

A NEW MODEL FOR STATES AS LABORATORIES FOR REFORM: HOW FEDERALISM INFORMS EDUCATION POLICY

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In the decade since passage of the No Child Left Behind Act, American education policy has been federalized and politicized to an unprecedented degree. Widespread substantive and ideological criticism of the Act has left the future of the legislation—and of federal education policy itself—in doubt. The Obama Administration has called for an overhaul of No Child Left Behind, which has engendered criticism as an unfunded federal mandate on the states. But the Administration's implementation of Race to the Top, a controversial education reform competition among the states, has exacerbated concern about federal encroachment upon state policy making autonomy.

In this Note, I explore both the troubling federalism implications of recent federal education initiatives and the equally compelling policy considerations demanding continued federal leadership. I conclude that globalization and entrenched interstate inequality, among other forces, necessitate a continued, albeit more prudent, role for the federal government in reforming K–12 education.

INTRODUCTION

When the most recent results of the Programme for International Student Assessment (PISA), an internationally administered test for fifteen-year-old students, were released in late 2010, many were surprised to learn that students in Shanghai had received the highest mean scores in each subject area by a significant margin.¹ The success of these first-time participants received a great deal of media attention.² While this stunning performance is not representative of the Chinese student population as a whole, it nonetheless struck a nerve in the United States, bringing American students' own middling per-

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¹ 1 ORG. FOR ECON. CO-OPERATION & DEV. (OECD), PISA 2009 RESULTS: WHAT STUDENTS KNOW AND CAN DO: STUDENT PERFORMANCE IN READING, MATHEMATICS AND SCIENCE 13 (2010) [hereinafter PISA 2009 RESULTS], available at <http://browse.oecdbookshop.org/oecd/pdfs/free/9810071e.pdf>; see also Sam Dillon, *Top Test Scores from Shanghai Stun Educators*, N.Y. TIMES, Dec. 7, 2010, at A1 (noting that Shanghai scores “surprised experts”).

² See, e.g., Nick Anderson, *U.S. Students in Middle of Global Pack*, WASH. POST, Dec. 7, 2010, at A4 (noting that Shanghai finished first); Dillon, *supra* note 1 (same).

formance into sharp relief.³ Many, including President Obama, characterized the announcement of the results as a “Sputnik moment”: an opportunity for the United States to prioritize education in the wake of an embarrassing loss on the global stage.⁴

The results, while revealing, should not have been altogether surprising. In a 1983 report entitled *A Nation at Risk*, the National Commission on Excellence in Education had predicted that the United States’ continued status as a world economic leader would hinge on the reform of its public education system.⁵ In strong language befitting its Cold War backdrop, the report documented the decline of American education and warned that a loss of global competitiveness was imminent:

Our Nation is at risk. Our once unchallenged preeminence in commerce, industry, science, and technological innovation is being overtaken by competitors throughout the world. . . . [T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people.⁶

A Nation at Risk left an indelible mark on the national consciousness, generating K–12 education reforms at the local, state, and, later, federal level. Some have even credited it with saving the then-fledgling U.S. Department of Education (DOE) from dismantlement.⁷

The role of the DOE, and federal involvement in education policy generally, increased dramatically in the ensuing thirty years, although not without controversy. The passage of the No Child Left Behind Act (NCLB) in 2001 signaled that education reform, once con-

³ See *infra* notes 137–139 and accompanying text (summarizing American performance on the 2009 exam administration).

⁴ See Dillon, *supra* note 1 (noting President Obama’s use of the term “Sputnik moment” in a speech following the announcement of the PISA results); see also Nicholas D. Kristof, *China’s Winning Schools?*, Op-Ed., N.Y. TIMES, Jan. 16, 2011, at WK10 (“These latest test results should be our 21st-century Sputnik.”). The Soviet Union’s 1957 launch of *Sputnik*, the first manmade satellite, spurred investment in science and mathematics education in the United States. Sean Cavanagh, *Lessons Drawn from Sputnik 50 Years Later*, 27 EDUC. WEEK 12, 13 (2007).

⁵ NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM* 8 (1983).

⁶ *Id.*

⁷ The DOE may not have survived in the face of demonstrated antipathy from President Reagan and other prominent Republicans. PAUL MANNA, *SCHOOL’S IN: FEDERALISM AND THE NATIONAL EDUCATION AGENDA* 80 (2006). It had received cabinet-level status only a few years earlier, Department of Education Organization Act, Pub. L. No. 96-88, § 201, 93 Stat. 668, 671 (1979) (codified at 20 U.S.C. § 3411 (2006)), despite frequent proposals to that effect throughout the twentieth century, MANNA, *supra*, at 77 (noting more than fifty such bills were introduced in the first half of the twentieth century).

fined to the “margins”⁸ of federal policy, had become a fixture of the national agenda. NCLB, the most comprehensive federal education legislation to date, passed both houses of Congress with overwhelming bipartisan support⁹ but has since been the subject of widespread criticism from commentators, states, and federal officials. The federal government has not retreated from the education policy field, however. President Obama made education a priority of his domestic agenda in his first fourteen months in office, introducing two major education policy initiatives: first, an NCLB reauthorization and reform plan that would focus on college- and career-ready standards,¹⁰ and second, the Race to the Top Fund (Race to the Top), a competitive grant program for states authorized by the 2009 economic stimulus bill.¹¹

While concerns over an increased federal role in education have been exacerbated by the imperfect design and implementation of Race to the Top, I argue that some federal leadership in education reform is desirable from a political, theoretical, and legal perspective. The more difficult question is how best to achieve federal oversight of education. This paper puts forth one partial answer. Drawing from a normative federalism framework that values overlapping federal and state policy making, I advocate federal policies that pair the federal government’s superior resources with the states’ superior ability to innovate policy responses to local and national education challenges.

In Part I, I briefly address the implications of competing theoretical formulations of federalism in the context of education reform. I ultimately adopt, with some restriction, the model of “polyphonic federalism” developed by Professor Robert A. Schapiro.¹² In Part II, I examine four core legal and policy objections to NCLB and to the Obama Administration’s recent education initiatives: first, the doctrine of local control; second, unfunded (or underfunded) mandates and federal policy influence exceeding school funding expenditures; third, threats to the political independence of state legislatures; and

⁸ Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 134 (2006).

⁹ The Act passed with a landslide 384–45 vote in the House of Representatives, 147 CONG. REC. 9296–97 (2001), and an equally landslide 91–8 vote in the Senate, 147 CONG. REC. 10,802.

¹⁰ U.S. DEP’T OF EDUC., A BLUEPRINT FOR REFORM (2010) [hereinafter BLUEPRINT FOR REFORM], available at <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>. The blueprint was released in March of 2010. *Id.*

¹¹ Race to the Top Fund; Final Rule, 74 Fed. Reg. 59,688 (Nov. 18, 2009) (to be codified at 34 C.F.R. subtit. B, ch. II).

¹² ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009).

fourth, the ossification of untested education reform trends. Notwithstanding these concerns, I explain in Part III that a compelling national interest in education outcomes and the limited capacity of state education authorities justify a continuing federal role in education reform. I conclude in Part IV by providing a model for federal oversight that affords states continued autonomy. My illustrative proposal for federally funded, competitive pilot programs at the state level to follow *Race to the Top* relies in part on a reinterpretation of the classic economic formulation of states as “laboratories” for reform.¹³

I

FEDERALISM THEORY AND EDUCATION POLICY

Theoretical models of federalism have real-world implications for policy making. It is therefore difficult to prescribe the appropriate intergovernmental balance in education reform without first establishing a normative framework. How does—and more importantly, how *should*—the federal-state relationship work in practice? In this Part, I critique popular federalism models in the education law literature and adopt Robert A. Schapiro’s “polyphonic” model as a starting point for my examination of education federalism.

A. *Popular Federalism Theories Provide Little Guidance*

One longstanding conception of federalism envisions two distinct, mutually exclusive domains of state and federal power.¹⁴ This formulation, frequently termed “dual federalism,” fell out of vogue in the New Deal era but has since enjoyed a resurgence under the devolutionary “New Federalism” ideology of the Reagan years.¹⁵ The idea that the federal government and the states occupy mutually exclusive

¹³ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); SCHAPIRO, *supra* note 12, at 75 (citing Brandeis for the theory that states are “firms” engaged in competition).

¹⁴ SCHAPIRO, *supra* note 12, at 47.

¹⁵ Donald B. Rosenthal & James M. Hoefler, *Competing Approaches to the Study of American Federalism and Intergovernmental Relations*, 19 *PUBLICUS* 1, 3 (1989). The term “devolution” is used to describe the transfer of certain federal functions, such as developmental policies, back to the states. Paul E. Peterson, *Devolution’s Price*, 14 *YALE L. & POL’Y REV.* 111, 114–15 (1996). The vitality of dual federalism was affirmed in the wake of a stunning 1995 Supreme Court decision that, for the first time in sixty years, struck down federal legislation as beyond Congress’s interstate commerce power. *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (expressing concern that an overbroad Commerce Clause would erase the distinction between “what is truly national and what is truly local”).

areas of jurisdiction finds structural support in the Constitution's creation of a federal government of limited, enumerated powers.¹⁶ Yet, this conception of federalism bears little resemblance to a modern administrative state in which "nearly everything has become inter-governmental,"¹⁷ including education. Scholars, recognizing that dual federalism theory did not match federalism practice, have developed a number of contemporary alternatives, including cooperative federalism and coercive federalism. "Cooperative federalism" is a model popularized in the mid-twentieth century that emphasizes shared interests and voluntary collaboration between state and federal governments,¹⁸ including state implementation of national policy through federal grants. By contrast, some commentators believe that "coercive federalism," describing the federal government's increased use of statutory mandates, conditional grants, preemption, and administrative regulation to force states' compliance with federal policy initiatives,¹⁹ more aptly describes the status quo.²⁰

The education law literature frequently invokes the cooperative and coercive federalism models,²¹ particularly when analyzing NCLB, which requires states to implement standards and to assess schools according to their progress in meeting those standards, among other things.²² Because the precise definition and formulation of these standards and assessments is a matter of state discretion, federal-state partnerships are crucial to realizing NCLB's goal of providing all children with a "fair, equal, and significant opportunity to obtain a high

¹⁶ See U.S. CONST. art. I, § 8 (listing Congress's powers).

¹⁷ Donald F. Kettl, *The Maturing of American Federalism*, in *THE COSTS OF FEDERALISM* 73, 73 (Robert T. Golembiewski & Aaron Wildavsky eds., 1984).

¹⁸ SCHAPIRO, *supra* note 12, at 90.

¹⁹ Paul Posner, *The Politics of Coercive Federalism in the Bush Era*, 37 *PUBLIUS* 390, 391 (2007).

²⁰ See, e.g., John Kincaid, *From Cooperative to Coercive Federalism*, 509 *ANNALS AM. ACAD. POL. & SOC. SCI.* 139, 145–49 (1990) (arguing that coercive federalism replaced cooperative federalism in the 1970s and 1980s).

²¹ See, e.g., Goodwin Liu, *Interstate Inequality of Educational Opportunity*, 81 *N.Y.U. L. REV.* 2044, 2044 (2006) (arguing for "Congress to pursue, within an existing framework of cooperative federalism, reforms that create national education standards and an expanded federal role in school finance to serve as building blocks of a national policy to guarantee all children educational adequacy for equal citizenship"); Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 *J.L. & EDUC.* 1, 11–14 (2010) (describing the design of NCLB as an example of cooperative federalism but noting that "most state and local education officers would assert that NCLB is far more coercive than it is collaborative").

