The Importance of Negotiated Rulemaking to the No Child Left Behind Act

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Danielle Holley-Walker*

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The No Child Left Behind Act (NCLB) of 2001 is failing both in theory and execution. NCLB has been called "the most sweeping reform of the Elementary and Secondary Education Act since it was enacted in 1965" and was intended to "redefine the federal role in K–12 education so it can be used to improve the academic achievement of all American students." The stated purpose of NCLB is to "ensure that all children have a fair, equal and significant opportunity to obtain a high-quality education." Instead, NCLB is leading to increasing lawsuits between the states and the federal government, threatened school closures, and the potential collapse of entire city public school systems.

This Article takes a new approach to examining the failure of NCLB. Much of the criticism of NCLB focuses on the Act's substantive requirements. NCLB attempts to achieve its goals by requiring states to adopt minimum proficiency levels for students in reading, math, and science. The Act then requires states to develop tests to assess student proficiency according to these standards. The Act also directs states to adopt teacher preparation and training methods, student curriculum, and student instructional materials designed to meet the academic standards set by the state. The Act professes to provide

4. Id. § 6301(1); Mark Littleton, High Stakes Testing, 187 Educ. Law Rep. 389, 389 (2004) ("States are required to develop a system where state standards are aligned with and measured by a state-determined system of measurement. NCLB does not require any exit exam, but it does require testing in reading and mathematics at specific grade levels.").
5. Littleton, supra note 4, at 389; see also M. Hayes Mizell, From Muck to Mountaintop, 33 J.L. & Educ. 261, 271 (2004) (stating that NCLB insists that school boards and principals devote resources to hiring teachers who are highly knowledgeable in their subject areas).

Title II of NCLB is entitled "Preparing, Training, and Recruiting High Quality Teachers and Principals." This portion of the Act gives grants to states and school districts to hire well-qualified teachers and improve teacher training. This portion requires states and school districts seeking these funds to assess the needs of the teachers for professional development. Id. at 268. The teacher prep-
“greater decisionmaking authority and flexibility to schools and teachers in exchange for greater responsibility for student performance.” Critics charge that these statutory provisions have many negative consequences, including an overreliance on standardized testing, a strain on state educational resources, and the further isolation of minority students and students with disabilities.

One aspect of NCLB that has been virtually ignored by its proponents and critics is the day-to-day administration of the Act. NCLB is administered by the Department of Education (DOE), and much of its actual impact on schools and students will be determined based on the regulations enacted by that agency. Congress has directed the DOE to use negotiated rulemaking as the procedure for adopting all regulations to implement the Act. This negotiated rulemaking procedure used by the DOE will prominently figure into the implementation of NCLB.

Negotiated rulemaking rose to prominence in the late 1980s and early 1990s as an alternative to the traditional notice and comment rulemaking procedure outlined in the Administrative Procedure Act. Negotiated rulemaking requires an agency to consult with interested parties before giving notice of a proposed regulation. Negotiated rulemaking has been championed as a means of decreasing the length of rulemaking proceedings and avoiding subsequent litigation. The agency attempts to build consensus among these interested parties prior to issuing a proposed rule. For example, when used to enact en-
vironmental regulations, a negotiated rulemaking committee will bring together the Environmental Protection Agency, environmentalist groups, and industry interests in order to come to a consensus on a proposed rule to implement an environmental statute.12 In the context of education, the interested parties likely to participate in NCLB negotiated rulemakings with the DOE are representatives of state education agencies, local school board officials, school administrators, teachers, parents, and students.

This Article argues that the substantive failures of NCLB are magnified and exacerbated in the negotiated rulemaking process. Negotiated rulemaking offers the promise of collaboration between the DOE, state education officials, local school boards, teachers, parents, and students to achieve the goals of NCLB. Instead, the voices of the non-DOE officials are being ignored during the negotiated rulemaking process. The valid critiques of many aspects of the Act, such as the burdens on state resources, are left unaddressed during the rulemaking process. Instead of the administrative process leading to the best practices to achieve statutory goals, it becomes another roadblock to success for NCLB.

Part I of this Article describes the major statutory provisions of NCLB. These include the requirements that states set academic content standards for all grades, that states develop an assessment system to measure students' progress towards meeting the adopted academic standards, and finally the statutory requirement for schools to make adequate yearly progress towards all students meeting the designated proficiency standards. Part I also describes the dominant substantive critiques of NCLB. Part II of this Article describes the procedural requirements of NCLB, specifically the negotiated rulemaking sessions undertaken by the DOE since 2002. Part III provides a detailed description of the history of negotiated rulemaking as an administrative procedure. Part IV of this Article demonstrates the connection between the substantive critiques of NCLB and the DOE's failure in procedural execution. I argue that NCLB was intended to be a partnership between the federal and state governments to benefit the welfare of public schools. Instead, NCLB has created greater bureaucracy for school systems and has increased conflict between states and the federal government. I further contend that a significant barrier to maximizing the potential benefits of NCLB is the silencing of the interested stakeholders in the negotiated rulemaking process. Part V proposes solutions to the procedural missteps of NCLB that are intended to address the overall substantive goals of the Act.

12. See Coglianese, supra note 9, at 392 (stating that as of 1996, the EPA had completed twelve negotiated rulemakings).
I. NCLB—A SUBSTANTIVE OVERVIEW

The legislation commonly known as the “No Child Left Behind Act of 2001” is an amendment to the Elementary and Secondary Education Act of 1965. The Act unfolds in many parts and focuses on a wide variety of topics, including improving academic achievement, the creation of charter schools, teacher training, and even the role of faith-based groups in improvement of public education.

The portion of NCLB that is the focus of this Article and of most of the public attention is Title I of the Act, “Improving the Academic Achievement of the Disadvantaged.” The stated goal of this portion of NCLB is to improve the academic performance of all public school children. Another goal of this portion is to “close[s] the achievement gap between high and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers.” To meet this goal of improving student performance, NCLB requires states to attend to three different areas: academic standards, assessments, and accountability.

A. Academic Standards, Assessments, and Accountability Under NCLB

1. Academic Standards

NCLB requires states to develop statewide academic content and standards for all public schools and students. The academic stan-
dards adopted by a state must apply to students and all schools in the state. The states were required to adopt these standards by the 2004–2005 school year for math and reading. By 2007, the states must have developed academic content and standards in science.

NCLB describes "challenging academic standards" as standards that (1) "specify what children are expected to know and be able to do"; (2) "contain coherent and rigorous content"; and (3) "encourage the teaching of advanced skills." Once the state sets academic content, the state should also set up three levels of achievement standards—basic, proficient, and advanced—to determine how well children master the academic content. The Act gives states the option of developing academic standards for each grade or across several grades. Finally, NCLB requires each state to detail the body of knowledge each student should have in reading and math at the time of her high school graduation.

2. Assessments

In order to determine whether students are meeting the statewide academic standards, each state must adopt "a set of high-quality, yearly student academic assessments." The assessment system should be "designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and students with limited English proficiency." The Act further requires that, beginning in 2004–2005, testing be given every year to students in reading and math. Testing for science began in 2007.

NCLB sets up a series of requirements for the assessment method chosen by the state. These requirements mandate (1) that the same assessment system be used to measure all children; (2) that the assessment system be aligned with the state academic content standards; (3) that the assessment be used for purposes that are valid and reliable; and (4) that the state be able to provide evidence to the DOE...
from the test publisher or other relevant sources that the assessment is of adequate technical quality.\textsuperscript{29}

One of the unique aspects of the NCLB assessment requirements is the data that states are expected to collect. States are instructed to collect longitudinal data that links student test scores, length of enrollment, and graduation rates.\textsuperscript{30} States must also "produce individual student interpretive, descriptive, and diagnostic reports" that are intended to inform parents, teachers, and administrators about each child's particular academic needs.\textsuperscript{31} Also, the assessment results must be disaggregated within "each State, local educational agency, and school by gender, by each major racial and ethnic group, by English proficiency status, by migrant status, by students with disabilities as compared to non-disabled students, and by economically disadvantaged students as compared to students who are not economically disadvantaged."\textsuperscript{32}

3. Accountability

In the wake of the yearly testing, NCLB requires states to hold schools and school districts accountable for student performance.\textsuperscript{33} The benchmark for the NCLB accountability system is adequate yearly progress (AYP).\textsuperscript{34} The ultimate statutory goal is for all students in the state to reach proficiency in reading, math, and science in twelve years.\textsuperscript{35} The states must determine the yearly progress that should be made towards this goal.\textsuperscript{36} Each state must define what constitutes the AYP of the state, and all public elementary and secondary schools are evaluated according to whether they meet the AYP.\textsuperscript{37}

The definition of AYP must include a separate annual objective for continuous and substantial improvement for students who are eco-

\begin{itemize}
\item \textsuperscript{29} Id. § 6311(b)(3)(C)(i)-(iv).
\item \textsuperscript{30} Id. § 6311(b)(3)(B).
\item \textsuperscript{31} Id. § 6311(b)(3)(C)(xii).
\item \textsuperscript{32} Id. § 6311(b)(3)(C)(xiii).
\item \textsuperscript{33} Id. § 6311(b)(2).
\item \textsuperscript{34} Id. § 6311(b)(2)(A) ("Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress as defined under this paragraph.").
\item \textsuperscript{35} Id. § 6311(b)(2)(F).
\item \textsuperscript{36} Id. § 6311(b)(2)(B). The statute defines AYP as a standard that (1) applies high standards of academic achievement to all public elementary and secondary schools in the state; (2) is statistically valid and reliable; (3) results in substantial academic improvement for all students; (4) includes annual objectives for academic improvement; and (5) includes separate measurable annual objectives for academic improvement and achievement for minority students, disabled students, and economically disadvantaged students. Id. § 6311(b)(2)(C).
\item \textsuperscript{37} Id. § 6311(b)(2)(B).
\end{itemize}
nomically disadvantaged, as well as those in major racial and ethnic

groups.\textsuperscript{38} Ninety-five percent of students in a racial or ethnic minority
group or disability subgroup must take the assessment in order for

a school to reach AYP.\textsuperscript{39} However, in order for the school to actually
count these subgroup scores, the number of students in the subgroup
must be sufficient to provide statistically reliable results in order for
the ninety-five percent requirement to affect AYP.\textsuperscript{40}

If a school fails to meet the state goals for AYP, it should be identi-

fied for “improvement, corrective action, or restructuring.”\textsuperscript{41} Parents
must be informed if the school fails to meet AYP.\textsuperscript{42} Any school that
fails to make adequate yearly progress for two or more consecutive
years is designated as in need of “improvement.”\textsuperscript{43} This designation
allows parents the option to transfer their child to another public
school, and the ability to receive funds for supplemental educational
services.\textsuperscript{44} The option of transferring also allows parents to choose a
public charter school.\textsuperscript{45} Priority for transfer is given to “the lowest
achieving children from low-income families.”\textsuperscript{46}

