NO CHILD LEFT BEHIND FOR THE TEACHERS LEFT BEHIND: RETURNING EDUCATION TO THE EDUCATORS

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INTRODUCTION

In 2002, America's teachers faced a choice: comply or defy. Compliance meant time and money.[1] Defiance meant embarrassment[2] and potential unemployment.[3] This "choice" arose when President George W. Bush supplemented the Elementary and Secondary Education Act by signing the No Child Left Behind Act (NCLBA),[4] which has teachers throughout the country concerned about the future of education.[5] Even though the goal of the NCLBA—nationwide proficiency in mathematics, reading, and science[6]—is honorable, the path taken to achieve this goal infringes upon dual sovereignty and forces state-run educational institutions to implement a federal education program.[7]

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[1] *See* U.S. GEN. ACCOUNTING OFFICE, NO CHILD LEFT BEHIND ACT: MORE INFORMATION WOULD HELP STATES DETERMINE WHICH TEACHERS ARE HIGHLY QUALIFIED 3–4 (2003), *available at* http://www.gao.gov/new.items/d03631.pdf; Sheila Norris Hanna, *Responsibilities of Teachers Extend Beyond the Classroom*, BARGAIN HUNTER, Oct. 17, 2005, at A-4.

[2] *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 3; Letter from David Wade, Principal, Clark Elementary School, to Parents of Clark Elementary School Students (on file with author).

[3] *See* 20 U.S.C. § 6316(b)(7)(C)(iv)(I) (Supp. III 2003).

[4] No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.) [hereinafter No Child Left Behind Act].

[5] *See* Email from Georgia Jaeb, Elementary Teacher, Millersburg Elementary School, to Author (Sept. 26, 2005, 13:40 EST) (on file with author); Email from Lynda Park, Speech-Language Pathologist, Killbuck Elementary School, to Author (Sept. 21, 2005, 15:53 EST) (on file with author); Email from Terri Stoner, Elementary Teacher, Millersburg Elementary School, to Author (Sept. 14, 2005, 19:58 EST) (on file with author).

[6] *See* 20 U.S.C. § 6311(b)(3)(A).

[7] *See* discussion *infra* Part II.

Since the codification of the NCLBA, the future of education has found itself in the hands of the legal system, as court battles over the NCLBA emerge throughout the United States to determine its validity.[8] Educators have an interest in these court decisions because numerous provisions in the NCLBA changed the way teachers operate.[9] This Comment analyzes the constitutional issues resulting from the enactment of the NCLBA, which uncovers the legal arguments that favor allowing educators to regain control of their classrooms. Even though worthwhile legal challenges need to be brought by the states and not by individual educators, this Comment uses teachers' insights to identify the benefits of ousting the NCLBA.

To return education to the educators, the NCLBA must be attacked on two fronts: the limitations on congressional spending power in Article I, Section Eight, of the United States Constitution, and the dual sovereignty requirement of the Tenth Amendment. This Comment is divided into three parts. Part I examines the NCLBA and discusses some key provisions. Part II sets forth the constitutional issues that result from the relationship between the NCLBA and states-run educational institutions. Then, Part III looks at the federal government's response to the attacks against the NCLBA and offers promising alternatives to the current situation.

I. BACKGROUND: THE TEXT AND OPERATION

In effect only since 2002, the overall impact of the NCLBA on education has yet to unfold. This Part presents the major ways the NCLBA affects teachers, parents, students, and school operations. As this Part will show, some of the provisions are very reasonable on paper. Yet, the language of the NCLBA details a federal education program that states must follow to receive federal funds for education, which gives rise to the legal issues examined in Part II of this Comment.

A. Teachers

To comply with the NCLBA, teachers must go through two major changes: how they are educated and how they educate. Teachers who teach "core subjects"—English, reading, language arts, mathematics,

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[8] Civ. Soc'y Inst., NCLB Left Behind: Report Finds 47 of 50 States in "Some Stage of Rebellion" Against Controversial Law (Aug. 17, 2005), http://www.resultsforamerica.org/calendar/files/nclb_release.pdf.

[9] *See, e.g.*, 20 U.S.C. § 7801(23); Stoner, *supra* note 5; *Political Battle Surges Over Bush Education Policy: Seeks $2 Billion Increase in Funding*, CNN.COM, Jan. 8, 2004, http://www.cnn.com/2004/ALLPOLITICS/01/08/elec04.prez.bush.education/index.html.

science, foreign languages, civics and government, economics, arts, history, and geography—must undergo additional education to be considered "highly qualified" in those subjects.[10] Specific requirements vary with teacher experience and grade level, but the highly qualified standard generally requires: (1) a bachelor's degree, (2) state certification or licensure, and (3) subject area knowledge for each core subject.[11] To satisfy the third requirement, teachers must pass "a rigorous State academic subject test in each of the academic subjects in which the teacher teaches."[12] The first two requirements of the NCLBA have avoided significant legal action because the majority of states already require a bachelor's degree and state certification to teach.[13] Conversely, the third requirement—subject area knowledge for each core subject taught—poses a problem for many schools, specifically those located in rural areas and small towns.