²² For an overview of NCLB's major provisions, see *infra* Part II.A.1. For further detail, see James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 *N.Y.U. REV. L. & SOC. CHANGE* 183, 283–86 (2003).

quality education.”²³ In practice, however, NCLB has been decried as an unfunded mandate²⁴—a hallmark of coercive federalism—and an untoward “nationalization and centralization of policy.”²⁵ As such, neither model fully describes the current education policy landscape or provides guidance on ways to improve policy. Cooperative federalism is largely a descriptive model, and, moreover, one that unrealistically underemphasizes intergovernmental conflict.²⁶ Coercive federalism is susceptible to the opposite, but equally serious, problem: It overstates federal-state divergence, thereby obscuring common ground and forestalling cooperation.

B. Polyphonic Federalism Should Inform Education Policy

Normative and functional theories of federalism—with origins in the legal, political, and economic literatures—have more to say about how best to allocate power between the federal government and the states.²⁷ Robert A. Schapiro, for instance, has developed a model of “polyphonic federalism” that recognizes “multiple, independent sources of political authority . . . not defined by subject matter.”²⁸ Rather than perpetuating distinct enclaves of state and federal power, Schapiro’s model assumes that “plurality, dialogue, and redundancy” foster “innovation and resilience.”²⁹ The benefits of such a model are threefold: States learn from one another, the federal government “build[s] on the best practices of the states,” and states, “[s]ubject to federal baselines, . . . can vary their practices, and practices can evolve over time.”³⁰ Schapiro’s formulation shows potential for useful appli-

²³ 20 U.S.C. § 6301 (2006).

²⁴ See *infra* Part II.B.2 (describing unfunded mandate arguments made by states in federal court). For more on the states’ arguments, see generally Andrew G. Caffrey, Note, *No Ambiguity Left Behind: A Discussion of the Clear Statement Rule and the Unfunded Mandates Clause of No Child Left Behind*, 18 WM. & MARY BILL RTS. J. 1129 (2010).

²⁵ Posner, *supra* note 19, at 408.

²⁶ Rosenthal & Hoefler, *supra* note 15, at 5; see also SCHAPIRO, *supra* note 12, at 90–91 (noting that cooperative federalism fails to offer guidance on how to resolve power struggles between state and federal governments in areas of overlapping substantive authority).

²⁷ Economic efficiency is perhaps the most popular lens, but it is ill-suited to the education context. At its root, fiscal federalism assigns primary responsibility for the provision of national public goods to the federal government and for the provision of so-called local goods to the states. Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LITERATURE 1120, 1134–35 (1999). However, because local policies may jeopardize national educational outputs, distinctions drawn by traditional efficiency theory may not persuasively answer whether and to what extent the federal government should be involved in education reform. See *infra* notes 75–77 and accompanying text.

²⁸ SCHAPIRO, *supra* note 12, at 95. Schapiro has discussed his theory in a number of law review articles. E.g., Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

²⁹ SCHAPIRO, *supra* note 12, at 97–98.

³⁰ *Id.* at 103–04.

cation, with implications for the reauthorization of NCLB. It offers both a description of overlapping policy authority at the state and federal levels and a normative assumption about the desirability of further enmeshment.

Schapiro's polyphony metaphor is attractive because it simply and eloquently evokes a system in which federal and state policy making intersect.³¹ The model is not limited, of course, to education policy. Instead, it provides a global view of federalism in the United States. But for my purposes, Schapiro's metaphor provides a useful starting point for unlocking the potential of concurrent spheres of influence in the education context.³² Schapiro does not assume or demand a clean division of powers within a shared sphere of influence. The flexibility of his approach is a good match for education, a public good with redistributive and developmental, as well as national and local, aspects. Schapiro's polyphony metaphor will inform my assessment of the advantages and disadvantages of federal involvement in education reform in Parts II and III, in addition to my recommendations in Part IV for retaining federal policy leadership without eroding or precluding valuable contributions from the states.

II

LEGAL AND POLICY OBJECTIONS TO FEDERAL OVERSIGHT OF EDUCATION SUGGEST A CONTINUED NEED FOR STATE POLICY MAKING

A. *Current Federal Education Programs*

In its broadest form, opposition to federal oversight of education rests on structural or ideological arguments that view the states as the historical, and thus rightful, overseers of public education in our federalist system.³³ The expansion of federal education policy in recent

³¹ By highlighting a single theoretical framework, I do not intend to reject others out of hand. Cf. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1486 (1994) (“[W]hat federalism ‘is,’ what it ‘means,’ looks different depending on the area examined and the question asked.”). Efficiency theories, for example, remain relevant to questions of fiscal policy that arise in the context of debates over local control of education and government subsidies, the latter a key feature of the Obama Administration's education policy.

³² As a new, overarching theory of federalism, Schapiro's model is both more complex and more visionary than my distillation: It envisions a new order in which “[o]verlapping, concurrent power sharing [is] the norm,” and greater interdependence of federal and state judicial systems (“intersystemic adjudication”) helps to protect liberties. Hugh D. Spitzer, Book Review, 40 PUBLIUS 563, 564 (2010) (reviewing ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009)).

³³ The doctrine of local control, *see infra* Part II.B.1, is one formulation of this argument. Possibly motivated by concern with the federal role in education spending, prominent Republicans, including a newly elected President Reagan and 1996 presidential

years has increasingly shifted the discourse from a debate on the merits of any federal intervention to an evaluation of the federalism implications of particular federal programs. Familiarity with recent education initiatives is therefore crucial for understanding persistent legal and policy objections to the federal role in education. In this subsection, I briefly describe two of many such programs: NCLB and Race to the Top. These programs will then inform my analysis of the most salient risks posed by a strong federal role in the formation of education policy.

1. *The No Child Left Behind Act*

NCLB³⁴ is the latest iteration of the Elementary and Secondary Education Act of 1965 (ESEA), comprehensive federal education spending legislation first passed under the Johnson Administration.³⁵ Title I, the centerpiece of the ESEA, provides federal funding for low-income students. Receipt of Title I funds is conditioned on compliance with NCLB's substantive provisions, which focus on three core areas: testing, teaching, and accountability. Each state must implement an accountability plan developing "challenging academic standards" in math, reading, and science and describing three levels of academic achievement (basic, proficient, and advanced).³⁶ The accountability plan must also define what constitutes "adequate yearly progress" (AYP) toward meeting proficiency goals by NCLB's 2014 deadline with respect to the general student population and to specific sub-

candidate Bob Dole, have called for abolition of the DOE. See MANNA, *supra* note 7, at 78 (discussing Reagan's promises to eliminate the DOE); Peter Applebome, *With Education in Rare Political Spotlight, Mainstream Clinton Message Seems To Sell*, N.Y. TIMES, Oct. 16, 1996, at B10 (noting Dole promised to abolish the DOE); Veronique de Rugy & Marie Gryphon, *Elimination Lost: What Happened To Abolishing the Department of Education?*, CATO INST. (Feb. 11, 2004), <http://www.cato.org/research/articles/gryphon-040211.html> (arguing that Republicans had sought to abolish the DOE partly because it intruded on the states' authority).

³⁴ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

³⁵ Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

³⁶ 20 U.S.C. § 6311(b)(1) (2006).

groups.³⁷ Furthermore, each state must administer “high-quality, yearly student academic assessments” to measure AYP.³⁸

In addition to its emphasis on accountability measures, NCLB also encourages freedom for states and communities, parental choice, and the use of empirically proven reading programs.³⁹ States have flexibility in designating federal funds and defining the key substantive provisions under NCLB, while accountability-based sanctions on underperforming schools provide parental choice. Schools that consistently fail to meet AYP are subject to increasing penalties, culminating in mandatory state takeover or another “alternative governance arrangement[]” after five years of noncompliance.⁴⁰

These principles do not easily coexist, however. Faced with full flexibility in the implementation of standards and testing but tough sanctions for failure, states have diluted the means of evaluation and superficially inflated scores,⁴¹ precipitating a race to the bottom among the states. The Obama Administration has outlined a plan for overhauling NCLB that would retain the accountability system while replacing the current law’s penalties with an incentives-based program measuring student growth and increasing the number of criteria by which schools are evaluated.⁴²

³⁷ *Id.* § 6311(b)(2). The subgroups include racial minorities, students with disabilities, low-income students, and English language learners. *Id.* While states are granted the flexibility to define “adequate yearly progress,” the concept “is diagnostic in nature, and intended to highlight where schools need improvement and should focus their resources.” Rod Paige, *Dear Colleague*, U.S. DEP’T OF EDUC. (July 24, 2002), <http://www2.ed.gov/policy/elsec/guid/secletter/020724.html>.

³⁸ 20 U.S.C. § 6311(b)(3). The Act also requires that students take the National Assessment of Education Progress (NAEP), a national examination administered by the DOE, every two years, *id.* § 6311(c)(2), and requires that schools retain only “highly qualified teachers,” *id.* § 6319(a).

³⁹ The DOE describes these principles as the four pillars of NCLB. Four Pillars of NCLB, U.S. DEP’T OF EDUC., <http://www2.ed.gov/nclb/overview/intro/4pillars.html> (last modified July 1, 2004) (“No Child Left Behind is based on stronger accountability for results, more freedom for states and communities, proven education methods, and more choices for parents.”).

⁴⁰ 20 U.S.C. § 6316(b)(8)(B). The five-year deadline is derived from 20 U.S.C. § 6316(b)(1)(A) (requiring identification of schools that fail to make AYP for two years), 6316(b)(7)(C) (requiring education agencies to take corrective action by the end of two years after identification if schools continue to fail to make AYP), and 6316(b)(8) (requiring alternative governance one year after corrective action if there is continued failure). Other permissible alternative governance arrangements include reopening as a charter school, replacing all or most staff, or relinquishing control to a private operator. 20 U.S.C. § 6316(b)(8)(B).

⁴¹ See generally James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004) (discussing incentives for states to use easy tests to assess schools and other “perverse incentives” and “unintended consequences” of NCLB).

⁴² See generally BLUEPRINT FOR REFORM, *supra* note 10 (describing the Obama Administration’s vision for educational reform).

2. *The Race to the Top Fund*

The aptly named Race to the Top⁴³ is a \$4.35 billion competitive grant program for states announced in July 2009 that has four goals: “[e]nhancing standards and assessments, improving the collection and use of data, increasing teacher effectiveness and achieving equity in teacher distribution, and turning around struggling schools.”⁴⁴ Under DOE regulations, the fifty states, the District of Columbia, and Puerto Rico were eligible for funding if, among other things, they eliminated “any legal, statutory, or regulatory barriers at the State level to linking data on student achievement . . . or student growth . . . to teachers and principals for the purpose of teacher and principal evaluation.”⁴⁵ Independent examiners assessed state applicants on the basis of a scoring rubric developed by the DOE, which awarded up to five hundred points in the competition for innovative programs addressing these objectives.⁴⁶ The 2010 competition was administered in two rounds, with winners announced in March and August. Ultimately, twelve of forty-seven applicants received funding. A third, much smaller round of the competition that focused on early childhood education was announced in May 2011.⁴⁷ As explained in the next Section, Race to the Top, like NCLB, has been criticized on both policy and federalism grounds.

B. Legal and Policy Objections

Four salient, if nonexhaustive, objections to federal oversight of education can be drawn both from the education federalism literature

⁴³ Race to the Top is codified in the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115 (2009). ARRA appropriated additional DOE funds through the State Fiscal Stabilization Fund, ARRA div. A, tit. XIV, a one-time, \$53.6 billion appropriation intended to contribute to states’ recessionary budget shortfalls and to advance the four education goals also associated with Race to the Top. Through the Fund, ARRA authorized Race to the Top, ARRA §§ 14001(c), 14006, and the Investing in Innovation Fund, a \$650 million competitive grant program, ARRA §§ 14001(c), 14007, and provided \$200 million in additional funding for the Teacher Incentive Fund, a fund for merit-based teacher compensation systems, ARRA div. A, tit. VII.

