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A FEDERAL ROLE IN EDUCATION: ENCOURAGEMENT AS A GUIDING PHILOSOPHY FOR THE ADVANCEMENT OF LEARNING IN AMERICA

Gerard Robinson *

*“Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”*¹

—*Northwest Ordinance of 1787*

Education in the United States is governed by principles of federalism that guide the constitutional relationships between our national government’s three branches and state governments. American federalism was an ideological break from the “old ideas of sovereignty” under the English governance model that took root in the Constitutional Convention in Philadelphia, which occurred from May 25 to September 17, 1787.² On July 13, 1787, while delegates met in Philadelphia to strengthen the Articles of Confederation (later agreeing to abandon it for a Constitution),³ members of the Congress of the Confederation convened in New York City and enacted the Northwest Ordinance of 1787.⁴ It, along with a then prevailing ideology of encouragement, shaped

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1. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52 n.(a).

2. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 105–06 (2006); ROBERT A. MCGUIRE, *TO FORM A MORE PERFECT UNION: A NEW ECONOMIC INTERPRETATION OF THE UNITED STATES CONSTITUTION* 50–51 (2010).

3. MCGUIRE, *supra* note 2, at 51.

4. Ch. 8, 1 Stat. at 52–3 n.(a) (reenacting the Northwest Ordinance of 1787, passed under the Articles of Confederation, with slight modifications, under the United States Constitution); Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 929 (1995).

the early foundation of the federal government's role in state education.

Education, one of the most important investments of state governments, is an example of a power "reserved to the States respectively, or to the people" through the Tenth Amendment of the United States Constitution.⁵ By contrast, Article 1, section 8, of the Constitution outlines enumerated powers allocated to Congress but not to the states, which includes collecting taxes and supporting the "common Defence and general Welfare" of the nation.⁶ Given the importance of education to the general welfare of both the nation and the states, this article calls for a reimagining of the role of the federal government in education by adopting an encouragement philosophy rooted in the ideals of the Northwest Ordinance of 1787.

I. A FEDERAL ROLE IN EDUCATION: A MODERN VIEW

*"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."*⁷

—*Brown v. Board of Education*

Part I discusses the basic contours of education, federalism, and the key financial contributors to education. This information provides the foundation for my recommendations of an encouragement philosophy to guide the federal role in education.

Education is the responsibility of state and local governments. Each state has an education clause in its constitution.⁸ Each state also maintains a funding formula to determine the costs for educating a student in elementary and secondary public schools, the appropriate taxing methods to generate revenue for it, and the percentage of funding coming from state, local, and federal gov-

5. U.S. CONST. amend. X.

6. U.S. CONST. art. I, § 8, cl. 1.

7. 347 U.S. 483, 493 (1954).

8. Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991).

ernment sources.⁹ And, contrary to popular belief, the federal government is not the biggest investor in public education.

According to *The State Expenditure Report*, state governments spent \$344.6 billion on elementary and secondary education in 2014.¹⁰ Although Medicaid was the largest state expenditure at \$445 billion, of which the federal government paid 58.2% of the costs, elementary and secondary education remains the largest recipient of general funds in the states (i.e., revenue generated by state taxes).¹¹ When you disaggregate funding sources for education, a clear picture emerges about who funds America's schools: state funding accounts for 45.6%, local governments provide 45.3%, and the federal government provides 9.1%.¹² Table 1 shows the sources of state expenditures for elementary and secondary education for the 2014 fiscal year.

Table 1¹³

FUND	PERCENTAGE
General Revenue	72.4%
Federal Funds	15.1%
Other State Funds	11.9%
Bonds	0.5%

These data reveal that the federal government is not the biggest investor in elementary and secondary public schools. This is not to say the federal contribution is insignificant. In 2014, for example, the federal government contributed \$37.2 billion to elementary and secondary education programs administered

9. See Deborah A. Verstegen & Teresa S. Jordan, *A Fifty-State Survey of School Finance Policies and Programs: An Overview*, 34 J. EDUC. FIN. 213, 214–18 (2009). See generally THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015).

10. NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: EXAMINING FISCAL 2013–2015 STATE SPENDING 16 (2015), <http://www.nasbo.org/sites/default/files/State%20Expenditure%20Report%20%28Fiscal%202013-2015%29S.pdf>. This report focuses solely on spending for public elementary and secondary education, not private schools or higher education. *Id.*

11. *Id.* at 16, 46. Medicaid accounted for 25.6% of state expenditures in 2014. *Id.* at 16. If elementary and secondary spending, 19.8%, and higher education spending, 10.5%, are added, education is the largest state expenditure by function. *Id.* at 66.

12. *Id.* at 16 (providing state funding accounts for the 2013 fiscal year).

13. *Id.*

through the U.S. Department of Education (“DOE”).¹⁴ The federal contribution has risen significantly over time. For instance, the federal government allocated \$6.9 billion to education when the DOE gained cabinet status in 1980.¹⁵ The amount increased to \$10.7 billion in 1990 and tripled to \$38.9 billion in 2010.¹⁶

The increase in federal spending on elementary and secondary education came with additional federal regulations. This trend began with the passage of the Elementary and Secondary Education Act of 1965 (“ESEA”),¹⁷ which was a signature piece of legislation in President Johnson’s War on Poverty. Other Presidents reauthorized or amended ESEA during the next fifty years to put their stamps on education federalism. For example, President Carter’s reauthorization of ESEA through the Education Amendments of 1978 expanded the definition of Title I to include school-wide programs.¹⁸ President Reagan’s reauthorization of ESEA in 1988 required improvements in student achievement and greater accountability.¹⁹ President Clinton’s reauthorization through the Improving America’s Schools Act of 1994 supported state standards and federal rules for schools.²⁰ President George W. Bush’s reauthorization through the No Child Left Behind Act of 2001 created rewards and sanctions for students and districts alike.²¹ And President Obama’s reauthorization through the Eve-

14. U.S. DEPT OF EDUC., EDUCATION DEPARTMENT BUDGET HISTORY TABLE: FY 1980—FY 2016 PRESIDENT’S BUDGET 8 (2016), <http://www2.ed.gov/about/overview/budget/history/edhistory.pdf>. \$37.2 billion is the amount allocated to DOE-specific elementary and secondary programs such as Title I and special education. *Id.* The figure *does not* include federal funds allocated to DOE-specific higher education items or department programs such as Rehabilitation Services and Disability Research. *Id.* Nor does it include federal education programs not administered by the DOE, including Head Start, the Free and Reduced-Price Lunch Program, and benefits for veterans. *See id.*

15. *Id.* at 1.

16. *Id.* at 3, 7.

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

18. Pub. L. No. 95-561, 92 Stat. 2143, 2176 (codified as amended at 20 U.S.C. § 2753 (1982) (repealed 1988)).

19. Pub. L. No. 100-297, 102 Stat. 130 (codified as amended at 20 U.S.C. § 2701(1988)).

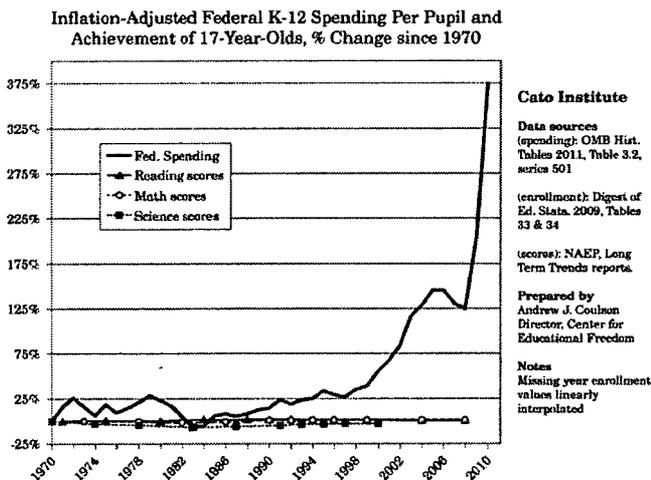
20. Pub. L. No. 103-382, 108 Stat. 3518, 3529 (codified as amended at 20 U.S.C. § 6311, (1994)).

21. Pub. L. No. 107-110, 115 Stat. 1425, 1457, 1466 (2002) (codified as amended at 20 U.S.C. §§ 6311, 6312 (2006)). For scholarly critiques of No Child Left Behind in the broader context of federal education since 1965, see JACK JENNINGS, PRESIDENTS, CONGRESS, AND THE PUBLIC SCHOOLS: THE POLITICS OF EDUCATION REFORM 81–100 (2015); PAUL MANNA, COLLISION COURSE: FEDERAL EDUCATION POLICY MEETS STATE AND LOCAL REALITIES 39–41 (2011); PATRICK J. MCGUINN, NO CHILD LEFT BEHIND AND THE

ry Student Succeeds Act of 2015 provides states with more flexibility for innovation while curtailing some DOE oversight of standards for students and teachers.²²

When assessing the growth of federal spending on education, it is important to note that the increase in federal spending has not resulted in improved student achievement on the National Assessment of Educational Progress (“NAEP”), referred to as “The Nation’s Report Card.” During testimony before a congressional education committee in 2012, Neal McClusky of the Cato Institute said, “the last 40-plus years of Federal involvement [in education] are a clear demonstration of futility.”²³ In essence, education achievement remained flat for forty years while spending escalated. Two tables produced in conjunction with McClusky’s remarks illustrate this point.