The highly qualified standard applies to all teachers and does not take into account the size or location of the school.[14] Elementary school teachers must pass a state test to demonstrate "subject knowledge and teaching skills in reading, writing, mathematics, and other areas of basic elementary school curriculum."[15] Middle school and secondary school teachers must demonstrate "a high level of competency in each of the academic subjects" they teach,[16] which can be achieved one of the following ways: passing a rigorous academic test in each subject area;[17] completing an academic major, a graduate degree, or coursework equivalent to an undergraduate degree; or obtaining advanced certification

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[10] U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 1.

[11] 20 U.S.C. § 7801(23).

[12] *Id.*

[13] *See, e.g.*, ALASKA STAT. § 14.20.020 (2004) (issuing teacher certificates to applicants who earned a bachelor's degree, passed a background test, and completed a competency exam); ME. REV. STAT. ANN. tit. 20–A, § 13003 (2005) (requiring teacher certification to teach in public schools); MASS. GEN. LAWS ANN. ch. 71, § 38G (West 2006) (requiring "provisional educators" to hold a bachelor's degree and pass an exam to receive a provisional educator certificate).

[14] *See* 20 U.S.C. § 7801(23).

[15] *Id.* § 7801(23)(B)(i)(II).

[16] *Id.* § 7801(23)(B)(ii).

[17] *Id.* § 7801(23)(B)(ii)(I).

in each area taught.[18] This provision of the NCLBA will undoubtedly force teachers to spend time and money to retain their jobs.[19]

The highly qualified standard punishes small and rural schools in particular.[20] For example, Hiland High School, located in the small farming community of Berlin, Ohio, has just over 350 students.[21] With such a small student body, teachers typically teach multiple courses that are based on the same subject.[22] So a science teacher might teach chemistry and physics, a history teacher might teach geography and government, and a math teacher might teach algebra and geometry. Under the highly qualified standard, if a Hiland science teacher teaches chemistry and physics, then the teacher must be highly qualified in both subjects.[23] Thus, either the current teachers must meet the highly qualified standard for each core subject they teach, or Hiland must hire additional teachers for each core subject offered.[24] Hiland is one of many schools that must confront this problem: forty-nine percent of the nation's 80,700 public schools are located in rural areas.[25]

Teachers must also change the way they educate to comply with the NCLBA. The NCLBA requires teachers to issue standardized tests to

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[18] *Id.* § 7801(23)(B)(ii)(II).

[19] In addition to this requirement being time consuming and costly, it also has an intense deadline. U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 1. All teachers of core subjects must be considered highly qualified by the end of the 2005–2006 school year, even though the highly qualified standard changed between June and December of 2002, giving teachers between three to four years to acquire proper certification under the changed standard. *Id.* at 1–2.

[20] Wayne Au, *No Child Left Untested: The NCLB Zone; Where "Highly Qualified" Can Mean Low-Quality Teaching*, RETHINKING SCHOOLS, Fall 2004, at 12, *available at* http://www.rethinkingschools.org/archive/19_01/nclb191.shtml.

[21] *See* Public School Review, Hiland High School, http://www.publicschoolreview.com/school_ov/school_id/63949 (last visited Sept. 23, 2006).

[22] *See* Hiland School Staff, http://www.eastholmes.k12.oh.us/hiland/staff.htm (last visited Sept. 23, 2006).

[23] Au, *supra* note 20.

[24] Hiring additional teachers for each core subject seems counterintuitive. Not only does Hiland lack the resources to do this, but they also lack the need. Hiring a teacher to teach physics would leave him with a great deal of free time because he would be teaching only one or two periods a day.

[25] Nat'l Educ. Ass'n, Status of Public Education in Rural Areas and Small Towns: A Comparative Analysis (Sept. 1998), http://www.nea.org/rural/companal-rural.html.

measure students' academic progress and achievement.[26] The testing requirement focuses on the three fundamental subjects taught in schools—mathematics, reading or language arts, and science.[27] Beginning in the 2005–2006 school year, schools are required to test students in grades three through twelve in at least math and reading.[28] Starting in the 2007–2008 school year, schools must incorporate science into the tests.[29] As a result of the testing requirement, teachers must replace personal lesson plans with uniform lesson plans to ensure higher passage rates on exams.[30]

The NCLBA states that the goal of testing is to "measure the achievement of students" against "student academic achievement standards" set by individual states.[31] Opinions regarding the benefits and fallbacks of testing requirements are varied,[32] but schools must meet these requirements to receive federal funds.[33] Students still have some time to meet the testing standards, but teachers cannot ease into new lesson plans: the NCLBA "aims to have all students, regardless of poverty, ethnicity or disability, reading and doing math well by 2014."[34]

B. Parents and Students

The NCLBA gives parents and students a great deal of power to make decisions about education. Schools must incorporate parents into the

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[26] 20 U.S.C. § 6311(b)(3) (Supp. III 2003).

[27] *Id.* § 6311(b)(3)(A).

[28] *Id.* § 6311(b)(3)(C)(v)(I).

[29] *Id.* § 6311(b)(3)(C)(V)(II).

[30] *See* Anne Stiman, *Retiring Teachers Voice Frustrations*, CAP. WKLY, Apr. 28, 2005, at A1.

[31] 20 U.S.C. § 6311(b)(3)(C)(vii).

[32] *Compare* U.S. Dep't Educ., Stronger Accountability: The Facts About Measuring Progress, http://www.ed.gov/nclb/accountability/ayp/testing.html (last visited Sept. 23, 2006) (claiming that numbers derived from test scores provide an accurate representation of student knowledge and the competence of teachers and schools), *with* Nat'l Educ. Ass'n, Accountability and Testing, http://www.nea.org/accountability/index.html (last visited Sept. 23, 2006) (arguing that test scores fail to adequately determine students' needs, school district support, and teachers' abilities), *and* Stoner, *supra* note 5 (reasoning that only teaching facts does not help students become "responsible, caring, problem solving citizens").