⁴⁴ Race to the Top Fund, Final Rule, 74 Fed. Reg. 59,688, 59,688 (Nov. 18, 2009) (to be codified at 34 C.F.R. subtit. B, ch. II). See *infra* notes 97–98 and accompanying text for a summary of selection criteria and *infra* notes 173–76 and accompanying text for a description of program procedures.

⁴⁵ 74 Fed. Reg. at 59,841.

⁴⁶ *Id.* at 59,813 (setting forth selection criteria and maximum point allotments).

⁴⁷ *Obama Administration Announces \$500 Million for Race to the Top—Early Learning Challenge*, U.S. DEP’T OF EDUC. (May 25, 2011), <http://www.ed.gov/news/press-releases/obama-administration-announces-500-million-race-top-early-learning-challenge>. By statutory mandate, all funds must be distributed by the end of 2011. Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1832, 125 Stat. 38, 163–64.

generally and from these two education programs specifically: (1) conflicts with the doctrine of local control and its attendant values of democratic participation and quality education; (2) limited federal funding and unfunded mandates; (3) threats to the institutional autonomy of state legislatures; and (4) ossification of unproven education reform trends. While each of these considerations may counsel in favor of a continued state role in education reform, they do not require exclusion of the federal government.

1. *Local Control, Democratic Participation, and Quality Education*

One of the most entrenched grounds of opposition to federal education programs like NCLB and Race to the Top is the doctrine of local control. Justice Brennan gave the principle its strongest endorsement in the 1974 school busing case *Milliken v. Bradley*:⁴⁸ “No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”⁴⁹ Litigants and courts invoke this principle not only in the desegregation context,⁵⁰ but also in other cases in which state defendants have an interest in shifting responsibility to local school districts.⁵¹

Notwithstanding judicial recognition of the two advantages of local control—democratic participation and educational quality—the principle is not legally or constitutionally compelled. Judicial respect for local control reflects deference to states’ allocation of authority within their borders rather than preservation of school district autonomy.⁵² Education is not a purely local function. Instead, it is an area of “core *state* responsibility”⁵³ guaranteed by education clauses in

⁴⁸ *Milliken v. Bradley*, 418 U.S. 717 (1974), held that courts cannot order school districts with a history of de facto (rather than de jure) segregation to undertake integration through school busing.

⁴⁹ *Id.* at 741–42.

⁵⁰ *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995) (“[O]ur cases recognize that local autonomy of school districts is a vital national tradition . . .”).

⁵¹ Richard Briffault, *The Local School District in American Law*, in *BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS* 24, 51 (William G. Howell ed. 2005). For instance, the Court’s decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), upholding a school financing system tied to local property taxes notwithstanding substantial intrastate inequalities, relied in part on core values associated with local control: increased citizen participation and pluralism. *Id.* at 49–50.

⁵² In *Rodriguez*, the Court turned aside the federal constitutional claims against Texas by characterizing local control as a “legitimate state purpose or interest.” 411 U.S. at 54–55.

⁵³ *Horne v. Flores*, 129 S. Ct. 2579, 2593 (2009) (emphasis added) (citing *Jenkins*, 515 U.S. at 99) (emphasizing independence of state and local authorities); see also *United*

all fifty state constitutions. School districts lack federal constitutional status and exist solely as “creature[s] of the state.”⁵⁴ Unlike similarly situated local governments, however, school districts’ sole function—the provision of, and financial responsibility for, public education—ultimately lies with the states.⁵⁵ Nonetheless, “de facto local autonomy”⁵⁶ persists as a form of state policy in diminished form. To some, the rise of school finance and adequacy litigation⁵⁷ and the implementation of statewide standards and assessments, first under state initiatives and later through NCLB, have rendered local control illusory.⁵⁸ On the other hand, local coffers continue to provide over forty percent of public school budgets⁵⁹ and a number of municipalities have adopted mayoral control and other decentralizing measures in recent years.⁶⁰ The persistence of local control is likely a product of tradition, powerful interest group networks,⁶¹ and the belief that it promotes “accountability and community choice.”⁶²

Even if we accept a diminishing (though still significant) sphere of influence for school districts, the value of citizen participation in education does not disappear at the state level. Admittedly, political accountability and citizen engagement, which are quite immediate at

States v. Lopez, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring) (citing *Milliken*, 418 U.S. at 741–42) (characterizing education as a “traditional concern of the States”).

⁵⁴ Briffault, *supra* note 51, at 28.

⁵⁵ *Id.* at 28, 37–38.

⁵⁶ *Id.* at 40.

⁵⁷ In contrast to the Federal Constitution, which is silent on the subject of education, many state constitutions require the provision of free public education. *See, e.g.*, N.Y. CONST. art. XI, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”). There have been a number of lawsuits brought in recent decades challenging school finance regimes on the theory that the State has failed to fulfill its state constitutional obligations to provide an adequate education to all pupils, particularly those in poorer districts. *E.g.*, Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326 (N.Y. 2003).

⁵⁸ Heise, *supra* note 8, at 130–32.

⁵⁹ Local governments provided 43.9% of K–12 public education funding in the 2006–07 fiscal year. THOMAS D. SNYDER & SALLY A. DILLOW, NAT’L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2009, at 247 tbl.172 (2009) [hereinafter DIGEST OF EDUCATION STATISTICS], available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2010013>. The federal government, in contrast, provided 8.5% of revenues in 2006–07, and states provided the remaining 47.6%. *Id.*

⁶⁰ Briffault, *supra* note 51, at 53.

⁶¹ David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2545, 2564 (2005) (noting that “[t]raditional divisions of responsibility [in a federalist system] tend to continue even without legal compulsion” in part because of interest group networks and costs of transferring authority).

⁶² Alvin D. Sokolow, *The Changing Property Tax and State-Local Relations*, 28 PUBLIUS 165, 182 (1998).

the local level,⁶³ are diluted at the state level. This dilution is not as drastic as that experienced in the shift from state to national politics, but it is not insignificant. Elected officials in state government oversee—and are politically accountable for—a broad range of equally salient initiatives, from criminal justice to social welfare. Similarly, citizen participation, including by ballot, may be more effective if the citizens are concentrated in one of the United States' fifteen thousand local school districts rather than one of fifty states, particularly with respect to hard decisions about how—and how much—to spend on education.⁶⁴

Nevertheless, citizens can and do influence the state education budget. For example, New Jersey made headlines in 2010 when its voters defeated more than half of the state's local education budgets, many of which were to be financed by additional property taxes.⁶⁵ The election results supported Governor Chris Christie's proposal for significant state education spending cuts to address New Jersey's budget shortfall.⁶⁶ As a general matter, citizens in many jurisdictions have played an important role in shifting financial responsibility for education funding, and attendant policy making power, from the local to the state level. Demands for relief from high property taxes and court-mandated equalization efforts, for example, have led to both limitations on property taxes and increases in state aid to public schools.⁶⁷

In short, meaningful citizen participation in education policy remains possible at the state level. This conclusion counsels in favor of respecting the historic role of states, their school district agents, and their citizens in shaping policy. It does not counsel *against* the intervention of federal policy makers, however. Because education policy is increasingly salient at the national level,⁶⁸ there is greater potential

⁶³ See Heise, *supra* note 8, at 130 (discussing local control); *Milliken v. Bradley*, 418 U.S. 717, 741–42 (same).

⁶⁴ The assumption that “people are more able to govern themselves, more able to exercise collective self-determination, more able to exercise real control over their government when they are governed locally” may break down in jurisdictions as large as states. Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, 101 AM. POL. SCI. REV. 459, 462 (2007).

⁶⁵ The defeated local budgets were meant to offset proposed reductions in state funding to local schools. Winnie Hu, *Schools in New Jersey Plan Heavy Cuts After Voters Reject Most Budgets*, N.Y. TIMES, Apr. 22, 2010, at A20.

⁶⁶ In the weeks prior to the budget vote, Christie had chastised local districts for refusing to adopt austerity measures to lower costs and explicitly called on New Jersey residents to express their displeasure at the polls. *Id.*

⁶⁷ Sokolow, *supra* note 62, at 175.

⁶⁸ See *infra* Part III.A (providing reasons that the national government has an interest in education policy).

than ever for meaningful democratic participation with respect to forming federal policy and holding federal politicians accountable for their choices.

Concern for the “quality of the educational process,”⁶⁹ like increased democratic participation, is a popular justification for local control that remains salient at the state level. In *Milliken*, the Court asserted that local control “permits the structuring of school programs to fit local needs, and encourages ‘experimentation, innovation, and a healthy competition for educational excellence.’”⁷⁰ This formulation resembles subsidiarity, the principle that government functions should be assigned to the lowest practical level.⁷¹ While subsidiarity protects individual and state dignitary interests, it also addresses efficiency concerns—namely, responsiveness to local needs.⁷²

The validity of the educational quality rationale for local control thus depends on whether schools require flexibility to respond to unique local conditions. Regional differences are often exaggerated in an era of unprecedentedly nationalized politics, policy, and culture.⁷³ Nonetheless, undeniable differences in demographics and tax policy, among other things, remain between and within states. Concentrated populations of English-language learners or low-income students in particular localities or states may require specialized local educational policy.⁷⁴ On the other hand, local differences may jeopardize rather than promote quality education if not for federal intervention. For instance, a state or locality’s limited fiscal capacity or tax effort can drastically reduce per-pupil expenditures,⁷⁵ or educational content

⁶⁹ *Milliken v. Bradley*, 418 U.S. 717, 742 (1974).

⁷⁰ *Id.* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973)).

⁷¹ See Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 *IND. L. REV.* 103, 103 (2001) (describing subsidiarity). Vischer argues that subsidiarity is an important, though unarticulated, background principle in American politics. *Id.* at 121–23.

⁷² See Arie Reich, *Bilateralism Versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity*, 60 *U. TORONTO L.J.* 263, 271–72 (2010) (discussing efficiency benefits of subsidiarity).

⁷³ See SCHAPIRO, *supra* note 12, at 16–26 (describing nationalizing trends in politics, policy, and culture).

⁷⁴ A recent report indicates that, while immigrant students remain concentrated in the six largest states by population, dispersion throughout the United States is increasing. RANDY CAPPS ET AL., *URBAN INST., THE NEW DEMOGRAPHY OF AMERICA’S SCHOOLS: IMMIGRATION AND THE NO CHILD LEFT BEHIND ACT 11–12* (2005), available at http://www.urban.org/UploadedPDF/311230_new_demography.pdf.

⁷⁵ See generally Liu, *supra* note 21 (detailing interstate education inequalities); see also *infra* Part III.A.2 (discussing fiscal inequalities between states). Fiscal capacity refers to the ability of governments to generate tax revenue, while tax effort refers to the amount actually collected. The former varies with the amount and value of natural resources, the wealth of the population, and the presence of industry; the latter depends on tax rates,

may vary with local political ideology⁷⁶ in an era in which state and federal policy makers agree that the use of internationalized standards are necessary for post-secondary success as well as national competitiveness.⁷⁷ Recognition of the necessity of local/state solutions to some uniquely local/state problems is not inconsistent with federal oversight of education. It simply requires a sensitive application of the federalism model described in Part I. The fact that local governments can solve some problems better should not preclude the federal government from making supplementary, or even overlapping, efforts.