A school is designated as in need of “corrective action” if it fails to
make AYP for two additional years after an “improvement” designa-
tion.\textsuperscript{47} Beyond allowing school transfer and supplemental education
services, a “corrective action” designation also calls for replacement of
school staff, implementation of a new curriculum, and decreased man-
agement authority at the school level.\textsuperscript{48}

If after one school year of corrective action a school still fails to
achieve AYP, the school is designated as in need of “restructuring.”\textsuperscript{49}
Thus, after five years of failed AYP, a school is designated for restruc-
turing. As of 2006, almost 2,000 schools were given the “restructuring”
designation after failing to meet the AYP requirements for five
consecutive years.\textsuperscript{50} This number may reach as many as 10,000

\textsuperscript{38} Id. \S 6311(b)(2)(C).
\textsuperscript{39} Id. \S 6311(b)(2)(I)(ii).
\textsuperscript{40} Id.
\textsuperscript{41} Id. \S 6316(a).
\textsuperscript{42} Id. \S 6316(b)(6). Parents must be informed if a school is designated as in need of
improvement, corrective action, or restructuring. The notice must include an ex-
planation of the designation, reason for identification, and an explanation of a
plan of improvement. Id.
\textsuperscript{43} Id. \S 6316(b)(1)(A).
\textsuperscript{44} Id. \S 6316(b)(1); see also Gail Sunderman et al., NCLB Meets School Reali-
\textsuperscript{46} Id. \S 6316(b)(1)(E)(ii).
\textsuperscript{47} Id. \S 6316(b)(7)(C).
\textsuperscript{48} Id.
\textsuperscript{49} Id. \S 6316(b)(8).
\textsuperscript{50} Associated Press, Rising Number of Schools Face Serious Penalties, CNN Online
schools in the next five years. A "restructuring" designation opens the school to a variety of options including state takeover, mass staff firings, reopening the school as a charter school, and even school closure.

B. Dominant Substantive Critiques of NCLB

NCLB appears to have an uncontroversial legislative agenda: improving education for all students. However, there has been a widespread discussion by federal and state legislators, education policy experts, legal experts, and the public about the Act's benefits and drawbacks. These debates have focused on several of the prominent substantive features of NCLB, including the stress on state resources to comply with the Act, the proliferation of and dependence on high-stakes testing, the effect on minority children and special education students, and the possible link to privatization of public schools.

51. Id. In some cities and states the number of schools "failing" under NCLB is reaching crisis level. For example, one-third of Chicago's public schools will undergo restructuring under NCLB. Kate N. Grossman, 185 Failing Schools to Undergo $5 Mil. in Changes, CHICAGO SUN TIMES, May 22, 2006, at 26; Karen Francisco, Inadequate Yearly Help: State Lacks Resources to Help Schools That Miss No Child Left Behind Targets, May 21, 2006 (on file with author) (reporting that one-half of the state's schools fail to meet AYP and the state may be forced to move toward a charter school system to meet the requirements of NCLB).

52. Id.

53. See, e.g., Mizell, supra note 5, at 261 (stating that some see NCLB as being a tool to reshape America's schools while others consider it impractical and counter-productive); Michael Winerip, On Education: A Failure of Logic and Logistics, N.Y. TIMES, Oct. 1, 2003, at B8 (stating that NCLB "may go down as the most unpopular piece of education legislation ever created"); National Education Association, Growing Chorus of Voices Calling for Changes in No Child Left Behind, http://www.nea.org/esea/chorus1.html (last visited Feb. 1, 2007) (stating the National Education Association supports the goals of NCLB but wants the Act to look for alternative ways to measure student achievement and remedies for underperforming schools).


This Article does not address the validity of each of these criticisms. Instead I seek to identify the critiques of NCLB, and demonstrate how these criticisms are affected by the administrative procedure employed by the DOE.
1. NCLB Burdens on State Resources

The critique of NCLB that has generated the most formal legal action is the argument that Congress is not providing sufficient monetary resources to the states to meet the statutory requirements. There have been several major lawsuits filed by states to challenge the Act on this basis. In 2005, Connecticut filed a lawsuit against the DOE

55. School District of Pontiac v. Spellings, No. Civ.A. 05-CV-71535-D, 2005 WL 3149545 (E.D. Mich. Nov. 23, 2005), was filed on April 20, 2005, against the DOE by the National Education Association (NEA) and joined by school districts in Michigan, Texas, Vermont, and ten other NEA affiliated teachers associations. Id. at *1. The NEA argued that NCLB is costing districts more than money than they are receiving in federal funding. Id. This lawsuit is a direct challenge to the enforcement of NCLB’s accountability standards.

More specifically, the claim asserts that state and local school districts are illegally being required to cover unfunded mandates as set forth by the Act. Id. The provision of NCLB in question raised by the NEA would appear to excuse states from having to cover any requirement under NCLB that is not fully funded by the federal government. The unfunded mandate provision, section 9527(a) of NCLB, states, “Nothing in this Act shall be construed to authorize an officer or employee of the federal government to mandate . . . a state or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.” 20 U.S.C. § 7907(a) (Supp. III 2003). The plaintiffs request that the government exempt school districts from any of the law’s requirements that are not paid. The lawsuit also asks that the federal government be further prohibited from withholding funds if a state refuses to comply with the accountability standards that require a state to spend its own revenue to meet such standards. The lawsuit alleges that NCLB imposes requirements on state and school districts that were not paid for by the federal government. Spellings, 2005 WL 3149545, at *2.

The government filed a motion to dismiss on the argument that the plaintiffs lacked sufficient legal standing to bring the lawsuit. The government’s motion to dismiss was granted on November 23, 2005. The district court judge stated that “if the lawmakers had meant to pay for mandates in the law, they would have phrased the legislation to say so clearly and unambiguously.” Id. at *4.

As of March 22, 2006, the case is currently on appeal by the NEA and other plaintiffs. The plaintiffs claim that legislative history supports their interpretation of section 9527(a), the section that prohibits unfunded mandates.

The most recent lawsuit attacking the legality of certain provisions of NCLB was originally filed by Connecticut Attorney General Richard Blumenthal on August 22, 2005. See First Amended Complaint, Connecticut v. Spellings, No. 3:05cv1330 (D. Conn. Mar. 2, 2006) (on file with author). In a show of support for Connecticut’s lawsuit, the District of Columbia and Connecticut, Delaware, Illinois, Maine, Oklahoma, and Wisconsin have all also filed an amicus brief with the Sixth Circuit on the legal interpretation of the Unfunded Mandates Provision, 20 U.S.C. § 7907(a) (Supp. III 2003), of NCLB. Blumenthal alleges that the U.S. Secretary of Education, Margaret Spellings, is in effect illegally imposing more than $50 million in unfunded federal mandates on Connecticut under NCLB. The lawsuit alleges that the federal government has repeatedly refused to grant the state waivers or full funding to comply with NCLB—violating the express terms of the Act and the Spending Clause of the U.S. Constitution. First Amended Complaint, supra, at 3.

The State of Connecticut argues that NCLB prohibits the federal government from forcing the state to pay for any costs associated with complying with NCLB
alleging that NCLB unlawfully requires states to use more resources for student testing than are being provided by the federal government.\textsuperscript{56}

Another aspect of this argument is that NCLB is infringing on a realm of regulation that is traditionally left to the states. Although Title I has provided federal funds to local schools for almost forty years, NCLB represents a significant expansion of federal influence in an area typically left to the states. Many observers point to the fact that before NCLB most states already had their own mechanisms for setting academic proficiency standards and using testing to assess student achievement. In fact, all fifty states had accountability systems prior to the passage of NCLB.\textsuperscript{57} Most states have had these accountability systems since the mid-1980s, and the Clinton Administration began requiring accountability plans under Title I in 1994.\textsuperscript{58}

The process of implementing NCLB has meant that many states are expending resources adopting academic standards and in-


\textsuperscript{57}SUNDERMAN ET AL., supra note 44, at 23–38.

\textsuperscript{58}Id.
stituting new assessment measures when they already had accountability mechanisms in place.59 One educational policy expert has noted:

In building accountability systems that complied with the requirements in NCLB, states layered the federal requirements on top of existing systems. Many policymakers decided to retain their own accountability systems in addition to adopting plans that complied with NCLB. This allowed states to keep educational goals they felt were important, maintain broad-based support for the state system, and, at the same time, satisfy the federal goals. Nonetheless, it created fragmented systems where schools often had to meet two sets of performance measures—one for the state and one to meet the federal law’s AYP goals.60

The tension between the federal legislative goals of NCLB and the existing state accountability systems places a strain on state resources and represents an incoherent educational policy agenda.

2. NCLB as Testocracy

Another critique of the NCLB that is gaining increasing momentum is the argument that NCLB creates overreliance on standardized testing that actually jeopardizes the educational progress of students. Some critics maintain that there has not been enough study of the assessments being administered to determine that the tests are valid and reliable.61

Furthermore, other observers argue that the high-stakes nature of the testing changes the educational environment. The basic proposition is that because test scores in math and reading are the sole stan-

59. See id. In a few states the added consequences of NCLB may cause states to lower academic standards already in place to insure schools are not labeled as “failing” under NCLB. See Carrie Sturrock, States Distort School Test Scores, Researchers Say: Critics Say California Among Those That Lower Standards for No Child Left Behind, SAN FRANCISCO CHRON., June 30, 2006, at A4; see also Bruce Fuller et al., Is The No Child Left Behind Act Working? The Reliability of How States Track Achievement (Univ. of Cal., Berkeley Policy Analysis for Cal. Educ., Working Paper No. 06-1, 2006), available at http://pace.berkeley.edu/NCLB/WP06-01_Web.pdf (examining twelve state testing systems and concluding that state test results exaggerate improvement, and NCLB has the unintended incentive of encouraging states to lower proficiency standards).

60. SUNDERMAN ET AL., supra note 44, at 26–27. The State of Connecticut argues in its lawsuit against the DOE that its “state-wide mastery examination” had been successful, and that requiring additional measures of student achievement is unnecessary. First Amended Complaint, supra note 55, at 3.

61. See generally Benjamin Michael Superfine, At the Intersection of Law and Psychometrics: Explaining the Validity Clause of No Child Left Behind, 33 J.L. & EDUC. 475, 476–77 (2004) (explaining that the consequences of high-stakes testing under NCLB should result in states taking special care to ensure that testing practices are valid as defined under the Act); David Nash, Improving No Child Left Behind: Achieving Excellence and Equity in Partnership with the States, 55 RUTGERS L. REV. 239, 241 (2002) (arguing that NCLB is flawed because it relies on the ability of states to develop rigorous and valid assessment instruments).
dards for measuring AYP, the incentive for school administrators and teachers is to concentrate on mastering only the body of knowledge that will be tested.62 This may be done to the exclusion of, or decrease in, emphasis on nontested subjects such as social studies, music, art, and foreign languages. Even in the areas of reading and math, some groups insist that “teaching to the test” may harm emphasis on broader, critical-thinking skills.63

The negative impact on teachers under NCLB has also been documented.64 “Teachers and their organizations, and people who do research on teachers, were not actively involved in the writing of NCLB and often seem to be the target of the Act.”65 Teachers in schools that do not meet AYP and are labeled as in need of improvement may face sanctions. Under NCLB, teacher compensation and promotion may be tied to testing results.66 Surveys of teachers demonstrate that the majority of teachers disagree with the premise that sanctions will assist them in improving student achievement levels.67 Studies demon-

62. See James E. Ryan, The Perverse Incentives of the No Child Left Behind Act, 79 N.Y.U. L. Rev. 932, 934 (2004). Ryan’s article provides a fascinating perspective on what he believes are the incentives created by NCLB. Ryan praises the goals of the Act, but argues that NCLB is at war with itself. Ryan points to three areas where NCLB creates incentives that work against the goals of the Act. Ryan argues that the academic standards requirements of NCLB actually encourage states to lower standards in order that they might be met. Also, the Act may increase segregation by race and class making it more difficult for these students to catch up to their wealthier peers. Finally, the NCLB’s demand for high-quality teachers may deter some talented people from wanting to enter teaching. Id.