[33] *See* 20 U.S.C. § 6311(b)(3)(A).

[34] Jennifer Toomer-Cook, *Legislature May Seek Repeal of No Child: Lawmakers to Debate Bill Asking Congress to Act*, DESERET MORNING NEWS, Jan. 21, 2006, at B05, *available at* http://deseretnews.com/dn/view/1,1442,635177962,00.html.

decisionmaking process that creates school policy.[35] Under the NCLBA, schools must: (1) include parents in the overall planning at the district and school levels, (2) draft written policies on parent involvement at the district and the school levels, (3) conduct annual meetings with parents concerning school issues, (4) offer parents training on education, (5) coordinate parent involvement strategies among federal education programs, and (6) evaluate and revise strategies adopted for coordinating parent involvement among federal education programs.[36] This provision holds schools accountable for making sure that parents are involved in the education of their children.

The NCLBA also guarantees annual notification to parents—deemed parents' "right-to-know"—of the qualifications of teachers.[37] This empowers parents to request and receive information regarding the professional qualifications of teachers, such as college education, state certification, and whether a teacher is teaching under emergency or other provisional status.[38] The right-to-know provision seems to offer parents some reassurance that local school teachers are qualified to teach their children.

Additionally, schools must meet the benchmarks set by the NCLBA or students will be allowed to transfer, and the school will have to restructure its operations. When a school is in a low performing category and fails to make adequate yearly progress[39] for two consecutive years, the school is termed as "needing improvement," and it must develop a two-year turn around plan.[40] Students attending schools that maintain failing status for two consecutive years may transfer.[41] A school falls to "school

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[35] 20 U.S.C. § 6318.

[36] *Id.*

[37] *Id.* § 6311(h)(6).

[38] *Id.*

[39] "Adequate yearly progress" is a term that is supposed to be defined by the individual states. *See id.* § 6311(b)(2)(c). Nevertheless, the NCLBA provides that "academic assessments" (i.e., standardized tests) are to be used as the primary means of determining each school's yearly performance. *See id.* § 6311(b)(3).

[40] *Id.* § 6316. This provision resulted in a minor uproar of students attempting to assert their right to transfer, most of which were denied. *See, e.g.*, Ass'n of Cmty. Orgs. for Reform Now v. New York City Dep't. of Educ., 269 F. Supp. 2d 338 (S.D.N.Y. 2003).

[41] 20 U.S.C. § 6316. The reason for offering an option to transfer is to "provid[e] better opportunities for individual kids and [to] creat[e] pressure on schools that are performing poorly." Ronald Brownstein, *Implementing No Child Left Behind*, *in* THE FUTURE OF SCHOOL CHOICE 213, 213 (Paul E. Peterson ed., 2003). However, school administrators have been resistant to accepting students from "failing" schools. *Id.* at 214. Moreover,

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improvement" status after failing to make adequate yearly progress for three consecutive years.[42] At this stage, all students can transfer and students from low-income families are eligible for tutoring or remedial classes.[43] When a school fails to make adequate yearly progress for four consecutive years, the school must implement a "corrective action" plan, which requires the school to adopt one of six prescribed actions, including "replac[ing] the school staff who are relevant to the failure to make adequate yearly progress" or implementing a new curriculum.[44] When a school fails to make adequate yearly progress for five consecutive years, the school must implement a "restructuring" plan.[45] This requires the school to reopen as a public charter school, replace all or most of the staff, or turn over school operations to the state or a private company.[46]

The provisions examined in this Part are only a few examples of how the federal government is using the NCLBA to govern schools. The federal government's increased influence in teachers' lives and students' education raises the important legal issues that will be examined next.

II. CHALLENGING THE NCLBA

Section Eight of Article I of the United States Constitution gives Congress the power to spend money for the general welfare of the people,[47] but this power comes with limits. The Tenth Amendment imposes one of these limits: "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."[48] This Part will show that the Constitution is silent on the federal government's role in education, which means that the NCLBA is subject to legal challenges because it uses congressional spending power to force states to implement a detailed federal education plan. The NCLBA infringes upon dual sovereignty by exerting excessive federal control in a state-governed institution.

The following two sections consider past and potential legal challenges to the NCLBA. The first section offers a brief look at two notable legal

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students must deal with "the sheer lack of high-quality public school alternatives within reasonable driving distance of a failing urban school." *Id.*

[42] 20 U.S.C. § 6316.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] U.S. CONST. art. I, § 8.

[48] U.S. CONST. amend. X.

battles waged against the NCLBA and explains why challengers have not yet been successful in the courtroom. The second section considers the limitations on congressional spending power and the constitutional requirement of dual sovereignty to uncover the strengths and weaknesses of a potential legal argument against the NCLBA.

A. Reasons for Dismissal

Because the NCLBA extends over one thousand pages in length,[49] states, administrators, and teachers often complain about the difficulty of incorporating its provisions into current education plans.[50] Instead of working with provisions, opponents of the NCLBA are challenging them. Since its enactment, forty-seven states have questioned or challenged "the educational and fiscal impact of NCLBA."[51] This section examines two of the more notable, but also two of the most typical, lawsuits filed against the U.S. Department of Education (DOE).