Nor does *Milliken's* citation of "experimentation, innovation, and . . . competition"⁷⁸ as a means of achieving educational quality compel a slavish devotion to local control. True, one of the merits of a federalist system is the ability of its component parts to innovate. An individual state—by virtue of its smaller size, knowledge of local conditions, or more homogenous citizenry—may be better able than the federal government to implement (and, where necessary, modify) new education policy with flexibility. But the recognition that states are better innovators does not compel local control over education. As I explain in Part IV, the federal government can maintain a policy role while harnessing the advantages of the states-as-laboratories model.⁷⁹

deductions, enforcement, and other tax policies. See Liu, *supra* note 21, at 2082–85 & 2085 n.154 (describing different ways to measure fiscal capacity).

⁷⁶ Two recent examples are illustrative. The National Governors Association content standards, see THE NAT'L GOVERNORS ASS'N, COUNCIL OF CHIEF STATE SCH. OFFICERS & ACHIEVE, INC., BENCHMARKING FOR SUCCESS: ENSURING U.S. STUDENTS RECEIVE A WORLD-CLASS EDUCATION (2008) [hereinafter NGA REPORT], available at <http://www.nga.org/Files/pdf/0812BENCHMARKING.PDF>, conspicuously exclude scientific concepts like evolution that may be "a cause of controversy in some states." Sam Dillon, *Panel Proposes Single Standard for All Schools*, N.Y. TIMES, Mar. 11, 2010, at A1. Texas was the subject of publicity following a revision of state social studies standards, which, among other things, mandated instruction on certain key conservative figures. Critics charged that these changes were overly politicized. See Susan Jacoby, Op-Ed., *One Classroom, From Sea to Shining Sea*, N.Y. TIMES, Mar. 19, 2010, at A25 (describing changes to Texas standards). This move by Texas, a large purchaser of textbooks, is likely to affect the content of publications used across the nation. See April Castro, TEXAS BOARD OKS ADJUSTED SOCIAL STUDIES CURRICULUM, ASSOCIATED PRESS, reprinted in CHARLESTON GAZETTE (West Virginia), May 22, 2010, at A2 (noting that Texas standards will be used by textbook publishers for material reaching other states).

⁷⁷ For instance, recent initiatives by the Obama Administration highlight the need to use internationalized standards. See *supra* text accompanying notes 10–11 (describing Obama initiatives).

⁷⁸ *Milliken v. Bradley*, 418 U.S. 717, 742 (1974) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973)) (internal quotation marks omitted).

⁷⁹ See *infra* Part IV.B. It might be argued that federal oversight of education may, over time, lead to policy convergence that hampers the ability of states to compete for citizens. Cf. Levy, *supra* note 64, at 460–61 (explaining federalism theories that emphasize the salutary effects of policy differences between states and the ability of citizens to move to different localities according to their policy preferences). As such, *Milliken's* invocation of

2. *Limited Federal Funding and Unfunded Mandates*

Financial obligations imposed from the top down also animate opposition to NCLB and federal education policy generally. While NCLB had broad support in Congress, state legislatures controlled by both parties were so alarmed by NCLB's new conditions that many took the unusual step of formally resisting its implementation.⁸⁰ At least thirty-eight states considered, and some passed, legislative resolutions condemning NCLB, prohibiting the use of state or local money to support it, and/or urging school districts to reject NCLB funds.⁸¹ Utah went further, famously becoming the first state to (temporarily) opt out of NCLB entirely.⁸²

The bulk of this formal opposition to NCLB is rooted in the contention that the states bear most of the costs of implementing NCLB, in violation of the Spending Clause and NCLB's own unfunded mandates provision.⁸³ One lawsuit brought by a state and another by school districts—instrumentalities of states—challenged NCLB on these grounds but were dismissed.⁸⁴ While two unfavorable disposi-

innovation is in tension with its competition rationale. However, I submit that competition in the education context is more likely to occur within jurisdictions—manifested, for instance, in the choice between public, private, and charter offerings—than between them. While the quality of schools is no doubt a salient consideration when choosing where to settle, it is by no means the only one. Nor can perfect mobility of citizenry be assumed. Moreover, the design of Race to the Top as a competitive grant program suggests that states can be spurred to innovate by competing directly for funds rather than needing to compete for citizens. See *supra* Part II.A.2 for an overview of the program.

⁸⁰ See Bryan Shelly, *Rebels and Their Causes: State Resistance to No Child Left Behind*, 38 PUBLIUS 444, 444–48 (2008) (describing state resistance to NCLB). Shelly notes that it is far more common for states to seek redress from onerous federal regulation through negotiation with federal policy makers and officials.

⁸¹ *Id.*; see also William J. Mathis, *The Cost of Implementing the Federal No Child Left Behind Act: Different Assumptions, Different Answers*, 80 PEABODY J. EDUC. 90, 91–92 (2005) (detailing specific responses).

⁸² Mathis, *supra* note 81, at 92.

⁸³ The states alleged more than \$25 billion in shortfalls in the first three years of NCLB's implementation. LARRY N. GERSTON, *AMERICAN FEDERALISM* 99 (2007). Federal officials not only disputed this figure, but contended that the Act was, in fact, *fully* funded. Mathis, *supra* note 81, at 92. The disagreement arose over the extent to which the true cost of NCLB is limited to *additional* administrative costs it imposes (the federal view) or also includes the total costs of teaching students to the demanding standards the Act requires all children to meet by 2014 (the state view). See *id.* at 93, 96–97 (describing various interpretations of “fully funded”).

⁸⁴ *Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253 (6th Cir. 2009) (en banc) (finding no Spending Clause violation), *cert. denied*, 130 S. Ct. 3385 (2010); *Connecticut v. Spellings*, 549 F. Supp. 2d 161 (D. Conn. 2008) (dismissing the sole remaining claim for failure to develop administrative record), *aff'd sub nom.* *Connecticut v. Duncan*, 612 F.3d 107, 111–12 (2d Cir. 2010) (declining to reach the merits with respect to the claim that the Secretary of Education violated NCLB's unfunded mandates provision), *cert. denied*, 131 S. Ct. 1471 (2011). The concurrence in the Sixth Circuit case held that NCLB provided clear notice to the States of the conditions attached to federal funds

tions cast doubt on the viability of legal challenges to NCLB's unfunded mandates,⁸⁵ dicta in these cases have broad and important policy implications. The Sixth Circuit recognized, albeit indirectly, that practical coercion under the Spending Clause can exist independently of legally actionable, constitutionally infirm coercion, stating in unequivocal terms that "Congress has not fully funded the cost of complying with NCLB."⁸⁶ Indeed, since the genesis of the Elementary and Secondary Education Act (ESEA) in the 1960s, K-12 education expenditures by the federal government have increased in absolute terms but remained flat relative to spending by states and localities.⁸⁷ The passage of NCLB, which increased the number and extent of states' obligations under Title I, as well as the number of affected schools, did not dramatically alter this calculus.⁸⁸ State and local governments remain responsible for most of the cost of public education.

This data inevitably raises the question "whether it makes sense to permit the federal government . . . to exert far more policy influence than the federal government's financial contribution to state and local school district budgets might traditionally warrant."⁸⁹ The most obvious answer, and thus the least satisfying, is that state implementation of any of the major federal education initiatives is voluntary, at least in name. Recall, however, that Connecticut objected to the financial balance struck by NCLB strongly enough to file a federal action, but apparently not strongly enough to forego the funds in the first

and thus passed constitutional muster under *South Dakota v. Dole*, 483 U.S. 203 (1987). *Pontiac*, 584 F.3d at 295-96 (Sutton, J. concurring). The Supreme Court's denial of certiorari in *Pontiac* has suspended the debate for the time being.

⁸⁵ The concept of an unfunded mandate is itself ill-defined and, in the view of one fiscal federalist, is an "analytically bankrupt concept[.]" Super, *supra* note 61, at 2580 (noting that the concept's focus on adequacy of marginal rather than total funding ignores the fact that government money is fungible). Moreover, the *Dole* Spending Clause test has never resulted in a finding of unconstitutionality. Michael D. Barolsky, Note, *High Schools Are Not Highways: How Dole Frees States from the Unconstitutional Coercion of No Child Left Behind*, 76 GEO. WASH. L. REV. 725, 733 (2008).

⁸⁶ *Pontiac*, 584 F.3d at 263 (Cole, J., plurality) (ruling on threshold ripeness issue).

⁸⁷ MANNA, *supra* note 7, at 12 fig.1.2, 68-69.

⁸⁸ From 2000-01 (the year prior to NCLB's passage) to 2004-05 (the second year of its implementation), total federal education expenditures increased by \$15 billion. This represents a minor increase in the federal funding burden from 7.3 percent to 9.2 percent. DIGEST OF EDUCATION STATISTICS, *supra* note 59, at 247 tbl.172.

⁸⁹ Heise, *supra* note 8, at 130. Heise explores the issue of federal influence relative to federal spending at length. He observes that states have managed to increase their contribution to public education funding relative to local sources in tandem with their assertion of greater policy making authority vis-à-vis local school districts. *Id.* at 153-54 (arguing further that the federal government is loath to produce unfunded mandates and that disjoining policy making from funding compromises political accountability and meaningful citizen participation).

place.⁹⁰ The current recession and concomitant state budget deficits have surely exacerbated the problem.⁹¹ The states' ability to make meaningful decisions about whether to accept conditional grants depends not only on the amount in question and the relative burdens of the strings attached, but also on the vagaries of the financial climate.⁹² Neither *Race to the Top* nor Obama's proposal for similar incentives-based Title I grants under a revamped and reauthorized NCLB has addressed the disparity between federal and state spending.

Heise offers a partial solution to this problem: adoption of voluntary national policies rather than practically compulsory federal policies.⁹³ To be sure, this approach risks engendering the same legally noncoercive, but *practically* coercive, influence that has led all fifty states to participate in NCLB. However, as I will explain in Part IV, incentives-based federal grants—in the general vein of *Race to the Top*, but with substantial tweaking—impose fewer burdens than do the punitive “strings” attached to NCLB participation.

3. *Threats to the Institutional Autonomy of State Legislatures*

NCLB is probably not unconstitutionally coercive, but it is certainly controversial. Similarly, *Race to the Top* has indirectly—and thus not actionably—threatened the institutional autonomy of state legislatures. At its core, NCLB is premised on the “central tradeoff” of increased flexibility for increased accountability.⁹⁴ If, as critics suggest, NCLB's dual commitment to these goals is self-defeating, with states diluting standards in a “race to the bottom,”⁹⁵ the fault is the result of too little coercion—not too much. As implemented, *Race to*

⁹⁰ See *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 464, 481 (D. Conn. 2006) (describing Connecticut's challenges to the Department of Education's interpretation and implementation of NCLB while noting that “no federal funds have been withheld from” Connecticut), *aff'd sub nom.* *Connecticut v. Duncan*, 612 F.3d 107 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1471 (2011).

⁹¹ Cf. Editorial, *Don't Turn Down Fed Money*, *DESERET NEWS*, Feb. 2, 2004, at 6 (arguing, even before the recession, that “[c]ash-strapped Utah can't turn its back on hundreds of millions of federal dollars” from NCLB). *But see* Michele McNeil, *South Dakota Also Plans To Defy NCLB*, *POLITICS K-12* (June 30, 2011), http://blogs.edweek.org/edweek/campaign-k-12/2011/06/sd_also_plans_to_defy_nclb.html (noting three states recently threatened to opt out of NCLB in response to the NCLB's escalating performance targets).

⁹² See Super, *supra* note 61, at 2582 (describing the influence of business cycle on state acceptance of federal funds).

⁹³ See Heise, *supra* note 8, at 153 (discussing the advantages of decoupling policy making and funding responsibilities).

⁹⁴ *Pontiac*, 584 F.3d at 287 (Sutton, J., concurring).

