AN INCREASED ROLE FOR THE DEPARTMENT OF EDUCATION IN ADDRESSING FEDERALISM CONCERNS

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I. INTRODUCTION

The No Child Left Behind Act of 2001 (NCLB)—seen by some as one of the most important pieces of education legislation in our nation’s history—
is overdue for reauthorization. Prior attempts at reauthorization have failed due to political controversy surrounding NCLB, particularly the extent of the federal role in education. One critic has

1. See, e.g., Robert A. Garda, Jr., Coming Full Circle: The Journey from Separate But Equal to Separate and Unequal Schools, 2 DUKE J. CONST. L. & PUB. POLY 1, 32 (2007) (“The No Child Left Behind Act of 2001 ("NCLB") is the most important piece of education legislation in the last thirty-five years.")


referred to NCLB as “the most intrusive federal education legislation in our nation’s history.” NCLB indeed ushered in an expansive federal role in education. But whether this role is detrimental is debatable.

Federalism addresses the interaction of state governments with the federal government. This interaction often involves trade-offs between state and federal power, where courts try to draw limits on federal power. But NCLB does not fit squarely into lines traditionally drawn. Through its spending power, the federal government is boldly raising its voice in education. The states have all accepted this federal role, incorporating federal goals into their own education plans. The courts have largely left the issue untouched. The field is thus ripe for new theories of federalism. Many theories have emerged, mostly in support of a continued federal role. How a refined view of federalism should influence legislators looking to reauthorize NCLB, however, has not been adequately addressed in the literature.

allow for a more limited federal role).


8. Id. at 256 (arguing that the “overall dualist project of dividing state from federal authority provides little guidance” when applied to NCLB).


11. Michael Heise, The Political Economy of Education Federalism, 56 EMORY L.J. 125, 127 (2006) (noting that while there had been legal attacks on NCLB none had succeeded). One court has now held NCLB inconsistent with the requirements for the Spending Clause, but this opinion addresses only the “unfunded mandate” portion of NCLB and has not yet been adopted by other courts. See Sch. Dist. of Pontiac v. Sec’y of U.S. Dep’t of Educ., 584 F.3d 283, 277 (6th Cir. 2009) (deciding that the federal government could not require states to spend their own money to achieve NCLB goals because if the Act purported to require such action, the language was ambiguous, in violation of the unambiguous requirement of Spending Clause jurisprudence).

12. Schapiro, supra note 7, at 293 (arguing “the dualist approach provides little guidance in assessing the NCLB [while a new theory of polyphony provides at least a framework for analysis]

13. See, e.g., id. at 283 (encouraging an approach that gives Congress direct management on federal-state interaction, but not providing any specific recommendations for changes to NCLB).
This article argues that the traditional institutions for addressing federalism concerns—legislative and judicial—are inadequate in the education context. Instead, Congress, in reauthorizing NCLB, should give greater responsibility to administrative agencies, particularly the Department of Education (DOE). Part II traces the history of judicial and legislative control of federalism concerns. Parts III and IV introduce NCLB and the DOE's role in its enforcement. Part V addresses new proposals for its reauthorization. Part VI highlights novel theories of federalism and applies them to NCLB. Part VII argues that agencies must be further engaged in balancing state and federal concerns regarding education reform.

II. HISTORY OF FEDERALISM AND EDUCATION LAW

For the first one hundred years of U.S. history, Congress had a limited but active role in education. For example, as early as 1785, the federal government required that proceeds from the sale of land in the Northwest Territories go to public schools. Congress likely operated with self-restraint due to pervading views of strong states' rights. As a result, the Supreme Court did not strike down a single federal law as violating the Commerce Clause or the Tenth Amendment.

Congress's role increased after the ending of the Civil War in 1865. The federal government required new Union states to provide free public schools and established an early form of the Department of Education, though departmental powers were limited mainly to collecting and publishing data on the state of American education. The Court responded by putting limits on congressional power: by 1936 the Court had narrowed the scope of Commerce Clause power and had used the Tenth Amendment to prohibit even federal taxing and spending

17. See id. (describing how the Civil War ended defiance to federal power).
18. Robelen, supra note 1414, at 240.
19. Id. at 241.
power from encroaching into traditionally state activities.\textsuperscript{20} Despite the Court's restrictive views, however, Congress enacted the 1917 Smith–Hughes Act, which succeeded in providing federal aid to schools in the form of grants for vocational programs.\textsuperscript{21}

From the late 1930s to the early 1990s, the Court's opposition to congressional power decreased, clearing the way for a greater federal role in education. The Court shifted to a "nationalist" perspective, rejecting the Tenth Amendment as a constraint on federal legislative power and permitting broad legislation based on Congress's commerce and spending powers.\textsuperscript{22} The federal role in education indeed expanded: Congress provided money for school construction and teacher salaries, supported veterans going to college and local school districts affected by military mobilization, passed school lunch programs, and provided aid for areas affected by federal acquisition of property.\textsuperscript{23} The Cold War further encouraged federal support for math, science, and foreign language education to stay competitive with Soviet rivals.\textsuperscript{24}

The federal aid, however, tended to favor wealthier school districts to the detriment of poorer countryside and urban schools.\textsuperscript{25} To combat these disparities, Congress enacted influential federal education legislation, including the 1965 Elementary and Secondary Education Act (ESEA), the precursor of NCLB.\textsuperscript{26} ESEA dramatically increased federal spending on K-12 education and helped the DOE gain prominence in setting education policy—as the agency administered ESEA.\textsuperscript{27} Congress also set the Secretary of Education as a cabinet post.\textsuperscript{28}

At the same time, the states began creating statewide education policies.\textsuperscript{29} States have always provided, and continue

\textsuperscript{20} CHEMERINSKY, supra note 16, at 269 n. 3 ("See e.g., Carter v. Carter Coal Co., 298 U.S. 238 (1936) (limiting the commerce power); United States v. Butler, 297 U.S. 1 (1936) (invalidating spending law for violating the Tenth Amendment).")
\textsuperscript{21} Robelen, supra note 14, at 240.
\textsuperscript{22} CHEMERINSKY, supra note 16, at 145.
\textsuperscript{23} Robelen, supra note 14, at 240-41.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} See Id. (listing the federal initiatives from the 1960s and 1970s).
\textsuperscript{27} Id.
\textsuperscript{29} PAUL MANNA, SCHOOL'S IN: FEDERALISM AND THE NATIONAL EDUCATION
to provide, the majority of the nation’s education funding, but typically did not have experts and political bodies dedicated to education policy until the 1970s. Since this time, state governments have made strides towards providing equality of financing amongst school districts, increasing educational quality, and setting standards for student achievement.

The federal position shifted in 1981 when President Reagan took office trumpeting the goal of a limited federal government. Although he managed to slow the increasing level of federal spending on education, at least initially, he did not otherwise decrease the federal role in education directly. But he did limit the federal role in less-obvious ways. For example, he required that executive agencies consider specific federalism concerns when formulating policies (an order revoked by President Clinton) and, along with President Bush, managed to appoint a Supreme Court majority of conservatively-inclined justices. These conservative justices have abated the increasing role of the federal government in education, defending states’ rights under the Tenth Amendment and limiting the scope of the Commerce Clause by prohibiting the federal government from regulating the states in regards to “noncommercial” activities. So as Congress continues to increase the federal role in education, the Supreme Court has essentially worked against that effort, shifting back to a “federalist” perspective, increasingly focused on states’ rights.