63. One survey of teachers demonstrates that the NCLB accountability system influences the instructional and curricular practices of teachers. In one school district, forty-six percent of teachers in improvement schools agreed that AYP requirements caused them to deemphasize or neglect untested topics. SUNDERMAN ET AL., supra note 44, at 91.

64. NCLB requires school systems to use “highly qualified” teachers. See 20 U.S.C. § 6319 (Supp. III 2003). The requirement for highly qualified teachers has affected teachers in many states. See, e.g., V. Dion Hayes, 370 Uncertified Teachers Will Be Fired; 450 at Risk, Wash. Post, June 25, 2006, at C7 (reporting that hundreds of teachers will be fired due to failure to produce proof of their certification); Feds Won’t Sanction Alaska over Teacher Qualifications, St. News, June 24, 2006, http://www.sitnews.us/0606news/062406/062406_educ_sanctions.html (noting that DOE threatened to place conditions on a federal grant due to Alaska’s failure to meet the “highly qualified” teacher requirement); Associated Press, Test Required for New Iowa Teachers, Sioux City J., http://www.siouxcityjournal.com/articles/2006/06/18/news/iowa/0e42dd779526d7442862571910007ad23.txt (last visited May 7, 2007) (reporting that new elementary school teachers will have to take a test for certification to meet the NCLB requirements); Callie Clark Miller, Federal Deadline on Teacher Certification Coming Next Month, SOUTHEAST MISSOURIAN, June 12, 2006, at 1A (stating that very few Missouri school districts have met the federal requirement of having “highly qualified” teachers).

65. SUNDERMAN ET AL., supra note 44, at xxxii.

66. See id.

67. See id. A survey of teachers in Vermont reported that eighty-three percent of all teachers believed that NCLB mandates were ineffective and had a detrimental
strate that teachers believe that “effective teachers, committed administrators, and sufficient resources in the form of instructional and curriculum materials are also needed for improving schools.”

3. Impact on Minority and Disabled Students

An additional complication of NCLB is the effect of the additional assessments and accountability regime on groups of vulnerable students, such as minority and disabled students. Ironically, NCLB sets a special legislative agenda to improve the educational performance of these students. The potential and actual impact of NCLB on minority and disabled students is a complicated story that deserves in-depth analysis and consideration. This subsection only seeks to provide a brief overview of the controversy.

The critique of NCLB in regards to minority and disabled students is multifaceted. First, some observers argue that NCLB has a large loophole allowing schools to exclude minority students from calculations of AYP. The Act and DOE regulations require that the number of any minority subgroup taking the assessment be large enough to reliably measure the results. Many schools have asked for exemptions to exclude minority students from being counted in their school results due to an insufficient sample. In 2005–2006, the test scores of nearly two million students were not counted in the AYP calculations, and most of these were minority students. The DOE claims that it is attempting to close this loophole in the Act. Some observers argue that the exemption creates perverse incentives, such as at-

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68. SUnderman et al., supra note 44, at 87.
69. See generally Lewin, supra note 7, at 95 (arguing that DOE regulations under NCLB “subjugate desegregation to school choice and standards-based accountability”).
70. See Ryan, supra note 62, at 962.
71. 20 U.S.C. § 6311(b)(2)(I)(ii) (Supp. III 2003) (“Not less than 95 percent of each group of students . . . who are enrolled in the school are required to take the assessments . . . on which adequate yearly progress is based (except that the 95 percent requirement described in this clause) shall not apply in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student.”).
72. See, e.g., Meghan E. Moravcik, English-Learner Test Scores May Imperil Schools, ARIZ. REPUBLIC, June 10, 2006, at A1 (stating that state education officials battle to exclude test scores of students not yet proficient in English in order to avoid having 100 schools labeled as “failing” under NCLB).
73. Associated Press, supra note 50.
tempts to maintain small numbers of minority and disabled students in a school to continue to qualify for this exemption.\textsuperscript{75}

In contrast, the DOE and some civil rights advocates argue that the school transfer option may help to integrate students from schools with greater numbers of low-income and minority students into schools with higher achievement levels.\textsuperscript{76} The basic theory is that if low-performing schools are schools that have high concentrations of minority and poor students, the transfer option will allow these students to move to schools with higher achievement levels. This would make the schools with higher achievement levels more racially integrated. However, the data collected on the school transfer option demonstrates that a very small number of students are taking advantage of the transfer option.\textsuperscript{77}

Some observers have also pointed out the possible effect NCLB may have on the already complicated landscape of desegregation cases. The school-choice provisions of NCLB may throw off the racial balance achieved under the student assignment aspects of a school district's desegregation plan.\textsuperscript{78} This concern is exacerbated because the DOE has informed some school districts that they should follow the NCLB school-choice provision even when doing so conflicts with desegregation orders.\textsuperscript{79} The DOE has also advised school districts facing this problem to seek to have desegregation orders lifted.\textsuperscript{80}

The statutory language and regulations of NCLB also attempt to consider the implications for students covered by the Individuals with

\textsuperscript{75} See Ryan, supra note 62, at 961–62.
\textsuperscript{76} Sunderman et al., supra note 44, at 40; see also Daniel J. Losen, Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability, 47 How. L.J. 243, 246 (2004) (arguing that NCLB's race-conscious accountability measures have the potential to give civil rights advocates the tools to hold schools accountable for failures in the education of minority and socioeconomically disadvantaged students).
\textsuperscript{77} The Harvard Civil Rights Project examined the school transfer policy in ten school districts that began implementation of the option in 2002–2003. Their study showed that only three percent of the eligible students requested transfers. The Council of Great City Schools study from 2003–2004 shows that nationwide only two percent of the eligible students requested transfers. Sunderman et al., supra note 44, at 44–45.
\textsuperscript{78} See Lewin, supra note 7, at 96 (pointing out that the DOE regulations require school districts to place school choice provisions above their desegregation plans); Cathryn Vaughn, Note, The School Choice Provision of the No Child Left Behind Act and Its Conflict with Desegregation Orders, 13 B.U. PUB. INT. L.J. 79 (2003).
\textsuperscript{79} Vaughn, supra note 78, at 85–86. Vaughn gives the example of the Richmond County, Georgia, school district where the district asked to be exempted from the NCLB school-choice provisions in order to comply with its desegregation plan. The DOE informed the school district that they were not exempt from the Act, and advised them to have their desegregation order lifted. Id.
\textsuperscript{80} Id.
Disabilities Education Act (IDEA). Some critics argue that the goals of NCLB are inherently at odds with the IDEA.\textsuperscript{81}

\section*{II. PROCEDURAL OVERVIEW OF NCLB}

The previous Parts provided an overview of the substantive requirements of NCLB and the critiques of the Act by various interest groups. This Part begins to provide an overview of an area of NCLB that has been virtually ignored—the procedural aspects of implementing the Act. Title I of NCLB gives broad rulemaking authority to the Secretary of Education. "The Secretary may issue such regulations as are necessary to reasonably ensure that there is compliance with this subchapter."\textsuperscript{82} Under Title I, in order to adopt rules to implement the Act, the agency must engage in negotiated rulemaking. The negotiated rulemaking procedure under the Act first requires "the Secretary [to] obtain the advice and recommendations of representatives of Federal, State, and local administrators, parents, teachers, paraprofessionals, and members of local school boards and other organizations involved with the implementation and operation of programs under this subchapter."\textsuperscript{83}

After the agency receives the recommendations, it begins the negotiated rulemaking process by appointing a group to participate in the negotiations.\textsuperscript{84} The agency should appoint representatives to partici-

\begin{itemize}
  \item \textsuperscript{81} Matthew R. Plain, Comment, \textit{Results Above Rights? The No Child Left Behind Act's Insidious Effect on Students with Disabilities}, \textit{10 Roger Williams U. L. Rev.} 249, 250 (2004) (concluding that the goals of NCLB are adverse to the directives of the Individual with Disabilities Education Act).
  \item The Ottawa, Illinois, school districts sought to have a federal court declare two sections of NCLB invalid because complying with such provisions would require the districts to violate the IDEA. \textit{See Order on Motion to Dismiss, Bd. of Educ. of Ottawa Twp. High Sch. Dist. 140 v. U.S. Dep't of Educ., No. 5C655 (N.D. Ill. July 20, 2005) (on file with author).}
  \item The plaintiffs sought a declaratory judgment invalidating provisions of NCLB that require the school districts to employ systemic remediation activities that necessitate the modification of students' individualized education programs (IEPs) without regard to the individual needs of the students. The judge dismissed the complaint because the districts failed to establish a "sufficient level of injury" to meet the constitutional standing requirements. The district court found that because NCLB does not mandate any specific action, the school districts are not required to do anything that would necessarily violate the IDEA. Since the suit was dismissed for lack of standing, the court did not reach the defendant's arguments that the suit should be barred by the Eleventh Amendment.
  \item \textsuperscript{82} 20 U.S.C. § 6571(a) (Supp. III 2003).
  \item \textsuperscript{83} Id. § 6571(b)(1).
  \item \textsuperscript{84} \textit{See No Child Left Behind Act of 2001}, Pub. L. No. 107-110, § 1901(b)(3)(B), 115 Stat. 1425, 1617 (2002). Before the agency may publish proposed rules under NCLB, the agency was required to establish a negotiated rulemaking process to address standards and assessments for NCLB; select the group to participate in the negotiated rulemaking process from the group that provided advice and rec-
\end{itemize}
pate in the process from among the individuals or groups that provided recommendations and advice.\textsuperscript{85} The Act states that there should be "representation from all geographic regions of the United States, in such numbers as will provide an equitable balance between representatives of parents and students and representatives of educators and education officials."\textsuperscript{86}

The negotiated rulemaking requirement of NCLB is relatively novel in that it is required in every rulemaking under Title I of the Act.\textsuperscript{87} Negotiated rulemaking has traditionally been an option for an agency to adopt after deciding that the rulemaking fits certain criteria.\textsuperscript{88} Under the Negotiated Rulemaking Act of 1990, before instituting a negotiated rulemaking process, the agency should find that "there are a limited number of identifiable interests that will be significantly affected by the rule."\textsuperscript{89} NCLB skips this step in the process by requiring negotiated rulemaking in all circumstances in which the DOE is proposing a new regulation.