On April 20, 2005, the National Education Association (NEA); school districts in Michigan, Texas and Vermont; and NEA-affiliates in Connecticut, Illinois, Indiana, Michigan, New Hampshire, Ohio, Pennsylvania, Texas, Utah, and Vermont, filed the first national lawsuit against the DOE in the United States District Court for the Eastern District of Michigan.[52] The sixty-page complaint attacked the NCLBA as an unfunded federal mandate.[53] The district court responded with an eight page opinion, granting the DOE's motion to dismiss for failure to state a claim.[54] According to the court, "[P]laintiffs have pointed to no statutory provision . . . to support their argument that Congress intended for these requirements to be paid for *solely* by the federal appropriations."[55] The NEA has indicated that it will appeal the ruling to the Sixth Circuit.[56]

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[49] Gina Austin, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights*, 27 T. JEFFERSON L. REV. 337, 339 (2005).

[50] *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 25.

[51] Civ. Soc'y Inst., NCLB Left Behind: Understanding the Growing Grassroots Rebellion Against a Controversial Law, http://www.nclbgrassroots.org/landscape.php (last visited Sept. 23, 2006).

[52] Complaint at 1–3, Sch. Dist. of Pontiac v. Spellings, No. 05-CV-71535-DT (E.D. Mich. Apr. 20, 2005), http://www.nea.org/lawsuit/images/nclbcomplaint.pdf.

[53] *Id.* at 3–4.

[54] *See* Sch. Dist. of Pontiac v. Spellings, No. 05-CV-71535-DT, slip op. at 8 (E.D. Mich. Nov. 23, 2005), http://www.nea.org/lawsuit/images/nclbdismiss.pdf.

[55] *Id.* at 7.

[56] Nat'l Educ. Ass'n, Plaintiffs in 'No Child Left Behind' Act Lawsuit Will Appeal Decisions (Nov. 23, 2005), http://www.nea.org/newsreleases/2005/nr051123.html.

Connecticut Attorney General Richard Blumenthal, a vocal opponent of the NCLBA since its inception, recently filed the first suit to be brought on behalf of a state.[57] In March of 2005, Connecticut Commissioner of Education Betty J. Sternberg issued a report that gave Blumenthal the figures he needed to pursue a lawsuit.[58] According to the report, in order to meet the federal requirements established in the NCLBA, Connecticut anticipates expenditures of $112.2 million over the next three years,[59] but the federal government only allocated $70.6 million to Connecticut.[60] Blumenthal argued that the difference of $41.6 million placed an unfunded burden on Connecticut.[61]

The DOE vehemently opposed the grounds for this lawsuit.[62] A spokeswoman for the DOE stated, "The basis for the state's lawsuit appears to rest on a flawed cost study of the No Child Left Behind Act that creates inflated projections built upon questionable estimates and misallocation of costs."[63] Continuing, the spokeswoman said, "It is very disappointing that officials in Connecticut are spending their time hiring lawyers while Connecticut's students are suffering from one of the largest achievement gaps in the nation."[64]

Soon after Blumenthal filed the suit, the federal government responded with a motion to dismiss.[65] The United States District Court for the District of Connecticut offered a more substantial opinion than the district court in the NEA lawsuit, but the outcome was the same.[66] According to the court, Connecticut's suit was a "pre-enforcement challenge" to the DOE's implementation of the NCLBA: "The word 'pre-enforcement' is used because, at this point, the State continues to comply with the Act."[67] The court, agreeing with the DOE, granted the motion to dismiss for lack of jurisdiction because "'[t]his pre-enforcement challenge represent[ed] an

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[57] Sam Dillon, *Connecticut to Sue U.S. Over Cost of School Testing Law*, N.Y. TIMES, Apr. 6, 2005, at B1.

[58] *See id.*

[59] *Id.*

[60] *Id.*

[61] *See id.*

[62] *See id.*

[63] *Id.*

[64] *Id.*

[65] *See* Conn. Attorney Gen.'s Office, Attorney General Fights Motion To Dismiss No Child Left Behind Suit (Dec. 23, 2005), http://www.ct.gov/ag/cwp/view.asp?A=1949&Q=308044.

[66] Connecticut v. Spellings, 453 F. Supp. 2d 459, 503 (D. Conn. 2006).

[67] *Id.* at 482.

impermissible end-run around the mandatory administrative and judicial review scheme set forth in the governing statute.'"[68]

Overall, the focus of legal battles attacking the validity of the NCLBA revolves around the same claim: the NCLBA is an unfunded federal mandate because states cannot meet the NCLBA's requirements without using state funds.[69] This claim appears strong at first glance because the NCLBA specifically declares that it will not impose unfunded mandates on states;[70] however, both the NEA and Connecticut discovered that courts do not view it that way. Not only has the DOE used loopholes in the language and flaws in procedure to win courts' favor, but the DOE also has a strong argument for courts that do not see the loopholes or flaws.

Under the NCLBA, the federal government has increased funding for education by approximately four billion dollars.[71] Federal attorneys have used these increases to counter lawsuits attacking the NCLBA from a funding standpoint: "Since the year prior to enactment of the NCLBA . . . appropriations for Title I grants have increased by 45 percent, from $8.76 billion in 2001 to $12.74 billion for 2005. If anything, however, this comparison significantly understates the amount of additional funding available."[72] With strong evidence showing a significant increase in federal funding, courts can find the NCLBA is funded, and that states are failing to efficiently and effectively use the available funds.

