Tough Call: Is No Child Left Behind Constitutional?

Control over education is a power that the Constitution reserves for the states, not the federal government. But, for the reasons Ms. McColl explains in this article, answering the question she raises in the title is not such an easy matter.

BY ANN McCOLL

The No Child Left Behind (NCLB) Act, the 2001 reauthorization of the Elementary and Secondary Education Act, has become a symbol of all things good and bad in education. While the basic concepts of the legislation — accountability for results, research-based education programs, increased parental options, and expanded local control and flexibility — have wide support, some critics have argued that NCLB has failed to deliver. Others have focused on how best to implement its provisions. Although this scrutiny of the requirements and outcomes of NCLB is crucial to the policy debate, the law has largely escaped a more fundamental review, and answers to the following questions are needed: Has Congress overstepped its legal authority with No Child Left Behind? Is NCLB a constitutional exercise of congressional power, or does it infringe on states’ rights? What is the role of the U.S. Department of Education (ED) in addressing ambiguities in the law? Answering these questions requires a close examination of federalism as it is expressed in the U.S. Constitution and interpreted by the U.S. Supreme Court.

The call to examine the law in this light comes with a warning: reaching conclusions about whether Congress acted within the limits of its constitutional authority may cause some discomfort. “Liberals” may find their customary inclination to favor a more expanded role for the federal government to be in conflict with their concern about the substance of NCLB. “Conservatives” may similarly find their general bias in favor of states’ rights to be in conflict with their support for the accountability and school-choice elements of NCLB.

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And if the courts ignore, as they should, both the politics surrounding NCLB and its education reform goals, the results of a legal challenge could be interesting, indeed. A conservative Supreme Court may ultimately conclude that President George W. Bush’s education agenda exceeds constitutional bounds.

**IS THERE CONSTITUTIONAL AUTHORITY FOR NCLB?**

There is little dispute over whether NCLB represents an unprecedented level of federal involvement in the affairs of our public schools. However, there is disagreement between the law’s supporters, who hail this federal intrusion into state and local education as effective national reform, and its detractors, who argue that the intrusion consists of a set of politically motivated mandates that are detrimental to our schools. The language of NCLB speaks to the sweeping authority intended by its passage: “The purpose of the title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments.” To accomplish this, NCLB sets extensive requirements for states, including establishing an accountability system and staffing schools with high-quality professionals.

This level of federal intrusion into a domain typically under state control raises legal questions because Congress must act within the limits of federal authority established by the U.S. Constitution. The Constitution reflects a careful balance between the powers of the federal government and those of the states. James Madison argued, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” The Constitution defines this balance in the 10th Amendment: “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.”

Past court decisions, most notably *San Antonio v. Rodriguez* (1973), have declared that the Constitution does not establish, either explicitly or implicitly, education as a right or delegate the authority over schools to the federal government. Instead, education is within the domain of state and local governments. As the U.S. Supreme Court said in the celebrated 1954 *Brown v. Board of Education* opinion, “Education is perhaps the most important function of state and local governments.”

If the federal government is not specifically authorized by the Constitution to delve into matters of education, what other grounds could there be that would satisfy the 10th Amendment’s conditions for the assignment of powers? For the authority to legislate as broadly as it has in NCLB, Congress relied on a provision in the Constitution that provides power unlike any other defined in that document: the spending clause. In archaic-sounding language, the spending clause (Art. I, sec. 8, cl. 1) states: “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 . . . ” The spending clause is the basis not only for NCLB but also for most federal education policies, including those that prohibit discrimination — Title VI (race, ethnicity, and national origin), Title IX (gender), and the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act (disability) — and those, like the Family Education Rights and Privacy Act, that protect student privacy. Any future federal education reforms, including a national curriculum, national tests, or national licensure standards, will almost certainly have to be crafted as spending clause legislation.

**SPENDING CLAUSE LEGISLATION AS A CONTRACT**

The spending clause is unique in that it allows Congress to enact legislation in areas over which it otherwise has no authority, if the legislation is in the form of an offer of a contract — i.e., if federal funds are offered to states as an inducement to meet certain conditions. In constitutional parlance, this arrangement, also known as a conditional grant, does not “offend” the 10th Amendment reservation of certain powers to states since states can simply refuse the contract.