Although states’ rights advocates expected this “federalism revolution” to affect Congress’s spending power, the Court has


30. Id.
31. Id. at 10-14.
32. See Robelen, supra note 14, at 241 (describing President Reagan’s priority of limiting the federal role in education).
33. Id.
36. CHEMERINSKY, supra note 16, at 146.
37. See United States v. Lopez, 514 U.S. 549 (1995) (limiting congressional Commerce Clause authority to impose firearm regulation); United States v. Morrison, 529 U.S. 598 (2000) (limiting congressional Commerce Clause authority to regulate domestic violence); Schapiro, supra note 7, at 247 (“With regard to the key source of federal authority, the Interstate Commerce Clause, the United States Supreme Court has fastened on to the distinction between ‘commercial’ and ‘noncommercial’ activity as a defensible boundary for an enclave of exclusive state control.”).
left this power largely unbridled.\textsuperscript{38} Even today, the Spending Clause remains mostly unconstrained by federalism concerns\textsuperscript{39} resulting in Congress pushing its education policy on states primarily by conditioning federal funding on state adherence to federal priorities.\textsuperscript{40} For example, in 1994 Congress passed President Clinton's Goals 2000: Educate America Act, which focused on using federal aid to assist states in creating their own academic achievement standards and assessment mechanisms.\textsuperscript{41} Congress included these types of reforms in subsequent reauthorizations of ESEA,\textsuperscript{42} including NCLB.\textsuperscript{43}

III. KEY PROVISIONS OF NO CHILD LEFT BEHIND

With NCLB, Congress sought to improve academic achievement of all students—but particularly disadvantaged students—through increased accountability of public-school systems.\textsuperscript{44} To this end, NCLB requires states, in order to receive federal funds, to implement standards-based tests to determine annual yearly progress, require teachers to meet

\textsuperscript{38} See Samuel R. Bagenstos, Spending Clause Litigation in the Roberts Court, 58 DUKE L.J. 345 (2008) (discussing how the Rehnquist Court left the congressional spending power largely untouched and predicted the Roberts Court may still limit such authority). Professor Bagenstos notes: "Throughout the Rehnquist Court’s ‘federalism revolution,’ as the Court cut back on federal power under Article I and the Civil War Amendments, many commentators asserted that the spending power was next to go on the chopping block. The spending power seemed to offer Congress a way to circumvent the limitations the Court had imposed on the other legislative powers. . . . To defenders of states’ rights, the spending power now seemed ‘[t]he greatest threat to state autonomy,’ and was thus likely to be the next front in the federalism revolution . . . . In the end, the Rehnquist Court never got around to limiting Congress’s power under the Spending Clause.” Id. at 346-48.

\textsuperscript{39} See id. at 349-50 (“In its first two significant cases addressing the scope of federal power—cases that ruled (narrowly) in favor of federal abrogations of state sovereign immunity—the Roberts Court seemed to follow the same nonrevolutionary line as did the late Rehnquist Court. One might, therefore, expect the Roberts Court also to be charitable about Congress’s exercise of the spending power.”).

\textsuperscript{40} Not only is this the method used for NCLB, but also for the newer Race to the Top Program, which provides awards to states that develop the best education plans according to pre-established measuring standards. See generally U.S. DEPT OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY (Nov. 2009) [hereinafter RACE TO THE TOP PROGRAM], available at http://www2.ed.gov/programs/racetothetop/executive-summary.pdf (summarizing the Race to the Top program).

\textsuperscript{41} Robelen, supra note 14, at 241.

\textsuperscript{42} Id.

\textsuperscript{43} See Wayne C. Riddle & Rebecca R. Skinner, The Elementary and Secondary Education Act, as Amended by the No Child Left Behind Act: A Primer, in NO CHILD LEFT BEHIND: ISSUES AND DEVELOPMENTS 84 (Paul H. Berkhart ed., 2008).

\textsuperscript{44} Id.
specific qualifications, and shut down schools not meeting annual benchmarks.\textsuperscript{45} Funding is distributed using four different formulas, all of which primarily consider state expenditures on students and the number of students from poor families.\textsuperscript{46} NCLB also grants funding for specific programs: drug-abuse prevention, impact aid, teacher development, and instruction for limited English proficiency.\textsuperscript{47} This part of the article examines NCLB’s key features in more detail.

A. Standards-Based Assessments and AYP Determinations

According to President George W. Bush, annual testing administered by states is the “cornerstone” of NCLB, allowing state control and flexibility.\textsuperscript{48} States annually test students in grades 3 to 8 in mathematics and reading or language arts\textsuperscript{49} and do so once more during grades 10 to 12.\textsuperscript{50} States also test students in science annually.\textsuperscript{51} The results of these tests place students in one of three categories: advanced, proficient, or basic.\textsuperscript{52} The states also must administer a national test—the National Assessment of Educational Progress—to 4\textsuperscript{th} and 8\textsuperscript{th} grade students.\textsuperscript{53}

States must use the results from these tests to determine whether schools and school districts are making “adequate yearly progress.”\textsuperscript{54} This determination is complex and increasingly guided by the federal government, and this requirement applies to all public schools, local educational authorities, and the state overall.\textsuperscript{55} In addition, states must try to get all students testing at proficient or advanced levels by 2014.\textsuperscript{56} The federal government allows a limited number of states to use an experimental “growth” model for calculating

\textsuperscript{45} Id.
\textsuperscript{46} Id. at 85.
\textsuperscript{47} Id. at 84.
\textsuperscript{48} MANNA, supra note 29, at 119.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at § 6311(b)(3)(C)(v)(II).
\textsuperscript{52} Id. at § 6311(b)(2)(C).
\textsuperscript{53} Id. at § 6311(c)(2).
\textsuperscript{54} Id. at § 6311(b)(2)(B).
\textsuperscript{55} PAUL H. BERKHART, NO CHILD LEFT BEHIND: ISSUES AND DEVELOPMENTS viii (Paul H. Berkhart ed., 2008).
\textsuperscript{56} Id.
yearly progress.\textsuperscript{57}

As the federal government discovered, pressing states toward overall national progress presents unique challenges. It was difficult to account for variations in fifty different schools systems and student populations.\textsuperscript{58} Some states protested that they would have to use their own resources\textsuperscript{59} to implement the requirements of NCLB since federal funds made up only about 7\% of the total education bill.\textsuperscript{60} Additionally, it also proved a challenge to seek academic improvement in the nation's students as a whole while targeting disadvantaged and minority students.\textsuperscript{61} Tracking the progress of various groups met this challenge theoretically, but federal officials had to spend time fine-tuning the formula.\textsuperscript{62} Federal officials also had to balance enforcement of NCLB with the desire to have it widely accepted by the states—to the point of issuing multiple revisions and policy updates.\textsuperscript{63} Now that all states have accepted NCLB, the DOE has penalized multiple states for failing to meet its requirements.\textsuperscript{64}

\begin{itemize}
  \item \textsuperscript{57} See Riddle \& Skinner, \textit{supra} note 43, at 87 ("In recent years, there has been increasing interest in using 'growth' models to determine AYP, by which the achievement of individual pupils is tracked from year to year."). Because of the growing popularity of this approach, "[u]nder a pilot program, a limited number of states are being allowed to use such models." \textit{Id.}
  \item \textsuperscript{58} MANNA, \textit{supra} note 29, at 122.
  \item \textsuperscript{59} \textit{Id.} (describing the difficulties faced by the drafters of NCLB).
  \item \textsuperscript{60} \textit{Id.} at 121, 132 (discussing how NCLB puts high capacity demands on states and Virginia's protest to the "sweeping intrusion" of the federal government that would "overwhelm Virginia's finances and throw the state from progress it had already made on increasing student achievement.").
  \item \textsuperscript{61} \textit{Id.} at 124.
  \item \textsuperscript{62} See \textit{id.} at 125 (describing how the original AYP formula inaccurately labeled successful schools as failures.).
  \item \textsuperscript{63} \textit{Id.} at 134-35 (describing how President Bush and the Secretary of Education praised states and issued policy revisions when states were failing to meet requirements under the Act, in order to maintain the ability to pursue their agenda).
  \item \textsuperscript{64} See Janet Y. Thomas \& Kevin P. Brady, \textit{The Elementary and Secondary Education Act at 40: Equity, Accountability, and the Evolving Federal Role in Public Education}, 29 REV. RES. EDUC. 51, 61 (2005) (describing situations where the Department of Education has penalized states financially for failing to meet NCLB requirements). In 2005, Professors Janet Thomas and Kevin Brady recounted the following examples: "Georgia had its funding reduced by $718,300 for failing to align its high school test with state content standards .... That same year, Minnesota's administrative budget was cut because it used attendance records rather than the required test scores to report AYP .... In 2005 Texas lost almost half a million dollars in administrative support for failing to notify parents that their children had the right to transfer from failing schools .... The District of Columbia is facing a 25\% decrease in aid for failing to match standardized testing to academic performance standards." \textit{Id.} (internal citations omitted).\end{itemize}
B. Teacher Qualifications

