

# School's Out: The Failure of No Child Left Behind

The No Child Left Behind Act of 2001 promised to combat the “soft bigotry of low expectations” in public education through a set of nationwide standards and federally enforced accountability. In a September 5, 2007, Capitol Hill Briefing, Neal McCluskey and Andrew Coulson of the Cato Institute’s Center for Educational Freedom were joined by Rep. Scott Garrett (R-NJ) to examine how NCLB has fared.

**NEAL McCLUSKEY:** Let me be very clear from the outset. The Constitution gives the federal government no authority whatsoever to be involved in education (except through the Fourteenth Amendment, ensuring that states do not discriminate in how they provide public education). If you look at Article 1, Section 8, of the Constitution, where the powers of the federal government are laid out, you won’t see education or schooling mentioned.

What about the “promoting the general welfare” clause? That clause does not empower the federal government to do anything outside of the specific enumerated powers that follow it. All it does is help explain why those specific powers are there.

But don’t take my word for it. James Madison wrote in Federalist 41, and I quote: “For what purpose could the enumeration of particular powers be inserted if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase and then to explain and qualify it by recital of particulars.”

So the phrase “promote the general welfare” confers no authority to the federal government. But suppose that is not enough. Suppose the actual delegation of powers is not enough. Well, if you go to the Tenth Amendment in the Bill of Rights, it

says: “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.”



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So there is actually a double protection in the Constitution that says the federal government can’t do anything it doesn’t have specific enumerated powers to do.

And education is one of those things it has no power to be involved in.

So why doesn’t the Constitution give the federal government power over education? This isn’t just an oversight by the Founding Fathers, as some people have suggested. No, most of the Founding Fathers would never have considered education the proper domain of even state governments, much less the Federal government. Education has traditionally been a family and local concern, because all children are different, as are individual communities. They have different problems, different values, and different goals.

So what happened? What happened over the past century in education? Slowly but surely education became more centralized. First, there were larger local districts. Then there was a call for more state involvement when people were unhappy with the local districts. And then finally there was federal intervention. Perhaps this federal intervention can be thought of as the inevitable consequence of constant centralization. But the question then remains: *When* was the Constitution gutted? When did we suddenly forget the fact that the federal government has no authority, according to the Constitution, in education?

The turning point was of course, as you can imagine, FDR’s court-packing scheme. To avoid being packed, the Court fundamentally changed its stand on what government power would be permitted, shifting from a presumption of liberty, which restricted federal authority to only those things that are specifically permitted under the Constitution, to what they call a presumption of constitutionality, in which everything is constitutional unless, and this is from footnote 4 of *United States v. Carolene Products* (1938), it “appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments.”

From prohibiting the federal govern-

ment from doing anything it is not specifically permitted, today we let it do everything as long as it's not specifically restricted from doing it. And that power was fully cemented in the creation of the Department of Education in 1979.

The Founders would never have allowed Washington to interfere in education. And indeed, most would have kept state and even local governments largely out of education. Why? Because they knew that government was a big danger. The more centralized, the more dangerous. Because basically, power corrupts. And the people often will use political power if they have it for their own advantage. And NCLB makes this abundantly clear.

**ANDREW COULSON:** Let's turn our attention from the past to the present. No Child Left Behind is big government's latest and one of its most far-reaching encroachments on American education. Let's take a detailed look at NCLB's effect on actual achievement.

A lot of studies have been done on NCLB, the most recent of which was by the Center on Educational Policy, a generally favorable assessment released just a few months ago. Unfortunately, that study has some serious limitations. The data were not nationally representative, examining only 13 states. Furthermore, for the most part it looked at data from just a couple of years before NCLB passed. Lastly, as the authors of the study themselves acknowledge, these are high-stakes state tests, and there is a great incentive for teachers to teach to the test in order to artificially inflate test scores, without really guaranteeing that the students have learned anything. I reviewed the literature four or five years ago, and it's astonishing how much of a problem teaching to the test is.

Fortunately, there are a number of other studies that are better designed and can tell us a lot more about NCLB's effects. The best one was done by Jaekyung Lee, at Harvard, in September 2006. Lee had nationally representative data from the National Assessment of Educational Progress, also known as the Nation's Report Card, dating as far back as 1990. He

was able to establish a really good pattern of achievement before NCLB was passed and compare that to the results after it was passed.

What Lee found was that NCLB doesn't appear to have helped achievement overall, and it doesn't appear to have narrowed the achievement gaps. Now, this isn't just Lee's finding. There have been other reports that have looked at the NAEP scores and



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NCLB's effect on them, including one by Bruce Fuller and his colleagues that just came out earlier this year. And once again, they find that NCLB did not improve on preexisting trends in student achievement. There are some continuing gains in math, according to Fuller and his colleagues, but they are slower gains, the rate of improvement in these test scores, is slower than it was before the law was passed. So not encouraging for NCLB supporters.