A. Negotiated Rulemaking Under NCLB

Soon after NCLB became law, the DOE began the major rulemaking required under Title I of the Act. The DOE's first proposed regulations were intended to implement the statutory requirements related

\begin{quote}
See id.
\end{quote}

\begin{quote}
Id. (emphasis added).
\end{quote}

\begin{quote}
"Before publishing in the Federal Register proposed regulations to carry out this title, the Secretary shall obtain the advice and recommendations of representatives of Federal, State, and local administrators, parents, teachers, paraprofessionals, and members of local school boards and other organizations involved with the implementation and operation of programs under this title." No Child Left Behind Act § 1901(b)(1), 115 Stat. at 1617 (emphasis added).
\end{quote}

NCLB is not the DOE's first foray into negotiated rulemaking. Prior to the passage of NCLB, the DOE promulgated six rules as a result of negotiated rulemaking. Coglianese, supra note 9, at 447 n.29.

In a few other statutes Congress has required an agency to engage in negotiated rulemaking in order to promulgate regulations under a statute. See, e.g., USA Group Loan Serv. v. Riley, 82 F.3d 708 (7th Cir. 1996) (noting that the Higher Education Act was amended in 1992 to require the DOE to conduct a negotiated rulemaking on the liability of loan service providers); Quality Care Ambulance Serv., Inc. v. United States, 204 F. Supp. 2d 1096, 1097 (W.D. Tenn. 2002) (noting that the Balanced Budget Act of 1997 amended Social Security Act to require a new fee schedule set through negotiated rulemaking).

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to academic standards and assessments. The DOE issued a notice seeking advice and recommendations on the proposed regulations from "Federal, State, and local administrators; parents; teachers; paraprofessionals; members of local boards of education; and other organizations involved with the implementation and operation of Title I." Over one hundred parties submitted recommendations to the DOE. From this group of participants, the DOE selected the persons and organizations that would participate on the negotiated rulemaking committee. The rulemaking committee was made up of two DOE officials and twenty-two other individuals from the groups of school administrators, parents, teachers, and other organizations. The DOE also conducted focus groups in four cities. The first negotiated rulemaking focused on the same three areas as the statutory language in Title I of NCLB: academic standards, student assessments, and accountability.

1. Standards

The proposed regulations repeat statutory language that all states must "develop academic content and student academic achievement standards for all schools and all [students]." The regulations allow flexibility for states to develop content standards that cover each grade, or content over several grades. The regulations further state that high school standards should reflect what students should know at graduation in math, reading/language arts, and science, rather than content linked to course names. This must have been done in math and reading by 2005-2006.

2. Assessments

The regulations incorporate the statutory requirement that each state "implement a system of high-quality, yearly student academic assessments." The regulations specify that the assessment system should be "designed to be valid and accessible for use with the widest possible range of students, including students with disabilities and students with limited English proficiency." They also incorporate the "statutory language requiring a State's assessment system to be

91. Id.
92. Id.
93. Id.
94. Id.
95. Id. at 30,453.
96. Id.
97. Id.
98. Id.
99. Id.
supported by evidence provided by test publishers or other relevant sources."\textsuperscript{100}

The regulations also provide more detailed instructions for states on the collection and use of assessment data. For the purpose of disaggregating assessment data, students with disabilities are defined by the IDEA.\textsuperscript{101} The regulations make clear that the Act's "requirement to test only objective knowledge does not prohibit essay responses and opinion questions."\textsuperscript{102} "[A] State may use different types of assessments as long as each test (for grade and subject) fully addresses the depth and breadth of the State's academic content standards; is valid, reliable and of high technical quality ...."\textsuperscript{103}

As discussed in more detail in the next Part of this Article, the negotiated rulemaking process also yielded regulation concerning how a state's data should be measured against student assessment data from other states. The regulations adopted require that if a state uses assessments referenced against national norms at a particular grade, the assessments should be augmented to accurately measure the depth and breadth of the state's academic content and allow for results to be measured in terms of the state's academic levels.\textsuperscript{104} The regulations allow a state to use both state and local assessments if the design is rational and measures state academic content.\textsuperscript{105}

The regulations also reiterate the statutory timeline for implementation of assessments. States must have implemented yearly assessments in math and reading/language arts in grades three through eight, and an assessment once during grades through twelve by 2005–2006.\textsuperscript{106} The assessment system must include all students and provide accommodations for students with disabilities.\textsuperscript{107} There must be one or more alternate assessments for students with disabilities.\textsuperscript{108} Also, assessments must be made for students with limited English proficiency in a "valid and reliable manner."\textsuperscript{109}

3. Accountability

The regulations also include an exception that has become the source of controversy with respect to the gathering of assessment data about minority students. The regulations state that in determining AYP, the state is responsible for determining how many students con-

\begin{thebibliography}{99}
\bibitem{100} Id.
\bibitem{101} Id. at 30,454.
\bibitem{102} Id.
\bibitem{103} Id.
\bibitem{104} Id.
\bibitem{105} Id.
\bibitem{106} Id. at 30,455.
\bibitem{107} Id.
\bibitem{108} Id.
\bibitem{109} Id.
\end{thebibliography}
stitute a sufficient number to make results reliable. The results must be disaggregated by gender, race, major racial and ethnic groups, students with disabilities, and limited English proficiency.

B. Adequate Yearly Progress

The NCLB regulations incorporate the requirement that each state must implement a single, statewide accountability system to ensure that all public schools make AYP. Each state must define what constitutes AYP for the state and for all public elementary and secondary schools to ensure that each school meets the academic achievement standards. The definition of AYP must include a separate annual objective for continuous and substantial improvement for economically disadvantaged students, as well as those in major racial and ethnic groups.

The regulations repeat the statutory language that a state should identify schools that do not make AYP for “improvement, corrective action, or restructuring.” After an “improvement” designation, a school that does not make AYP for two additional years should be identified as in need of “corrective action” and offer public school choice and supplemental educational services to students enrolled.

It is important to explain in detail the regulations that were the outcome of the first negotiated rulemaking, primarily to demonstrate their similarity with the statutory language of NCLB that was explained in the previous Part. The similarity between the regulations and the statutory language is the first indication of the startlingly close connection between the substance of NCLB and the way it is affected by the negotiated rulemaking process.

Several important points emerge from this first series of regulations. First, there seems to be a concerted effort by the DOE to paint the negotiated rulemaking process as “nonregulatory.” In other words, the agency claims that its purpose is not to use regulation to provide additional detail to the general statutory provisions, but only to explain the statutory provisions as they are. As set forth in the preamble to the proposed regulations,

[the Secretary intends to regulate only if absolutely necessary. Rather than regulating extensively, the Secretary intends to issue non-regulatory guidance addressing particular legal and policy issues under Title I programs . . . . This

110. Id.
111. Id.
112. Improving the Academic Achievement of the Disadvantaged, 67 Fed. Reg. 50,986, 50,987 (proposed Aug. 6, 2002) (to be codified at 34 C.F.R. pt. 200). There must be guidelines for identifying the students with disabilities who should take alternative assessments, and those numbers should be reported. Id.
113. Id. at 50,986.
114. Id. at 50,989.
115. Id.
guidance will inform schools, parents, school districts, States, and other affected parties about the flexibility that exists under the statute, including different approaches they may take to carry out the statute’s requirements.\textsuperscript{116} The agency’s goal of providing only guidance, and not actual regulation, means that the regulations themselves contain little substance. As demonstrated above, most of the regulations simply restate the language of the Act with a few clarifications. The agency is admittedly engaged in the project of not regulating.

Therefore, the negotiated rulemaking process that sought the input of the teachers, students, states, and local school boards amounts to nothing of substance. After meeting with the various interest groups, the agency adopts only exactly what it was given by Congress. The key problem with the DOE’s position is that the statutory language is clearly the work of Congress, while the regulations now have the gloss of stakeholder consensus due to the participation of the interest groups. The next Part of this Article demonstrates how the use of negotiated rulemaking in the NCLB nonregulatory environment distorts the original purpose of negotiated rulemaking.

III. THE GOALS AND PURPOSES OF NEGOTIATED RULEMAKING

A. Harter’s Negotiated Rulemaking

In 1982, Phillip Harter published the first article advocating the use of negotiated rulemaking by federal agencies.\textsuperscript{117} Harter described a “malaise” in administrative law, especially surrounding the rulemaking procedures.\textsuperscript{118} Harter argued that the malaise surround-
ing agency rulemaking was created due to the adversarial nature of the procedure, and that parties continually complained about the time, expense, and legitimacy of the rulemaking process. Under the traditional "notice and comment" informal rulemaking as described in the Administrative Procedure Act (APA), the agency would make the initial determinations about policy and develop a proposed rule based on the expertise of the agency staff.


120. Id. at 9 (stating that the APA "was clearly built on the notion of agency expertise"). The Supreme Court has repeatedly pointed to agency expertise as a reason for courts to be deferential to the agency when reviewing an agency's decision to adopt a regulation. See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); generally Nat'l Cable & Telecomm. Ass'rn v. Brand X Internet Serv., 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a
NEGOTIATED RULEMAKING AND NCLB

statute trumps an agency construction otherwise entitled to 

Chevron
deference only if the prior court decision holds that its construction follows from the unambiguous terms of the Act and thus leaves no room for agency discretion.”; Barnhart v. Walton, 535 U.S. 212, 222 (2002) (“In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that 