Table 2²⁴



TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965-2005, at 165–94 (2006); JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATION OPPORTUNITY IN MODERN AMERICA 250–67 (2010).

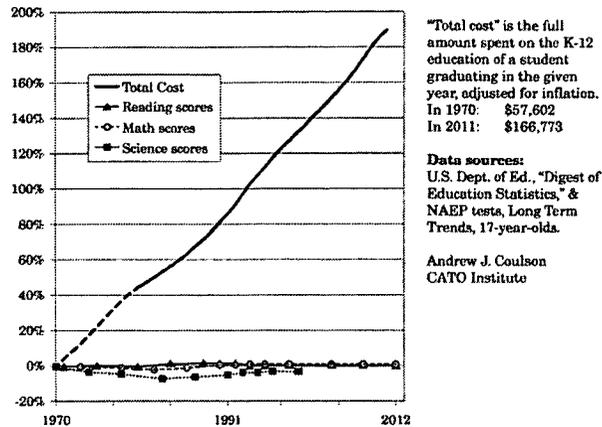
22. Pub. L. No. 114-95 (2015) (to be codified at 20 U.S.C. § 6311); see Rick Hess, *5 Thoughts on ESSA*, EDUC. WKLY. (Dec. 15, 2015), http://blogs.edweek.org/edweek/rick_hess_straight_up/2015/12/5_thoughts_on_essa.html; Gerard Robinson, *A Remarkable Feat in Education*, U.S. NEWS & WORLD REP. (Jan. 4, 2016), <http://www.usnews.com/opinion/knowledge-bank/articles/2016-01-04/the-every-student-succeeds-act-loosens-the-federal-grip-on-education>.

23. *The Impact of Sequestration on Education: Hearing Before the Subcomm. of the S. Comm. on Appropriations*, 112th Cong. 79 (2012) (testimony of Neal P. McCluskey, Associate Director, Center for Education Freedom, Cato Institute).

24. *Id.* at 82.

Table 3²⁵

Trends in American Public Schooling Since 1970



Naturally, a discussion about federal spending on education and lackluster student achievement results raises several questions. Why has additional federal spending not resulted in greater student achievement? Does money matter?²⁶ What is the impact of poverty?²⁷ How does race, ethnicity, or the history of segregation in schools influence academic outcomes?²⁸ Is the role of the

25. *Id.*

26. See generally BRUCE D. BAKER, ALBERT SHANKER INST., REVISITING THAT AGE-OLD QUESTION: DOES MONEY MATTER IN EDUCATION (2012) (analyzing whether money matters in providing a quality education); DOES MONEY MATTER? THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS (Gary Burtless ed., 2011) (analyzing how additional resources—capital and human—lead to student achievement); Eric A. Hanushek et al., *Education and Economic Growth: It's Not Just Going to School, but Learning Something There That Matters*, EDUC. NEXT, Spring 2008, at 62, 70 (2008) (discussing the relationship between students' cognitive skills and economic growth in thirty-two Organization for Economic Cooperation and Development nations and why they should invest money in programs and reforms that support this relationship).

27. For a historical view that poverty impacts student outcomes, see generally JAMES COLEMAN ET AL., NAT'L CTR. FOR EDUC. STATISTICS, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966). However, for a modern view that poverty is not the sole cause of lackluster student outcomes, see generally Michael J. Petrilli & Brandon L. Wright, *America's Mediocre Test Scores: Education Crisis or Poverty Crisis?*, EDUC. NEXT, Winter 2016, at 47, 52 (2016).

28. For scholarly considerations of these issues, see generally KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION (2005); SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM (2004); LAW TOUCHED OUR HEARTS: A GENERATION REMEMBERS *BROWN V. BOARD OF EDUCATION* (Mildred Wigfall Robinson & Richard J. Bonnie eds., 2009).

federal government too big or too small?²⁹ Scholarly dialogue about these questions is ongoing and will continue.

As we search for an appropriate federal role in education, we should seek to understand both its historical evolution as well as the political development of the DOE and its role in education, which is described below in Part II, as well as the scope of involvement of other federal agencies within education, which is described in Part III.

II. A FEDERAL ROLE IN EDUCATION: A BUREAUCRATIC VIEW

*“Because the schools have been afraid of Federal domination, the Government has never had a comprehensive policy for the advancement of education and research. But it is unrealistic to think we can protect the freedom of education by pretending to ignore it.”*³⁰

—*The 1964 Task Force on Government Reorganization*

Part II chronicles the political road that led to the creation of the DOE. Understanding this journey is helpful for understanding the concerns of the political actors that will shape whether an encouragement philosophy for the federal role in education can be adopted.

Part of the challenge with defining a federal role in education is bureaucratic, meaning that the federal role is, to some extent, synonymous with the DOE. Undoubtedly, the DOE has the greatest involvement in education of any federal agency. However, while the DOE plays a major role in the federal government’s investment in state education policy, it is not the sole stakeholder, although it is the one to which we pay most attention.

29. See generally Frederick M. Hess & Andrew P. Kelly, *Reflections on the Federal Role: A Half-Century of Hard-Won Lessons*, in CARROTS, STICKS, AND THE BULLY PULPIT: LESSONS FROM A HALF-CENTURY OF FEDERAL EFFORTS TO IMPROVE AMERICA’S SCHOOLS 273 (2011) (discussing what the federal government does well in education and the limits to what the federal government can do).

30. S. REP. NO. 95-1078 (1978), reprinted in STAFF OF S. COMM. ON GOVERNMENTAL AFFAIRS, 96TH CONG., 1 LEGISLATIVE HISTORY OF PUB. L. NO. 96-88 DEPARTMENT OF EDUCATION ORGANIZATION ACT 64, 77 (Comm. Print 1980) [hereinafter S. REP. NO. 95-1078 (1978), LEGISLATIVE HISTORY] (quoting the 1964 Task Force on Government Reorganization).

The DOE is the chief federal executive agency responsible for developing regulations to govern the delivery of education to 50 million public school students and, at a different level, to 5 million students educated in private schools and 1.77 million at home.³¹ This is the case for the DOE in 2016. However, the DOE did not exist as its own agency until 1980.³²

The 39th Congress approved legislation sponsored by Ohio republican representative James A. Garfield to create a federal DOE on March 2, 1867.³³ The purpose of this department was “collecting such statistics and facts as shall show the condition and progress of education in the several States and Territories, and of diffusing such information respecting the organization and management of schools . . . and otherwise promote the cause of education throughout the country.”³⁴ The law authorized the President, with advice and consent from the Senate, to appoint a Commissioner to manage the DOE and required the Commissioner to deliver a report to Congress annually about the condition of education in United States.³⁵ But the “Department” status was short lived.³⁶ In 1868, President Johnson approved a law that replaced the “Department” with an “Office” of Education and housed it in the Department of the Interior.³⁷ The new Office of Education had a Commissioner, but he worked under the “direction of the Secretary of the Interior,” effective July 1, 1869.³⁸ For the next 110 years, the Office of Education underwent several changes reflected by its change in name:

31. Cf. GRACE KENA ET AL., NAT'L CTR. FOR EDUC. STATISTICS, DEPT OF EDUC., THE CONDITION OF EDUCATION 68–69, 74–78 (2015), <http://nces.ed.gov/pubs2015/2015144.pdf>; THOMAS D. SNYDER, NAT'L CTR. FOR EDUC. STATISTICS, DEPT OF EDUC., DIGEST OF EDUCATION STATISTICS 2013, at 124 (2015), <http://nces.ed.gov/pubs2015/2015011.pdf>.

32. *An Overview of the U.S. Department of Education*, U.S. DEP'T EDUC. (Sept. 2010), http://www2.ed.gov/about/overview/focus/what_pg2.html.

33. Act to Establish a Department of Education, Pub. L. No. 39-73, ch. CLVIII, 14 Stat. 434 (1867); see also CONG. GLOBE, 39th Cong., 1st Sess. 2966 (1866) (detailing Garfield's original introduction and sponsorship of the legislation).

34. Ch. CLVIII, 14 Stat. at 434.

35. *Id.*

36. *An Overview of the U.S. Department of Education*, *supra* note 32.