States must require public school teachers to be “highly qualified” in core subjects.65 This means they must possess a bachelor’s degree, state certification or equivalent, a license to teach, and demonstrate competence in the subject they teach.66 Critics argued that this standard was overly stringent, provoking the DOE to issue revisions and flexibility provisions for groups like rural schools and multi-subject teachers.67 Critics also continue to complain that the requirements do not take actual student achievement into account.68

C. Shutting Down Schools Failing to Meet AYP

In addition to guidelines for student achievement and teacher qualifications, NCLB mandates how states must handle failing schools receiving federal funding.69 If a school does not make adequate progress for two consecutive years, then that school’s students must be given the option to attend a school that is meeting NCLB standards.70 If progress isn’t made after three consecutive years, the state must offer supplemental educational services (from a parent-selected provider “with a demonstrated record of effectiveness”) to low-income students at the school.71 After four consecutive years, the school must take one or more “corrective actions” mandated by statute.72 A year after taking one of these corrective

67. See MANNA, supra note 29, at 134-35 (describing pressures causing the Department of Education to revise the teacher qualification standards); see also U.S. Dep’t of Educ., New No Child Left Behind Flexibility: Highly Qualified Teachers Fact Sheet, ED.GOV (Mar. 2004), http://www2.ed.gov/nclb/methods/teachers/hqtflexibility.html (discussing flexibility in meeting “highly qualified” requirement).
69. See 20 U.S.C. § 6316(b) (2006); BERKHART, supra note 55, at viii. Here, “failing” means failure to meet AYP. Also, it should be noted that around 94% of all local educational entities receive funds through NCLB. McColl, supra note 9, at 609.
71. Id. at § 6316(b)(7)(B)(iii) & (e)(1).
72. Id. at § 6316(b)(7)(C)(iv). The options are as follows: (i) Replace the school staff who are relevant to the failure to make adequate yearly progress. (ii) Institute and fully implement a new curriculum, including providing appropriate professional development for all relevant staff, that is based on scientifically based research and offers substantial promise of improving educational achievement for low-achieving...
actions, the school must implement a plan for “alternate governance” that fits within one of five specified arrangements. Although even critics agree that failing schools must be identified and improved, they challenge these requirements as incomplete and overly restrictive. They argue that the requirements resulted more from political compromise than from a fair assessment of the best way to improve failing schools.

students and enabling the school to make adequate yearly progress. (iii) Significantly decrease management authority at the school level. (iv) Appoint an outside expert to advise the school on its progress toward making adequate yearly progress . . . . (v) Extend the school year or school day for the school. (vi) Restructure the internal organizational structure of the school.”

73. The local education agency can delay corrective actions for a year, bringing the total time failing to meet AYP up to six years. See id. at § 6316(b)(7)(D).

74. Id. at § 6316(b)(8)(B). The arrangements include: “(i) Reopening the school as a public charter school. (ii) Replacing all or most of the school staff (which may include the principal) who are relevant to the failure to make adequate yearly progress. (iii) Entering into a contract with an entity, such as a private management company, with a demonstrated record of effectiveness, to operate the public school. (iv) Turning the operation of the school over to the State educational agency, if permitted under State law and agreed to by the State. (v) Any other major restructuring of the school’s governance arrangement that makes fundamental reforms, such as significant changes in the school’s staffing and governance, to improve student academic achievement in the school and that has substantial promise of enabling the school to make adequate yearly progress . . . .” Id.


IV. ROLE OF THE DEPARTMENT OF EDUCATION

Although NCLB expanded the DOE’s position as a national standard setter, early setbacks caused Congress to limit DOE enforcement.\textsuperscript{78} Prior to NCLB, the DOE dispersed federal funds, offered assistance, and attempted to encourage state compliance, but the agency did not impose negative consequences on states for not complying with achievement standards.\textsuperscript{79} The DOE now monitors and enforces progress requirements, teacher qualification, and failing-school consequences.\textsuperscript{80} Additionally, Congress gave the DOE an integral position in facilitating federalism by giving it the power to grant waivers to states.\textsuperscript{81} Meant to encourage states to try new methods of achievement,\textsuperscript{82} states mainly sought waivers when unable to meet yearly progress requirements.\textsuperscript{83} This has led to allegations that waivers dilute accountability standards.\textsuperscript{84}

Initial enforcement by the DOE proved a bumpy road. For example, although President Bush and Congress instructed the DOE to strictly enforce the Reading First program, allegations soon arose that the agency, by influencing school reading curriculum, had violated a federal law\textsuperscript{85} that prohibits it from supervising or controlling local curriculum.\textsuperscript{86} This provision puts the DOE in a tough spot: entrusted with enforcing federal policy in local schools but prohibited from influencing their

\textsuperscript{78} Pinder, supra note 10, at 29.
\textsuperscript{79} See id. at 13 (discussing the pre-NCLB DOE).
\textsuperscript{80} Id. at 15 (discussing the effect of NCLB on DOE).
\textsuperscript{82} See Kristina P. Doan, No Child Left Behind Waivers: A Lesson in Federal Flexibility or Regulatory Failure?, 69 ADMIN. L. REV. 211, 216-18 (2008) (discussing the momentum leading to the decision to allow NCLB waivers).
\textsuperscript{83} See Garda, supra note 1, at 70 (discussing how states have used waivers to dilute their AYP requirements).
\textsuperscript{84} See, e.g., Pinder, supra note 10, at 35 ("many states have used loopholes and waivers to dilute the impact of NCLB's accountability provisions.").
\textsuperscript{85} Id. at 16 (citing OFFICE OF THE INSPECTOR GEN., U.S. DEPT OF EDUC., THE READING FIRST PROGRAM'S GRANT APPLICATION PROCESS 6-26 (2006)).
\textsuperscript{86} 20 U.S.C. § 3403(b) (2011). The full provision states that: "No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law." Id.
curriculum.87 The backlash from the Reading First program undermined one of the keys for NCLB’s success—strict state accountability—contributing to NCLB’s failure to live up to its promise of improving academic achievement.88

V. THE OBAMA ADMINISTRATION’S PROPOSED CHANGES TO NCLB

The Obama administration has proposed wide-ranging changes to NCLB.89 These changes include increasing state competition for federal funds, eliminating the 2014 deadline for student proficiency, and replacing the current progress requirements with a new goal of creating “college-and career-ready” students.90 The proposal preserves the analysis of demographic groups.91 Schools showing improvement would be rewarded.92 The National Governors Association is already coordinating an effort, joined by over 40 states, to write common standards to define “college- and career-ready.”93

The proposed changes seek to respond to key objections from educators. Instead of focusing solely on funding districts based on their proportion of poor students, the administration wants to reward academic progress.94 Instead of schools claiming entitlement to funds, it will give funds to schools that

87. See Pinder, supra note 10, at 16 (“The report and its political aftermath left the Department with conflicting messages of how to meet its obligation to enforce the prescriptive curricular requirements of scientifically-based research within the parameters of the statutory prohibitions against the federal government from influencing or directing state and local curricula.”).

88. Professor Pinder suggests: “[T]he backlash against federal enforcement of NCLB’s accountability measures has been so strong that Congress responded by restricting the Department of Education’s ability to effectively enforce the rigorous requirements of NCLB. This expanded federal role not only failed to bring about discernible successful academic results, it weakened the very qualities that held much of NCLB’s potential for success.” id. at 29.

89. See Dillon Changes, supra note 68 (describing the proposed changes, as described in a policy document discussing the 2011 Department of Education budget).