⁹⁵ See *supra* note 41 and accompanying text for a discussion of NCLB's “perverse incentives.”

the Top is substantively and politically coercive in a way that NCLB is not.

If formulated at a broad level of abstraction, Race to the Top appears to be the perfect antidote to the punitive and inflexible accountability provisions of NCLB.⁹⁶ Many of its selection criteria are written in general terms.⁹⁷ Other criteria, however, are very specific.⁹⁸ Where Race to the Top demands particular policies, it reflects a top-down approach inconsistent with the program's central purpose: to foster innovation.

Race to the Top also threatened the autonomy of state legislatures, who scrambled to bring their codes into line with the Administration's preferences in time for the January and June 2010 application deadlines.⁹⁹ New York's leaders, for instance, initially failed to muster sufficient support in the state legislature to raise charter school caps and to repeal a measure prohibiting the use of student test scores in tenure decisions,¹⁰⁰ two accountability measures necessary to secure Race to the Top funding. While New York was one of sixteen finalists out of a total of forty-one applicants in Phase 1, only two states were awarded funding in the first round of competition: Tennessee and Delaware.¹⁰¹ Tennessee and Delaware's success was predicated both on the passage of new state laws consistent with the federal government's preferences and on strong support from local teachers, school districts, and business leaders.¹⁰² With significant pressure from New York City Mayor Michael Bloomberg, his

⁹⁶ See *supra* Part II.A.2 for an overview of Race to the Top.

⁹⁷ The standards and assessments criteria, for example, include “[d]eveloping and adopting common standards,” “[d]eveloping and implementing common, high-quality assessments,” and “[s]upporting the transition to enhanced standards and high-quality assessments.” Race to the Top Fund, 74 Fed. Reg. at 59,813.

⁹⁸ Notable examples include criteria for teacher accountability measures and charter school development. See *id.* at 59,844 (using annual teacher and principal evaluations to inform personnel decisions including removing teachers and granting tenure); *id.* at 59,845 (evaluating whether the state discriminates against charter schools).

⁹⁹ See Race to the Top Fund; Notice Inviting Applications for New Awards, 74 Fed. Reg. 59,836, 59,836 (Nov. 18, 2009) (providing notice of two 2010 deadlines).

¹⁰⁰ Jennifer Medina, *New York Fails To Get Grant of \$700 Million for Schools*, N.Y. TIMES, Mar. 30, 2010, at A22; see also N.Y. EDUC. LAW § 3012-b(2)(a) (McKinney 2009) (repealed July 2010) (providing that teachers hired beginning in the 2008 school year “shall not be granted or denied tenure based on student performance data”).

¹⁰¹ Medina, *supra* note 100; *Delaware and Tennessee Win First Race to the Top Grants*, U.S. DEP'T OF EDUC. (Mar. 29, 2010), <http://www2.ed.gov/news/pressreleases/2010/03/03292010.html>.

¹⁰² See Sam Dillon, *Delaware and Tennessee Win U.S. School Grant*, N.Y. TIMES, Mar. 30, 2010, at A15 (describing the reasons Delaware and Tennessee won). Delaware, for example, passed laws permitting state intervention in failing schools and authorizing teacher accountability. Following the announcement of the winners, Governor David Patterson made a final appeal to the New York legislature to make the changes called for

Chancellor of Education, and charter school advocates, the New York legislature finally passed legislation authorizing more than a twofold increase in the number of charter schools and a teacher evaluation system that accounts for student performance just before the second Race to the Top deadline.¹⁰³ All told, thirty-four of the forty-seven applicants in Phases 1 and 2 changed state education law or policy in their bid for the extra funds,¹⁰⁴ although most of them ultimately received no funding for their efforts.¹⁰⁵

While this kind of policy influence falls short of mandating federal standards, it allows the federal government to intervene in state governance and policy making. The states' capitulation also eschews genuine policy debate on the wisdom and efficacy of the reform measures urged by the Obama Administration. A recent longitudinal study of charter schools by the Center for Research on Education Outcomes (CREDO) at Stanford University illustrates this point.¹⁰⁶ The national report, the first of its kind, was funded by pro-charter school foundations.¹⁰⁷ Yet, the results suggest that the vast majority of American charter schools fail to measurably improve student achievement relative to traditional public schools.¹⁰⁸ That is not to say that charter schools show no promise. A supplementary study by CREDO on elementary school students in forty-nine charter schools in New York City, a system with substantial backing by the Mayor, indicates that charter schools provide "significantly better results" than traditional public schools.¹⁰⁹ The relative merits of

by the Obama Administration, stating, "We can't afford the luxury of ideological differences getting in the way right now." Medina, *supra* note 100.

¹⁰³ See Jennifer Medina, *For New York, \$700 Million in School Aid*, N.Y. TIMES, Aug. 25, 2010, at A1 (describing changes to state education law).

¹⁰⁴ *Nine States and the District of Columbia Win Second Round Race to the Top Grants*, U.S. DEP'T OF EDUC. (Aug. 24, 2010), <http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants>.

¹⁰⁵ Three months later, New York, eight other states, and the District of Columbia received funding in the second round of competition. *Id.*

¹⁰⁶ See CTR. FOR RESEARCH ON EDUC. OUTCOMES, STANFORD UNIV., MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES (2009) [hereinafter MULTIPLE CHOICE], available at http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf (assessing charter schools in fifteen states and the District of Columbia).

¹⁰⁷ Diane Ravitch, Op-Ed., *Why I Changed My Mind About School Reform*, WALL ST. J., Mar. 9, 2010, at A21.

¹⁰⁸ See MULTIPLE CHOICE, *supra* note 106, at 1 ("Nearly half of the charter schools nationwide have results that are no different from the local public school options and over a third, 37 percent, deliver learning results that are significantly worse than their student would have realized had they remained in traditional public schools.").

¹⁰⁹ See CTR. FOR RESEARCH ON EDUC. OUTCOMES, STANFORD UNIV., CHARTER SCHOOL PERFORMANCE IN NEW YORK CITY 14 (2010), available at http://credo.stanford.edu/reports/NYC%202009%20_CREDO.pdf (detailing specific student groups with significantly better results in math and reading).

various charter schools are beyond the scope of this Note. The wide range in the quality of these institutions, however, renders dubious a federal policy that supports charter school implementation as an end in itself—especially because further devolution of power, from state and local education authorities to private charter companies, may well complicate future education reform initiatives.¹¹⁰

The fairness and efficacy of penalizing teachers for poor student outcomes, especially in light of teacher shortages in many areas of the country, is similarly a matter of ongoing debate. For instance, Florida's Republican legislature passed a bill that would have held teachers accountable for student outcomes and eliminated tenure, a mainstay of unionized contracts,¹¹¹ partly to strengthen Florida's candidacy for Race to the Top Phase 2.¹¹² After receiving over 120,000 messages on the issue, Governor Charlie Crist publicly broke with his party and vetoed that bill, arguing that it failed to provide a "clear understanding of how gains will be measured."¹¹³

The untested nature of these, and many other popular reform initiatives, exacerbates the risks attendant to federal encroachment upon state policy making autonomy. This institutional vulnerability is always present to some degree when federal money is used as the "carrot" in "carrot and stick" policy making. Requiring states to pass specific legislation in order to receive extra funding is, as a practical matter, largely indistinguishable from providing money for a specific policy purpose knowing it will require considerable supplementation by state treasuries.¹¹⁴ Courts routinely uphold both claims in the face of constitutional attack.¹¹⁵ As a policy matter, however, there is a significant qualitative difference. Consider the Federal Aid Highway Act, which conditions states' receipt of some federal highway funds on, among other things, state seatbelt regulation and a legal drinking

¹¹⁰ See, e.g., Jacoby, *supra* note 76, at A25 (decrying "further balkanizing of a public education system already hampered by the legacy of extreme decentralization").

¹¹¹ Trip Gabriel & Damien Cave, *Florida Governor Bucks G.O.P. on Teacher Pay Bill*, N.Y. TIMES, Apr. 15, 2010, at A16 ("Passions have not run so high in Florida, the governor said, since the controversy over ending the life of Terri Schiavo in 2005.").

¹¹² *Id.*

¹¹³ *Id.* The difficulty of accurately and meaningfully measuring student outcomes has also frustrated the goals of NCLB. See *supra* Part II.A.1 (describing the shortcomings of NCLB).

¹¹⁴ Cf. *supra* Part II.B.2 (describing the unfunded mandate litigation arising under NCLB).

¹¹⁵ See *supra* notes 84–85 and accompanying text (discussing failure of states' Spending Clause claims and permissiveness of *South Dakota v. Dole* generally).

age of twenty-one years.¹¹⁶ While the policy rationale for the latter is assailable,¹¹⁷ transportation safety initiatives of this kind present clear, mutually exclusive choices. In formulating the funding condition, the federal government must weigh the benefits of the safety feature against its policy costs. A state actor deciding whether to accept the funds and the attached conditions faces the same choice. This stands in contrast to many popular education reforms, which are not only of uncertain value but—as charter schools powerfully illustrate—infininitely variable.

Moreover, to be effective, education reforms do not necessarily require nationwide uniformity. The drinking limitation in *South Dakota v. Dole* was predicated upon findings that variable state drinking ages encouraged young people to drive “to border States where the drinking age [was] lower.”¹¹⁸ State education policies may have some similar “spillover effects.”¹¹⁹ To cite one example, a single state may impose its educational content preferences upon its sister states because states are served by a nationwide textbook market.¹²⁰ But, for the most part, local and regional conditions present unique challenges in the implementation of policy,¹²¹ meaning uniformity is not always possible or even desirable. Nor is education policy analogous to industry regulation, which, unless nationalized, presents collective action problems. If state participation in the Clean Air Act, for example, were not encouraged through conditions and sanctions,¹²² economic incentives might exist for states to under- or deregulate. The failure of NCLB, in contrast, is not a manifestation of classic collective action theory but rather the product of a shortsighted statutory mechanism for federal oversight.

While there may be no legal difference between tying federal funding to the implementation of a statute requiring seatbelts and tying it to the passage of a statute authorizing charter schools, the

¹¹⁶ 23 U.S.C. §§ 153(a), 158(a) (2006). The latter provision was upheld under *Dole*. See *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (concluding drinking age provision is a valid use of the spending power).

¹¹⁷ See generally, e.g., Mary Pat Treuthart, *Lowering the Bar: Rethinking Underage Drinking*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 303 (2005) (discussing the prevalence of underage drinking and advocating for state-set drinking laws).

¹¹⁸ 483 U.S. at 208–09 (quoting PRESIDENTIAL COMM’N ON DRUNK DRIVING, FINAL REPORT 11 (1983)).

¹¹⁹ SCHAPIRO, *supra* note 12, at 114–15 (contemplating “spillover effects” as one justification for federal preemption in a polyphonic system).

¹²⁰ See *supra* note 76 (describing the interstate effects of new Texas social studies standards).

¹²¹ Demographics is perhaps the best example. See *supra* note 74 and accompanying text (discussing dispersion and concentration of immigrants in different states).

¹²² See 42 U.S.C. § 7509 (2006) (detailing sanctions).

cooption of state policy making in the latter example is less justifiable. Education reforms generally do not require uniform application or collective action and may be difficult to evaluate empirically. In the absence of both a need for uniform collective action and the ability to predict results, the federal government should not impose pressure on a state legislature to approve a particular statutory enactment.