37. Kevin R. Kosar, *Department of Education Abolition Act of 1868*, FED. EDUC. POL'Y HIST. (Sept. 10, 2015), <https://federaleducationpolicy.wordpress.com/2015/09/10/department-of-education-abolition-act-of-1868-2/>.

38. Act of July 20, 1868, ch. CLXXVI, 15 Stat. 92, 106 (1868). See generally DONALD R. WARREN, *TO ENFORCE EDUCATION: A HISTORY OF THE FOUNDING YEARS OF THE UNITED STATES OFFICE OF EDUCATION* (1974) (providing a historical account of the foundation of the DOE and the politics surrounding it).

- Department of Education (1867–68)
- Office of Education in the Department of the Interior (1868–69)
- Bureau of Education in the Department of the Interior (1869–1930)
- Office of Education in the Department of the Interior (1930–39)
- Office of Education in the Federal Security Agency (1939–53)
- Office of Education in the Department of Health, Education, and Welfare (1953–72)
- Education Division, Department of Health, Education, and Welfare (1972–80)³⁹

The main obstacle to the establishment of a permanent DOE was a deep-seated ideological tug-of-war between concerned stakeholders, who believed a cabinet-level DOE would involve the federal government in matters better left to state and local education officials, and concerned stakeholders who believed a cabinet-level DOE would advance the nation's commitment to education. This debate has played out in the legislative and executive branches from 1867 to 2016.

Members of Congress introduced more than fifty bills to create a cabinet-level DOE between 1908 and 1951, yet none made it out of the appropriate House or Senate committee for full consideration by Congress.⁴⁰ During the same period, American Presidents weighed into this debate as well. President Harding informed Congress in 1921 of his interest in creating a single department focused on education, health, and other social policies.⁴¹ In doing so, President Harding stated:

In creating such a department it should be made plain that there is no purpose to invade fields which the States have occupied. In respect of education, for example, control and administration have rested with the States, yet the Federal Government has always aided them. . . . There need be no fear of undue centralization or of creating a Federal bureaucracy to dominate affairs better to be left in State control.⁴²

But Congress failed to act on President Harding's request.

39. *General Records of the Department of Education*, NAT'L ARCHIVES, <http://www.archives.gov/research/guide-fed-records/groups/441.html> (last visited Feb. 19, 2016).

40. S. REP. NO. 95-1078 (1978), LEGISLATIVE HISTORY, *supra* note 30, at 64, 76.

41. President Warren G. Harding, Address of the President of the United States Delivered at a Joint Session of the Two Houses of Congress (Apr. 12, 1921) [hereinafter Harding, Address of the President]; JOHN W. DEAN, WARREN G. HARDING 101 (2004).

42. Harding, Address of the President, *supra* note 41, at 14.

Under the next three Presidents, education remained an office within another agency despite efforts to elevate its status. In 1932, President Hoover included in a reorganizational proposal the creation of a single Department for Education, Health, and Recreational Activities.⁴³ In 1939, President Roosevelt supported the transfer of the Office of Education to the Federal Security Agency in an effort to downsize government, which Congress approved.⁴⁴ In 1950, President Truman submitted Plan No. 27 to create a Department of Health, Education, and Security.⁴⁵ However, elevation of education to cabinet-level status remained elusive.

The first presidential victory in the battle to make education a cabinet level issue came in 1953. In that year, President Eisenhower submitted to Congress the Reorganization Plan No. 1 of 1953 to create the Department of Health, Education, and Welfare (“HEW”).⁴⁶ In his remarks to Congress, President Eisenhower said,

The purpose of this plan is to improve the administration of the vital health, education, and social security functions now being carried on in the Federal Security Agency by giving them departmental rank. Such action is demanded by the importance and magnitude of these functions, which affect the well-being of millions of our citizens.⁴⁷

The HEW was created that same year.⁴⁸

Members of Congress introduced more than eighty bills to create a cabinet-level DOE between 1953 and 1980,⁴⁹ a number of which focused on moving “education” out of HEW. As before,

43. Special Message to the Congress Transmitting Reorganization Plan 1 of 1953 Creating the Department of Health, Education, and Welfare, PUB. PAPERS 94, 96 (Mar. 12, 1953).

44. President Franklin D. Roosevelt, The President Presents Plan No. I to Carry Out the Provisions of the Reorganization Act (Apr. 25, 1939), in 1939 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 245, 253 (Samuel I. Rosenman ed., 1941).

45. *Special Collections*, SOC. SECURITY ADMIN., <https://www.ssa.gov/history/1950.html> (last visited Feb. 19, 2016).

46. Reorganization Plan No. 1 of 1953, 18 Fed. Reg. 2053, 67 Stat. 631 (1953). See generally RUFUS E. MILES JR., THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE (1974) (discussing the historical roots, operation, and future of the HEW).

47. Special Message to the Congress Transmitting Reorganization Plan 1 of 1953 Creating the Department of Health, Education, and Welfare, PUB. PAPERS 94, 94 (Mar. 12, 1953).

48. See CHRISTOPHER T. CROSS, POLITICAL EDUCATION: NATIONAL POLICY COMES OF AGE 8 (2004). See generally Marion B. Folsom, *Health, Education and Welfare: The First Decade*, 45 CURRENT HIST. 87 (1963) (discussing the first decade of HEW).

49. See S. REP. NO. 95-1078 (1978), LEGISLATIVE HISTORY, *supra* note 30, at 64, 77.

Presidents weighed in on this issue. For instance, President Johnson, the only American President to earn a degree from a teachers college,⁵⁰ supported a stronger role in federal education. But what role would an Office of Education or a Department of Education play in it? President Johnson created several task forces to provide recommendations. Harvard University Dean Don Price chaired The Taskforce on Government Reorganization in 1964.⁵¹ The Price Report recommended the creation of “five new departments: transportation, education, housing and community development, economic development, and natural resources.”⁵² Another task force chaired by railroad executive Bill Heineman concluded there was no need for a cabinet-level DOE,⁵³ which was supported by another group chaired by Dwight Ink of the Atomic Energy Commission.⁵⁴ Another group headed by the president of the Carnegie Corporation, John Gardner, reached differing opinions: one bloc wanted a cabinet-level DOE, and another wanted an Office of Education independent of HEW.⁵⁵ A host of political, fiscal, and organizational challenges made it tough for President Johnson to create a DOE. In fact, none of the seventeen federal reorganizational plans President Johnson submitted to Congress included a DOE.⁵⁶

Nevertheless, President Johnson’s education wins were legislative with the enactment of the ESEA of 1965⁵⁷ and the Higher Education Act of 1965.⁵⁸ The HEW had to oversee the new laws,

50. Cf. *Lyndon B. Johnson*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/1600/presidents/lyndonbjohnson> (last visited Feb. 19, 2016).

51. Peri E. Arnold, *Reform’s Changing Role*, 55 PUB. ADMIN. REV. 407, 411 (1995).

52. PAUL CHARLES LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 48 (1995); see also BERYL A. RADIN & WILLIS D. HAWLEY, THE POLITICS OF FEDERAL REORGANIZATION: CREATING THE U.S. DEPARTMENT OF EDUCATION 18 (1988).

53. S. REP. NO. 95-1078 (1978), LEGISLATIVE HISTORY, *supra* note 30, at 64, 77.

54. See RADIN & HAWLEY, *supra* note 52, at 20.

55. S. REP. NO. 95-1078 (1978), LEGISLATIVE HISTORY, *supra* note 30, at 64, 77; RADIN & HAWLEY, *supra* note 52, at 18–19. For a look into the politics related to creating the DOE, see generally HUGH DAVIS GRAHAM, THE UNCERTAIN TRIUMPH: FEDERAL EDUCATION POLICY IN THE KENNEDY AND JOHNSON YEARS (1984).

56. See RADIN & HAWLEY, *supra* note 52, at 17. It is worth noting that President Johnson created two new cabinet departments, Housing and Urban Development in 1965 and Transportation in 1966. See CROSS, *supra* note 48, at 31.

57. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.); see also JENNINGS, *supra* note 21, at 22–27 (giving an account of the history and politics associated with the enactment of the ESEA in 1965).

58. Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in scattered sections of 20 U.S.C.).

which concerned some people who identified a host of internal programs within the Office of Education that could torpedo the ESEA. Rather than create a new DOE, President Johnson appointed new leaders to transform the Office of Education in HEW.⁵⁹ Thus, a “mend it but not begin it” motto drove President Johnson’s work regarding the DOE.