Because the DOE has a handful of legal arguments available to counter attacks against the NCLBA from a funding standpoint, funding is a weak avenue for relief. Alternatively, a stronger, more viable challenge to the NCLBA should focus on how funding provisions in the NCLBA require states to implement a federal education program.

B. Federal Coercion

As is the case with the NCLBA, Congress often makes funds available for states on the condition that the states use those funds to further various

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[68] *Id.*

[69] Linda Conner Lambeck, *Pressure on Blumenthal in No Child Left Behind Lawsuit: AG has 4 Weeks to Outline Case*, CONN. POST, Feb. 1, 2006, at A3.

[70] 20 U.S.C. § 7907(a) (Supp. III 2003).

[71] Brendan McKenna, *Federal Judge to Consider Challenge to Education Law*, TIMES ARGUS, Oct. 17, 2005, *available at* http://www.timesargus.com/apps/pbcs.dll/artikkel?&Dato=20051017&Kategori=NEWS&Lopenr=510170320&Ref=AR.

[72] *Id.*

federal policies.[73] Section Eight of Article I of the United States Constitution gives Congress the power to spend money for the general welfare of the United States.[74] Yet, congressional spending power is not unlimited, "but is instead subject to several general restrictions."[75]

In *South Dakota v. Dole*, the Supreme Court expressed the current leading restrictions on congressional spending power.[76] First, Congress must use its spending power in pursuit of "the general welfare."[77] Second, Congress must "'unambiguously'" state the conditions that will allow states to receive federal funds to enable states to "'exercise their choice knowingly, cognizant of the consequences of their participation.'"[78] Third, congressional conditions on grants must relate "'to the federal interest in particular national projects or programs.'"[79] Fourth, Congress cannot use funds to force states to engage in unconstitutional activity.[80] Fifth, the financial inducement offered by Congress cannot "be so coercive as to pass the point at which 'pressure turns into compulsion.'"[81]

The following subsections consider the five limits to congressional spending power as expressed in *South Dakota v. Dole*.[82] Case law indicates that any state challenging the NCLBA under the first four limits to the Spending Clause faces limited likelihood of success. The fifth limit, on the other hand, presents a more optimistic option for states.

1. The General Welfare

The first limitation on congressional spending comes directly from Article I, Section Eight, of the United States Constitution, which gives

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[73] *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 474 (1980).

[74] U.S. CONST. art. I, § 8.

[75] South Dakota v. Dole, 483 U.S. 203, 207 (1987).

[76] *Id.* at 207.

[77] *Id.*

[78] *Id.* (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[79] *Id.* (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

[80] *Id.* at 208.

[81] *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

[82] *South Dakota v. Dole* focused on South Dakota's challenge to 23 U.S.C. § 158, which directed the Secretary of Transportation "to withhold a percentage of federal highway funds otherwise allocable from States 'in which the purchase or public possession of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.'" *Id.* at 205. Because South Dakota allowed the purchase of beer containing 3.2% alcohol by persons 19 years of age or older, § 158 prevented South Dakota from receiving the full amount of federal highway funds. *Id.* South Dakota challenged § 158 under the Spending Clause and the Twenty-First Amendment. *Id.*

Congress the power of the purse, but only for the general welfare of the people.[83] In *South Dakota v. Dole*, Congress sought to advance the general welfare through 23 U.S.C. § 158, requiring all states to set the minimum age at which citizens may consume alcohol to twenty-one.[84] Through § 158, Congress hoped to terminate incentives for young people to drive to states where it was legal for nineteen-year-olds to purchase beer containing 3.2% alcohol, drink the beer, and then drive home while intoxicated.[85]

The NCLBA aims "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and to reach, at a minimum, proficiency on challenging State academic achievement standards and state [sic] academic assessments."[86] Like a national drinking age, which reduces the amount of youth driving under the influence of alcohol, the NCLBA clearly benefits the general welfare of the people because it seeks to end inequality in education and promotes a more educated citizenry. Hence, the general welfare limitation on congressional spending power is not the NCLBA's weakness.

2. Unambiguous Conditions

The second limitation to congressional spending power requires Congress to clearly state the conditions under which funds can be received or denied.[87] The Supreme Court explained this limitation in *Pennhurst State School and Hospital v. Halderman*,[88] writing, "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."[89] *Pennhurst* likens conditional funding to a contract between the states and the federal government, in which the states agree to conditions to receive funds.[90] For the contract to be valid, the states must "voluntarily and knowingly" accept the terms of the contract because there can "be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it."[91]

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[83] U.S. CONST. art. I, § 8.
[84] *Dole*, 483 U.S. at 208.
[85] *Id.*
[86] 20 U.S.C. § 6301 (Supp. III 2003).
[87] *Dole*, 483 U.S. at 207.
[88] 451 U.S. 1 (1981).
[89] *Id.* at 17.
[90] *Id.*
[91] *Id.*

In *Pennhurst*, the Supreme Court found the Developmentally Disabled Assistance and Bill of Rights Act (DDABRA) ambiguous because it did not express outright that funding would be terminated if states did not comply with 42 U.S.C. § 6010.[92] Section 6010 required states to provide "appropriate treatment" to the mentally handicapped in the "least restrictive" setting;[93] however, there was no provision in the DDABRA that indicated federal funds would be terminated if states did not comply with this standard.[94] Therefore, the Court concluded that funds could not be denied to states that did not comply with § 6010 because the DDABRA was ambiguous.[95]

Unlike the DDABRA, in each section where the NCLBA sets forth a requirement, it also clearly states that funds will be denied to states that do not adopt the requirement.[96] The NCLBA leaves no room for a state to argue that it was unsure of whether or not it had to comply with a certain portion of the NCLBA in order to continue to receive federal funds.