Because spending clause legislation operates as a contract, its provisions must be clear enough for states to be able to decide whether to accept the terms of the contract. As the Supreme Court stated in *Pennhurst State School v. Halderman* (1981), “The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract’” (emphasis added). The Court further identifies the parameters of this authority, stating that, “by insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.” This conforms to the understanding that most people have of what makes a contract valid.

But the requirement for clarity in spending clause legislation stems from broader concerns having to do with democratic principles and the 10th Amendment. Because such legislation is probably addressing an issue normally reserved for the states — such as education — it is crucial that the
citizenry of the states understand the terms of the contract and have the choice to accept or reject it. As the Supreme Court explained in *New York v. United States* (1992), “The residents of the State retain the ultimate decision as to whether or not the State will comply. If a State’s citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.” While this may sound unrealistic to those who are familiar with how policy decisions are typically made, the debates in Utah, Arizona, Wyoming, and other states over accepting the NCLB contract are consistent with the process envisioned by the Supreme Court.

In *South Dakota v. Dole* (1987), the Supreme Court has provided further guidance for determining whether Congress has met spending clause requirements. To be constitutionally valid, legislation that relies on the spending clause must be in pursuit of the “general welfare,” related to the federal interest in particular national projects or programs, not prohibited by other constitutional provisions, unambiguous in describing the conditions for the States’ receipt of federal funds, and cast as a financial inducement, not a coercion.

Based on prior court analysis of other federal legislation, it seems quite likely that NCLB will easily pass legal muster on the first three criteria. The fourth and fifth criteria raise more issues. The requirement for the legislation to be unambiguous in describing its conditions goes to the heart of the contract issue. Using the Supreme Court’s language, the issue is whether a state “knowingly and voluntarily accepts the terms of the [NCLB] contract.” In other words, were the critical provisions of NCLB clear and unambiguous when it was enacted? Is it tempting to be flippant in answering this. If the law were clear, why would we need all of these conferences, regulations, and instances of informal guidance? Why would members of Congress be in such disagreement over the law’s intent? Why would commentators still be unraveling the implications of the legislation? But a serious issue deserves a serious answer.

**ARE THE TERMS OF NCLB UNAMBIGUOUS?**

Achieving the requisite level of clarity is extremely difficult to do with such a vast reform as NCLB, which leads to the policy question of whether Congress should be able to use a backdoor approach to pass any legislation that is so far-reaching on an issue reserved for the states. While only a court of law can make the ultimate decision, it is easy enough to conclude from the sheer extent of ED’s efforts to clarify NCLB and provide guidance to the states on its implementation that the law was not clear. By the end of February 2004, ED reported that it had issued 29 guidance documents, 20 letters to chief state school officers and state officials, and over 500 letters to various state and local offices. In addition, ED has issued formal regulations on at least three occasions in order to clarify key issues, including public school choice requirements, standards and assessments, the definition of a highly qualified teacher, the inclusion of students with significant cognitive disabilities, and several aspects of the accountability model.

These efforts to clarify various provisions of NCLB are not addressing issues around the fringes. How the law defines “highly qualified” has a dramatic impact on whether states can meet the requirement for staffing their schools in a time of teacher shortages and retention problems. How NCLB determines which students are counted toward a
school’s AYP (adequate yearly progress) and what tests can be used has a direct bearing on how many schools and school districts will be identified as needing improvement. The ED regulation mandating that neither capacity issues nor desegregation orders can be a barrier to school choice means that many more schools and school districts must offer this option to their students. These are not small issues, and they do not have insignificant financial implications for school districts.

From a constitutional perspective, this means that there were many important issues that were not clear in the legislation. And there simply is no role for ED in resolving these ambiguities. In another spending clause case, Virginia Dept. of Educ. v. Riley (1997), ED asserted that it could withhold funds from Virginia on the basis that it had clarified ambiguities in IDEA through an interpretive rule and that Virginia had failed to comply. The Fourth Circuit rejected this argument, responding that “it is axiomatic that statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States’ receipt of federal monies in the manner asserted.”