91. See Dillon Changes, supra note 68 (summarizing Obama’s proposal for NCLB reauthorization).

92. BLUEPRINT, supra note 90, at 9 (discussing the goal of “college and career ready”).

93. Dillon Changes, supra note 68.

94. BLUEPRINT, supra note 90, at 9.
promise greater reform, similar to the Race to the Top Program, which is viewed as a success. Instead of branding schools as failing, the administration hopes it can approach accountability in a more nuanced way, differentiating between good schools that are dealing effectively with low-scoring students and schools with high-performing students that may be neglecting low-scoring students. The administration is avoiding talk of merit pay, which helped derail the attempted 2007 rewrite of NCLB, but the new effort may use student achievement as a benchmark for teacher qualification. A Senate panel recently approved a bill that adopts the general contours of this approach.

VI. APPLYING THEORIES OF FEDERALISM TO NCLB

Under a conventional viewpoint of federalism, NCLB is a federal encroachment into a traditionally state realm. But the federal role in education shows no signs of decreasing, so new theories are needed to explain and analyze this unique federal and state collaboration.

95. Id. at 36 (discussing how the new proposal is modeled after Race to the Top).

96. See Arne Duncan, Reauthorization of ESEA: Why We Can't Wait, Remarks at the Monthly Stakeholders Meeting (Sept. 24, 2009), available at http://www2.ed.gov/news/speeches/2009/09/09242009.html ("I also agree with some NCLB critics: the law was underfunded—it unfairly labeled many schools as failures even when they were making progress—it places too much emphasis on raw test scores rather than student growth—and it is overly prescriptive in some ways while it is too blunt an instrument of reform in others.").

97. See Dillon Changes, supra note 68 (discussing the administration's hopes for a new accountability standard).

98. BLUEPRINT, supra note 90, at 4 ("We are calling on states and districts to develop and implement systems of teacher and principal evaluation and support, and to identify effective and highly effective teachers and principals on the basis of student growth and other factors."); Dillon Changes, supra note 68 (discussing the opposition to merit pay).


100. See Donald C. Orlich, No Child Left Behind: An Illogical Accountability Model, 78 CLEARING HOUSE 6, 7 (2004) ("This new federalism [experienced through NCLB] encroaches on states' rights, as guaranteed by the Tenth Amendment.").

101. See Schapiro, supra note 7, at 256 n.48 and accompanying text (discussing how the arguments that NCLB "are quite weak and serve to emphasize how the current doctrines of dualist federalism do not provide a useful vocabulary for discussing real contemporary issues of federalism."); Gail L. Sunderman, The Federal Role in Education: From the Reagan to the Obama Administration, 24 VOICES URB. EDUC. 6,
NCLB could just be a sign that federalism is obsolete in America. This contention has been made by Professors Malcolm Feeley and Edward Rubin, who suggest that federalism is merely a tool for political compromise. According to them, America now has a strong national identity and the states do not hold strong distinct values, so federalism is no longer necessary. Although they recognize federalism won't disappear any time soon, Feeley and Rubin suggest that education is an area where national standards may be particularly appropriate, as highlighted by the recent initiative of the National Governors Association to establish uniform national education standards. Feeley and Rubin point out that people promoting “state rights” often use federalism arguments to obscure their true objectives—whether they are preserving parental control, promoting school experimentation, or avoiding federal bureaucracy—when it would be better to debate these underlying policies directly.

Instead of arguing federalism is obsolete, Professor Erwin Chemerinsky argues for an augmented theory of federalism as empowerment. He contends that the genius of federalism is giving multiple actors power to address society's ills. He suggests that federal and state governments should vigorously and simultaneously try to reform education, with little

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13 (2009) ("By all indications, the Obama administration will continue expanding the federal role in education.").
102. FEELEY & RUBIN, supra note 6, at 152-53 (summarizing the author's view of federalism and how it is "vestigial in the United States").
103. Id. at 152. Professors Feeley and Rubin note that: "The situation now is that the United States has a highly integrated culture, and most of its citizens identify strongly as Americans. Regional differences exist and are occasionally celebrated, but they are trivial in comparison with the divisions that exist in other nations. As a result, federalism is vestigial in the United States. It is a historical memory that no longer serves any political purpose, and it is thus available for manipulation by forces that oppose each other with respect to issues that, unlike federalism itself, people really care about." Id.
104. Id. at 149, 152-53.
106. See FEELEY & RUBIN, supra note 6, at 116-17 (discussing how federalism is used as a political tool rather than for its merits).
107. See CHEMERINSKY, supra note 16, at 246-47 (arguing that the Court should embrace a new theory of federalism).
108. Id. at 146-47.
restraint from courts. He also argues that, to empower states, the preemption doctrine should be applied only in circumstances where the federal government expressly preempts state law. Although this theory appears to be broader than the Supreme Court's current stance on federal power, it is less radical than the theory that federalism is obsolete altogether.

Similar to Chemerinsky, Professor Robert Schapiro argues for a "polyphonic" approach to federalism. Since the federal and state governments cannot take away each other's authority to create law, these governments "represent independent voices of authority." Schapiro describes this interaction as "polyphony"—when both federal and state governments can voice their independent ideas and concerns on education law and policy. He criticizes Chemerinsky's theory for having "nothing to say about the No Child Left Behind Act, other than that courts should keep their hands off it." In contrast, polyphonic federalism, he argues, provides "at least a framework" for analyzing NCLB. As a "joint state-federal effort to improve education," he says, NCLB fosters more accountability of education policy set solely by states. Schapiro acknowledges, however, that his "analysis rests to

109. Id.
110. Id. at 158.
111. Id. at 246.
113. Schapiro, supra note 7, at 248-49.
114. Professor Schapiro describes the concept of polyphony, by discussing the following: "[P]olyphony . . . emphasizes multiplicity. Polyphony entails many voices. . . . It may be useful to draw an analogy between the development of law, so conceived, and the development of music. From the eleventh and twelfth centuries on, monophonic music, reflected chiefly in the Gregorian chant, was gradually supplanted by polyphonic styles." [Professor Harold Berman] not[es] the significance of plurality in Western legal culture. Amelie Oksenberg Rorty has similarly found polyphony to be a useful concept for evoking political pluralism. Polyphony thus highlights the key features of federalism. It shifts the focus away from dualism's concern with protecting state or federal turf. Instead, federalism is about the interaction of multiple independent voices. These characteristics allow a polyphonic conception to avoid the trap of dualism, while still reaping the benefits of federalism." Id. at 95 (quoting Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition 7 (1983)).
115. Id. at 90.
116. Id. at 103.
117. Id.
118. Id.
some extent on an optimistic account of NCLB, and he never recommends how NCLB should change when reauthorized. The changes he does propose—limiting preemption doctrine and using our dual court system to protect fundamental rights—would have little effect on NCLB because of the liberal judicial approach to the Spending Clause and the lack of a federal right to education.

Finally, NCLB could be viewed through the lens of Professor Gillian Metzger’s work. She argues that, because the administrative state necessarily intersects with federalism concerns, administrative law is useful to states and courts in addressing these concerns. For example, states have used traditional agency procedures to challenge the rationality of agency decisionmaking. And the Supreme Court has used administrative law to address federalism by applying unique standing rules and heightened substantive scrutiny when analyzing agency action challenged by states. Metzger argues that agencies are particularly responsive to states because regional offices give agencies a closer connection to states and state implementation ensures that agencies account for their interests. Additionally, agencies safeguard state interests because their rulemaking guidelines require review of state input in a way that ad hoc litigation does not; agencies are subject to judicial review; and agencies can review state concerns on an ongoing basis. As discussed in the next section, Metzger’s proposal holds promise in increasing the “polyphony” of NCLB because administrative law might provide the perfect stage for state and federal government to raise their voices on education policy.