In *Pennhurst*, the Court considered a suggested variation of the ambiguity limit: whether it is possible for a state to knowingly accept federal funds, fully aware of the conditions and able to ascertain what is expected.[97] Applying this language to the NCLBA, the issue is whether the NCLBA is so ambiguous that states cannot figure out how to satisfy its requirements. In light of the confusion over implementation of the NCLBA, an attack on the Spending Clause under this limit appears strong. Yet, a closer look yields a different result.

The NCLBA is long, detailed, and provides step-by-step instructions on how to adopt and implement programs.[98] Amidst all its detail, the NCLBA indicates that states can devise and adopt individual plans to comply with its standards.[99] This language ostensibly gives states some breathing room, but in reality, compliance with the NCLBA generally requires a complete overhaul of current education systems.[100]

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[92] *See id.* at 24.

[93] *Id.* at 25.

[94] *See id.* at 24.

[95] *See id.*

[96] *See, e.g.*, 20 U.S.C. § 6311(g)(2) (Supp. III 2003) ("If a State fails to meet any of the requirements of this section, . . . then the Secretary may withhold funds for State administration . . . .").

[97] *Pennhurst*, 451 U.S. at 17.

[98] *See generally* No Child Left Behind Act, *supra* note 4.

[99] 20 U.S.C. § 6311(a)(1).

[100] *See* Carl Glickman, *Don't Turn Our Schools into Uniform Testing Mills*, DALLAS MORNING NEWS, Feb. 8, 2004, at 5H.

In 2002, the DOE reviled the true federal character of the NCLBA.[101] The California State Commission on Teacher Credentialing listed teachers with emergency credentials as meeting the highly qualified requirement.[102] In response, the DOE rejected California's definition of highly qualified and required California to create and submit a new standard.[103] The NCLBA allows states to set their own standards for compliance, but those standards are subject to the approval or rejection of the DOE, which can quickly address any suggestion of ambiguity.[104]

Addressing the highly qualified standard, one author stated, "On paper, at least, states are given leeway to interpret how they will meet the federal standards for 'highly qualified' teachers, but the reality is that states are being forced to substitute a federal definition of 'highly qualified' for their own."[105] The highly qualified standard is just one example of how the ambiguity limit on congressional spending fails to present a strong challenge to the NCLBA. Essentially, if a state argues that the NCLBA is ambiguous in any way, the DOE is more than willing to clarify those uncertainties.

3. Federal Interests

The third limitation on congressional spending requires federal grants to relate to a federal interest.[106] In *South Dakota v. Dole*, the federal government argued that it enacted 23 U.S.C § 158 to reduce the number of accidents on the nation's highways by requiring states to set their drinking age to twenty-one to receive federal funds for highways.[107] Therefore, "the condition imposed by Congress [was] directly related to one of the main purposes for which highway funds are expended—safe interstate travel."[108] The NCLBA also conditions grants on a highly related federal interest—education. Hence, the third limit on congressional spending does not offer a helpful legal attack.

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[101] Catherine Gewertz, *Calif. Group Sues Over 'Highly Qualified' Label*, EDUC. WEEK, Aug. 10, 2005, at 6.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] Au, *supra* note 20.

[106] South Dakota v. Dole, 483 U.S. 203, 207 (1987).

[107] *Id.* at 209.

[108] *Id.* at 208.

4. Unconstitutional Activity

In *South Dakota v. Dole*, the Supreme Court presented the fourth limitation on congressional spending power: funds "may not be used to induce the States to engage in activities that would themselves be unconstitutional."[109] This statement is often misconstrued, as it was by South Dakota in its challenge of the constitutionality of 23 U.S.C. § 158.[110] South Dakota interpreted the unconstitutional activity limitation on spending power as "a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly."[111] However, the limitation actually means that Congress cannot condition funds on a state's participation in unconstitutional activity, such as cruel and unusual punishment or discriminatory action.[112] Whether Congress has the Constitutional power to engage in an activity is not the issue; the issue is whether Congress is forcing states to engage in unconstitutional activity by way of federal funds.[113]

The NCLBA does not force states to engage in discrimination, disenfranchisement, or any other unconstitutional activity. The NCLBA simply requires states to implement a national education plan. States that misinterpret this limitation argue that the Tenth Amendment serves as an independent constitutional bar against Congress' ability to regulate education through the spending power,[114] but this argument should be explored in a different context—coercion.[115]

5. Coercion

The coercion argument offers two avenues of analysis to overturn the NCLBA. As this section explains, case law clarifies what qualifies as coercive—the point where pressure to comply turns into compulsion to comply—by considering both who and what the federal regulation in question compels to act.[116] Another way to determine coercion is to consider the extent of the financial inducement offered by Congress.[117] By

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[109] *Id.* at 210.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 210–11.

[113] *Id.* at 210.

[114] *See* Austin, *supra* note 49, at 363–64.