There are a couple of other studies that I would mention. Neither of these are nationally representative, but they are both interesting for their own reasons. One of

them, which has gotten very little press, was an interesting study by the Northwest Evaluation Association. This is a private organization that provides testing services to school districts; they have a lot of nitty gritty data from 23 states on student achievement before and after NCLB.

Rather than just looking at test scores at one point in time, they looked at how much students gained in learning over a particular year, the years 2001–2002 and 2003–2004. And what they found is that students learned more in that earlier year, before NCLB passed, than they did in 2003–2004, after it had passed. Now, again, this isn't nationally representative, but the NWEA did have data for almost twice as many states as the CEP study. So it certainly gives us a better idea than the CEP study about what NCLB's effects are.

So is this a surprise? Should we have expected NCLB to have had a greater impact on achievement? And a related question: Should we imagine that if we give Congress another 5 years, or another 10, or another 15 years, that they will get the hang of this whole federal involvement in education thing and turn achievement around?

Well, we don't have to speculate about it. We can actually look at the data. We can look at the rise in federal per-pupil spending since 1965. It's gone from about \$50 per student to nearly \$900 per student over that period of time. And that is in constant, inflation-adjusted dollars. So that is a real increase of about a factor of 17. This increase in spending has not been accompanied by real achievement improvement, however.

We have doubled per pupil spending and yet we have flat achievement. We have had a precipitous, fantastic, staggering drop in the productivity of American education. To get a feel for how bad this period has been, you have to imagine buying something that you would have bought in 1969 but paying twice as much for it as people did then. Imagine buying a 1969 car today—no seatbelts, no airbags, no traction control, no antilock brakes—but having to pay twice what you would have paid if you bought it in 1969.

We expect progress in every aspect of life

except education, because we've been accustomed to this flat, stagnant achievement, despite rising costs. It's a terrible result, and it's a result that you only see in education.

But fortunately, NCLB, federal involvement in education, more central planning, more spending from the central government—that is not the only policy option open to us. And after two full generations of that approach, and its complete ineffectiveness and wastefulness, it is about time we looked at some of the alternatives.

**REP. SCOTT GARRETT:** The goal of No Child Left Behind was to raise achievement by setting standards. Instead, what we've accomplished is a proverbial race to the bottom. The states understand all too well how to game the system—not just in this area but in health care and all the other areas as well—and they realize that if they simply lower their standards, then they could say, "Hey, we met our goal and we get our funding, and we don't have any of the additional restrictions." So NCLB provided an incentive for states who once had a good standard to lower that down much lower.

Furthermore, NCLB changed the focus from the education of our kids to bureaucracy and accountability issues. Because of that, money had to be spent elsewhere. According to the GAO, 41 percent of the financial support and staffing at state education agencies was needed to satisfy federal regulation. In other words, the federal government was the cause of 41 percent of the administrative burden at the state level, despite, on average, providing just 7 percent of the funding.

NCLB will cost states about \$1.9 billion between 2002 and 2008. It takes more than 6 million hours of teachers' and administrators' time to deal with all the testing requirements.

As I said, I have drafted some legislation to try to address the many problems inherent in NCLB. As I did that I sat down with the folks from Cato and tried to figure out what the history of education was here on the national level and across the country as well. It really was quite illuminating. In essence, what I found out was that two

things happen whenever the federal government becomes involved. First of all, they always find a new problem to address. And second, when they find that new problem, they find a new reason for greater federal involvement or control.

Let me present an alternative. We have submitted a bill, about a week or so ago, called the LEARN Act. It stands for Local Education Authority Returns Now. And



Rep. Scott Garrett

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that is my goal, to return education authority back to where it belongs, where the Founding Fathers always intended it, in the local community and at the state level. It returns it back to the parents, the school boards, the local administrators, and so on and so forth.

You could have that occur today if a state was willing to step up and say, "We don't want any part of NCLB." Because under the law right now, a state could, to a large extent, step away from all the requirements of NCLB if it wanted to. My bill will certainly allow this, but it will also allow your state to opt out of NCLB and hold

onto its funds. How fair is it that a state like New Jersey would have to continue to fund the Department of Education should it choose to opt out of NCLB?

My bill works to sever the relationship between the federal government and local, New Jersey education. And it will do so through a refundable tax credit. So, should New Jersey decide to opt out, its funds would stay in New Jersey. Not only that, its funds would never go to Washington in the first place.

So if you're a taxpayer from whatever state you're from and your state opts out, you would basically receive when you adjust your W-2 or your W-4 for deductions—a tax credit. You as a taxpayer would never send money to Washington anymore with regard to education. So the several hundreds of millions of dollars that New Jersey sends to Washington each year on education, money that eventually at the end of the year comes back to us with strings attached, would now stay in your own pocket. You opt out; you keep the funds.

That's our plan. The basic principle is this: keep my money in my state and keep control of my children in my hands. I believe that is a true principle of the Founding Fathers.

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