Chevron
provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.”); Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 20 (2000) (“The Secretary's regulations make clear that she so interprets the statute. The statute’s language, though not free of ambiguity, bears that interpretation.” (citations omitted)); United States v. Haggar Apparel Co., 526 U.S. 380, 390 (1999) (“Particularly in light of the fact that the agency utilized the notice-and-comment rulemaking process before issuing the regulations, the argument that they were not intended to be entitled to judicial deference implies a sufficient departure from conventional contemporary administrative practice that we ought not to adopt it absent a different statutory structure and more express language to this effect in the regulations themselves.”); AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 397 (1999) (“Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency . . . . We can only enforce the clear limits that the 1996 Act contains . . . .”); INS v. Aguirre-Aguirre, 526 U.S. 415, 423–425 (1999) (noting that the court of appeals failed to apply the appropriate level of deference to the attorney general and Board of Immigration Appeal's opinions); Nat'l Fed'n of Fed. Employees v. Dep't of Interior, 526 U.S. 86, 98–99 (1999) (discussing why judicial deference to the agency decision is appropriate); PUD No. 1 of Jefferson City. v. Wash. Dept. of Ecology, 511 U.S. 700, 712 (1994) (“EPA’s conclusion that activities—not merely discharges—must comply with state water quality standards is a reasonable interpretation of § 401, and is entitled to deference.”); ABF Freight System, Inc. v. NLRB, 510 U.S. 317, 324–25 (1994) (“When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling
Harter proposed a form of negotiation as an alternative to the traditional notice and comment rulemaking procedure. Harter argued that parties having direct participation through negotiations with the agency is preferable to entrusting the major policy decisions weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.' (quoting Chevron, 467 U.S. at 844); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993) ("Where the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction."); Nat'l R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 417 (1992) ("Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law."); Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 612 (1991) ("[E]ven if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority."); Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117, 128 (1991) (finding Interstate Commerce Commission's regulation valid because the relevant statute is worded in broad language); Fort Stewart Sch. v. Fed. Labor Relations Auth., 495 U.S. 641, 644–45 (1990) ("In construing these provisions, and the other provisions of the FSLMRS at issue in this case, the Authority was interpreting the statute that it is charged with implementing. We must therefore review its conclusions under the standard set forth in [Chevron]." (citations omitted)); Dep't of the Treasury v. Fed. Labor Relations Auth., 494 U.S. 922, 928 (1990) ("We must accept that construction if it is a reasonable one, even though it is not the one we ourselves would arrive at."); Sullivan v. Everhart, 494 U.S. 83, 89 (1990) (stating that if a statute is silent or ambiguous to an issue, then the court is limited to only determining whether or not the agency's interpretation is rational); Sullivan v. Zebley, 493 U.S. 521, 541 (1990) (regulations given by the Secretary of Health and Human Services could not be reconciled with the Act); Massachusetts v. Morash, 490 U.S. 107, 116 (1989) (Secretary of Labor's decisions are entitled to deference); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 292 (1988) ("If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute."); Atkins v. Rivera, 477 U.S. 154, 162 (1986) ("Because the Secretary's regulation appears supported by the plain language of the statute and is adopted pursuant to the explicit grant of rulemaking authority in § 1396a(a)(17), it is 'entitled to more than mere deference or weight.'" (quoting Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981))); United States v. City of Fulton, 475 U.S. 657, 666 (1986) ("We must uphold that interpretation if the statute yields up no definitive contrary legislative command and if the agencies' approach is a reasonable one."); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985) ("An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress."); Aluminum Co. of Am. v. Cent. Lincoln Util. Dist., 467 U.S. 380, 390 (1984) (discussing the importance of giving deference to an administrator's decision); United States v. Shimer, 367 U.S. 374 (1961) ("Where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong." (quoting Bates & Guild v. Payne, 194 U.S. 106, 108–09 (1904))).

121. Harter, supra note 117, at 7.
to the agency.\textsuperscript{122} Harter reasoned that a regulation negotiated between the interested parties and the agencies would have the support of the various interests and the political legitimacy that many rules lacked.\textsuperscript{123} Harter characterized the traditional APA rulemaking as an adversarial process in which the agency makes the initial policy decision, and then is forced to defend its position after it receives additional information from the interested parties.\textsuperscript{124}

Harter further contrasts negotiated rulemaking with traditional APA informal or hybrid rulemaking. Under APA rulemaking, the participation of interested parties is limited to presenting facts and arguments to the agency in order for the agency to develop a record that establishes the factual basis for its rule.\textsuperscript{125}

Harter presents the major justifications for adopting negotiation as a model for agency rulemaking. First, negotiated rulemaking will lend political legitimacy to an agency rulemaking system that has lost legitimacy.\textsuperscript{126} Traditional APA rulemaking attempts to garner legitimacy by relying on agency expertise, whereas negotiated rulemaking derives its legitimacy from interested parties and the agency reaching a consensus as to the proposed rule.\textsuperscript{127}

Second, interested parties in a negotiated rulemaking participate directly in the decisionmaking.\textsuperscript{128} The parties are closely involved in developing the regulation, instead of simply submitting information to the agency and the agency deciding how to use the information.\textsuperscript{129} Harter gives the example of a dam project where the agency talked to the developers and environmental groups involved and reached a compromise before beginning the official administrative process. Harter argues that involving the interested parties in the decisionmaking is also less expensive than the adversarial model of APA rulemaking because it allows the agency to avoid the need to develop defensive re-

\textsuperscript{122} \textit{Id.}.

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.} at 18–22 (describing the adversarial nature of APA rulemaking).

\textsuperscript{125} \textit{Id.} at 16. The Supreme Court and appellate courts would review agency decisions to insure that the agency had a factual basis underlying the adopted regulation. \textit{See, e.g.,} United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252–53 (2d Cir. 1977) (criticizing the FDA for failing to explain its review and use of scientific studies presented to the agency during the rulemaking procedure); Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

\textsuperscript{126} \textit{See} Harter, \textit{supra} note 117, at 18.

\textsuperscript{127} \textit{See id.} at 17 ("Agency actions no longer gain acceptance from the presumed expertise of its staff. It is no longer viewed as legitimate simply because it fills in the gaps left by Congress, or because it is guided by widely accepted public philosophy. To the extent that rulemaking has political legitimacy, it derives from the right of affected interests to present facts and arguments . . . .").

\textsuperscript{128} \textit{Id.} at 28.

\textsuperscript{129} \textit{Id.}
search to counter information submitted by a party in response to a proposed rule.  

Third, Harter predicts that negotiated rulemaking will allow parties to focus on their real interests and rank their concerns in order to make trades in the negotiating process. In APA rulemaking, a party will often take an extreme position, like seeking to overturn an entire regulation, when the party’s real interest is to modify a few aspects of regulation. In the APA adversarial model, this type of small disagreement may lead to protracted litigation, while in the negotiation model, parties are able to express their real concerns and have them specifically addressed.

One of Harter’s key justifications is that negotiated rulemaking is more efficient than traditional APA rulemaking. “Rulemaking by negotiation can reduce the time and cost of developing regulations by emphasizing practical and empirical concerns rather than theoretical predictions.” Negotiation allows the parties to jointly decide what information is necessary to make an informed decision. This is in contrast to traditional APA rulemaking pursuant to which all the parties and the agency collect their own evidence in order to have information available for the adversarial process. Negotiated rulemaking allows the parties and agencies to pool their resources and spend time focusing on the details of the regulation.

Finally, Harter theorized that the added legitimacy created through negotiation would decrease litigation. “Overarching all the other benefits of negotiation is the added legitimacy a rule would acquire if all parties viewed the rule as reasonable and endorsed it without a fight.” Harter believed that many of the disputes settled in courtrooms in the world of APA rulemaking would be discussed and compromised among the parties during the negotiation.

B. Negotiated Rulemaking Act of 1990

Many of Harter’s prescriptions outlined in his groundbreaking article became law when negotiated rulemaking was officially sanctioned by Congress in the Negotiated Rulemaking Act (NRA) of 1990

130. Id.
131. Id. at 29.
132. Id. Harter gives an example of an environmental group suing the EPA for granting a permit for a uranium mine, when the environmental group felt the environmental impact statement (EIS) was insufficient. After the lawsuit was filed, the parties entered into negotiations and the environmental group admitted that its goal was a more extensive EIS, not to completely block the mine permit.
133. Id. at 30.
134. Id.
135. Id.
136. Id. at 31.
and permanently reauthorized in 1996. Negotiated rulemaking is a supplement for the notice-and-comment informal rulemaking under the APA. When an agency engages in negotiated rulemaking, the agency meets with representatives of interested parties prior to issuing a proposed rule. The interested parties may include the regulated industry, community citizen groups, and trade associations. The agency tries to reach a consensus with the representatives.

Under the NRA, agencies are not required to engage in negotiated rulemaking. Prior to beginning a rulemaking, the agency should assess whether a negotiated rulemaking would be appropriate. This includes considerations about the number of identifiable interests and the likelihood that the parties will negotiate in good faith.

Once the agency decides to undertake a negotiated rulemaking process, there is a notice in the Federal Register to seek representatives from interested parties and give notice that the process will be a negotiated rulemaking. If the group reaches a consensus on a rule, the proposed rule is then published in the Federal Register and the remaining steps of the notice and comment procedure are undertaken.

C. Critiques of Negotiated Rulemaking

After the adoption of the NRA following Harter's seminal article, most of the literature on negotiated rulemaking praised its outcomes. More recently, the academic literature reflects significant critiques of negotiated rulemaking. There are a number of case studies evaluating negotiated rulemaking involving the Environmental


138. Id. at 1256-57.

139. Id. at 1267. One of Harter's concerns in his negotiated rulemaking proposal was that negotiated rulemaking would be used in situations where it was inappropriate. "Negotiation must be carefully analyzed to determine not only whether it can work at all in the regulatory context, but also to identify those situations in which it is appropriate." Harter, supra note 117, at 31.

Harter identified many criteria for determining whether negotiated rulemaking would produce a sound regulation or facilitate the rulemaking process. Id. at 41. First, various interests must have sufficient power so that no single party may achieve its goal without negotiating with the others. Second, there must be a limited number of identifiable parties to participate in the negotiation. Next, the issues to be negotiated must be mature or "ripe" for determination. Fourth, the parties need to be assured that regulation is imminent and inevitable to persuade them that they will benefit from expending the resources necessary to negotiate. Fifth, there must be some opportunity for both sides to win, meaning zero-sum games are not ideal for negotiation. Id. at 45-52.

140. Coglianese, supra note 137, at 1267.

141. See Funk, supra note 117, at 1353 (stating that the academic literature on negotiated rulemaking has largely extolled the virtues of the procedure).
Protection Agency (EPA) because the EPA has undertaken and completed the most negotiated rulemakings of any federal agency.\textsuperscript{142}

In recent years, commentators such as Cary Coglianese have focused on two primary justifications for negotiated rulemaking: efficiency and reduction of litigation. In one of the only comprehensive empirical studies of negotiated rulemaking, Coglianese concludes that the overall proportion of negotiated rulemakings is still relatively small, at one-tenth of one percent of all agency rulemakings. There were sixty-seven negotiated rulemakings undertaken by the end of 1996, thirteen abandoned, and nineteen remained pending. By 1997, only thirty-five rules promulgated using negotiated rulemaking procedure remained.\textsuperscript{143}

William Funk argues that negotiated rulemaking conflicts with the goals and theories of the APA and the administrative agency system.\textsuperscript{144} Funk states that the goal of agencies is to carry out the law as written by Congress.\textsuperscript{145} Negotiated rulemaking makes the law "merely a limitation on the range of bargaining [amongst the parties]."\textsuperscript{146} The parties involved in a negotiated rulemaking seek to serve their private interests, and a bargain is struck between the private interests and the agency within the limits that the law provides.

Funk further contends that the role of the agency is to be a responsible actor, and contrary to this role, negotiated rulemaking reduces the agency to a participant.\textsuperscript{147} The agency should not become a mediator or brokering service.\textsuperscript{148} Instead, the agency's ultimate responsibility is to achieve statutory goals. Funk argues that in negotiated rulemaking, the agency is reduced "to the level of a mere participant in the formulation of the rule and [negotiated rulemaking] essentially

\textsuperscript{142} See Coglianese, supra note 137, at 1273.