[115] *See id.* at 365.

[116] *See* Printz v. United States, 521 U.S. 898, 902 (1977); New York v. United States, 505 U.S. 144, 149 (1992).

[117] *See Dole*, 483 U.S. at 211.

applying precedent to the NCLBA, this section will show that compliance is achieved through compulsion, both from a dual sovereignty aspect and from a congressional spending aspect.

a. From Pressure to Compulsion

In *Printz v. United States*, county sheriffs in Montana and Arizona sought to enjoin enforcement of the provision of the Brady Handgun Violence Prevention Act (Brady Act) that commanded the chief law enforcement officer (CLEO) of each local jurisdiction to conduct background checks on firearm purchasers.[118] Specifically, the Brady Act required a CLEO who received notice of a proposed transfer of a firearm to "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law."[119] If the CLEO determined that possession of the firearm would violate the law and the would-be purchaser requested an explanation, the CLEO must provide "a written statement of the reasons for that determination."[120] If the sale would be lawful, the CLEO had to "destroy any records in his possession relating to the transfer, including his copy of the Brady Form."[121]

The Supreme Court found that the Brady Act required state law enforcement officers to participate "in the administration of a federally enacted regulatory scheme."[122] Montana and Arizona argued that the scheme forced their CLEOs into federal service because the Brady Act compelled state officers to execute federal laws.[123] Striking the challenged provisions as unconstitutional, the Supreme Court stated, "Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'"[124] Therefore, the Court held, "The Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs,"[125] and "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of

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[118] *See Printz*, 521 U.S. at 902–03.
[119] *Id.* at 903.
[120] *Id.*
[121] *Id.* at 903–04.
[122] *Id.* at 904.
[123] *Id.* at 905.
[124] *Id.* at 918–19.
[125] *Id.* at 925.

their political subdivisions, to administer or enforce a federal regulatory program."[126]

New York v. United States[127] also examined a federal regulatory scheme that imposed great burdens on states that accepted federal funds. In *New York*, New York challenged certain provisions of the Low-Level Radioactive Waste Policy Act (Waste Policy Act),[128] which required states to implement plans that complied with new federal standards governing radioactive waste.[129] The main provision at issue in *New York* was the "take title" provision. The take title provision required states to take title to waste sites at the request of the owner of the waste. If title was not taken, the states would be liable "for all damages directly or indirectly incurred by such . . . owner as a consequence of the failure of the State to take possession of the waste."[130]

The Supreme Court's analysis of the Waste Policy Act considered the dual sovereignty element of the Tenth Amendment. The Supreme Court started at the root of the Constitution: "[T]he framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[131] The Court continued, "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[132] The Court stated that the Commerce Clause, for example, "authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."[133] Applying the foregoing principals, the Supreme Court concluded, "[W]hile Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so."[134] Thus, congressional use of the take title provision

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[126] *Id.* at 935.
[127] 505 U.S. 144 (1992).
[128] *Id.* at 149.
[129] *See id.*
[130] *Id.* at 153–54.
[131] *Id.* at 166.
[132] *Id.*
[133] *Id.*
[134] *Id.* at 149.

of the Waste Policy Act "crossed the line distinguishing encouragement from coercion,"[135] violating dual sovereignty.[136]

Both *Printz* and *New York* offer detailed precedent to guide an analysis of the NCLBA.[137] Similar to the Brady Act in *Printz* and the Waste Policy Act in *New York*, the NCLBA requires states to implement a federal plan that effectively ignores dual sovereignty. The NCLBA includes words such as "shall" and "requires,"[138] which leaves no room for the federal government to argue that the standards are suggestions and not requirements. Congress would like the NCLBA to be seen as a general outline that allows states to fill in the details, but as shown in Part I, the NCLBA puts the federal government in control of every administrative decision, certification procedure, and lesson plan in the United States.[139] Congress forces state educational institutions to adopt a state plan that directly reflects federal education policies.[140] This is a clear violation of dual sovereignty.

b. With Money Comes Problems

The fifth limitation on congressional spending considers whether "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[141] Congress cannot

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[135] *Id.* at 175.

[136] *See id.* at 188.

[137] It is important to note that neither case is a Spending Clause case, both are Tenth Amendment cases. In other words, instead of compelling states to act in order to receive funds, the federal government in *Printz* and *New York* compelled states to enforce a federal policy that the federal government could not enact without violating dual sovereignty. *See* Printz v. United States, 521 U.S. 898, 935 (1977); *New York*, 505 U.S. at 149. States can make a Tenth Amendment argument against the NCLBA under the analysis in *Printz* and *New York* because the federal government has no intention of allowing states to opt out of participating in the program. U.S. Dep't Educ., Archived: Fact Sheet on No Child Left Behind (Aug. 23, 2003), http://www.ed.gov/nclb/overview/intro/factsheet.html. President George W. Bush has made education his "number one domestic priority," so his administration is dedicated to finding a way to declare the NCLBA his great success. *Id.* The force driving this program should be enough for states to argue under *Printz* and *New York*.

[138] *See, e.g.*, 20 U.S.C. 6311(a)(1) (for example, "the State educational agency *shall* submit to the Secretary a plan" (emphasis added)).

[139] *See supra* Part I.

[140] *See supra* Part I.