SHIFTING POSITIONS

The lack of clarity in NCLB is also evident in ED’s review of state accountability plans, which are intended to outline the states’ efforts to comply with the conditions of the legislation. These plans are the clearest measure of how the states are responding to the law. If NCLB were clear, then the approval process for the plans would be fairly straightforward — states would either meet the conditions or they would not. Instead, the approval process has been characterized by confusion, the application of inconsistent standards, and even reversals in ED’s positions. On numerous occasions, the department has allowed some states to proceed with their accountability programs after having rejected similar plans from other states.4

The process of approving accountability plans has state boards of education and state school officers scrambling to change their state’s accountability system based on ED’s latest interpretation of the law. If one state is successful in securing approval for a dual accountability system, then other states seek to amend their plan so that they can do it too. Or once statistical tests in safe harbor become acceptable — after having been rejected in earlier plans — states seek to add them to their plans. NCLB has been a moving target and has forced state education leaders to continually revise their strategies for compliance.

Two of the most controversial areas have been the testing of both students with severe cognitive disabilities and those who are not proficient in English. These students pose a challenge to test-based accountability systems because, while there are strong policy arguments for including them in the assessment system, it is difficult to test them in the same way as other students. NCLB made the stakes higher with the requirement that these students be included in AYP calculations, which means that failure to get them to attain grade-level proficiency could ultimately cause a school or school district to miss its AYP target. Without clear guidance in the law itself, states chose to address the testing of these students in different ways, and ED’s position on the issue changed over time in the process of approving accountability plans. ED adopted final regulations for the inclusion of students with significant cognitive disabilities in states’ assessment systems on 9 December 2003 and then issued additional guidance on 2 March 2004. The department also released informal guidance reflecting its evolving position on the assessment of English-language learners but did not initiate the formal rule-making process until 24 June 2004. While the new guidance would change many states’ calculations of whether they had met their AYP targets, ED has indicated that it does not believe that 2002-03 data should be recalculated based on the new rules. The concerns regarding ED’s shift in position on the issue are captured in a letter dated 16 June 2004 from the Council of Chief State School Officers to Rep. George Miller (D-Calif.) and Sen. Edward Kennedy (D-Mass.):

For more than two years, state education agencies, local school systems, and the U.S. Department of Education (ED) have been struggling to align educational practices with the requirements of NCLB. The implementation has been a learning process for all stakeholders, and NCLB continues to evolve as state education agencies and ED uncover new possibilities allowed by the law. Many states have changed their approach to NCLB, and more recently, ED has adopted new interpretations and regulations allowing for some flexibility. Unfortunately, this means that many of the initial accountability determinations made in the 2002-03 school year were made under a system of policies and regulations that are now outdated. As a result, many schools were identified for improvement last year, when in fact current policies would now recognize those same schools as having successfully demonstrated progress.

It is perhaps easy to say from a policy perspective that some issues will have to be worked out and that the implications of the legislation are better understood after they are implemented. But to the extent that the shifts in ED’s interpretation of NCLB prevented a state from knowingly accepting the terms of the contract, the law is unconstitution-
ally ambiguous and is an invalid exercise of spending clause power.

SHifting resources

In addition to being confused over exactly what was expected of them, the states did not know how much money they would receive in exchange for meeting all of the conditions in the law. In funding NCLB, Congress took the unusual step of setting authorization levels for the next five years. The authorization level for Title I-A increases each year in roughly a stepwise progression, beginning at $13.5 billion in FY 2002 and climbing to $25 billion in FY 2007. The FY 2007 authorization level represents full funding of the Title I basic formula, based on the cost of serving all counted children and the law’s expenditure factors. The substantial increase in funding over the five-year period is also consistent with the increased requirements placed on states and the schools. The House-Senate conference report (H. Rept. 107-334) accompanying NCLB reflects this, stating that the conferees “recognize that to implement fully the reforms incorporated in the conference agreement, the local educational agencies will require increased Title I resources, for which reason the Conferees have agreed to significant and annual increases in Title I authorizations.”