So where did the push to create a DOE come from? The first push came from U.S. Senator Abraham Ribicoff (D-CT).⁶⁰ As the former Secretary of HEW, Senator Ribicoff brought credibility to the Senate regarding why a DOE matters to education. He supported the creation of a DOE because he believed that, “federal education efforts are really scattershot; there is no focus or coordination.”⁶¹ In fact, Senator Ribicoff supported the idea so enthusiastically that he introduced the Department of Education Act in January 1965 and continued to introduce similar bills in the 1960s and 1970s.⁶²

The second push came from the National Education Association (“NEA”).⁶³ Founded in Philadelphia in 1857 as the National Teachers Association,⁶⁴ the NEA had become a powerful voice in education politics on Capitol Hill by the 1970s. For example, the NEA created its first political action committee in 1972, it co-sponsored the publication of a report titled “Needed: A Cabinet Department of Education” in 1975, and for the first time in its 118-year history endorsed a candidate for president in 1976—Jimmy Carter.⁶⁵

President Carter entered the White House with a goal to have the federal government become a full partner in education. One of

59. See S. REP. NO. 95-1078 (1978), LEGISLATIVE HISTORY, *supra* note 30, at 64, 77.

60. D. T. Stallings, *A Brief History of the U.S. Department of Education, 1979-2002*, PHI DELTA KAPPAN 677, 678 (2002).

61. *Department of Education*, in CONGRESSIONAL QUARTERLY ALMANAC 571 (34th ed. 1979), <https://library.cqpress.com/cqalmanac/document.php?id=cqal78-1239578>.

62. S. REP. NO. 95-1078 (1978), LEGISLATIVE HISTORY, *supra* note 30, at 64, 77.

63. Stallings, *supra* note 60, at 678; see also LAWRENCE J. MCANDREWS, THE ERA OF EDUCATION: THE PRESIDENTS AND THE SCHOOLS 38-39 (2006). The NEA’s goal since 1857 has been “to elevate the character and advance the interests of the profession of teaching and to promote the cause of popular education in the United States.” *Our Long Proud History of Advocacy*, NAT’L EDUC. ASS’N, <http://www.nea.org/home/16281.htm> (last visited Feb. 19, 2016).

64. *Answering the Call: The History of the NEA, Part 1*, NAT’L EDUC. ASS’N, <http://www.nea.org/home/11608.htm> (last visited Feb. 19, 2016).

65. MCANDREWS, *supra* note 63, at 38-39; Stallings, *supra* note 60, at 678.

the first things he did was to appoint President Johnson's former advisor, Joseph Califano, Jr., as the new Secretary of HEW on January 25, 1977.⁶⁶ A few weeks later, Califano hosted a Q&A with President Carter and the HEW employees.⁶⁷ President Carter then commissioned a task force to recommend how to improve the federal role in education via a reorganization plan. The group met between April and November 1977 and submitted three options for review: (1) create a DOE, (2) create a Department of Education and Human Development, or (3) upgrade the education division within the HEW.⁶⁸ President Carter chose the first option.⁶⁹

On January 19, 1978, President Carter shared his decision to advocate for a Department of Education separate from HEW during his State of the Union Address: "We've brought together parts of 11 Government agencies to create a new Department of Energy. And now it's time to take another major step by creating a separate Department of Education."⁷⁰ In March 1977, Senator Ribicoff introduced legislation to create a DOE.⁷¹ Hearings about an education department were held in the Committee for Governmental Affairs for the first time in twenty-five years.⁷² Although President Carter wanted a DOE, others did not. President Carter's Secretary of HEW and Director of the Office of Management and Budget opposed the plan, as did the American Federation for Teachers, the U.S. Catholic Conference, and several higher education associations.⁷³ They believed that education was served well while under the HEW model. To separate it from "health" and "welfare" would force it to compete for scarce resources as a solo entity. Nevertheless, after a year-and-one-half

66. See *Cabinet Officers in the Carter Administration*, JIMMY CARTER PRESIDENTIAL LIBRARY & MUSEUM, <http://www.jimmycarterlibrary.gov/documents/jec/cabinet.phtml> (last visited Feb. 19, 2016).

67. See Department of Health, Education, and Welfare Remarks and a Question-and-Answer Session with Department Employees, 1 PUB. PAPERS 158 (Feb. 16, 1977).

68. S. REP. NO. 95-1078 (1978), LEGISLATIVE HISTORY, *supra* note 30, at 64, 77.

69. *Id.* at 77-78.

70. The State of the Union Address Delivered Before a Joint Session of Congress, 1 PUB. PAPERS 90, 94-95 (Jan. 19, 1978).

71. S. REP. NO. 95-1078 (1978), LEGISLATIVE HISTORY, *supra* note 30, at 64, 77.

72. *Cf. id.* at 64-65, 77.

73. See RICHARD D. KAHLENBERG, *TOUGH LIBERAL: ALBERT SHANKER AND THE BATTLES OVER SCHOOLS, UNIONS, RACE, AND DEMOCRACY* 213, 215-17 (2007) (offering insight into interest group and Democratic intra-party battles for and against the creation of the DOE).

long battle in the court of public opinion, Congress passed the legislation, and President Carter signed the Department of Education Organization Act on October 17, 1979.⁷⁴

President Carter used the signing ceremony to explain what a new DOE meant to American education: "I came to the office of the Presidency determined that the American people should receive a better return on their investment in education. I came equally determined that our Nation's formidable educational challenges should be brought to the forefront of national discussion, where they belong."⁷⁵

President Carter then listed six things that he expected to accomplish from the new DOE:

The Department of Education bill will allow the Federal Government to meet its responsibilities in education more effectively, more efficiently, and more responsively.

First, it will increase the Nation's attention to education. Instead of being buried in a \$200 billion-a-year bureaucracy, educational issues will receive the top-level priority they deserve. For the first time, there will be a Cabinet-level leader in education, someone with the status and the resources to stir national discussion of critical education concerns.

Second, it will make Federal education programs more accountable. For the first time there will be a single Cabinet Secretary, responsible full-time for the effective conduct of Federal education programs.

Third, it will streamline administration of aid-to-education programs. Separating education programs from HEW will eliminate unnecessary bureaucracy, cut red tape, and promote better service for local school systems. For the first time there will be a direct, unobstructed relationship between those who administer aid-to-education programs and those who actually provide education in our country.

Fourth, a Department of Education will save tax dollars. By eliminating bureaucratic layers, the reorganization will permit direct, substantial personnel reductions. By enhancing top-level management attention to education programs, it will mean improved educational services at less cost.

Fifth, it will make Federal education programs more responsive. Placing education in a highly visible department of its own gives the

74. Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) (codified at 20 U.S.C. §§ 3441-3442); Department of Education Organization Act Statement on Signing S. 210 into Law, 2 PUB. PAPERS 1958 (Jan. 19, 1979).

75. Department of Education Organization Act Statement on Signing S. 210 into Law, 2 PUB. PAPERS 1958, 1958 (Jan. 19, 1979).

American people a much clearer perspective on what the Federal Government is doing in education and who is responsible for these activities. It allows people to better decide what the Government should and should not be doing in education.

Sixth, a Department of Education will ensure that local communities retain control of their schools and education programs. That is essential if our schools are to serve their students properly, and the Department of Education will, therefore, not permit the Federal Government to begin making decisions on education policy that are best made at the local level.⁷⁶

At the May 7, 1980 inauguration for the DOE, President Carter discussed its opening as a fulfillment of what the founding generation wanted for America:

I think it's a delightful thing for us to remember that this is what our Founding Fathers expected for us in this great country. George Washington, in the first State of the Union message ever given, said this about education: "Knowledge is, in every country, the surest basis for public happiness." And Thomas Jefferson spoke with equal force on the subject of education when he said, "No more sure foundation can be devised for the preservation of freedom and happiness." Both Washington, our first President, and Thomas Jefferson, who perhaps was the most intellectually gifted of all, recognized that education can mean happiness, not just to an individual but also to a nation.⁷⁷

Thus began the era of the DOE defining its federal role in education.

Since its establishment, every President from Ronald Reagan to Barack Obama has weighed in on the role of the federal government in education and, particularly, the DOE's place within it. President Reagan, for instance, advocated for the abolition of the DOE during his run for President against Jimmy Carter. In fact, the 1980 Republican Party Platform endorsed "the elimination of the federal Department of Education."⁷⁸ Although President Reagan said in his 1982 State of the Union Address that his budget plan "will realize major savings by dismantling the Departments of Energy and Education,"⁷⁹ the DOE survived intact.

76. *Id.*

77. Department of Education Remarks at a Ceremony Marking the Inauguration of the Department, 1 PUB. PAPERS 855, 856 (May 7, 1980).

78. Republican Nat'l Convention, Republican Party Platform of 1980 (July 15, 1980), AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=25844>.

79. Address Before a Joint Session of the Congress Reporting on the State of the Union, 1 PUB. PAPERS 72, 74 (Jan. 26, 1982).