119. Id. at 104.
120. Schapiro, supra note 7, at 294-96.
123. Id. at 2055-60.
124. Id. at 2063-65.
125. Id. at 2074-75.
126. Id. at 2077-92.
VII. RECOMMENDATIONS FOR NCLB REAUTHORIZATION

The theories above support one argument: the federal government should continue to take a role in education, but the traditional mechanism for accountability—the courts and detailed congressional legislation—are inadequate in addressing the federalism concerns raised by education reform. The courts currently do not put meaningful constraints on NCLB,\(^\text{127}\) and proposals to modify this approach are unworkable\(^\text{128}\) and would decrease polyphony by unnecessarily cabining federal involvement.\(^\text{129}\) Protecting federalism concerns in education reform requires a nuanced approach. When Congress updates NCLB, it should establish mechanisms for ongoing reform by granting greater authority to the Department of Education, rather than by setting out detailed new policies.

A. Shortcomings of the Current Approach

First, a word on the shortcomings of the current approach, which is both too monophonically federal and too hard to adjust as new educational approaches are developed. Although states

\(^{127}\) See Schapiro, supra note 7, at 256 n.48 (discussing how the arguments that NCLB is unconstitutional "under the lenient standards . . . [of] South Dakota v. Dole, 483 U.S. 203 (1987)" are "quite weak") (citing TASK FORCE ON NO CHILD LEFT BEHIND, NATIONAL CONFERENCE OF STATE LEGISLATURES, FINAL REPORT 7 (2005) (alleging NCLB is unconstitutional)); Heise, supra note 11, at 135-36 ("The traditional mechanism for the resolution of such policy turf disputes [between local, state, and federal interests in education policy]—judicial enforcement of federalism boundaries—is noticeably absent where the federal government seeks to influence policy through Congress’s conditional spending authority . . . .").

\(^{128}\) See Jesse H. Choper, The Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights, 4 CORNELL J.L. & PUB. POL’Y 460, 464 (1995) ("The Court has been hesitant to impose marked limits on the Congressional spending power because it has adopted the Hamiltonian view that the spending power is an independent power."). Likewise, Professor Heise notes that NCLB will likely not be seen as coercive because "courts have permitted conditional spending programs where the federal funding at issue is so large that a state had ‘no choice’ but to submit to federal policy. In contrast, the burden of the condition imposed by NCLB pales by comparison. To be sure, $12.7 billion is a lot of money and, not surprisingly, Title I funding is important to all states and most school districts. But state and local—not federal—agencies shoulder the overwhelming bulk of the school finance load." Heise, supra note 11, at 138.

\(^{129}\) See Anthony Consiglio, Nervous Laughter and the High Cost of Equality: Renewing “No Child Left Behind” Will Safeguard a Vibrant Federalism and a Path Toward Educational Excellence, 2009 BYU EDUC. & L.J. 365, 389 (arguing that proposals to invalidate federal involvement in education policies fail because they do not point the way forward, but rely on the same mechanisms that did not work before).
set the standards for measuring yearly progress, Congress explicitly set the consequences for failing to meet those standards.\textsuperscript{130} This setup produces an incentive for states to lower their standards to avoid failure.\textsuperscript{131} Purely federal standards have been suggested,\textsuperscript{132} but NCLB is already a "monstrously complex statute."\textsuperscript{133} Setting uniform standards by statute hinders state experimentation and further complicates the law. The federal government must find a way to account for diverse state initiatives and allow states to have their voices heard in setting national education policy.

Especially when using the spending power, the primary restraint on federal involvement is the political process.\textsuperscript{134} Some scholars suggest the political process sufficiently protects federalism concerns, but this theory doesn't work in practice; Congress did not give meaningful thought to state interests in adopting NCLB.\textsuperscript{135} Republicans wanted to support President Bush in his first major domestic policy initiative,\textsuperscript{136} and with the parties aligned, lobbyists for state interests were "intentionally frozen out."\textsuperscript{137} The political process, then, safeguards polyphony only when it will reap political rewards.\textsuperscript{138}

NCLB is also unresponsive to ongoing state concerns. One of the only ways for states to challenge federal education policies is to sue the DOE for misapplying NCLB.\textsuperscript{139} The City of Pontiac in fact succeeded in convincing the Sixth Circuit that

\begin{itemize}
  \item \textsuperscript{130} See supra Part II.A-C (discussing the specifics of NCLB).
  \item \textsuperscript{131} Ryan, supra note 5, at 988-89.
  \item \textsuperscript{132} Id. at 987-88 (arguing that if states cannot be trusted, then the federal government should set standards).
  \item \textsuperscript{133} Dillon Hard Rewrite, supra note 2 (quoting Chester E. Finn, Jr., an assistant secretary of education in the Reagan administration).
  \item \textsuperscript{134} The Note, No Child Left Behind and the Political Safeguards of Federalism, 119 HARV. L. REV. 885, 891 (2006) ("As a result of the Supreme Court's decision in South Dakota v. Dole, political safeguards are particularly important for federal spending legislation.").
  \item \textsuperscript{135} See id. at 890, 893 (discussing Professor Herbert Wechsler's argument that the political process guarded federalism, but noting that acting federal legislators seemed "indifferent" to federalism concerns during the reauthorization that produced NCLB).
  \item \textsuperscript{136} Id. at 895.
  \item \textsuperscript{137} Id.
  \item \textsuperscript{138} Id. at 902 ("Although the federal government may not always act to aggrandize power from the states, it will do so when the intrusion will reap political capital.").
  \item \textsuperscript{139} See Dillon Hard Rewrite, supra note 2 ("Several states sued the Bush administration over the law in the last decade, unsuccessfully.").
\end{itemize}
NCLB was unconstitutionally ambiguous. But state lawsuits are not usually so successful. For example, Arizona attempted to challenge the DOE’s decisions regarding students with limited English proficiency, but the case was dismissed for lack of subject-matter jurisdiction. Similarly, when Connecticut sued the Secretary of Education—alleging that the Secretary violated the Administrative Procedures Act by rejecting the state’s amendments to its educational plan—a district court upheld the Secretary’s actions as not arbitrary and capricious.

Scholars perennially forecast that reauthorization of NCLB will finally vindicate state protests, but legislation is simply a poor mechanism for an issue—like education—that needs periodic updating to reflect new research on improving educational achievement. Recently, prominent NCLB advocate, and former Assistant Secretary of Education, Diane Ravitch, turned heads by reversing course on most of NCLB’s core principles. She has become particularly opposed to using competition to improve schools and standardized testing—core components of NCLB that the current administration has proposed retaining and even increasing. She cites studies concluding that NCLB is not increasing student achievement and criticizes the approach of “measuring and punishing” as prompting excess cheating by local districts. She also notes

140. See Sch. Dist. Pontiac v. Sec’y of U.S. Dep’t of Educ., 584 F.3d 253, 277 (6th Cir. 2009) (“[A] state official deciding to participate in NCLB reasonably could read § 7907(a) to mean that the State need not comply with requirements that are ‘not paid for under the Act’ with federal funds.”).
143. See id. at 181.
144. See, e.g., Michael Heise, The 2006 Winthrop and Frances Lane Lecture: The Unintended Legal and Policy Consequences of the No Child Left Behind Act, 86 Neb. L. Rev. 119, 123-25 (2007) (discussing how state lawsuits had not been effective but noting that political prospects in 2007 looked promising). Professor Heise noted that while “lawsuits [challenging NCLB] have not been especially effective. On the political front, however, the prospects for influencing NCLB appear more promising. That NCLB is due for reauthorization in 2007 highlights the potential for change.” Id.
146. Id.
147. Dillon Changes, supra note 68.
148. Steve Insekep, Former ‘No Child Left Behind’ Advocate Turns Critic, NPR
that many states have lowered their standards to ensure compliance with federal guidelines.\footnote{149}

The studies Ravitch cites, however, date back to 2006. More than four years have passed and a failing law has not been changed.\footnote{150} The reason is simple: NCLB is politically charged and the bipartisan support that existed for the 2001 reauthorization has disappeared.\footnote{151} Congress is increasingly hostile to bipartisan efforts, to the detriment of a school system in need of reform. By contrast, greater delegation to independent agencies could create a more-flexible regime. So in reauthorizing NCLB, Congress should permit the DOE, in coordination with the states, to set core guidelines for teacher qualification, consequences for inadequate schools, and the standard for measuring progress.