The most recent iteration of Race to the Top may be vulnerable to similar criticism. Although the Early Learning Challenge is a laudable effort to address gaps in preschool access, quality, and achievement,¹²³ it has nonetheless met with controversy. Of particular concern is an “[a]bsolute [p]riority” requiring applicants to tackle development standards and kindergarten entry assessments.¹²⁴ At present, less than half the states require preassessment of incoming kindergarteners.¹²⁵ While many in the education community have applauded the effort, others have questioned the wisdom of implementing standardized testing so soon in a child’s educational career.¹²⁶

4. *Ossification of Unproven Policy*

A related concern is the extent to which top-down policy making of the sort employed by the DOE in its distribution of stimulus funds risks nationalizing and ossifying unproven education trends. The last thirty years witnessed an explosion of reform initiatives at the state and, later, federal level beginning with adequacy and school finance litigation. During the 1980s, states took an interest in educational quality reforms, including rigorous testing, high school graduation requirements, and teacher certification requirements.¹²⁷ Standards, in the form of content and performance benchmarks and student assessments, became the reform *du jour* in the 1990s,¹²⁸ culminating in the passage of NCLB at the dawn of the new century. Support for charter

¹²³ See *supra* note 47 and accompanying text (describing the Early Learning Challenge).

¹²⁴ See U.S. DEP’T OF EDUC. & U.S. DEP’T OF HEALTH & HUMAN SERVS., RACE TO THE TOP—EARLY LEARNING CHALLENGE 7 (2011), available at <http://www.ed.gov/sites/default/files/rtt-elc-draft-execsumm-070111.pdf>.

¹²⁵ Melanie Smollin, *Is Standardized Testing for Preschoolers a Good Idea?*, TAKE PART (July 27, 2011), <http://www.takepart.com/article/2011/07/27/standardized-testing-preschoolers-good-idea> (noting that twenty-two states require student assessments prior to kindergarten).

¹²⁶ See, e.g., Valerie Strauss, *Race to the Top: Standardized Testing for Preschoolers*, WASH. POST (July 6, 2011, 12:28 PM), http://www.washingtonpost.com/blogs/answer-sheet/post/race-to-the-top-standardized-testing-for-preschoolers/2011/07/05/gIQU4Wi0H_blog.html (“The institutionalization of standardized assessments for young kids threatens to turn preschool into an academic environment that is too regimented for youngsters.”).

¹²⁷ MANNA, *supra* note 7, at 11–12.

¹²⁸ *Id.* at 12.

schools and teacher accountability is more recent. The pace of reform has accelerated so quickly that it is difficult to find solid empirical research to corroborate even established initiatives.¹²⁹

Absent reliable data, the federal government's assertion of specific policy preferences is little more than political posturing. NCLB may have suffered from insufficient attention to pedagogical method,¹³⁰ but *Race to the Top* goes too far in the opposite direction. The Obama Administration's insistence on charter schools and teacher accountability measures recalls the federal government's unpopular foray into bilingual education in the 1960s. By mandating bilingual instruction to English-language learners, the government endorsed a "pedagogical approach of disputed and unproven efficacy" and ignored "the diverse views of ethnic communities on the value of bilingual education."¹³¹ If the federal government is to be involved in education reform at all, its central goal should be to encourage the reasoned development of best practices over the long haul.

III

THE CASE FOR FEDERAL OVERSIGHT OF EDUCATION REFORM

Notwithstanding serious legal and policy objections to the Bush and Obama Administrations' recent education reform attempts, some federal oversight remains both wise and politically tenable. In this Part, I suggest two principal justifications for a leading federal role in education reform: the strong national interest in education and the states' limited educational capacity. Each must be balanced against the federalism considerations outlined in Part II—the relationship of funding to policy making power, states' (sometimes) superior ability to respond to local conditions, states' cosovereignty, and the need to test education policy before wide implementation. These factors suggest that the federal government should fund policy experimentation in the states, with a view toward identifying best practices to be implemented later at the state and/or national level.

¹²⁹ It is worth remembering that the first nationwide, longitudinal study of charter school outcomes was not released until 2009. *See supra* notes 106–07 and accompanying text (discussing the first such report).

¹³⁰ Aaron J. Saiger, *Legislating Accountability: Standards, Sanctions, and School District Reform*, 46 WM. & MARY L. REV. 1655, 1724 (2005).

¹³¹ AMY GUTMANN, *DEMOCRATIC EDUCATION* 86 (rev. ed. 1999).

A. *The National Interest in Education Necessitates
Federal Leadership*

As true local control is supplanted in part by state regulation,¹³² the relevant stakeholders in education outcomes also must change. Local control capitalizes on the value of small government political accountability as well as parental and community involvement in policy making. The nationalization of education reform engenders a new value particularly, though not exclusively, salient to national stakeholders: global competitiveness. While states have a mutual interest in the economic prospects of their denizens in a globalized society,¹³³ interstate inequalities in education inputs and outputs call for federal involvement.¹³⁴

1. *Competitiveness in the International Sphere*

How American education measures up on the global stage has been a central concern since the National Commission on Excellence in Education sounded the alarm in *A Nation at Risk* in 1983.¹³⁵ Nearly thirty years later, however, American students continue to lag behind their peers. Disparities are particularly apparent at the secondary school level. Consider the recent performance of fifteen-year-olds on PISA, a test administered by the Organisation for Economic Cooperation and Development (OECD), an organization of thirty-four North American, South American, European, and Asian nations. The exam, which is given every three years, tests knowledge in reading, mathematics, and science in nine-year cycles; one of these three subjects is the major assessment area in any given exam administration.¹³⁶ Despite modest gains in science, recent PISA results for U.S. students otherwise show little change from earlier exam administrations,¹³⁷ notwithstanding the intervening passage of NCLB. In

¹³² See *supra* Part I.A. (discussing models for education in which the major actors are the federal and state governments).

¹³³ Indeed, the voluntary adoption of content standards in core academic subjects by the National Governors Association grew out of this very concern. See NGA REPORT 24 (noting that in order “to ensure that students are equipped with the necessary knowledge and skills to be globally competitive,” states must upgrade their classrooms with “a common core of internationally benchmarked standards in math and language arts”).

¹³⁴ As considered in this Note, the most important educational inputs might include funding, personnel, and other resources. The primary educational output would be student achievement, as measured by graduation rates, test scores, academic progress, and other benchmarks. See *infra* Part III.A.2 (describing interstate inequalities in education inputs and outputs).

¹³⁵ NAT’L COMM’N ON EXCELLENCE IN EDUC., *supra* note 5.

¹³⁶ PISA 2009 RESULTS, *supra* note 1, at 21.

¹³⁷ Secretary Arne Duncan’s Remarks at OECD’s Release of the Program for International Student Assessment (PISA) 2009 Results, U.S. DEP’T OF EDUC. (Dec. 7, 2010),

2009, a “reading year” and the most recent exam administration for which data are available, the United States scored fourteenth in reading, seventeenth in science, and twenty-fifth in mathematics out of thirty-four OECD participants.¹³⁸ American mean reading and science scores are each at or near the OECD average, but the United States’ mathematics performance was deemed below average by a statistically significant margin.¹³⁹

PISA results have proven to be a useful diagnostic for participating countries, providing sound evidence both of international standing and domestic performance over time.¹⁴⁰ While preoccupation with rankings can exaggerate deficiencies, the OECD has estimated that the differences in scores between the highest- and lowest-performing OECD countries represent more than two grade levels,¹⁴¹ a serious discrepancy. On average, U.S. students are at the middle of the pack but still significantly behind their peers in Korea, Finland, and Canada, the top-ranked OECD test-takers. Unfortunately, these deficits are only more pronounced for the nation’s lowest-performing students.¹⁴²

2. *Interstate Inequalities in Education Inputs and Outputs*

The federal government is better poised to improve the international standing of the country’s students to the extent that it can remedy or mitigate substantial inequalities in education inputs and outputs. Then-professor Goodwin Liu has shown that inequality of educational opportunity—measured in terms of per-pupil expenditures, academic standards under NCLB, and student performance—is more pronounced between states than within states, due largely to

<http://www.ed.gov/news/speeches/secretary-arne-duncans-remarks-oecd-release-program-international-student-assessment->. In fact, U.S. performance has declined slightly. *Id.*

¹³⁸ *Id.* The participants in the 2009 administration also included a number of non-OECD countries (and, as described in the Introduction, one city, Shanghai) that were not counted for the purposes of OECD rankings and averages. *Id.*

¹³⁹ PISA 2009 RESULTS, *supra* note 1, at 15 tbl.I.a.

¹⁴⁰ See Richard Posner, *The PISA Rankings and the Role of Schools in Student Performance on Standardized Tests—Posner*, BECKER-POSNER BLOG (Jan. 2, 2011, 5:40 PM), <http://www.becker-posner-blog.com/2011/01/the-pisa-rankings-and-the-role-of-schools-in-student-performance-on-standardized-testsposner.html> (describing PISA as a “careful and responsible program, the results of which deserve to be taken seriously”); see also Florian Waldow, *What PISA Did and Did Not Do: Germany After the ‘PISA-shock,’* 8 EUR. EDUC. RES. J. 476 (2009), available at <http://dx.doi.org/10.2304/eej.2009.8.3.476> (describing policy and political discourse changes in Germany in response to below-average performance on the first PISA administration in 2000).

¹⁴¹ PISA 2009 RESULTS, *supra* note 1, at 13.

¹⁴² See *infra* note 145 and accompanying text (discussing differential performance across subgroups).

states' variable fundraising ability.¹⁴³ Unfortunately, states with low fiscal capacity have greater concentrations of low-income students, minority students, and English language learners,¹⁴⁴ subgroups which lag far behind their domestic and international peers. Although PISA results are not available on a state-by-state basis, demographic differences in performance are substantial. When the most recent reading scores of racial groups are isolated, Asian Americans lead all OECD countries, White Americans come in third, and Blacks and Hispanics appear near the bottom, behind students from most developed Asian and Western democracies.¹⁴⁵ Any discussion of U.S. educational excellence must therefore consider inequality. Substantial differences in the degree of social, racial, and economic diversity of the school-age population exacerbate the substantial funding discrepancies between states that are troubling in their own right. The problems of fiscal capacity and equality are mutually reinforcing because disadvantaged students require more funds—in the form of English-language teachers, reduced-price lunches, tutoring, and other special services—than revenue-poor states can provide. The need for wealth redistribution and protection of civil rights, functions better served by the national government,¹⁴⁶ provides a strong case for federal intervention.

Despite a number of successful constitutional challenges to unequal state finance regimes under state constitutional law, there is no clear federal cause of action to redress this troubling interstate inequality.¹⁴⁷ Liu advocates revision of federal policy to encourage voluntary adoption of rigorous national content standards by the states and an increased federal role in school finance regimes.¹⁴⁸ He calls for a substantial infusion of federal funds into state school

¹⁴³ Liu, *supra* note 21, at 2044, 2061–62.

¹⁴⁴ *Id.* at 2061–62.

¹⁴⁵ MICHAEL J. PETRILLI & JANIE SCULL, THOMAS B. FORDHAM INST., AMERICAN ACHIEVEMENT IN INTERNATIONAL PERSPECTIVE 8 (2011).

¹⁴⁶ See Peterson, *supra* note 15, at 112–13 (describing the federal government's assumption of responsibility for wealth-redistributive expenditures); cf. Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 157 (2011) (acknowledging, though ultimately questioning, “[t]he canonical idea . . . [that] the federal role in civil rights is . . . of federal power invoked against recalcitrant states, localities, and private parties”).

¹⁴⁷ *San Antonio Independent School District v. Rodriguez* held that education is not a fundamental right under the Equal Protection Clause. 411 U.S. 1, 37 (1973) (rejecting the district court's arguments that education is a fundamental right and finding that the federal government should not closely scrutinize the state government's intrastate education inequality).