By contrast, the Presidents following President Reagan employed the DOE as a tool to accomplish their education agendas. Republican Presidents George H.W. Bush and George W. Bush used the DOE to advocate for choice and accountability.⁸⁰ Democratic Presidents Clinton and Obama used the DOE to push states to adopt standards and encourage states to embrace Administration-preferred approaches on issues such as charter schools and linking teacher assessments to student achievement outcomes.⁸¹

III. A FEDERAL ROLE IN EDUCATION: A JURISDICTIONAL VIEW

The encouragement philosophy recommended as a guiding principle in Part IV should guide all federal involvement in education, not just the role of the DOE. Therefore, it is essential to comprehend the broad scope of federal involvement in education. Three examples outside of the DOE will illustrate this point: Head Start, which is administered by the Department of Health and Human Services (“HHS”);⁸² the free and reduced-price lunch program, which is administered by the U.S. Department of Agriculture (“USDA”);⁸³ and Job Corps, which is administered by the Department of Labor.⁸⁴

A. *U.S. Department of Health and Human Services: Head Start*

President Johnson declared a “War on Poverty” in his state of the union address to Congress on January 8, 1964:

80. See generally MCGUINN, *supra* note 21, at 51–74, 146–94 (2006) (describing President George H. W. Bush’s and George W. Bush’s educational pursuits).

81. See generally ROBERT MARANTO & MICHAEL Q. MCSHANE, *PRESIDENT OBAMA AND EDUCATION REFORM: THE PERSONAL AND THE POLITICAL* 145–62 (2012) (providing an analysis of President Obama’s education reform agenda); MCGUIRE, *supra* note 21, at 75–104 (describing President Clinton’s educational pursuits); Linda Darling-Hammond, *President Obama and Education: The Possibility for Dramatic Improvements in Teaching and Learning*, 79 HARV. EDUC. REV. 210, 214, 216–17 (2009) (describing President Obama’s educational pursuits); Stephen M. Weatherford & Lorraine McDonnell, *Advancing a Social Policy Agenda through Economic Policy: Obama’s Stimulus and Education Reform*, 9 FORUM 1, 1, 8–9 (2011) (explaining President Obama’s education policy plan).

82. See *What We Do*, OFF. HEAD START, <http://www.acf.hhs.gov/programs/ohs/about> (last modified June 22, 2015).

83. See Food & Nutrition Serv., *National School Lunch Program*, U.S. DEPT OF AGRIC., <http://www.fns.usda.gov/nslp/national-school-lunch-program-nslp> (last updated Jan. 13, 2016).

84. See *About Job Corps*, JOB CORPS, <http://www.jobcorps.gov/AboutJobCorps.aspx> (last updated Mar. 20, 2013).

Unfortunately, many Americans live on the outskirts of hope—some because of their poverty, and some because of their color, and all too many because of both. Our task is to help replace their despair with opportunity. This administration today, here and now, declares unconditional war on poverty in America. . . . Poverty is a national problem, requiring improved national organization and support. But this attack, to be effective, must also be organized at the State and the local level and must be supported and directed by State and local efforts.⁸⁵

One year and four days after President Johnson announced in his 1964 State of the Union Address that early childhood education was one of his tools to fight the “War on Poverty” in America, he used the term “Head Start” to announce his goal to create a summer pilot project.⁸⁶ By August 1965, approximately 560,000 preschoolers and nearly one million parents had participated in Head Start programs in 13,400 centers nationwide.⁸⁷ With Sargent Shriver, Director of the Office of Economic Opportunity, and Francis Keppel, Commissioner of the HEW, President Johnson announced to Congress his desire to expand Head Start “with the hope of making it a continuing part of the American educational system.”⁸⁸ For a host of political and administrative reasons, Head Start was initially administered through the Office of Economic Opportunity, which was created in 1964.⁸⁹ However, President Nixon moved it into the Office of Child Development in the HEW⁹⁰—*not* into the Office of Education. When President Carter suggested placing Head Start in the newly created DOE, opposition from early childhood advocates prevented the move. Head Start instead found a home in the newly created HHS in 1980.⁹¹

85. Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 112, 113–14 (Jan. 8, 1964).

86. *See id.* at 114 (Jan. 8, 1964); Special Message to the Congress: “Toward Full Educational Opportunity,” 1 PUB. PAPERS 25, 27 (Jan. 12, 1965).

87. Remarks on Announcing Plans to Extend Project Head Start, 2 PUB. PAPERS 953, 953 (Aug. 31, 1965).

88. President Lyndon B. Johnson, Remarks on Announcing Plans to Extend Project Head Start (Aug. 31, 1965) in AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=27204>.

89. KATHARINE B. STEVENS, RENEWING CHILDHOOD’S PROMISE: THE HISTORY AND FUTURE OF FEDERAL EARLY CARE AND EDUCATION POLICY 23 (2015), <https://www.aei.org/wp-content/uploads/2015/11/Renewing-childhoods-promise.pdf>; *see* Economic Opportunity Act, Pub. L. No. 88-452, 78 Stat. 508 (1964).

90. STEVENS, *supra* note 89, at 23.

91. U.S. Dep’t of Health & Human Servs., *HHS Historical Highlights*, HHS.GOV, <http://www.hhs.gov/about/historical-highlights/index.html> (last reviewed Aug. 22, 2014).

Currently, Head Start is managed in the HHS by the Administration for Children and Families, and it remains one of the oldest and largest federal programs to address the academic, social, and emotional needs of low-income children and parents.⁹² Over 32 million children from birth to age five have participated in Head Start since 1965.⁹³ The majority of students in Head Start are three- and four-year-olds, while those from birth to age three are put in Early Head Start.⁹⁴ Congress invested \$8.5 billion in Head Start in 2014, with Virginia receiving \$117 million to serve 14,590 children.⁹⁵ The Omnibus federal budget bill approved by Congress and signed by President Obama on December 18, 2015, will invest \$9.1 billion for Head Start in 2016, a \$570 million increase from 2015.⁹⁶

Head Start turned fifty in 2015,⁹⁷ and research about its effectiveness is mixed. For instance, the What Works Clearinghouse (“WWC”) in the Institute of Education Sciences reviewed ninety studies on the effects of Head Start on school readiness for preschool students.⁹⁸ Of the forty studies that met the research standards of WWC, only one study indicated Head Start had a positive impact.⁹⁹ Overall, “*Head Start* was found to have potentially positive effects on general reading achievement and no dis-

92. See STEVENS, *supra* note 89, at 24; *History*, OFF. HEAD START, <http://eclkc.ohs.acf.hhs.gov/hslc/hs/about/history> (last updated Nov. 10, 2015).

93. OFFICE OF HEAD START, HEAD START PROGRAM FACTS: FISCAL YEAR 2014, at 1, <http://eclkc.ohs.acf.hhs.gov/hslc/data/factsheets/docs/hs-program-fact-sheet-2014.pdf> (last visited Feb. 19, 2016).

94. *About Us*, OFF. HEAD START, <http://eclkc.ohs.acf.hhs.gov/hslc/hs/about> (last updated Dec. 24, 2015).

95. HEAD START PROGRAM FACTS: FISCAL YEAR 2014, *supra* note 93, at 4, 11.

96. DIVISION H—DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2016 122, <http://docs.house.gov/meetings/RU/RU00/20151216/104298/HMTG-114-RU00-20151216-SD009.pdf>; see also DEPT OF HEALTH & HUMAN SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES: JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES (2015), https://www.acf.hhs.gov/sites/default/files/olab/fy_2015_congressional_budget_justification.pdf (demonstrating the FY 2015 HHS request for Head Start); Bill Chappell, *Obama Signs \$1.8 Trillion Tax and Spending Bill into Law*, NPR (Dec. 18, 2015, 6:20 PM), <http://www.npr.org/sections/thetwo-way/2015/12/18/460281572/congress-sends-1-8-trillion-tax-and-spending-bill-to-president-obama>.

97. Christina A. Samuels, *Head Start Endures, Evolves as 50-Year Milestone Nears*, EDUC. WK. (Aug. 5, 2015), <http://www.edweek.org/ew/articles/2014/08/06/37wop-headstart.h33.html>.

98. U.S. DEP'T OF EDUC., WWC INTERVENTION REPORT: A SUMMARY OF FINDINGS FROM A SYSTEMATIC REVIEW OF THE EVIDENCE 4 (2015), http://ies.ed.gov/ncee/wwc/pdf/intervention_reports/wwc_headstart_072815.pdf.

99. *Id.* at 4–5.

cernible effects on mathematics achievement and social-emotional development for 3- and 4-year-old children.”¹⁰⁰ Some researchers concluded that the \$180 billion invested in Head Start has not dramatically improved the social-emotional nor cognitive health of its students.¹⁰¹

On the other hand, research made available from the Office of Planning, Research and Evaluation in the HHS found positive effects from Head Start,¹⁰² while another study identified that Head Start is “likely to generate benefits to participants and society as a whole that are large enough to justify the program’s costs.”¹⁰³ Despite the mixed research on its impact, Head Start will likely remain an example of federal involvement in education outside of the purview of the DOE.