\textsuperscript{143} See id. at 1274. According to Coglianese the average negotiated rulemaking takes a little less than two and a half years to complete from the time intent to engage in negotiated rulemaking is announced until the final rule is published. \textit{Id.} at 1279. Coglianese also found that there is no considerable time savings over the traditional informal rulemaking process, although negotiated rulemaking demands more concentrated amounts of time. Also, there has been litigation after some notable negotiated rulemakings including the EPA's visibility rule for the Grand Canyon and the EPA's reformulated gasoline rule. Coglianese says from 1987 through 1991, twenty-six percent of EPA rules were challenged. At least six of the EPA's twelve negotiated rules were challenged. \textit{Id.} at 1301.

\textsuperscript{144} See Funk, supra note 117, at 1374.

\textsuperscript{145} Id.

\textsuperscript{146} \textit{Id.} See also William Funk, \textit{When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards}, 18 ENVTL. L. 55, 67 (1987) (describing how in an EPA negotiated rulemaking the process led the agency to deviate from the law).

\textsuperscript{147} Funk, supra note 117, at 1375.

\textsuperscript{148} Id. at 1376.
denies the agency any responsibility beyond effectuating the consensus achieved by the group.\textsuperscript{149}

Funk also asserts that the agency is required to exercise instrumental rationality.\textsuperscript{150} An agency is required to design solutions to the problems posed by the Act.\textsuperscript{151} The agency should gather data, views, arguments, and other relevant material to come to a rational decision.\textsuperscript{152} Negotiated rulemaking undermines the search for rationality by putting the emphasis on coming to a consensus instead of reaching the best solution.\textsuperscript{153}

Funk also maintains that the agency should do what is in the public’s best interest according to the law and the information the agency gathers.\textsuperscript{154} When the agency acts in the public interest, it establishes and maintains its legitimacy. Negotiated rulemaking undermines this principle because it allows the agency’s legitimacy to flow from the participation of parties and consensus building instead of the agency’s ability to act in the public interest.\textsuperscript{155}

\textsuperscript{149} Id.
\textsuperscript{150} Id. at 1379.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 1380.
\textsuperscript{153} See id. at 1382 (claiming that in one negotiated rulemaking the EPA used its data and analysis as chips in the bargaining process instead of tools to reach a reasoned decision).
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 1386. Funk also describes two schools of thought that derive from the study of legislative and administrative process. Public-choice theory is the idea that regulation is inefficient because legislators and bureaucrats act in their own self-interest, and in accordance with any special interest that will help them achieve their goal. Id. at 1383. Interest-representation theory says there is no general public interest or welfare to guide administrative decisionmaking. Groups should attempt to influence agency participation by organizing and asserting themselves in the administrative process. Id. at 1384. See Jody Freeman, \textit{The Private Role in Public Governance}, 75 N.Y.U. L. Rev. 543, 561–62 (2000) (providing a comparison of the public-choice theory and interest-representation theory). \textit{But see id.} at 567–71 (presenting a critique of the public-choice theory and the unavoidable flaws inherent in implementing such a system). \textit{See generally id.} at 559–60 (explaining the effect the interest-representation theory has on administrative law); Harold H. Bruff, \textit{Legislative Formality, Administrative Rationality}, 63 Tex. L. Rev. 207, 210–12 (1984) (providing a summary of the interest-representation theory and an overview of the reasons and motivations behind adopting such a theory in policymaking); Frank B. Cross, \textit{The Judiciary and Public Choice}, 50 Hastings L.J. 355, 355–82 (1999) (discussing the impact ‘public choice’ has on the judiciary and litigation); Richard B. Stewart, \textit{The Reformation of American Administrative Law}, 88 Harv. L. Rev. 1667, 1760–802 (1975) (describing the interest representation model and how it affects administrative law); Keith Werhan, \textit{The Neoclassical Revival in Administrative Law}, 44 Admin. L. Rev. 567 (1992) (describing the “interest representation” period and the “neoclassical revival”).
NCLB requires extensive cooperation from federal, state, and local officials. The Act also has a significant impact on local school boards, teachers, parents, and children. NCLB presents the type of scenario described by Harter in which the agency's work in rulemaking may be assisted by interacting with interests groups and attempting to pool resources. Under Harter's vision of negotiated rulemaking, the NCLB interest groups would pool information and ideas in order to reach the best policy choice.

At the same time, unlike the NRA, there is no gateway procedure for negotiated rulemaking under NCLB. Whenever the DOE undertakes regulation under Title I of the Act, it must use the negotiation process. This means that negotiation may be used in situations in which it may not be most efficient.

Finally, the critiques of negotiated rulemaking represented by Funk's arguments resonate in the NCLB environment. Is the DOE seeking the benefits and legitimacy that derive from an appearance of consensus amongst the affected interest groups to the detriment of the public interest? Is data and other relevant information being used only as a bargaining tool instead of a means to reach a rational resolution? The next Part explores the implications of the use of negotiated rulemaking under NCLB.

IV. CONNECTING THE SUBSTANTIVE AND PROCEDURAL FAILINGS OF NCLB

The previous Parts have presented a substantive and procedural overview of NCLB. This Part makes the connection between the substantive critiques of the Act and the DOE's administration of the Act. I argue that the misuse of the negotiated rulemaking process is actually magnifying the substantive shortcomings of the Act.

In order to demonstrate the integral role that administrative procedure has in the functioning of NCLB, this Article focuses on legislative history. Why did Congress require that all regulations under Title I of the Act be the product of the negotiated rulemaking process? The statutory language and legislative history demonstrate several reasons.

First, the inclusion of negotiated rulemaking appears to be an acknowledgement by Congress that NCLB is a complicated statutory scheme that will affect numerous groups of stakeholders. The Act

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156. See supra Part I.
157. See supra section I.B.
158. See supra section III.A.
159. See supra section III.A.
160. See supra notes 87–89 and accompanying text.
161. See supra notes 87–89 and accompanying text.
162. See supra section III.C.
states that at the outset of the negotiated rulemaking process, the agency should obtain "the advice and recommendations of representatives of Federal, State, and local administrators, parents, teachers, paraprofessionals, and members of local school boards." 163

Also, Congress appears to be concerned with the Act's legitimacy in the eyes of the key stakeholders. The Act specifically mentions that representatives of parents and students should be included in the rulemaking process. The DOE is required to "provide an equitable balance between representatives of parents and students and representatives of educators and education officials" on the negotiated rulemaking committee.164

Beyond the plain language of the Act, its legislative history provides further support for the view that Congress's intent was to get input from various stakeholder groups that will be affected by NCLB.165 The conference report outlines the intended balance among representatives of parents, school officials, and others on the negotiated rulemaking committee:

The Conferees intend that the Secretary select individuals to participate in the Title I negotiated rulemaking in numbers that will provide an equitable balance between representatives of parents and students and representatives of educators and education officials. The Conferees do not intend this language to require strict numerical equality or comparability among these representatives. Rather, the Conferees intend the Secretary to have flexibility in selecting the Conferees, while ensuring that the views of both program beneficiaries and program providers are fairly heard and considered. 166

The legislative history of NCLB further emphasizes the need for participation by certain groups of parents and students:

[Specifically], parents or other representatives of migrant children, homeless children, and limited English proficient children be included among "parents" and that civil rights groups, test publishers, participating private schools, and faith-based organizations with educational expertise [should] be included among the "other organizations involved with the implementation and operation of programs under this title."167

A. The DOE Fails to Comply with Negotiated Rulemaking Requirements Under NCLB

Despite clear congressional intent that negotiated rulemaking be used to gather information from stakeholders and gain legitimacy for NCLB, the DOE has failed to properly administer the Act. First, the DOE has failed to comply with the negotiated rulemaking portions of

164. Id. (emphasis added).
167. Id.
NCLB. Specifically, the DOE has intentionally created negotiated rulemaking committees that inadequately represent the interests of parents and students.

The DOE selected twenty-two people to participate in the negotiated rulemaking committee that created the first NCLB regulations.\(^{168}\) This included six representatives for state administrators and state boards of education, four representatives of local administrators and school boards, four representatives of principals and teachers, seven representatives of students, and one representative of business interests.\(^ {169}\) Of the seven "student representatives," five were also employees of a school system or state DOE.\(^ {170}\)

As noted above, the Act clearly states that while equal representation of all groups (administrators, parents, students) is not required, the DOE should achieve an "equitable balance between representatives of parents and students and representatives of educators and education officials" to insure "that the views of both program beneficiaries and program providers are fairly heard and considered."\(^ {171}\) The DOE failed to follow this statutory directive. Five of the seven representatives for students or "program beneficiaries" were actually "program providers," such as employees of school districts.\(^ {172}\) This lack of representation for program beneficiaries likely meant that their views were not expressed independently from the goals of the program providers.

NCLB's requirement of "equitable balance" indicates that Congress was of the opinion that the views and goals of program beneficiaries and program providers might differ.\(^ {173}\) That is not a surprising conclusion considering that NCLB places significant burdens on the resources that affect school districts, school administrators, and teachers.\(^ {174}\) The failure of the DOE to appoint to the negotiated rulemaking process independent representatives for program beneficiaries is a significant failure in implementation of the Act.

There is evidence from this first negotiated rulemaking that the DOE intentionally created an inequitable balance on the rulemaking

\(^{169}\) Id.
\(^{170}\) Id. The representatives for the students were Tasha Tillman, a parent from Colorado Springs, Colorado; Minnie Pearce, a parent from Detroit, Michigan; Arturo Abarca, a teacher from an elementary school in Los Angeles, California; Maria Seidner, the Director of Bilingual Education for the Texas Education Agency; Dr. Alexa Pochowski, Associate Commissioner, Kansas DOE; Myrna Toney, Director of Migrant Education, Wisconsin DOE; and John R. Clark, Assistant Superintendent for the DOE of the Diocese of Allentown, Pennsylvania.
\(^{171}\) H.R. REP. No. 107-334, at 809 (emphasis added).
\(^{174}\) See infra subsection IV.A.1.
committee. In a lawsuit against the DOE regarding the composition of the rulemaking committee, the plaintiffs pointed to several important pieces of evidence that demonstrate the agency's intention to exclude representatives of parents and students who might disagree with the agency's policy choices.\textsuperscript{175}

In an e-mail regarding one of the two parents on the negotiated rulemaking committee, the agency stated, "[N]ominee, Tasha Tillman, sided with the other parent to include the civil rights groups at the table . . . . On a couple of the other early votes, [Tillman] is also siding with the other parent group. Obviously not as reliable as we thought, still early . . . ."\textsuperscript{176}

The plaintiffs in the lawsuit also pointed to a notice in the \textit{Federal Register} seeking members for the negotiated rulemaking committee. The agency listed several criteria that the agency would use in selecting members of the committee. The first criterion stated that members of the committee should be practitioners "significantly involved with implementing and operating Title I programs."\textsuperscript{177}

The DOE further signaled its intention to silence the representatives of students and parents through the vigorous defense of this lawsuit challenging the negotiated rulemaking committee. In March 2002, a parent of two public school students and two advocacy groups, Designs For Change and the Center for Law and Education, filed a lawsuit in federal court to challenge the composition of a NCLB negotiated rulemaking committee.\textsuperscript{178} The plaintiffs' lawsuit and immediate request for a temporary restraining order (TRO) was filed only two months after NCLB was signed into law.\textsuperscript{179} Thus, almost immediately, the negotiated rulemaking process itself led the DOE and NCLB into litigation.

