfunded mandate. Then, they objected that the dollars did not cover the full cost of desegregating their schools. Now, resistance comes from those who claim to represent public-school employees. Now, as much as then, the resistance is woefully misguided.

There are two things wrong with the NEA's claim that NCLB is an unfunded mandate: The law is neither a mandate, nor is it unfunded. The nonpartisan General Accounting Office dismissed the mandate claim last October. The law only provides funds to those states that wish to receive them. Any state that wants to reject the dollars -- and the rules that accompany them -- is free to do so. That no state has yet taken this route provides an on-the-ground basis for rejecting the complaint out of hand. As for funding, the law does contain this clause: "Nothing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act."

Placing this clause at the heart of its complaint, the NEA offers up three arguments. The silliest says congressional appropriations fall short of amounts authorized. Never mind that federal aid to education reached a historic high in 2005, when spending reached $12.7 billion. That number, says the NEA, still falls short of the $20.5 billion that had been authorized in 2002.

This misleading argument attempts to turn a ceiling into a floor, an architectural feat that would leave no room for congressional discretion. As all lawmakers and union leaders well know, congressional authorizations limit -- they do not compel -- expenditure. Neither Johnson, nor Carter, nor Clinton, to say nothing of Reagan, signed education appropriation bills that reached their authorized limit. Indeed, virtually every federal program is funded below its authorized level. Were the courts to accept the NEA claim and compel all appropriations to equal authorized limits, the federal deficit would
immediately balloon to levels beyond the wildest imagination of the most unabashed Keynesian.

To acquire a patina of credibility, the lawsuit also claims that money appropriated does not cover the costs of the new activities that are required, namely designing and administering statewide tests in reading, math and science, as well as offering school choice and supplemental services to schools that persistently fall short of performance standards. But as the GAO and other outside observers have also shown, testing is one of the best bargains in education. Nationwide, cost estimates have run as low as $9 per student, on average, for the type of tests currently used, and nearly all independent estimates of the costs of testing come to less than $50 per student out of the approximately $10,000 per student currently being spent on their education. To devote one half of 1% to obtain information about how well one is doing is money well spent. Moreover, it is but a token share of the more than $1,000 per student that states, on average, receive from the feds.

Nor are the law's choice and tutoring provisions placing much of a fiscal burden on school districts. The latest data from the Department of Education indicate that less than 1% of all eligible students have taken advantage of the opportunity to attend another public school, while the costs of more popular tutoring options have so far been covered in full by Federal dollars.

So NEA's legal claim narrows down to the tired argument that schools need more money to get the job done, this time rephrased to say that more money is required to bring all students up to state-determined proficiency standards. But since the standards are set by each state individually, how is this a federal mandate? And have not public schools -- and teachers unions, too -- long been committed to educating the next generation? If not, taxpayers could be excused for wondering where all their money went.

Spending on schools has climbed steadily for three decades. In inflation-adjusted dollars, expenditures per pupil in 1970 hovered around $5,000: Today, it is over twice that. With all the extra money, classes are smaller, those with special needs are given closer attention, and average teacher compensation has more than kept pace with the cost of living. Yet according to the most recent results from the National Assessment of Educational Progress, 17-year-olds score no better today than they did in 1970. In other words, the doubling of real expenditures has borne little educational fruit. That is the scandal No Child Left Behind is attempting to address.

The law has its deficiencies: Implementation of key features is left to school districts, many of which are dragging their heels. The blunt measuring stick states must use to gauge schools' performance can be improved. Choices given to parents in underperforming schools remain limited. But those problems can be fixed with a modicum of the goodwill that historically has been the hallmark of our intergovernmental system. Instead of joining efforts to improve a law designed to help the most disadvantaged of Americans, the NEA seeks to shut it down.
Yet educating the neediest of our young remains the civil rights issue of our time. The Southerners who resisted integration found themselves on the wrong side of history. Fortunately, most Southern governors have figured this out. It will be a great day for all children when teachers unions do so as well.

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