B. *U.S. Department of Agriculture: Free and Reduced-Price Lunch Program*

President Truman signed the Richard B. Russell National School Lunch Act on June 4, 1946.¹⁰⁴ In signing the bill, President Truman said, “In the long view, no nation is any healthier than its children or more prosperous than its farmers; and in the National School Lunch Act, the Congress has contributed immeasurably both to the welfare of our farmers and the health of our children.”¹⁰⁵ Although the USDA provided money and food to schools prior to 1946, the school lunch law improved the program. At the end of 1947, approximately 7.1 million students participated in the program at the cost of \$70 million.¹⁰⁶

100. *Id.* at 1.

101. LINDSEY M. BURKE & DAVID V. MUHLHAUSEN, HERITAGE FOUND., ISSUE BRIEF NO. 3823, HEAD START IMPACT EVALUATION REPORT FINALLY RELEASED 1 (2013), http://thf_media.s3.amazonaws.com/2013/pdf/ib3823.pdf.

102. See U.S. DEPT HEALTH & HUMAN SERVS., HEAD START IMPACT STUDY FINAL REPORT 8-2, 8-3 (2010), http://www.acf.hhs.gov/sites/default/files/opre/hs_impact_study_final.pdf.

103. Jens Ludwig & Deborah A. Phillips, *Long-Term Effects of Head Start on Low-Income Children*, 1136 ANNALS N.Y. ACAD. SCI. 257, 257 (2008).

104. See Pub. L. No. 79-396, 60 Stat. 230 (1946) (codified as amended at 42 U.S.C. § 1751 (2012)); NATIONAL SCHOOL LUNCH PROGRAM (NSLP), U.S. DEPT AGRIC., <http://www.fns.usda.gov/nslp/national-school-lunch-program-nslp> (last published Jan. 13, 2016).

105. Statement by the President upon Signing the National School Lunch Act, PUB. PAPERS 285, 285 (June 4, 1946).

106. U.S. DEPT AGRIC., NATIONAL SCHOOL LUNCH PROGRAM (2013), <http://www>.

In modern times, the National School Lunch Program serves free and reduced-price lunches (“FRPL”) at over 100,000 public schools and non-profit private schools in the United States, making it one of the largest elementary and secondary programs in the country.¹⁰⁷ In 2012, the program enrolled more than 31 million students at the cost of \$11.6 billion.¹⁰⁸ Students living in households with an income at or below 130% of the federal poverty level qualify for a free lunch for 2015–16, whereas students living in a household with an income at or below 185% of the federal poverty level qualify for a reduced-price lunch.¹⁰⁹ During the 2014–15 school year, Virginia had 525,597 students qualify as FRPL eligible, which accounted for 42% of all students in the Commonwealth.¹¹⁰ While there are questions about whether FRPL is an accurate measure of school poverty,¹¹¹ the USDA administers a program that is critical to the nutritional needs of many children.

C. U.S. Department of Labor: Job Corps

Job Corps was created in 1964 and is the largest educational, vocational, and residential program in the United States for low-income people ages sixteen through twenty-four.¹¹² The program has more than 100 centers nationwide to train over 60,000 students in careers ranging from financial services and hospitality to construction and manufacturing at the cost of approximately \$1.5

fns.usda.gov/sites/default/files/NSLPFactSheet.pdf [hereinafter 2013 NATIONAL SCHOOL LUNCH PROGRAM].

107. See *id.*; Tom Snyder & Lauren Musu-Gillette, *Free or Reduced Price Lunch: A Proxy for Poverty?*, NCES BLOG (Apr. 16, 2015), <http://nces.ed.gov/blogs/nces/post/free-or-reduced-price-lunch-a-proxy-for-poverty>.

108. 2013 NATIONAL SCHOOL LUNCH PROGRAM, *supra* note 106.

109. Child Nutrition Programs—Income Eligibility Guidelines, 80 Fed. Reg. 17,026, 17,027 (proposed Mar. 31, 2015); see also 2013 NATIONAL SCHOOL LUNCH PROGRAM, *supra* note 106.

110. OFFICE OF SCH. NUTRITION PROGRAMS, VA. DEP’T OF EDUC., SCHOOL YEAR 2014–2015 NATIONAL SCHOOL LUNCH PROGRAM (NSLP) FREE AND REDUCED PRICE ELIGIBILITY REPORT 4 (2015), http://doe.virginia.gov/support/nutrition/statistics/free_reduced_eligibility/2014-2015/divisions/frpe_div_report_sy2014-15.pdf.

111. See David N. Bass, *Fraud in the Lunchroom?: Federal School-Lunch Program May Not Be a Reliable Measure of Poverty*, 10 EDUC. NEXT 67, 67 (2010); Will Hunstberry, *True or False?: Free and Reduced-Price Lunch=Poor*, NPR (Jan. 30, 2015), <http://www.npr.org/sections/ed/2015/01/30/379330001/true-or-false-free-and-reduced-price-lunch-poor>; Snyder & Musu-Gillette, *supra* note 107, at 1–3.

112. EMP’T & TRAINING ADMIN., U.S. DEP’T OF LABOR, JOB CORPS ANNUAL REPORT 6 (2004), <http://www.jobcorps.gov/libraries/pdf/py03report.sflb>.

billion annually.¹¹³ Job Corps also prepares students to earn a GED or a high school diploma.¹¹⁴ Research about the effects of Job Corps on student outcomes is mixed. One major evaluation of 81,000 Job Corps-eligible applicants randomly assigned into two groups provides insight into the program's effectiveness.¹¹⁵ The evaluation concluded that Job Corps improves literacy and educational attainment and generates earning gains in the marketplace two years after a student leaves the program.¹¹⁶ However, earning increases persist only for the twenty- to twenty-four-year-olds, who make up one fourth of the Job Corps students in the program.¹¹⁷

D. *Federal Agencies that Provide Funds and Programs Relating to Education*

The three departments highlighted in this article are a sample of federal agencies that provide funds and programs relating to education. Table 4 lists other federal agencies that administer programs relating to education.

113. *Id.* at 6, 31, 63.

114. *Frequently Asked Questions*, JOB CORPS, <http://www.jobcorps.gov/faq.aspx> (last updated Apr. 15, 2015).

115. PETER Z. SCHOCHE ET AL., MATHEMATICA POLICY RESEARCH, INC., NATIONAL JOB CORPS STUDY AND LONGER-TERM FOLLOW-UP STUDY: IMPACT AND BENEFIT-COST FINDINGS USING SURVEY AND SUMMARY EARNINGS RECORDS DATA 8 (2006), https://wdr.doleta.gov/research/FullText_Documents/National%20Job%20Corps%20Study%20and%20Longer%20Term%20Follow-Up%20Study%20-%20Final%20Report.pdf.

116. *Id.* at 2.

117. *Id.* at 3.

Table 4¹¹⁸

Agency	Program
Corporation for National and Community Service	AmeriCorps
Office of National Drug Control Policy	National Youth Anti-Drug Media Campaign
Department of Defense	National Guard Youth Challenge Program
Department of Health and Human Service	Mentoring Children of Prisoners
Department of Housing and Urban Development	Choice Neighborhoods
Department of the Interior	Bureau of Indian Education
Department of Justice	Girls Study Group
Department of Transportation	Parental Responsibility Toolkit

As the above discussion demonstrates, the federal role in education is broader than the DOE and uses multiple funding streams from other federal agencies to reach students and teachers in Pre-K–12 public and private schools annually. Any philosophy that guides federal involvement in education must incorporate the diverse forms identified above.

IV. A FEDERAL ROLE IN EDUCATION: AN ENCOURAGEMENT PHILOSOPHY

*“Presidents and Congress will continue to reinvent the federal role, because education has become a top-tier domestic agenda item and because federalist traditions do not make clear what the federal role in education is, nor how reformers should proceed to improve education on a national scale.”*¹¹⁹

—Carl F. Kaestle

Federal involvement in education did not begin with the creation of the DOE in 1979. At best, the creation of the DOE signaled that the federal government wanted to single out education as a

118. *Federal Youth Funding Agencies*, YOUTH.GOV, <http://youth.gov/funding-search/federal-youth-funding-agencies> (last visited Feb. 19, 2016).

119. Carl F. Kaestle, *Federal Education Policy and the Changing National Polity for Education, 1957-2007*, in *TO EDUCATE A NATION: FEDERAL AND NATIONAL STRATEGIES OF SCHOOL REFORM* 17, 37 (Carl F. Kaestle & Alyssa E. Lodewick eds., 2007).

national priority in need of more attention by pulling it out of the HEW. What the creation of the DOE did accomplish was: (1) it marked the end of a 112-year effort to politically invest the federal government in education beyond the limits of land grants, a school construction fund, and the school lunch program—and in ways it could not invest working through the Department of the Interior, HEW, HHS, USDA or other agencies alone; and, (2) it marshaled a new era for federal engagement in education. Nonetheless, 1979 is the wrong place to begin a conversation about the federal role in education.