\textbf{B. The Promise of Administrative Law for Improving NCLB}

Instead of merely renaming the existing standards and making minor changes to teacher qualifications and consequences for failing to meet NCLB’s requirements,\footnote{152} Congress should simply set the broader objectives of national education policy and let one or more administrative agencies fill in the rest of the details.\footnote{153} As an example, Congress could set the broad objective of “having qualified teachers,” and allow an independent federal agency, in consultation with states, to set any further details of this objective. This approach not only allows for ongoing state participation in modifying the NCLB scheme, but it also promotes greater state participation in creating the specific policies that comprise NCLB reauthorization itself.

\footnote{149. Id.}
\footnote{150. Id.}
\footnote{151. Dillon Hard Rewrite, supra note 2 (“In 2001, when Congress completed the law’s most recent rewrite, the effort took a full year, and the bipartisan consensus that made that possible has long since shattered.”).}
\footnote{152. See supra Part II.D and accompanying text.}
\footnote{153. The Secretary of Education has generally advocated a similar approach of congressionally-set broad standards, with loose definitions of what meets those standards. See Arne Duncan, Reauthorization of ESEA: Why We Can’t Wait, Remarks at the Monthly Stakeholders Meeting (Sept. 24, 2009), available at http://www2.ed.gov/news/speeches/2009/09/09242009.html (“[W]e should be tight on the goals—with clear standards set by states that truly prepare young people for college and careers—but we should be loose on the means for meeting those goals“).}
Such a task could fall to the DOE; the Secretary of Education is already working on drafting new proposals for reauthorization of NCLB. Moreover, the DOE already administers NCLB—issuing policy guidance and disciplining states for noncompliance. Scholars suggest that NCLB would improve if the DOE simply offered more policy guidance. Congress should go a step further, wiping the slate clean and instructing the DOE—in coordination with state governments—to create the specific guidelines for achieving broad educational goals through informal rulemaking. This approach would not necessarily require modifying the prohibition against the DOE setting curriculum, since the DOE—as Congress did with NCLB—could set only assessment criteria and allow states to set the actual content of school curriculum.

One of the primary weaknesses of this approach is that it relies on Congress limiting its own role in setting the

154. See Dillon Changes, supra note 68 (“[The Secretary of Education] has been working behind the scenes on rewriting the No Child law with a bipartisan group of senior lawmakers in both chambers”); Sam Dillon, No-Child Law is a Highlight of Hearing on Education, N.Y. TIMES, Mar. 4, 2010, at A20 [hereinafter Dillon Hearing], available at http://www.nytimes.com/2010/03/04/education/04educ.html (describing how Congress questioned the Secretary of Education on the prospects of reauthorization).

155. MANNA, supra note 29, at 134-35 (describing how President Bush and the Secretary of Education praised states and issued policy revisions when states were failing to meet requirements under the Act, in order to maintain the ability to pursue their agenda); Thomas & Brady, supra note 64, at 61 (describing situations where the Department of Education has penalized states financially for failing to meet NCLB requirements).

156. See Pinder, supra note 10, at 17 (“Many states do not have the capacity to implement the supplemental services requirements for schools identified as ‘failing,’ the highly qualified teacher provisions or the standards and assessments required under the Adequate Yearly Progress (AYP) provision; moreover, there is a dearth of receiving schools to which students may transfer if their current school fails to meet AYP standards, and guidance from the Department is insufficient.” (emphasis added)).

157. The requirements for informal rulemaking are described in the APA, 5 U.S.C. § 553 (1966). Basic requirements include publishing “general notice of proposed rule making . . . in the Federal Register.” Id. at § 553(b). Additionally, “after notice . . . the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.” Id. at § 553(c). Then, the agency must consider the “relevant matter presented” and “incorporate in the rules adopted a concise general statement of their basis and purpose.” Id. The final rule is published at least 30 days before its effective date and an “interested person” has “the right to petition for the issuance, amendment, or repeal of a rule.” Id. at § 553(d)-(e). Of course, Congress is free to tailor these requirements in regard to any particular statutory scheme.

158. See Pinder, supra note 10, at 15-16 (discussing the limitations of DOE's enabling act).
particulars of education policy. But there are persuasive reasons that Congress should consider doing so. Since an agency will set the details of new policies, there is less potential for the partisan gridlock that derided past reauthorization efforts.\footnote{See Dillon Hard Rewrite, supra note 2 (discussing the partisan gridlock that stopped prior efforts at reauthorization).} For Republicans, and even the Tea Party, states’ rights are a key concern, and this approach encourages greater state participation in setting education policy. For Democrats, this approach ensures that the federal government will have a key role in setting objectives for education policy. Perhaps most importantly, for both parties, this approach sets the stage for the future success of federal and state relations regarding education policy. By moving the ongoing debate about education policy to a more responsive and flexible body, members of Congress can assure constituents that strides are being made in education policy, without having to shoulder the criticisms of again making multiple missteps due to political compromise.

This proposal also might be challenged as unconstitutional. States could argue that, if they are forced to accept federal funds before they know the specific rules the DOE will eventually promulgate, the rule is too ambiguous.\footnote{South Dakota v. Dole, 483 U.S. 203, 207 (1987) ("We have required that if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously... enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" (quoting Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 and n.13 (1981))).} Indeed, courts have been conflicted over whether to permit agencies to fill in the details of federal spending-clause legislation, though mainly when an agency issues guidance with a congressional mandate.\footnote{David F. Engstrom, Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State, 82 TEX. L. REV. 1197, 1212-14 (2004) (discussing Va. Dep't of Educ. v. Riley, 106 F.3d 599 (4th Cir. 1997) (en banc) (per curiam)). In Va. Dep't of Educ. v. Riley, the Fourth Circuit prohibited DOE interpretations of the IDEA to trump Virginia's interpretation. Id. at 1212. However, Congress had not explicitly entrusted the agency with creating the details of the regulation. Id. at 1212-13.} Congress could require that new DOE regulations remain nonbinding until the next installment of federal funds, allowing states to accept unambiguous terms when accepting funds.\footnote{Peter J. Smith, Pennhurst, Chevron, and the Spending Power, 110 YALE L.J. 1187, 1235-36 (2001) (discussing pros and cons of such an approach).} Congress also could preempt these arguments by unambiguously notifying states that the DOE is entrusted with
interpreting the broad conditions set by Congress. States might also argue that this approach is an unconstitutional delegation of congressional regulatory authority. But delegation is permissible as long as Congress gives an "intelligible principle" to guide agency rulemaking. The Supreme Court, unwilling to second guess most delegations, has interpreted "intelligible principle" very broadly, upholding even a delegation that simply required regulations "in the public interest." In fact, only two statutes have ever violated this rule, both of which gave little or no guidance. As long as Congress sets some broad educational goals—such as a general standard that schools hire qualified, effective teachers—then the delegation would probably be constitutionally permissible.

This proposal—using administrative law to give states a more prominent voice in setting federal education policy—encapsulates the emerging theories of federalism discussed previously. In regards to the proposition that federalism is obsolete, the administrative state offers a chance to rewrite the structural elements of government. The national priorities for education are still promulgated through federal agencies, thereby accounting for the United States' uniform normative

163. See id. at 1240. It would be a close question whether such an approach would be constitutional. Reviewing precedent, Peter Smith notes: "It would not be unreasonable to conclude, in light of general contract principles and the interests that Chevron serves, that states should (absent the Bowen retroactivity problems described above) be bound even by agency interpretations that postdate the state's acceptance of funds. Elemental notions of fairness for the state recipients give pause, however, especially when one considers the hypotheticals of the agency's reversing its prior view or the state's committing the grant funds in reliance on its own reasonable view, only to learn later that the agency has a different (albeit reasonable) view..." (The question is... a close one.) Id.

164. See Mistretta v. United States, 488 U.S. 361, 372 (1989) ("So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928))).