[141] South Dakota v. Dole, 483 U.S. 203, 211 (1987) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

use funds to overtly coerce states into complying with federal policies.[142] The federal government may argue that states are welcome to opt out of the federal plan if they are not willing to abide by the rules, but states are not in a position to deny the federal funds tied to the NCLBA. Utah, for example, said that it wanted to "focus on its own educational goals instead of" the NCLBA.[143] Yet, the legislation enacted by Utah to accomplish this task simply placed a "preference" on state education programs over the federal regulations.[144] Utah still complied with the NCLBA to prevent the loss of over $100 million in federal funds.[145] Many state lawmakers have discussed opting out, but they back off after realizing the substantial funding their states' educational institutions stand to lose.[146]

States have no choice but to accept the funding and comply with the NCLBA. If states opt out of requirements, they also opt out of millions of dollars in federal aid. States have no viable alternative to accepting both the money and the problems that are attached to the NCLBA. Hence, the NCLBA falls within the parameters of the fifth limitation on congressional spending power.

States must go beyond the rhetoric and file an adequate legal challenge against the NCLBA. States seem to fear the possibility that challenging the NCLBA in its entirety could threaten their receipt of federal funds for education. If states want to regain control of education, they must attack the NCLBA for its coercive nature, without worrying about the risk of backlash from the DOE.

III. REGAINING CONTROL OF EDUCATION

The benefits and harms of the NCLBA are continually being reviewed and assessed, and the DOE keeps searching for ways to combat the many critics of the NCLBA.[147] For example, the federal government funded institutions designed to help address any confusion over the NCLBA to dispel the argument that states were struggling to apply the various provisions.[148] But instead of having the DOE run the institutions, it awarded contracts to companies that proposed plans to establish

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[142] *Id.*

[143] Toomer-Cook, *supra* note 34.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *See, e.g.*, Debra Viadero, *Contracts Awarded for NCLB Centers*, EDUC. WEEK, Oct. 12, 2005, at 20.

[148] *Id.*

"comprehensive centers."[149] These centers' sole purpose is to address the many problems associated with the application of the NCLBA.[150] The DOE awarded the contracts to twenty different organizations, each for a five-year term, and in amounts ranging in size from $800,000 to $5 million per organization.[151] States have admitted the NCLBA is difficult to comprehend at times,[152] but they have not requested comprehensive centers to help them comply, they have requested more money.[153] The money has now found its way into the hands of corporations instead of educators.[154] The DOE has only created more bureaucracy rather than increasing financial aid to schools.

Funding is not the only problem referred to by opponents of the NCLBA. When asked about the current state of education, teachers from a school district in Holmes County, Ohio, a rural area, expressed distaste with a federal act that pits schools in a nationwide battle to beat federal mandates.[155] Teachers pointed out that no two states in the United States have the same set of citizens, so educational standards that assess every child in America uniformly are both absurd and inappropriate.[156] Also, standardized tests leave no room for students whose learning habits do not conform to test taking.[157] Teachers prefer state-controlled education programs because states often allow teachers to determine the policies that govern education.[158]

In addition to allowing states decide their own education policies, the NCLBA needs to include some form of accountability for students. One critic noted, "[The NCLBA] requires little in the way of student accountability, even though students themselves are most central to the learning process."[159] Students need to be held equally accountable for their

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[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 1, at 25.

[153] *See supra* Part II.A.

[154] *See* Viadero, *supra* note 147.

[155] *See* Jaeb, *supra* note 5; Park, *supra* note 5; Stoner, *supra* note 5.

[156] Stoner, *supra* note 5.

[157] *See* SHARON L. NICHOLS ET. AL., EDUC. POL'Y RESEARCH UNIT, HIGH-STAKES TESTING AND STUDENT ACHIEVEMENT: PROBLEMS FOR THE NO CHILD LEFT BEHIND ACT 1 (Sept. 2005), *available at* http://epsl.asu.edu/epru/documents/EPSL-0509-105-EPRU.pdf.

[158] Hanna, *supra* note 1.

[159] Paul E. Peterson & Martin R. West, *Preface to* NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY vii, vii–viii (Paul E. Peterson & Martin R. West eds., 2003).

education. A teacher cannot necessarily be blamed for a student who fails to pass a standardized test. Teachers can present all the information each student is expected to know, but teachers cannot force each student to invest the time and effort necessary to understand that information.

CONCLUSION

Undisputedly, the crisis of poorly performing public schools and uneducated Americans is a serious issue that needs to be addressed. As discussed in this Comment, not all of the provisions in the NCLBA are negative. Some of the provisions, like increased involvement of parents and special assistance for struggling students, are good suggestions. However, they should be presented to states as just that—suggestions, not requirements. Not only would the NCLBA pass the coercion test with this change, but it would also allow states to consider the suggestions and implement them without completely restructuring current education plans.

After examining the NCLBA, one commentator wrote, "Despite NCLBA's alleged shortcomings and . . . [the] claim that the Act is unconstitutional, it appears that NCLBA is here to stay."[160] This argument may have some truth to it, but the overwhelming pressure on the government may eventually cause the legislature and the DOE to consider a much needed compromise. One of the limitations of the Spending Clause and the clear violation of dual sovereignty favors an overhaul of the NCLBA. Unfortunately, those fighting the NCLBA face an uphill battle through the court system. If teachers and states are serious about regaining control of education, it is a battle worth fighting.

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[160] Amy Reichbach, Note, *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*, 45 B.C. L. REV. 667, 680 (2003).