Federal involvement in education has its ideological origins in the Land Ordinances of 1785 and 1787. The Land Ordinance of 1785 was approved by the Confederation Congress on May 20, 1785, and contained language for setting aside land for education: “There shall be reserved the lot N 16, of every township, for the maintenance of public schools, within the said township.”¹²⁰ One goal for the ordinance was to raise money for the national government through the sale of western land. At that time, Congress did not have the power of taxation, although the power was gained through the Constitution years later. This act is an early example of the federal government using public policy to shape the introduction of public education into new states.

The Congress of the Confederation later passed the Northwest Ordinance on July 13, 1787.¹²¹ Article III states: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”¹²² Some scholars believe that this clause

120. Ordinance for Ascertaining the Mode of Disposing Lands in the Western Territory (Land Ordinance of 1785), reprinted in 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 375, 378 (John C. Fitzpatrick ed., 1933). See generally Jack E. Eblen, *Origins of the United States Colonial System: The Ordinance of 1787*, 51 WIS. MAG. HIST. 294, 299–300 (1968) (discussing the Land Ordinance of 1787, also called the Northwest Ordinance of 1787, including its relation to the Land Ordinance of 1785); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 114–16 (2013) (discussing the influence the Land Ordinance of 1785 had on the Northwest Ordinance of 1787 and its subsequent impact on education).

121. Northwest Ordinance of 1787, ch. 8, 1 Stat. 50, 52 n.(a) (1789).

122. *Id.* at 52 n.(a). See generally PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE (1987) (examining the drafting and interpretation of the Northwest Ordinance); THE NORTHWEST ORDINANCE: ESSAYS ON ITS FORMULATION, PROVISIONS, AND LEGACY (Frederick D. Williams ed., 1989) (examining the formation and legacy of the Northwest Ordinance); Denis P. Duffy, *The Northwest Ordinance As A Constitutional Document*, 95 COLUM. L. REV. 929, 934–40 (1995) (discussing the origins of the 1787 Northwest Ordinance); Thomas Nathan Peters, Note, *Religion, Establishment, and*

played a role in promoting the idea of education nationally,¹²³ while others question this assumption.¹²⁴ Those who hold the first belief about Article III suggest the following rationale:

[T]he framers of the Northwest Ordinance, years before the Bill of Rights graced the Constitution, increased individuals' access to ownership of land, subsidized public education, and stabilized property rights in the territories as preconditions to the enhancement of liberty.¹²⁵

However, the great contribution of the Northwest Ordinance to the discussion about the federal role in education is not its focus on education; instead its real significance is its governmental encouragement philosophy, i.e., to invest in "schools and the means of education" is necessary for good government and the happiness of mankind.¹²⁶ What follows is a discussion of some of the historical roots of the belief that education is important to the character of the nation and its people and an examination of the evolution of education clauses in state constitutions after the Northwest Ordinance of 1787 to identify how many of them mirror this theme.

Around the time the Congress of the Confederation passed the Northwest Ordinance of 1787, the founding generation already believed that education was inseparable from the advancement of the new republic.¹²⁷ For example, John Adams, a signer of the

the Northwest Ordinance: A Closer Look at an Accommodationist Argument, 89 KY. L.J. 743, 748–71 (2000) (providing analysis of the Northwest Ordinance and its religious reservation provisions).

123. Friedman & Solow, *supra* note 120, at 92, 112–15 (quoting Molly O'Brien & Amanda Woodrum, *Constitutional Common School*, 51 CLEV. ST. L. REV. 581, 592 (2004)); see HAROLD M. HYMAN, *AMERICAN SINGULARITY: THE 1787 NORTHWEST ORDINANCE, THE 1862 HOMESTEAD AND MORRILL ACTS, AND THE 1944 G.I. BILL* 24 (1986).

124. DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954*, at 31–32 (1987).

125. HYMAN, *supra* note 123, at 20. But for a discussion of the critical view of the Northwest Ordinance, see *id.* at 18–19. For an analysis of what role property in the Northwest Ordinance played in the advancement of republican principles, see generally Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409, 436–48 (2013).

126. See Northwest Ordinance of 1787, ch. 8, 1 Stat. 50, 52 n.(a) (1789).

127. See LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE: 1783-1876*, at 103–04 (1980); GERALD L. GUTEK, *A HISTORY OF THE WESTERN EDUCATIONAL EXPERIENCE 174–75* (2nd ed. 1995); CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860*, at 5–7 (1983); LORRAINE SMITH PANGLE & THOMAS L. PANGLE, *THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS* 91 (1993); WAYNE J. URBAN & JENNINGS L. WAGONER, JR., *AMERICAN EDUCATION: A HISTORY* 66–67 (5th ed. 2014).

Declaration of Independence and the second President of the United States, helped to write the Massachusetts Constitution of 1780, which contains one of the earlier legislative purposes for education:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them¹²⁸

Similarly, John Jay, a signer of the Treaty of Paris in 1783, which ended the American Revolution, and the first Chief Justice of the United States Supreme Court, said, "I consider knowledge to be the soul of a republic Education is the way to do this, and nothing should be left undone to afford all ranks of people the means of obtaining a proper degree of it at a cheap and easy rate."¹²⁹

Noah Webster, while not a signer of any of the founding documents, nonetheless shaped American educational thought through *On the Education of Youth in America* published in 1788, one year after the Northwest Ordinance, where he noted:

For this reason society requires that the education of youth should be watched with the most scrupulous attention. Education, in a great measure, forms the moral characters of men, and morals are the basis of government. Education should therefore be the first care of a Legislature A good system of Education should be the first article in the code of political regulations.¹³⁰

Other individuals, many living behind the traditional members of the founding generation, also weighed in on the importance of education to the new nation during the 1700s. One person of note is Abigail Adams. On August 14, 1776, Abigail wrote a letter to her husband, John Adams, stating:

128. MASS. CONST. of 1780, ch. V, § 2; JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 321 (C. Bradley Thompson ed., 2000).

129. Letter from John Jay to Dr. Benjamin Rush (Mar. 24, 1785), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782–1793, at 139 (Henry P. Johnston ed., 1890–93).

130. Noah Webster, *On the Education of Youth in America*, in READING IN AMERICAN EDUCATIONAL THOUGHT: FROM PURITANISM TO PROGRESSIVISM 91, 105 (Andrew J. Milson ed., 2005).

If we mean to have Heroes, Statesmen and Philosophers, we should have learned women. The world perhaps would laugh at me, and accuse me of vanity, But you I know have a mind too enlarged and liberal to disregard the Sentiment. If much depends as is allowed upon the early Education of youth and the first principals which are instilled take the deepest root, great benefit must arise from literary accomplishments in women.¹³¹

Another person of importance is Prince Hall, a former slave and later a school founder in Boston.¹³² In 1773, the year Bostonians dumped tea into the harbor to protest Parliament's Tea Act, which symbolically laid a foundation for the colonists to seek freedom from England, a group of enslaved Africans and free persons submitted a petition to lawmakers in the Massachusetts General Assembly to seek freedom from slavery.¹³³ On October 17, 1787, nearly twelve weeks after Congress signed the Northwest Ordinance in New York City, Prince Hall and others submitted a petition to the Massachusetts General Assembly in Boston focusing on taxation and education:

[O]ther freemen of this town and Commonwealth and have never been backward in paying our proportionate part of the burdens under which they have . . . and as we are willing to pay our equal part of these burdens, we are of the humble opinion that we have the right to enjoy the privileges of free men. But that we do not will appear in many instances . . . and that is of the education of our children which now receive no benefit from the free schools of the town of Boston, which we think is a great grievance, as by woful experience we now feel the want of a common education.¹³⁴

The main theme in all of these statements is clear: education and the vitality of a people and nation are synonymous. As Montesquieu reminds us, "It is in a republican government that the whole power of education is required."¹³⁵

Education was a local matter at the time the Congress of the Confederation supported the Northwest Ordinance of 1787. Fami-

131. Letter from Abigail Adams to John Adams (Aug. 14, 1776), in 2 ADAMS FAMILY CORRESPONDENCE 93, 94 (L. H. Butterfield ed., 1963).

132. *Prince Hall, 1735-1807*, PBS: AFRICANS IN AMERICA, PEOPLE & EVENTS, <http://www.pbs.org/wgbh/aia/part2/2p37.html> (last visited Feb. 19, 2016).

133. *Felix's Petition*, PBS.ORG, <http://www.pbs.org/wgbh/aia/part2/2h22.html> (last visited Feb. 19, 2016).

134. Prince Hall et al., *1787 Petition for Equal Educational Facilities*, in CIVIL RIGHTS SINCE 1787: A READER ON THE BLACK STRUGGLE 35 (Jonathan Birnbaum & Clarence Taylor eds., 2000). See generally CHARLES H. WESLEY, *PRINCE HALL, LIFE AND LEGACY* (1983).