The plaintiffs sought a TRO to prevent the negotiated rulemaking committee from convening.\textsuperscript{180} The request for a TRO was denied by the district court due to lack of ripeness.\textsuperscript{181} The district court found that the plaintiffs had to wait until the negotiated rulemaking committee concluded its work to proceed with the suit.\textsuperscript{182} Instead of attempting to amicably resolve this dispute, the DOE refused to include any of the plaintiffs on the committee. As discussed below, the DOE's

\textsuperscript{176} Brief for Appellants at 14, Ctr. for Law & Educ., 396 F.3d 1152 (Nos. 02-5227 & 04-5150) (second ellipsis in original) (quoting an e-mail by a DOE employee from March 11, 2002).
\textsuperscript{177} Id. at 10.
\textsuperscript{178} See Ctr. for Law & Educ., 396 F.3d at 1155.
\textsuperscript{179} See id.
\textsuperscript{180} See id.
\textsuperscript{181} See id.
\textsuperscript{182} See id.
refusal to avoid litigation undermines one of the fundamental policy reasons for negotiated rulemaking.

In December 2002, the plaintiffs refiled their suit. The plaintiffs argued that the DOE violated the negotiated rulemaking provisions of NCLB by designating certain educators on the committee as representatives for parents and children. The plaintiffs claimed that the interests of parents and students were inadequately represented on the rulemaking committee and that this was a violation of the procedural rights guaranteed under NCLB.

The plaintiffs argued that the selection of the committee was unlawful under section 1901(b)(3)(B) of NCLB and “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The DOE vigorously and successfully defended this lawsuit, seeking to exclude the advocacy groups and parents from participating on the negotiated rulemaking committee. The district court granted the defendants’ motion to dismiss, finding that the plaintiffs lacked standing to pursue their claims under Article III of the Constitution and that the NRA bars judicial review of the DOE’s selection of committee members. The District of Columbia Circuit affirmed the district court’s determinations that the plaintiffs lacked standing, but refused to reach the issue of whether the NRA bars judicial review.

B. The Impact of Inequitable Balance on the DOE’s Policy Choices

The obvious question that looms large over the DOE’s failure to meet the equitable balance requirement in the Act is why the DOE would intentionally exclude actual representatives of parent’s and children’s interests, and what impact this exclusion had. The answer lies at the heart of the negotiated rulemaking process itself. Negotiated rulemaking requires that the committee reach a consensus on a proposed rule before that rule is published for notice and comment. The existence of widely divergent views on the policy issue to be decided in the rulemaking may signal to the agency that it will be difficult to build consensus. The agency has an incentive, therefore, to exclude differing viewpoints.

It is useful to describe the different viewpoints that would emerge amongst the groups designated to participate in a NCLB negotiated

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184. Id.
185. Id. (citing 5 U.S.C. § 706(2)(A) (1966)).
186. Id. at 17–18.
187. Ctr. for Law & Educ., 396 F.3d at 1153 (“Moreover, because this Court concludes that it lacks Article III jurisdiction over this case, it does not consider the alternate issue of whether judicial review is barred by the Act.”).
rulemaking, including state school and local school administrators, local school board representatives, teachers, parents, and students. The interests of parents and students, the program beneficiaries, are likely to converge. For example, in Center for Law & Education, the plaintiff organizations are an example of the types of interest groups that would likely be included in a negotiated rulemaking committee under NCLB. Both plaintiff organizations had a long history of advocating for parents and children in education, and a special interest in the welfare of low income children.\textsuperscript{189} The two advocacy groups that filed suit against the DOE were Designs for Change and the Center for Law and Education.\textsuperscript{190} Both organizations are advocacy groups that "have long records of promoting parental involvement in education and the overall improvement of the educational system, especially on behalf of low-income students."\textsuperscript{191}

These plaintiff organizations representing NCLB program beneficiaries had differing views on the policy choices to be made in the first negotiated rulemaking. The agency put forth the point of view that, in adopting assessment measures for students, the Act's requirement for "multiple measures" required only the use of standardized tests.\textsuperscript{192} The plaintiff organizations interpreted "multiple measures" to mean that student assessments should include factors other than standardized testing.\textsuperscript{193}

Beyond the plaintiff organizations in Center for Law & Education, other organizations that represent the interests of parents and children have indicated their fundamental disagreement with the Act and the agency's adopted and proposed policy choices. The National Center for Fair and Open Testing, an advocacy group for public school parents and students, issued a report questioning the use of standardized tests as the measure of student achievement.\textsuperscript{194}

Instead of appointing these types of parent and child representatives who might fundamentally disagree with the agency's policy choice, the DOE instead chose to appoint a teacher and local and state education officials as the designated representatives for students. The

\textsuperscript{189} See Ctr. for Law & Educ., 396 F.3d at 1156.
\textsuperscript{190} Ctr. for Law & Educ., 315 F. Supp. 2d at 18.
\textsuperscript{191} Id.
\textsuperscript{192} Id. at 21.
\textsuperscript{193} Brief for Appellants at 33, Ctr. for Law & Educ., 396 F.3d 1152 (Nos. 02-5227 & 04-5150) (arguing that the DOE's failure to clarify the meaning of "multiple measures" under the Act may cause harm to students because of the increased risk that students will be inaccurately assessed). See also Monty Neill \textsl{et al.}, Nat'l Ctr. for Fair & Open Testing, Failing Our Children: How "No Child Left Behind" Undermines Quality and Equity in Education 3 (2004), available at http://www.asu.edu/educ/epsl/EPRU/articles/EPRU-0405-62-OWI.pdf (arguing that the DOE has misinterpreted and failed to enforce the "multiple measures" provision of NCLB).
\textsuperscript{194} See Neill \textsl{et al.}, supra note 193, at 1–2.
appointment of program providers to represent the interests of program beneficiaries excludes unique views that may be held by the program beneficiaries. In contrast to the views of parent and student representatives, program providers have offered differing viewpoints on policy choices.

The lawsuits filed by the State of Connecticut and the school boards in Texas, Michigan, and other states indicate that the primary focus of local and state school administrators is on adequate funding for NCLB mandates and on burdens of administering the Act. By adopting a nonregulatory agenda, the DOE virtually insures that state concerns regarding funding and administrative problems are not debated in the negotiated rulemaking process. Also, the lawsuits themselves are an indication that the concerns of the states and state education agencies are not being fully addressed in the negotiated rulemaking process.

Exclusion of these groups is a choice by the DOE not to hear voices of opposition in the negotiated rulemaking process. The advocacy group plaintiffs indicated their strong opposition to another policy choice at issue in the negotiated rulemaking process. The DOE and the negotiated rulemaking committee agreed to propose a rule that would permit a state to base its assessment system for students on “either or both criterion-referenced assessments or nationally normed assessment.” The advocacy groups objected to the DOE’s proposed use of nationally normed assessments, which allow a student's proficiency in a subject to be measured based on a comparison to other student performance, instead of the mastery of specific skills or knowledge.

The advocacy groups' policy leanings regarding norm-referenced assessments would have posed a problem for the DOE in the consensus building required under negotiated rulemaking. Negotiated rulemaking requires that before a policy becomes a proposed rule, the committee must reach a consensus, which is defined as “the lack of active objection by any Committee member on all issues within a regulatory section.” Thus, if the DOE had appointed either the Center for Law and Education or Designs for Change to the committee, their continued objection to norm-referenced assessments may have caused the DOE to change its policy position to include norm-referenced assessments as the primary method for states in the student assessment process. Therefore, the failure to appoint the advocacy groups to the negotiated rulemaking committee seems to be motivated by the DOE's

195. See supra note 55.
196. See supra Part II.
198. Id. at 21 n.6.
199. Id. at 20 n.5.
determination to push through its own set of predetermined policy preferences. One of the benefits of negotiated rulemaking is to encourage the federal agency to seriously consider alternate viewpoints on policy. In this case, the DOE used selection of the committee members as a method of quieting adverse viewpoints.

Nick Lewin has made a persuasive argument that the DOE also adopted flawed regulations related to the school-choice provisions of NCLB. Lewin points out that the DOE adopted regulations that instruct school districts to follow the school-choice provision even when it conflicts with a desegregation order that is already in place. Lewin argues that this regulation flies in the face of congressional intent because the Act does not direct school districts to ignore desegregation orders. He also contends that the regulation is bad policy because it may make minority students more isolated than before, when one of the stated goals of NCLB is to improve education for minority students.

Lewin's argument is another example of how a flawed negotiated rulemaking process may exacerbate the substantive challenges to NCLB. The school-choice/desegregation rule that Lewin discusses was adopted in the first rulemaking in which there was inadequate representation for parents and students. Arguably, representatives of minority parents and children may have raised concerns about the impact of the NCLB school-choice provision on desegregation plans. Instead of adopting a regulation that is hostile towards desegregation orders, the DOE would have been presented with viewpoints that would have advocated a neutral or friendly position towards maintaining desegregation plans.

The broad goal set forth by Congress in its passage of NCLB is to benefit students, especially those in schools that are underperforming. NCLB requires states to set standards for student performance, and for there to be consequences when schools fail to have students meet those standards. These consequences promise to im-

200. Lewin, supra note 7, at 116. Title 34, section 200.44(c) of the Code of Federal Regulations states:
   (1) If an LEA is subject to a desegregation plan, whether that plan is voluntary, court-ordered, or required by a Federal or State administrative agency, the LEA is not exempt from offering students the option to transfer schools . . . .
   (3) If the desegregation plan forbids the LEA from offering the transfer option . . . the LEA must secure appropriate changes to the plan.
201. Id. at 117.
202. Id. at 120–21.
203. See id. at 116 (noting that the school-choice provision/desegregation regulation was adopted in the first rulemaking concluded December 2, 2002).
205. See supra section I.A.
impact students, parents, and educators. It is fair to say that students will bear the burden of many of these choices.\textsuperscript{206}

C. The DOE's Conduct in NCLB Negotiated Rulemaking also Violates General Negotiated Rulemaking Principles

Another question is whether the DOE's actions under NCLB are an anomaly in the world of negotiated rulemaking. Do agencies always attempt to stack the deck on the rulemaking committee by excluding interest groups who disagree with the agency's initial policy positions? A review of case law on negotiated rulemaking reveals that there have been no other reported cases in which an interest group attempts to challenge the composition of the rulemaking committee.