If authorization levels guaranteed states particular funding amounts, then states would clearly understand the terms of the NCLB contract. And presumably, this matters to states. As is true with most contracts, participants want to know what they will get in return for meeting the conditions. But the only thing that is clear with regard to NCLB is that authorization levels do not guarantee any particular amount of funding. Table 1 shows the extent of the variation between the amounts Congress authorized, the amounts the President requested in his budget proposals, and the actual amounts funded for implementing the law.

In the political arena, the difference between authorization levels and actual funding has caused some members of Congress, especially Democrats, to criticize the President and the process for failing to fully fund NCLB and to keep the promises made to schools. Supporters of the legislation counter that it is a mistake to use authorization levels as the benchmark for comparison and that the emphasis should be on the actual increases in funding. The disparity between authorized and actual funding also raises a constitutional question: If the funding level has nose-dived so much from the time the contract was offered (i.e., when the legislation was enacted), was it possible for states to have “knowingly” accepted the terms of the contract? Probably not. Having big decreases from authorized to appropriated levels means that states cannot know how much funding they will receive to implement the law until the federal budget is approved, which can occur even after the fiscal year has begun. What courts will say about this issue is less clear, as Supreme Court opinions have tended to focus on the clarity of a law’s provisions rather than the clarity of its funding.

IS NCLB AN INDUCEMENT?

The question of whether states feel pressured to accept the additional requirements in NCLB in order to continue receiving federal funds or whether they feel the law merely offers an inducement to act also requires more scrutiny. Before jumping into this analysis, it is worth explaining the concepts of inducement and coercion as the courts use them in reviewing spending clause legislation. First, some courts are reluctant to pursue this analysis at all because of a belief that it simply does not make sense to think of a state being coerced. In other words, coercion would seem to be more applicable to individuals, who might cave in to psychological pressure, than to the decision-making process of a governmental entity.

While courts may express such reluctance, it is one of the matters discussed by the Supreme Court in South Dakota v. Dole. In this case, the state of South Dakota challenged spending clause legislation that authorized the federal government to withhold 5% of a state’s federal highway funds if the state in question did not meet the condition of establishing a minimum drinking age of 21. The Supreme Court held that this was merely an inducement, not coercion, be-
affected only a small number of children served by these funds could be considered coercion.

To examine the issue of coercion as it relates to NCLB, it is useful to know that for most states federal funds account for approximately 7% to 10% of total funds for public education. The largest source of federal funds is Title I. States have been receiving these funds since 1965, when the ESEA was passed. Currently about 94% of all local education agencies receive Title I funds. Most of the funding provided under NCLB continues to be through Title I. While these funds historically have been targeted to the neediest children, Title I — as reauthorized in NCLB — establishes many conditions that affect all students and all schools. For example, NCLB sets the date by which all teachers of core academic subjects must be highly qualified. And all schools in a state — including high schools, which receive little Title I funding — must participate in the accountability program (although some sanctions apply only to Title I schools). NCLB also alters Title I funding formulas in order to shift more resources to high-poverty states.

The constitutional question is whether NCLB coerces rather than induces states to accept the extensive new requirements in order to continue to receive Title I funds. There are several factors that are particularly important in this analysis: 1) states have relied on Title I since 1965 and have developed ongoing programs and positions with their Title I funds; 2) NCLB dictates state policy choices pertaining to a core function of state government — education — that go well beyond the scope of Title I funding; and 3) high-poverty states will find it even more difficult to reject the offer because of both the increased funding they would receive under the new Title I funding formula and the greater challenge they would face in replacing the federal funds with state resources.

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As a realistic matter, the answer to the coercion question seems quite simple. Most, if not all, states faced with the combination of state budget crises that have loomed since NCLB was enacted and the prospect of losing significant federal funds would indeed conclude that they had no choice but to accept the law’s additional requirements. So, while states may resent that the source of only 7% to 10% of total education funding can dictate policy in such an intrusive manner, they recognize that every source of funds for schools is critical, especially if they lack other resources with which to replace the loss of federal dollars. And so the states are forced to accept the new requirements in NCLB.