¹⁴⁸ Liu, *supra* note 21, at 2104. Professor Liu argues that the Fourteenth Amendment's guarantee of national citizenship confers an affirmative obligation on Congress to remedy disparities that both disproportionately affect minority and low-income students and are primarily the result of variable fiscal capacity between states. *Id.* at 2061–62, 2101.

finance systems, with greater distributions to states with lesser fiscal capacity.¹⁴⁹ These substantive and fiscal equalization proposals recognize that, to improve national outcomes, the federal government cannot afford to ignore substantial interstate inequalities.

Increased federal aid to states would go a long way toward securing greater equality in the distribution of educational opportunity—but not all the way. First, increased expenditures alone have not been linked to measurable student achievement gains.¹⁵⁰ Second, variation in states' substantive education policy may exacerbate divergence of educational opportunity. In Germany, which, similar to the United States, has both a completely decentralized education system and one of the highest socioeconomic achievement gaps in the OECD, empirical studies have linked inequality in outputs to specific state policies.¹⁵¹ Liu recognizes as much when he notes that, to be successful, fiscal solutions “must leverage and integrate other reform agendas in the policy environment.”¹⁵² It is important to note that while equity considerations may demand some federalization of education funding, they do not necessarily require federalization of policy. The federal government should not set the reform agenda alone in the absence of empirical data on how best to spend limited education funds.¹⁵³ The formation of empirically sound, locally tailored educational policies thus requires substantial state contributions on the ground.

B. States Have Limited Educational Bureaucratic Capacity

The second principal justification for federal involvement is, unlike the first, structural and process oriented. In the education field,

¹⁴⁹ Goodwin Liu, *National Citizenship and Equality of Educational Opportunity*, 116 *YALE L.J. POCKET PART* 145, 150 (2006). Liu also proposes a revision to Title I that would allocate federal aid based on student poverty rather than the states' relative per-pupil spending. *Id.*

¹⁵⁰ See, e.g., GARY BURTLESS, *DOES MONEY MATTER?: THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS* 41 (1996) (“Statistical evidence and recent historical experience suggest to me that school performance is unlikely to be improved solely by investing extra money in the nation’s schools.”); see also Posner, *supra* note 140 (noting the United States’ “mediocre” PISA performance notwithstanding one of the highest per-pupil spending rates in the OECD).

¹⁵¹ Markus Freitag & Raphaela Schlicht, *Educational Federalism in Germany: Foundations of Social Inequality in Education*, 22 *GOVERNANCE* 47, 48 (2009) (linking “widely varying degrees of social inequality within the German federal states” to the availability of early childhood education and the use of ability tracking in young students).

¹⁵² Liu, *supra* note 21, at 2127.

¹⁵³ Cf. MICHAEL A. REBELL & JOSEPH J. WARDENSKI, *CAMPAIGN FOR FISCAL EQUITY, INC., OF COURSE MONEY MATTERS: WHY THE ARGUMENTS TO THE CONTRARY NEVER ADDED UP* 3 (2004) (“Studies have repeatedly shown that money targeted for proven instructional strategies . . . yield [sic] dramatic results in student achievement.”).

state bureaucratic capacity is, like its federal counterpart, fairly new. On the eve of the enactment of NCLB's antecedent, the ESEA, the Johnson Administration was concerned that state education departments were too weak to implement its provisions.¹⁵⁴ While state departments have been charged with implementation of an increasing number of federal education statutes in the intervening forty years, they have built up their compliance capacity at the expense of true policy expertise.¹⁵⁵ Limited state funds, the "sheer magnitude of the reforms states have initiated since the early 1980s," and a poor research base from which to assess policy have further limited their capacity.¹⁵⁶ This lack of capacity means that states do not, on average, possess sufficient resources and expertise to implement education reform unilaterally.

It also means that federal policy is constrained by both the DOE's capacity and each state's capacity. In implementing NCLB, the Bush Administration was forced to make a number of concessions, including individual waivers from requirements, blanket revisions, and reversals of policy in the face of state incapacity and its own inability to enforce the law as written.¹⁵⁷ Following the announcement of President Obama's proposal for NCLB reauthorization, which includes a shift from absolute to growth-based measurement of student achievement,¹⁵⁸ experts predicted it would take several years for states to develop the requisite capacity to monitor students' academic growth.¹⁵⁹ The limited capacity of state education departments justifies a strong federal role in education, but the interdependence of state and federal bureaucracies in implementing federal policy simultaneously serves to check sudden expansions of federal power.¹⁶⁰ The federal government simply cannot do it alone.

¹⁵⁴ MANNA, *supra* note 7, at 77.

¹⁵⁵ *Id.* at 107.

¹⁵⁶ *Id.* at 107–08.

¹⁵⁷ *Id.* at 133. One well-publicized example was a reversal on the use of commercially produced assessments. *Id.*

¹⁵⁸ BLUEPRINT FOR REFORM, *supra* note 10, at 9–10.

¹⁵⁹ Sam Dillon, *Array of Hurdles Awaits New Education Agenda*, N.Y. TIMES, Mar. 16, 2010, at A16 (noting that less than half of all states "currently have the advanced student data tracking systems needed to measure student academic growth").

¹⁶⁰ See MANNA, *supra* note 7, at 113 ("[S]tates can respond to federal requirements by saying 'no' or 'we can't.' When that happens, federal policy entrepreneurs may become frustrated, but they typically reply 'okay' and adjust their own agendas . . .").

IV

THE FUTURE OF FEDERAL OVERSIGHT OF EDUCATION

The central paradox presented by limited state capacity—that it simultaneously necessitates and cabins federal involvement in education policy making—can be resolved in part by synthesizing Schapiro’s conception of “polyphonic federalism” with Professor Paul Manna’s elaboration of the agenda-setting function of federalism.¹⁶¹ I borrow from these mutually accommodating theories of federalism and update the traditional model of states as laboratories for progressive reform by promoting the federal government to the role of facilitator.

A. Building State and Federal Capacity To Achieve Mutual Goals

Manna observes that federal policy makers can “expand the federal education agenda by borrowing strength from state governments. . . . Frequently, this borrowing has coalesced with federal education initiatives designed to build capacity at lower levels of government.”¹⁶² Originally, ESEA built up state education authorities, creating “a continuing source of bureaucratic capacity from which future federal policy makers could borrow.”¹⁶³ The history of NCLB lends further support to this processual reading. President Bush’s proposal came on the heels of a decade-long adequacy movement across many states as well as a law in his home state of Texas that tied accountability to high-stakes testing.¹⁶⁴

To achieve its twin goals for education reform—global competitiveness and equality of opportunity—any federal program undertaking education reform must recognize the crucial role of states in building up capacity at *both* levels of government to develop, test, and implement specific initiatives. Manna’s political science perspective complements and elucidates Schapiro’s overarching theory of polyphonic federalism. Conceived in such terms, the symbiotic, capacity-building relationship between the federal and state governments is a manifestation of overlapping sources of authority from

¹⁶¹ *Id.* at 14 (“[F]ederalism creates potential agenda setting opportunities for individuals who carefully size up their own weaknesses and then make up for them by leveraging arguments or capabilities that exist elsewhere in the system.”).

¹⁶² *Id.* at 89.

¹⁶³ *Id.* at 91.

¹⁶⁴ See Michael Klonsky, *Chicago’s School Reform: No “Miracles” Here*, 14 PUB. INT. L. REP. 255, 257–58 (2009) (describing and criticizing Texas education policy under then-Governor George W. Bush).

codependent sovereigns. It also promotes the “innovati[on] and resilien[ce]”¹⁶⁵ that is a centerpiece of Schapiro’s normative analysis.

B. *A New Model for States as Laboratories*

Justice Brandeis famously described states as laboratories that may “try novel social and economic experiments without risk to the rest of the country.”¹⁶⁶ While his metaphor remains very popular, Brandeis’s observation only tells us about one of the reasons for the existence of independent state and federal power, not “how to reconcile them.”¹⁶⁷ Moreover, the conspicuous exclusion of the federal government from Brandeis’s policy alchemy makes it more a relic of dual federalism’s heyday than a metaphor with continuing application. It says nothing about how to determine the proper place of the federal government in an era of increasingly centralized and nationalized policy making.¹⁶⁸ Through synthesis with Schapiro’s and Manna’s formulations, however, Justice Brandeis’s popular metaphor achieves a new vitality. One way to conceptualize the federal role is as a laboratory assistant who simultaneously observes and provides research support for a number of experiments, drawing inferences from the results and serving as an information repository for future experiments.¹⁶⁹

To some extent, the Obama Administration’s recent education reform proposals envision the federal role in similar terms. Under Obama, the DOE seems to recognize a good thing when it sees it: Its Race to the Top competition awarded up to forty points for the adoption of the national content standards developed by the NGA over the past two years, and its NCLB reauthorization proposal explicitly praises the standards’ alignment with its own goals for college- and

¹⁶⁵ SCHAPIRO, *supra* note 12, at 97–98.

¹⁶⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹⁶⁷ SCHAPIRO, *supra* note 12, at 77.

¹⁶⁸ Levy, *supra* note 64, at 461 (noting that the metaphor today “is widely used as a more all-purpose defense of the legitimacy of states pursuing divergent policies in general”).

¹⁶⁹ See Oates, *supra* note 27, at 1133 (“[O]ne might suspect that relatively independent efforts in a large number of states will generate a wider variety of approaches to public policy than a set of centrally designed experiments.”). I am not the first to propose a reboot of Brandeis’s laboratory metaphor. See, e.g., Mark Pilotin, Comment, *Finding a Common Yardstick: Implementing a National Student Assessment and School Accountability Plan Through State-Federal Collaboration*, 98 CAL. L. REV. 545, 548–49 (2010) (invoking states as laboratories and federal government as “facilitator” in arguing in favor of national student assessment and accountability plan). While Pilotin describes the federal-state role in terms similar to mine (and familiar to any student of federalism), his proposal is focused on comprehensive accountability reform administered through federal regulatory authority. My proposal, in contrast, is limited to a single pilot program focused on accountability reform. See *infra* Part IV.C (proposing such a program). As such, I envision a substantially less expansive role for the federal government in terms of subject matter and scope of oversight.

career-ready standards.¹⁷⁰ Moreover, the incentives-based (rather than penalty-based) funding initiatives that form the core of both proposals suggest sensitivity to legally permissible but practically coercive federal “carrot and stick” policy making that, as I discussed in Part II.B.3–4, precludes important localized policy making by state legislatures and threatens to ossify unproven reform trends.

Indeed, the Obama Administration’s heavy-handed approach to the selection of Race to the Top criteria belies its rhetoric of fostering innovation. By prioritizing and rewarding very specific reform measures, the program circumscribes the range of competitive state proposals. To fulfill the promise of states as laboratories for education reform, the federal government should commit to an unbiased assessment of funding applications, preferably by a panel of independent players, to detect and support those “novel social and economic experiments” most worthy of federal interest and expenditures.¹⁷¹ In the words of Diane Ravitch, a longtime proponent of national standards, the federal government’s role should be to “discover and explain the very best existing [practices], not to invent new and untried ones.”¹⁷²

C. *Pilot Programs as Successors to Race to the Top*

Given the uncertain efficacy of many new education reform ideas, one way to begin this important work is through the adoption of permanent pilot programs that would serve as successors to Race to the Top and focus on a variety of education reform goals. While many potential programs are possible, I suggest one plan devised with prior successes and failures under recent federal programs in mind: the establishment of an independent and transparent reform board within the DOE to administer state subsidy programs providing research funds for education reform proposals. Within this framework, the President and the DOE should retain primary authority for selecting the areas to be studied and improved—for example, teacher performance, union relations, testing, curricula, literacy programs, or administrative efficiency. An independent education reform board comprised of experienced education policy experts, reform advocates, educators, and administrators would contribute both substantive expertise and a diversity of viewpoints.