In the \textit{Center for Law & Education} litigation, the plaintiffs compared their argument to other litigants who have sought inclusion on committees formed under the Federal Advisory Committee Act.\textsuperscript{207} The plaintiffs/appellants argued that under the Federal Advisory Committee Act, the selection of a committee is a final agency action subject to judicial review.\textsuperscript{208}

It seems that in negotiated rulemaking litigation conducted against the EPA, OSHA, and FRA, the challenges have focused on the substantive outcomes of the rulemakings. Specifically, whether the final rule adopted by the agency after a negotiated rulemaking is an arbitrary and capricious interpretation of the governing statute.\textsuperscript{209}

The negotiated rulemaking by the DOE under NCLB was not the agency's first negotiated rulemaking. Prior to the enactment of NCLB, the DOE participated in at least six other negotiated rulemakings.\textsuperscript{210} In reported cases of these six negotiated rulemakings, one

\begin{itemize}
\item \textsuperscript{206} See supra Part I. For example, in Kansas schools students who failed to pass state assessments were required to double reading and math courses to improve test scores. See Heather Hollingsworth, \textit{Students get Double Doses of Three R's}, \textit{Kansas City Star}, June 29, 2006. In New York, thousands of elementary and middle school students will not be promoted to the next grade due to failing test scores. Andrew Wolf, \textit{An Uproar Erupts at State's Delay in Grading Exams}, \textit{N.Y. Sun}, June 20, 2006, http://www.nysun.com/article/34697.
\item \textsuperscript{207} Reply Brief for Appellants at 22, \textit{Ctr. for Law & Educ. v. Dep't of Educ.}, 396 F.3d 1152 (D.C. Cir. 2005) (Nos. 02-5227 & 04-5150).
\item \textsuperscript{208} Id.
\item \textsuperscript{209} See, e.g., \textit{Steel Joist Inst. v. OSHA}, 287 F.3d 1165, 1166 (D.C. Cir. 2002) (challenging safety standards for steel erection adopted by OSHA after a negotiated rulemaking); \textit{Ass'n of Am. R.R. v. Dept' of Transp.}, 198 F.3d 944, 946 (D.C. Cir. 1999) (challenging a Federal Railroad Administration technical bulletin that was issued after a negotiated rulemaking). Cary Coglianese found that as of 1996, six of the EPA's twelve finalized rules developed during negotiated rulemaking were subject to petitions for judicial review filed in federal court. All of these challenges were to the substance of the final rule. Coglianese, supra note 137, at 1301.
\item \textsuperscript{210} See Coglianese, supra note 9, at 393 n.29.
\end{itemize}
negotiated rulemaking was challenged. Congress required the DOE to initiate a negotiated rulemaking to develop regulations to implement the 1992 amendments to the Higher Education Act. There were several challenges to the final rule, including when the new regulations began to apply and the scope of authority for the Secretary of Education to impose broad duties on student loan servicers.

The only procedural challenge found in the reported cases to a DOE negotiated rulemaking was to the procedures used by the DOE in the negotiated rulemaking for the 1992 amendments to the Higher Education Act. Student loan service providers argued that the DOE negotiated in bad faith. The service providers claimed that during the negotiation process, the DOE promised to abide by the consensus reached by the committee unless there was a compelling reason to depart. The Seventh Circuit held that although this promise was made by an agency official, it was unenforceable and that the NRA did not intend to make such promises enforceable. The service providers did not challenge the composition of the rulemaking committee or claim that the Higher Education Act itself demanded that the negotiated rulemaking be conducted in a certain manner. The cases seem to indicate that all of the interested parties were represented in this negotiated rulemaking, including loan service providers, educational institutions, and representatives of students as borrowers.

Thus, the DOE's refusal to include legitimate representatives of parents and students on the negotiated rulemaking committee, as clearly required under NCLB, appears to be a relatively novel procedural defect in the agency's actions. It is important to recognize that this attempt to stack the deck for NCLB negotiated rulemaking is not a common negotiated rulemaking practice.

V. ADDRESSING THE DOE'S FAILURES IN IMPLEMENTATION OF NCLB

It is almost certain that NCLB will continue to exist. The law is up for renewal in 2007 and Congress appears committed to keeping the Act in place. The obvious question is how to correct the substantive and procedural shortcomings of the Act. As demonstrated in the

212. See id; USA Group Loan Serv., Inc. v. Riley, 82 F.3d 708, 712 (7th Cir. 1996).
213. Riley, 82 F.3d at 714.
214. Id.
215. Id. at 715.
previous Parts, many of the substantive shortcomings of NCLB are being enhanced by the DOE's failures in administration. Thus, this Part will focus on how to use administrative procedure to enhance the effectiveness of the Act as it is currently constructed.

It is especially important to focus on improving the DOE's administration, because negotiated rulemaking has the potential to directly address stakeholder concerns with the Act. Many of the substantive critiques of NCLB, such as overreliance on testing and the burdens for minority children are areas where NCLB stakeholders have expertise that may improve the Act. What aspects of the DOE's practice need to change to make negotiated rulemaking a statutory asset instead of a liability?

First, the DOE's limited inclusion of representatives of parents and students from the negotiated rulemaking process is a violation of NCLB and the broader principles of negotiated rulemaking. There are several steps that should be taken to address the DOE's failure in implementation of the Act.

Congress should clarify the "equitable balance" language in NCLB. Currently, the Act provides that the negotiated rulemaking committee should have an equitable balance between representatives of parents and students and representatives of educators and education officials. The agency has interpreted this portion of the Act to allow educators and education officials to act as representatives of parents and children. Congress should repudiate this interpretation with statutory language clarifying that representatives of parent and student interests should not be educators or education officials. While the current statutory language is already clear on this point, Congress must force the agency to adopt the proper interpretation of the statutory language.

Furthermore, Congress should provide a remedy for parties that believe they have been wrongfully excluded from the negotiated rulemaking process. The statutory language is clear that the negoti-
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The negotiated rulemaking committee should include an equitable balance.\textsuperscript{220} This directive has been ignored by the DOE, and through litigation, the agency has fought greater inclusion of parent and student representatives.\textsuperscript{221} In \textit{Center for Law & Education}, the DOE claimed both that the representatives did not have standing and that NCLB provided no private right of action.\textsuperscript{222} The district court agreed that no private right of action was included in the Act.\textsuperscript{223} Although the appellate court refused to reach this question, the outcome of the litigation demonstrates that the Act, as currently written, will likely be interpreted by courts to provide no remedy for interested parties excluded from the negotiated rulemaking process.\textsuperscript{224}

By including an explicit remedy to stakeholders to demand fair constitution of the negotiated rulemaking committee, Congress would provide incentive for the agency to fairly constitute the rulemaking committee. The agency would be aware of potential litigation stemming from the formation of the negotiated rulemaking committee and would have an incentive to compromise with the stakeholders. The agency's current position of attempting to limit participation of stakeholders that may disagree with the agency's initial policy position would be curtailed by the agency's interest in avoiding litigation.

Also, providing a remedy to stakeholders to address unfair constitution of a negotiated rulemaking committee is a return to Harter's original vision of negotiated rulemaking.\textsuperscript{225} Negotiated rulemaking was intended to limit litigation by bringing all the stakeholders to the rulemaking process in order to encourage collaboration and consensus in the rulemaking process.\textsuperscript{226} The events surrounding the first rulemaking under NCLB demonstrate that the agency's current interpretation of the Act is encouraging litigation through the agency's refusal to make a good-faith effort to use the negotiated rulemaking process to build consensus.\textsuperscript{227} Instead, the agency has simply attempted to stack the deck in favor of their initial policy position.\textsuperscript{228} A private right of action would likely help ward off litigation by provid-

\textsuperscript{220} See \textit{supra} Part IV.
\textsuperscript{221} See \textit{supra} section IV.A.
\textsuperscript{222} See \textit{Ctr. for Law & Educ. v. Dept of Educ.}, 396 F.3d 1152, 1156 (D.C. Cir. 2005) (finding that CLE and the individual parent plaintiff lacked standing to challenge the composition of the negotiated rulemaking committee).
\textsuperscript{223} See \textit{Ctr. for Law & Educ.}, 315 F. Supp. 2d at 29–30 (finding that section 570 of the NRA bars judicial review of a challenge to the establishment of an agency's negotiated rulemaking committee).
\textsuperscript{224} On appeal, the District of Columbia Circuit refused to reach the issue of the judicial review bar. \textit{Ctr. for Law & Educ.}, 396 F.3d at 1156.
\textsuperscript{225} See \textit{supra} section III.A.
\textsuperscript{226} See \textit{supra} sections III.A–B.
\textsuperscript{227} See \textit{supra} Part IV.
\textsuperscript{228} See \textit{supra} section IV.A.
ing the agency with an incentive not to stack the deck in the agency's favor.

Those scholars who question the success of negotiated rulemaking in decreasing litigation point to legal challenges by participants in negotiated rulemaking after the adoption of the final substantive rule. I suggest that Congress create two clear avenues for litigation: one at the formation of the rulemaking committee and another after the final rule is adopted. The potential for both a procedural challenge to composition of the committee and a substantive challenge to the rules themselves potentially creates twice the amount of litigation to develop from NCLB rulemaking. However, by clarifying the statutory language regarding composition of the committee and providing a private right of action, the DOE will be forced to bring all legitimate stakeholders into the negotiated rulemaking and to reach a real consensus. By more faithfully following the negotiated rulemaking principles, there will be less likelihood of challenges to the final rules.

Also, critics of negotiated rulemaking, such as William Funk, argue that negotiated rulemaking undermines the rule of law and turns regulation into bargaining among parties with the law serving only as a limitation. In the case of NCLB, I would argue that the participation of the stakeholders is actually needed to fulfill the rule of law. The law in itself requires meaningful participation by state and local officials, and representatives of parents and students. The DOE's refusal to honor this statutory requirement undermines the entire statutory scheme. Beyond the NCLB negotiated rulemaking requirements themselves, input of the stakeholders is vital to meeting NCLB's stated purpose of improving education for all children. Without meaningful stakeholder input, NCLB is destined to become nothing more than another level of bureaucracy with which educators must comply.

Beyond fulfilling the equitable balance requirement of NCLB, improving the administrative process will require the DOE to commit to actually regulate. The DOE currently claims in its rulemaking process that one of the goals of NCLB is to regulate as little as possible. This has led to states being left without sufficient guidance. Also, the DOE is approaching many of the most difficult questions

229. See supra section III.C.
231. See Funk, supra note 117, at 1374.
232. See supra Part IV.
233. See supra Part II.
234. See supra note 55.
under the Act on a case-by-case basis.\textsuperscript{235} This is a limited strategy for creating policy.

NCLB is a complex act that requires cooperation from all fifty states and the federal government. This statute comes into a highly regulated environment of already existing state laws regarding student achievement and testing. In the face of this regulatory challenge, the DOE must take the lead and use the rulemaking process to provide useful gap filling.

VI. CONCLUSION

NCLB is a troubled statutory scheme. In order for it to succeed, there must be significant participation by the NCLB stakeholders, such as teachers, parents, and students. Congress has provided negotiated rulemaking as a procedural mechanism to encourage stakeholder participation. The DOE must honor this choice and use negotiated rulemaking as a way to improve administration of the Act.

\textsuperscript{235}See Gail Sunderman, Civil Rights Project, The Unraveling of No Child Left Behind: How Negotiated Changes Transform the Law (2006).