166. Id. at 474 (quotation marks and citations omitted).

167. Id. at 474 ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" (citing Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1936)).
desire for better elementary and secondary education. Additionally, it permits regional or state experimentation until a more cohesive national ideal is identified. In regards to empowerment and polyphonic federalism, the whole objective of this approach is to further empower states while not diminishing federal power, actually adding further players— independent agencies—into the group of entities seeking to solve educational deficiencies. By empowering agencies to set the specifics of federal education policy, the federal government would appropriately set a stage for a dynamic ongoing debate over education policy. This debate would allow the federal and state governments to learn from each other without the crippling necessity of cumbersome congressional action to dramatically change course.

C. Administrative Law Mechanisms for Increasing Polyphony

If Congress does increase the role of the DOE in setting education policy, it is important for Congress to provide tools for the agency to perform this task in a way that increases state participation in setting national education policy. This article now proposes a series of administrative-law mechanisms that Congress could use to promote this participation.

D. Notice-and-comment rulemaking

Congress could enact a modified version of notice-and-comment rulemaking to specifically address state concerns.

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168. FEELEY & RUBIN, supra note 6, at 115 (discussing how “the American people . . . have a unified political identity.”).

169. Id. at 117 (“[S]tate divergence from national norms, while it may prevail during periods of normative uncertainty, it ultimately suppressed once the national position becomes clear.”).

170. See Schapiro, supra note 7, at 254 (“[F]ederalism is about the interaction of multiple independent voices.”).

171. See id. at 103 (“NCLB should allow states to learn from each other and from the national government”). Professor Schapiro notes that “[t]he national government also can build on the best practices of the states.” Id.

172. See supra notes 185-87 and accompanying text (discussing how agencies can take action easier than Congress).

173. See Pinder, supra note 10, at 15 (arguing that it was a fallacy to require DOE to enforce NCLB curriculum standards without giving any “real guidance about how to effectively enforce those provisions.”).

174. Professor Metzger suggests that courts could achieve this goal by “policing” the distinction between legislative and nonlegislative rules tightly, insisting on notice-
This would allow the federal government to consult with states on national education policy. Congress could require agencies to hold special notice-and-comment periods just for the states. The DOE thus could avoid opening the issue up to the whole public, while still addressing state concerns. This procedure would be ideal for allowing states to participate in setting the details of a reauthorized NCLB and also for responding to state concerns in ongoing modifications of NCLB. Moreover, by opening notice-and-comment procedure to local governments or school districts as well, this approach would refute the assertion that federal education policy silences the voices of local governments.

Of course, like normal administrative rulemaking, the federal government could still drive the policy, since the final rule would need to be a "logical outgrowth" of the originally proposed rule. The DOE would not have to side with the majority of states but would have to explain its reasoning, creating greater responsiveness than currently realized through congressional process.

One criticism might be that burdensome procedures for participating in agency rulemaking could stifle reform. But...
this procedure would be more flexible than formal rulemaking or Congressional action, especially for issues with the potential for partisan gridlock. A federal bill must garner the approval of both congressional houses and the President before becoming law. Requiring two governmental branches to alter the law—or three if it is challenged in court—promotes stability and hinders change. Agency rulemaking, on the other hand, moves much quicker. Too much fluidity can, of course, create a lack of clarity, but this approach would actually promote clarity by providing a much-needed mechanism for quickly modifying unclear or otherwise inadequate rules.

E. Judicial review of agency decisions

Allowing agencies to create specific guidelines for NCLB would also increase judicial review of NCLB regulations. Although courts are highly deferential to agency decisions, the APA imposes a standard of judicial review that is stricter than constitutional constraints alone. Courts evaluate burdensome, leading, according to many critics, to the notorious "ossification" of agency rulemaking.

181. See Lars Noah, Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules, 51 HASTINGS L.J. 255, 296 (2000) (discussing "the relative ease of amending a regulation through informal rulemaking procedures, at least as compared to the inertia and other difficulties encountered by Congress"); Nicholas S. Zeppos, Deference to Political Decisionmakers and the Preferred Scope of Judicial Review, 88 NW. U. L. REV. 296, 328 (1993) (suggesting agencies can make federal law easier than Congress); Notes, The Judicial Role in Defining Procedural Requirements for Agency Rulemaking, 87 HARV. L. REV. 782, 785 (1974) ("The relative advantages of efficiency, flexibility, and broad participation make informal rulemaking preferable to formal adjudication or formal rulemaking as a means of developing legislative facts and thereby formulating administrative policies.").

182. See Dillon Lawsuit, supra note 3 (discussing how Congress was "stymied by partisan strife over the [NCLB]'s renewal").

183. Zeppos, supra note 181, at 328.


185. See Zeppos, supra note 181, at 328 ("While the APA—more accurately, an APA vigorously interpreted by the judiciary—creates barriers to agency action, agency action need not go through the same cumbersome process as a bill (bicameralism and presentment) to become law.").


187. See 5 U.S.C. § 706(2)(A) (requiring courts to "hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").
whether agency decisions are reasonable and not "arbitrary or capricious." In some cases, courts even examine whether an agency made a rational connection between the facts and its decision.

Although often unsuccessful, alleging improper agency action is currently one of the main ways states can oppose NCLB. If the DOE was given more discretion, it would be easier for states to use this approach to oppose education policies. Rather than mounting a constitutional challenge, states could challenge DOE decisions as arbitrary and capricious. This burden is tough to meet but would provide an outer boundary on the DOE's discretion in setting education policy. Congress could even require the DOE to support its decisions with "substantial evidence." Either way, judicial review of state complaints increases polyphony between state and federal government because it increases the state voice in setting NCLB regulations. To avoid overburdening the courts—and to allow the DOE to control the agenda—Congress could limit the right of action to bring suit to state governments.

There are critics, however, of an expanded judicial role. Much of this criticism is directed at proposals for the Supreme Court to find that NCLB violates the spending power. The author agrees that this approach is unfavorable: it might severely limit the voice of the federal government, decreasing polyphony even in areas beyond education. Moreover, the

188. Chevron, 467 U.S. at 844-45.
190. Id. at 43 (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).
191. Compare Coulter M. Bump, Comment, Reviving the Coercion Test: A Proposal to Prevent Federal Conditional Spending That Leaves Children Behind, 76 U. COLO. L. REV. 521 (2005) (arguing the Court should revive a stricter analysis of federal coercion in order to limit NCLB), and Gina Austin, Note, Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights, 27 T. JEFFERSON L. REV. 337, 356 (2005) (arguing that NCLB "is inherently vague and ambiguous.")., with Consiglio, supra note 129, at 369 (criticizing the unconstitutionality argument and those like it because "[t]hey do not point the way forward to correcting the long intractable problem of inequality in educational opportunities, but insist that the flexibility and freedom schools have enjoyed for decades is still the solution.").
192. Two examples of spending clause legislation include federal antidiscrimination and child welfare statutes. See Ann Carey Juliano, The More You Spend, the More You Save: Can the Spending Clause Save Federal Anti-Discrimination Laws?, 46 VILL. L. REV. 1111, 1163 (2001) ("Two prime examples of anti-discrimination Spending Clause legislation are Title VI and Title IX."); Barbara Bennett Woodhouse, Reframing the Debate about the Socialization of Children: An Environmentalist
federal government took control of education policy because local control, by itself, had proved inadequate to improve national academic achievement. The proposal here avoids these pitfalls by not requiring courts to make wide-sweeping decisions about the scope of the Spending Clause just to strike down an arbitrary education policy.

F. Political accountability

Agencies may be even more accountable to the American public than Congress is, for primarily four reasons. First, agencies are more open to participation by low-budget lobbies. Second, they can respond more quickly to public opinion. Third, they have regional offices with staffers who live and work in local communities, giving them a better gauge of on-the-ground concerns than lawmakers in Washington. Finally, agencies are subjected to presidential appointment and removal, and presidential influence impresses state concerns on agencies because of the important role state officials play in presidential campaigns. As evidence of this phenomenon, since President Reagan, every president has “issued or at least maintained an executive order requiring agencies specifically to consider state and local government concerns when regulating.”

Paradigm, 2004 U. CHI. LEGAL F. 85, 120 n.169 (“Child welfare law provides many examples of spending clause measures, including the Adoption Assistance and Child Welfare Act . . .”).