135. M. de Secondat, Baron de Montesquieu, 1 THE SPIRIT OF THE LAWS 38 (Thomas Nugent trans., 1873).

lies, religious organizations, and enterprising educators taught children and youth; though most children in the eighteenth century received no formal education. Funding for a child's education came from private sources. Public funds to pay for schools in the thirteen colonies were virtually nonexistent in 1787.¹³⁶ This is why the lot (No. 16) reserved for a school as prescribed in the 1785 Land Ordinance mattered to the concept of public education: it created a way for states to support education at the township level in new states and use federal money as start-up capital.¹³⁷ For instance, Congress gave 77 million acres of land to support common schools, which produced nearly 10% of school revenue for the states west of the Mississippi.¹³⁸ Although financial malfeasance and corruption misdirected some of the money designed for public education, states benefited from the federal investment.

Education, while not a federal responsibility that made its way into the Constitution signed on September 17, 1787, was considered important enough to the formation of the nation's character that the Congress of the Confederation penned the phrase, "schools and the means of education shall forever be encouraged,"¹³⁹ in the Northwest Ordinance of 1787 only eight weeks earlier. But what did the phrase mean in the real world? At the time Congress adopted the Northwest Ordinance and the Constitution in 1787, public education in the original thirteen colonies was not a state priority as it is today. However, the 1787 phrase, "schools and the means of education shall forever be encouraged," influenced the education constitutions in some of the original colonies and many of the new states set to join the United States during the eighteenth and nineteenth centuries.

According to legal historian John Eastman, between 1776 and 1787, only eleven of the original thirteen colonies had a state constitution and only five included an education clause: Pennsylvania (1776), North Carolina (1776), Georgia (1777), Massachusetts (1780), and New Hampshire (1784).¹⁴⁰ All of these constitutions

136. Cf. TYACK ET AL., *supra* note 124, at 32.

137. See *supra* note 120 and accompanying text.

138. TYACK ET AL., *supra* note 124, at 22.

139. Northwest Ordinance of 1787, ch. 8, 1 Stat. 50, 52 n.(a) (1789).

140. John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education, 1776-1900*, 42 AM. J. LEGAL HIST. 1, 3 n.12 (1998) (providing one of the best treatments of the evolution of education in state constitutions); see also 2-5 FRANCIS N. THORPE, THE FEDERAL AND STATE CONSTITUTIONS,

preceded the passage of the Northwest Ordinance of 1787 and the Constitution. Between 1787 and 1900, new states created out of the territory covered by the Northwest Ordinance of 1787 enacted education clauses in their constitutions.¹⁴¹ Eastman classifies education clauses in state constitutions into two categories: *hortatory* provisions—visionary appeals for education without declaring it a right—and *facially obligatory* provisions requiring state lawmakers to create public schools.¹⁴² Eastman classifies the education language in the provision of the Northwest Ordinance of 1787 as hortatory.¹⁴³ With the passage of time, more education clauses became obligatory.

Eastman's categorization of state constitutions into two camps helps us understand the evolution of state commitment to education. However, the significance of these constitutions is not whether they included hortatory or obligatory language. Rather, it is important that modern lawmakers note that these early constitutions, many of which were used to gain admission as a new state (or to regain admission after the Civil War), consistently embraced an encouragement philosophy for the role of government in education. This was a philosophy that put ideals first—knowledge or the happiness of mankind—and utilized good government to support schools and the means of education.

The encouragement philosophy appears in twenty of thirty-seven state education clauses that had been admitted into the U.S. between 1787 and 1867 (the year the DOE was founded).¹⁴⁴ Two states used near-verbatim language from the Northwest Ordinance of 1787:

COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES AND TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 777 (1909) (re-printing past versions of state constitutions).

141. Eastman, *supra* note 140, at 10–13, 31–32.

142. *Id.* at 3–10.

143. *Id.* at 11.

144. Pennsylvania (1776), North Carolina (1776), Vermont (1777), Massachusetts (1780), Ohio (1802), Indiana (1816), Mississippi (1817), Connecticut (1818), Illinois (1818), Alabama (1819), Maine (1820), Tennessee (1835), Michigan (1835), Arkansas (1836), Iowa (1846), California (1849), Kansas (1859), West Virginia (1862), Nevada (1851), and Maryland (1867). Please note that a state can amend its constitution multiple times. The date for each state represents the first constitution to mention education or school, not its first constitution. This list of twenty states is compiled from research conducted by the author using Eastman's work, in part, for some references. Since Eastman's focus was not on "encouragement," the article includes some states that Eastman does not.

Ohio 1802

But religion, morality, and knowledge, being essentially necessary to the good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience.¹⁴⁵

Mississippi 1817

Religion, morality and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools, and the means of education, shall forever be encouraged in this State."¹⁴⁶

Several states did not include the word "encouragement" in their constitutions. Nevertheless, their education clauses included language to support the use of federal land grants for education, including creating trusts for the funds, of which Colorado and Utah are two examples.¹⁴⁷ Thus, even without the use of "encouragement," the federal government found a way to influence state education laws and programs.

It is worth noting that of the five states Eastman identifies that had an education clause by 1787, three—Pennsylvania, Massachusetts, and North Carolina—included an encouragement philosophy in their education clauses. Vermont's 1777 constitution also embraced an encouragement philosophy.¹⁴⁸ The encouragement language from each constitution is below.

Pennsylvania 1776

Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution: And all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they were accustomed to enjoy, or could of right have enjoyed, under the laws and former constitution of this state.¹⁴⁹

145. OHIO CONST. of 1802, art. VII, § 3. Compare *id.*, with Northwest Ordinance of 1787, ch. 8, 1 Stat. 50, 52 n.(a) (1789).

146. MISS. CONST. of 1817, art. VII, § 16. Compare *id.*, with Northwest Ordinance of 1787, ch. 8, 1 Stat. 50, 52 n.(a) (1789).

147. COLO. CONST. of 1876, art. IX, § 5; UTAH CONST. of 1895, art. X, § 3.

148. Vermont was not included within the five states Eastman identified, perhaps because the Vermont constitution mentions "school" not education. See Eastman, *supra* note 140, at 8.

149. PA. CONST. of 1776, § 45 (emphasis added).

Massachusetts 1780

THE *ENCOURAGEMENT OF LITERATURE, ETC.* Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments, among the people.¹⁵⁰

North Carolina 1776

That a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning *shall be duly encouraged*, and promoted, in one or more universities.¹⁵¹

Vermont 1777

Laws for the encouragement of virtue and prevention of vice and immorality, shall be made and constantly kept in force; and provision shall be made for their due execution; and all religious societies or bodies of men, that have or may be hereafter united and incorporated, for the advancement of religion and learning, or for other pious and charitable purposes, *shall be encouraged* and protected in the enjoyment of the privileges, immunities and estates which they, in justice, ought to enjoy, under such regulations, as the General Assembly of this State shall direct.¹⁵²

The inclusion of an encouragement theme in these four constitutions is worth noting because it preceded the encouragement theme of the Northwest Ordinance of 1787. This means that this philosophy for the role of government in education existed before the federal government's adoption of it. This encouragement philosophy should continue to guide the federal role in education.

150. MASS. CONST. of 1780, ch. V, § II (emphasis added).

151. N.C. CONST. of 1776, XLI (emphasis added).

152. VT. CONST. of 1777, § XLI (emphasis added).

CONCLUSION

The federal government must remain a stakeholder in education given its importance to the economic, scientific, social, and national security demands of our nation. This does not mean that the federal government should behave as a national school board. Rather, the federal government should use its constitutional authority to implement a guiding philosophy based upon the spirit of Article III of the Northwest Ordinance of 1787—“schools [public and private, nonprofit and for-profit, secular and religious] and the means of education [traditional, homeschool, online, dual enrollment] shall forever be *encouraged*.”¹⁵³

An encouragement philosophy guiding the federal role in education would provide five benefits. First, it could guide federal involvement through the DOE, but also the HHS, the USDA, and the Department of Labor. Second, it would focus federal involvement in education on supporting states’ goals for education. Third, it would enable states to approach the federal government for guidance with more excitement and less fear of indictment. Fourth, it would push the federal government to most often serve as an educational partner rather than an educational parent. Finally, it would invite greater innovation from states and local school boards with the knowledge that they can rely on federal support to invent new educational futures for our children.

At its core, an encouragement philosophy is not about more money, which the Left demands, or shrinking government, which the Right demands. It is bigger than school choice and bolder than a school turnaround. Ultimately, an encouragement philosophy recommends a return to our early thinking about the role government should play in education and the happiness of mankind.

153. Northwest Ordinance of 1787, ch. 8, 1 Stat. 50, 52 n.(a) (1789) (emphasis added).