¹⁷⁰ BLUEPRINT FOR REFORM, *supra* note 10, at 11–12.

¹⁷¹ *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

¹⁷² DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN’S GUIDE, at xxvi (1995) (new introduction).

My proposal would improve upon the procedures used in Race to the Top. In evaluating state applications, Race to the Top utilized fifty-eight independent reviewers selected by the DOE from a total of 1500 applicants for their background in education policy, education reform, application evaluation, and/or bureaucratic capacity and scale.¹⁷³ These experts both reviewed written applications independently and, in panels of five, attended presentations and question-and-answer sessions with applicants.¹⁷⁴

While the general contours of this evaluation process reflect an appropriate delegation of administrative authority to expert policy makers and a means for meaningful participation by stakeholders (i.e., the applicants themselves), other procedural aspects of the program were unwise and should be reformed. First, Race to the Top reviewers worked from rubrics designed without their input, which may be responsible for the significant discrepancies in scores within panels.¹⁷⁵ Second, the DOE anonymized the evaluation process to prevent applicants from imposing pressure, leaving the task of identifying conflicts of interest largely to the DOE itself.¹⁷⁶ Because this lack of transparency increases the risk that bias or conflicts of interest will remain undetected and obscures the DOE's own agenda, revelation of the names, qualifications, and associations of all reform board panelists would ensure that only the most worthy proposals receive funding. To similar effect, the functions of board members would include collaboration with DOE officials on the means of evaluation.

Overhauling the means of evaluation is the single most important substantive change my proposal contemplates. Like Race to the Top, these pilot programs would consist of incentive grants that award federal money for innovative reform projects designed to address public education challenges. Grants are less coercive than NCLB's retributive funding scheme and thus preferable from a policy and federalism perspective.¹⁷⁷

¹⁷³ U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM GUIDANCE AND FREQUENTLY ASKED QUESTIONS 12, 14 (May 27, 2010), available at <http://www2.ed.gov/programs/racetothetop/faq.pdf>.

¹⁷⁴ *Id.* at 11.

¹⁷⁵ *Id.* at 14–15 (describing differences in reviewer scores). The Department of Education maintains that these discrepancies were due to diversity of opinion, which they sought to encourage. *Id.* at 14.

¹⁷⁶ *Id.* at 12–13.

¹⁷⁷ Moreover, unlike sanctions, the main enforcement mechanism of NCLB, ex ante financial incentives are more likely to encourage innovation because failure to achieve results is not penalized. They also mitigate the free-rider problem that makes coordination among states difficult. Left to their own devices, many states will decline to take policy risks in the hope of benefiting from the information externalities produced by programs conducted in sister states. Oates, *supra* note 27, at 1133.

Incentive grants—if properly implemented as outlined in broad strokes below—are the optimal way for the federal government to harness the states’ policy making expertise in service of its own responsibility to equalize educational opportunity and increase national competitiveness in a global economy.¹⁷⁸ Indeed, it was the failure to employ truly objective criteria—and not the fiscal mechanism of the competition itself—that threatened to coopt state policy making autonomy and ossify unproven reform trends. Race to the Top evaluated potential programs in part on the basis of congruence with the Obama Administration’s specific policy preferences. I propose instead the use of scoring rubrics that reward points chiefly for research design, taking into account feasibility, cost effectiveness, program scope, past success or failure of similar policy initiatives there or elsewhere, and capacity for replication in other states or school populations. Imposing very specific program requirements from the top down not only threatens state autonomy in a federalist system, but also stifles innovation. By contrast, a pilot program aims to discover and develop best practices. Therefore, significant discretion on the ground to anticipate and respond to local conditions and unanticipated problems would best allow for innovation.¹⁷⁹

Consider a pilot program to evaluate how to set teacher compensation to best encourage student achievement. Proposals might range from an across-the-board salary increase to incentivize morale and retention of good teachers; bonuses for extraordinary student progress and/or student achievement; salary reductions for failure to meet certain benchmarks; or a variable salary system with each teacher’s salary set each year on the basis of the prior year’s performance. In evaluating such a proposal, the DOE, through its independent evaluators, may assess the feasibility of the program in light of current conditions in that state, the state’s union obligations, existing empirical research, and similar programs in other states, but it would not afford substantive preference to any one proposal. Indeed, the pilot program should not have been authorized if a particular result was desired.

I have delineated only the outlines of a pilot program, but the four federalism considerations developed in Part II can inform pro-

¹⁷⁸ See *supra* Part III.A (discussing the need for federal involvement).

¹⁷⁹ Cf. Saiger, *supra* note 130, at 1722–24 (noting that NCLB’s rigid adequate yearly progress standard prevented schools from seeking incremental solutions). State accountability systems work better because states generally retain discretion to decide whether or not to take corrective action against underperforming schools. If these schools know failure is inevitable, they lose the incentive to try novel approaches. *Id.* at 1728.

gram specifications for this and future proposals.¹⁸⁰ At a broad level of abstraction, a pilot program of the kind I envision internalizes both the state legislatures' policy making autonomy and the advantages of local control. Supporting development of education policy in the states avoids coercive top-down directives and exploits the chief structural advantages of a lower level of government: proximity to "the People" and the associated values of citizen participation and locally tailored initiatives. The guiding spirit of the proposal eschews ossification of unproven policy trends by restricting the subject matter of pilot programs to cutting-edge or untested education initiatives and precluding federal policy mandates. Admittedly, politicization of the process remains a threat, notwithstanding procedural safeguards that promote transparent and independent means of evaluation.¹⁸¹ However, ossification can be further prevented by extending project timelines both at the proposal and implementation stages to counteract the government's demonstrated bias for "shovel ready" projects that perpetuate the status quo.¹⁸² Finally, while limited pilot programs will not produce parity in federal and state education funding, they do provide some assistance to strained state budgets.

While this proposal appears to give most autonomy to states in developing policy, the federal policy making role is enhanced in two ways. First, by selecting the subject matter of pilot projects, the federal government becomes a key education agenda setter for the nation. Second, by conducting and evaluating pilot projects over time, the federal government can learn which reforms are worthy of increased federal investment and regulation through new or existing programs. These oversight powers are important tools for addressing national competitiveness in a global economy. Unfortunately, a program of this scale cannot eliminate the substantial interstate inequalities in state education budgets that partially create the problem,¹⁸³ but it offers a start, particularly if incentive grants take into account state need in terms of relative fiscal capacity.

¹⁸⁰ See *supra* Part II.B (discussing the local control doctrine, limited federal funding, threats to state autonomy, and ossification of unproven policy).

¹⁸¹ Empirically rooted policy making is always difficult, because "[t]he legitimacy of a certain policy measure (and in extension its advocates) does not necessarily come from its being empirically proven to be the most effective remedy for a problem, but rather from the political and public acceptance of this measure." Waldow, *supra* note 140, at 481.

¹⁸² When tight spending deadlines are in play, the government has an incentive to fund projects that can be implemented quickly whether or not they are the most promising proposals. Cf. Johnson, *supra* note 146, at 184 (noting that "shovel ready" projects present "possibility of entrenching existing patterns of inequality") (internal quotes omitted).

¹⁸³ As Professor Liu demonstrates, statutory reform and major increases in federal education appropriations would be required. See *supra* Part III.A.2 (describing inequalities in education inputs).

This Note has highlighted how federal education policy can impinge on state policy making autonomy. It is important to remember, however, that the success of federal spending programs relies on the federal government's ability to police state conduct. The key lesson of NCLB, expounded at length by other writers, is the need to avoid creation of perverse incentives.¹⁸⁴ While there is a fine line between coercion and accountability, the federal government must retain some oversight of state spending to ensure funds are being used for true reform. Analysis of the first year of short-term federal education funding programs enacted as companions to Race to the Top suggests that many states used earmarked funding primarily to fill their own budget shortfalls, in contravention of the statutory purpose of the appropriation.¹⁸⁵ The use of reporting mechanisms and staggered appropriation of programs can help mitigate the risk that cash-starved states misappropriate federal funds.¹⁸⁶

My pilot program proposal, though modest, illustrates the potential of a “polyphonic” model of education federalism. In the short term, the programs would harness the pluralism inherent in a large, heterogeneous federal system to test a number of innovative education solutions. In the medium- to long-term, emerging consensus on the best education policies may, but need not, suggest subject areas for substantive federal regulation. My modified “polyphonic” education policy framework tolerates—in fact, celebrates—a diversity of approaches as long as the federal government remains able to pursue national imperatives for educational quality and equality of opportunity.

CONCLUSION

The loss of Democratic control in the House of Representatives following the 2010 midterm elections has jeopardized President Obama's plans for NCLB reauthorization this year.¹⁸⁷ Republican

¹⁸⁴ For one such writer, see Ryan, *supra* note 41.

¹⁸⁵ MICHAEL A. REBELL ET AL., *STIMULATING EQUITY?: A PRELIMINARY ANALYSIS OF THE IMPACT OF THE FEDERAL STIMULUS ACT ON EDUCATIONAL OPPORTUNITY 4* (2010), available at http://www.equitycampaign.org/i/a/document/12857_Stimulating_Equity_Report_FINAL.pdf (finding, in a twenty-state sample of grant recipients from a one-time appropriation to the Fiscal Stabilization Fund, that none had devoted funds to the reform areas for which money was appropriated and instead used the funding to “backfill[]” and make up for gaps in normal education funding).

¹⁸⁶ See *id.* at 4, 36–37 (concluding that “states are not going to set aside scarce funds to support new initiatives for equity if they are not backed up by mandatory directives or strong maintenance of effort requirements” and proposing, *inter alia*, “transparent, comprehensible periodic reports”).

¹⁸⁷ See Sam Dillon, *New Challenges for Obama's Education Agenda in the Face of a G.O.P.-Led House*, N.Y. TIMES, Dec. 12, 2010, at A36 (noting that the new House com-

antipathy to greater federal involvement in education is unsurprising in light of the perceived failure of NCLB, a soaring deficit, and the controversy surrounding the Obama Administration's implementation of Race to the Top. While NCLB has many critics, states have spent substantial sums to develop accountability systems to comply with its requirements, and states' capacity for data collection has markedly improved.¹⁸⁸ In light of these changes to the education reform bureaucracy, abandoning the federal role in education is premature. My proposal for a new model of state-federal partnership recognizes that federal leadership in education reform can mitigate the effects of interstate inequality and suboptimal state capacity while respecting states as coequal policy makers in the education sphere. This "polyphonic" understanding of the federal-state relationship shows real promise in providing answers to the nation's intractable education challenges.

mittee chairman with jurisdiction over education had expressed interest in reducing the federal role in education). The reauthorization of NCLB has been delayed four years. See Joy Resmovits, *Sen. Michael Bennet: No Child Left Behind Overhaul Stalled by Politics*, HUFFINGTON POST (July 25, 2011), http://www.huffingtonpost.com/2011/07/25/education-law-overhaul-co_n_909186.html (last updated July 26, 2011) (describing political wrangling over NCLB's future). In August of 2011, the Obama Administration announced it would provide a process to grant exemptions for the heavily criticized accountability provisions on a case by case basis, citing congressional delay in taking up NCLB reform. *Obama Administration Proceeds with Reform of No Child Left Behind Following Congressional Inaction*, DEP'T OF EDUC. (Aug. 8, 2011), <http://www.ed.gov/news/press-releases/obama-administration-proceeds-reform-no-child-left-behind-following-congressiona>.

¹⁸⁸ Elizabeth DeBray-Pelot & Patrick McGuinn, *The New Politics of Education: Analyzing the Federal Education Policy Landscape in the Post-NCLB Era*, 23 EDUC. POL'Y 15, 28 (2009).