193. See Consiglio, supra note 129, at 369 (arguing that to invalidate federal involvement in education policies fails because it does not point the way forward, but relies on same mechanisms that did not work before).


195. Id. at 1960, 1982.

196. Id.

197. See Metzger, supra note 122, at 2074-75 (discussing the proximity of regional agency offices to the states as a reason that agencies are good entities to address federalism concerns).

198. See U.S. CONST. art. II, § 2, cl. 2 (requiring the President to appoint inferior officers); Myers v. United States, 272 U.S. 52 (1926) (holding that the President has power to remove executive branch officials, even though the Constitution does not explicitly address removal).

199. See Galle & Seidenfeld, supra note 194, at 1983 (making this argument regarding presidential influence on agencies).

Allowing and tracking state experimentation

Another benefit of using administrative law and independent agencies as the vehicle for reforming NCLB is the potential for the reauthorization to take greater account of diverse state education initiatives. As noted, Congress already requires the DOE to account for some state experimentation by allowing for state waivers. Additionally, the DOE is responsible for writing policy letters to the states and monitoring state compliance. These factors make the DOE more aware of the state concerns about education policy. The DOE will be—and already is—counseling Congress about the reauthorization of NCLB, but the agency should be the conduit for setting many of the standards for the new law.

The DOE should be encouraged to embrace experimentation in state policy and be given leeway to do so. This could take the form of waivers. For example, the DOE could grant a state a waiver for students who are not at risk in exchange for increased accountability in regard to disadvantaged students. Waivers are, of course, criticized for diluting accountability by allowing states to avoid consequences, and they are only a temporary remedy to the broader problem of

14, 1982).

201. 20 U.S.C. § 7861 (2002). According to NCLB: "Except as provided in subsection (c) of this section, the Secretary of Education may waive any statutory or regulatory requirement of this chapter for a State educational agency, local educational agency, Indian tribe, or school through a local educational agency, that—(1) receives funds under a program authorized by this chapter; and (2) requests a waiver under subsection (b) of this section." Id. at § 7861(a).


203. Dillon Hearing, supra note 154 (discussing a congressional hearing where the Secretary of Education briefly discussed the planned reauthorization of NCLB).

204. See Consiglio, supra note 129, at 370 (noting that "the Bush administration’s refusal to engage in any substantive negotiation with states requesting waivers of certain provisions of NCLB sent a chilling message that was counterproductive to NCLB’s goals.

205. Cf. Matthew D. Knepper, Comment, Shooting for the Moon: The Innocence of the No Child Left Behind Act’s One Hundred Percent Proficiency Goal and Its Consequences, 53 ST. LOUIS U. L.J. 899, 923 (2009) (noting that “since NCLB’s inception, the Secretary has been anything but willing to grant such waivers.


207. See, e.g., Pinder, supra note 10, at 35 ("[M]any states have used loopholes and waivers to dilute the impact of NCLB’s accountability provisions.

states being excluded from participating in setting national education policy. Many of the proposals discussed elsewhere in this article will help eliminate the risk that the new law will be watered-down through too many waivers.

Congress also could address another key concern of NCLB critics—states lowering their standards—simply by granting the DOE more discretion regarding state educational plans. The Secretary of Education already subjects state standards to peer and agency review, but the Secretary’s authority to deny approval of state plans is so limited that it is ineffective. The Secretary cannot put conditions on its approval of the plan, so the DOE can’t specify any particular academic assessment or require the state to add to or remove any part of their plan. By giving the DOE greater discretion to reject inadequate plans, Congress would increase states’ incentive to enact better plans. In the language of federal theory, standard setting has become too state-driven; greater discretion for the DOE would increase polyphony, just as giving states a greater voice in setting core NCLB regulations would increase the polyphony of that process.

G. Transparency in rulemaking

An additional benefit of using agencies to formulate more specific guidelines of NCLB is that agency rulemaking, especially under the regime of the Freedom of Information Act (FOIA), is likely more transparent than the legislative process. FOIA, part of the APA, requires agencies to provide a wide variety of documents to the public. Even apart from FOIA, because they face judicial review for “arbitrary and capricious” decisions, agencies have a greater incentive than

208. Doan, supra note 82, at 227.
209. 20 U.S.C. § 6311(o)(1) (2006). According to the statutes, the Secretary shall: “(A) establish a peer-review process to assist in the review of State plans; (B) appoint individuals to the peer-review process who are representative of parents, teachers, State educational agencies, and local educational agencies, and who are familiar with educational standards, assessments, accountability, the needs of low-performing schools, and other educational needs of students . . . .”
210. Id.
211. Id. at § 6311(o)(1)(F).
212. See Galle & Soidenfeld, supra note 194, at 1958 (“[T]he agency process likely is more transparent than the legislative process primarily because the costs of gaining access to agency staff members who can explain the agency’s deliberations is lower than the cost to gain access to legislators.”).
Congress to explain the rationale behind their decision-making. Agencies do not have the same incentive as Congress to use opacity as a shield against dissatisfied voters.

Moreover, it is, as a rule, less expensive to gain access to agency staffers than federal legislators. Cash-strapped state lobbies have greater potential for participation in agency rulemaking than through costly efforts to influence Congress. And because agencies have a greater incentive to explain their rationales, state lobbies can be better informed. For this reason, agencies are likely the most effective federal vehicle for ensuring that states have access to influence and understand the rationales behind new NCLB regulations, rather than just having to deal with the outcomes.

VIII. CONCLUSION

It is clear that NCLB needs to be reformed. The federal government is often unresponsive to state concerns, so the states have resorted to lowering their standards to comply with the law. Congress has been exceedingly slow to respond to the evidence that some parts of NCLB are not working, despite the fact that there remain many questions about how the law

214. See Galle & Seidenfeld, supra note 194, at 1960 ("[A]gency staff members facing hard look judicial review must know all the potential objections to a rule the agency is proposing and obtain as much information about those objections as possible to facilitate the defense of any rule if it is challenged in court.").

215. See id. (touching on this aspect of agency transparency).

216. Id. at 1958.

217. States indeed are facing severe financial difficulties. See Amy Merrick, States Sink in Benefits Hole, WALL ST. J., Feb. 18, 2010, available at http://online.wsj.com/article/SB1000142405274870439880457507187354732514.html (discussing a Pew Center on the States study that showed states were facing extreme financial burdens from their promised employment benefits).


219. See Galle & Seidenfeld, supra note 194, at 1961 (arguing that in regards to transparency, "agencies outperform their rivals, as they offer more sources of insight about their decisionmaking as well as information about how to influence it").

220. See id. ("Although the public may be more aware of statutes or Supreme Court decisions than of obscure federal regulations, true transparency entails not only knowledge of the outcomes but also knowledge of the rationales on which decisionmakers rely and the ability to influence the decisionmaker’s deliberations."). Scholars note that in regards to transparency "agencies outperform their rivals, as they offer more sources of insight about their decisionmaking as well as information about how to influence it."

Id.
should balance the state and federal roles in setting education policy.

Emerging theories of federalism are helpful in the task of re-imagining NCLB and should inform Congress in the reauthorization. These theories support a strong federal role in education. But they also promote greater empowerment of state governments, allowing coordination and competition between both levels of government, for the sake of the nation's education. With this theoretical underpinning, the role of Congress is to look for ways to promote federal and state polyphony in setting education law.

The best way to achieve this balance—to maintain federal control and increase the voice of the states—is to delegate more responsibility to federal agencies, while enacting special mechanisms meant to increase the voice of the states. Congress should allow federal agencies to set many of the specifics of NCLB's reauthorization, while also allowing for easier judicial review for state challenges to agency decisions, special notice-and-comment procedures for states, and procedures for encouraging state experimentation. Using agencies and these mechanisms, Congress can ensure that the next reauthorization of NCLB remains flexible enough to address ongoing concerns and promotes the empowerment of states. Future scholarship and research should continue to explore additional ways Congress can use administrative law to improve federal and state interaction in setting education policy and beyond.