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WHAT ABOUT THE SUPREMACY CLAUSE?

In examining the constitutional issues related to NCLB, it is worth considering one more repercussion of this expansive federal legislation. Not only have states had to accept many more conditions for only slightly more money, but any state law that contradicts NCLB in any way will have to be adjusted or dismantled. This is required by the supremacy clause (Art. VI, cl. 2) of the U.S. Constitution: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” In Lawrence Co. v. Lead-Deadwood School District (1985), the court determined that the supremacy clause applies not only to state laws that may be in direct conflict with federal law but to any state law that “stands as an obstacle to the accomplishment of the
full purposes and objectives of Congress.” Because spending clause legislation is so different from other types of legislation, some have challenged whether the supremacy clause should apply when state laws conflict with federal laws in this category. Appellate courts, however, have repeatedly held that it does.5

To comply with NCLB, many states have had to change laws related to their accountability systems, high school exit exams, licensure requirements, and class-size requirements. As broad as these changes may be, imagine the possible impact on states that have been through litigation regarding their responsibility to provide a constitutionally adequate education. Even state constitutions and court orders requiring certain actions can be displaced if they present an “obstacle to the accomplishment of the full purposes and objectives of Congress.” While state constitutional provisions may, in many respects, be aligned with the goals of NCLB, it is certainly possible that specific court orders may require different approaches to raising student achievement, such as reducing class size, providing prekindergarten, or increasing teacher salaries. If such efforts conflict with those necessary to fulfill NCLB mandates, such as the “highly qualified teachers” requirement, then they must be stopped. With this kind of implication for state education programs, it is particularly egregious that Congress did not speak with a clear voice on the requirements and funding for NCLB.

CONCLUSION

So what conclusion can we reach about whether NCLB is constitutional? Issues of governance tend to be highly controversial, and many of the major decisions of the past have come from a deeply split Supreme Court. In the 1990s, the Supreme Court acted to severely curtail congressional power under two major sources of broad legislative authority found in the Constitution — the commerce clause (U.S. v. Lopez, 1995) and the enforcement of equal protection of the laws under the 14th Amendment (City of Boerne v. Flores, 1997). These decisions show a clear willingness on the part of some of the justices to narrow Congress’ authority. Will the current Court do the same with the spending clause?

The Supreme Court opinion that gives the most guidance on the spending clause is the aforementioned South Dakota v. Dole. While Justice O’Connor provided a compelling dissent, most justices upheld the condition for federal highway funds. But, as already discussed, there are notable differences between the highway funds law and NCLB. Will the Supreme Court scrutinize Congress’ authority more closely when the subject is education — a core responsibility of the states? Will the complexity and ambiguity of the legislation affect the Court’s analysis? Will it matter that the legislation was not clear about the amount of funding states would receive? Will the Court consider the states’ historical reliance on Title I funds in determining whether coercion applies? Will Justice O’Connor, who has often been able to articulate a rationale to appeal to the majority on the Court, hold sway this time by making clear distinctions between the legislation in South Dakota v. Dole and NCLB or by clarifying the constitutional standards for spending clause legislation? It is a tough call.

So what happens if NCLB is challenged, and the Supreme Court determines that it was an unconstitutional use of the spending clause? Congress would have some options. If it wants to proceed with the reform goals of the law, it must draft a contract that clearly describes its conditions and that induces, but does not coerce, states to choose to participate. This is the absolute minimum required for a constitutional exercise of Congress’ spending clause power. Of course, Congress can go beyond this minimum and offer a great contract that no state would want to refuse. This is the policy choice before our federal legislators, and there are many experts who could assist Congress in crafting better legislation. But if Congress is unwilling to meet spending clause requirements, then it will have to take a very hard look at how it justifies its intrusion into the state domain of education.


5. See, for example, Fraserv. Gilbert, 300 F.3d 530 (5th Cir. 2002); Westside Mothers v. Haverman, 289 F.3d 852 (6th Cir. 2002); and Blum v. Bacon, 457 U.S. 132 (1982).