

# Michigan Journal of Race and Law

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Volume 20

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2015

## Mainstreaming Equality in Federal Budgeting: Addressing Educational Inequities With Regard to the States

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### Recommended Citation

Elizabeth K. Hinson, *Mainstreaming Equality in Federal Budgeting: Addressing Educational Inequities With Regard to the States*, 20 MICH. J. RACE & L. 377 (2015).

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# MAINSTREAMING EQUALITY IN FEDERAL BUDGETING: ADDRESSING EDUCATIONAL INEQUITIES WITH REGARD TO THE STATES

*Elizabeth K. Hinson\**

*Great Society reformers targeted poverty as the defining characteristic for a novel federal education policy in the United States in 1965. Title I of the Elementary and Secondary Education Act (ESEA), reincarnated within the No Child Left Behind Act of 2001, distributes financial aid to disadvantaged students within public schools solely based upon students' socioeconomic status. This Article does not dispute that financial resources improve student outcomes, but this Article argues that Title I's funding formula is ineffective, and a new funding scheme – specifically, a mainstreaming equality funding scheme – must replace it. The implementation of this funding scheme will require Congress to acknowledge that poverty in the United States is not a mere set of behaviors and attitudes but is intricately linked to race and class.*

*Mainstreaming equality schemes require that public bodies assess the impact of their policies on equality of opportunity and monitor any adverse impact on the promotion of equality of opportunity. This Article describes how such a scheme would address disparities among students. Second, this Article argues that Congress should define beneficiary groups based on characteristics additional to socioeconomic status, including measures of cultural isolation and local tax revenue contributed to public education. Third, this Article establishes that a federal mainstreaming school funding scheme based on “layered disadvantage” and its multiplicative effects will both acknowledge and address long-time, covered attitudes about race, poverty and privilege in the United States and the ways in which those attitudes continue to enforce a paralyzed outcome, especially for African American students within public schools. Finally, by examining mainstreaming equality models implemented in the European Union, this Article considers in detail the methodology for conducting mainstreaming equality within a federal school funding scheme as implemented by Congress with respect to the individual states.*

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## INTRODUCTION

Great Society reformers targeted poverty as the defining characteristic for a novel federal education policy in 1965. In declaring the war on poverty, President Lyndon Johnson insisted that “poverty and ignorance go hand in hand,” and his economic advisors diagnosed poverty as a set of particular behaviors and attitudes that would not be eliminated unless those individuals classified as “poor” fundamentally changed.<sup>1</sup> The United States Commissioner of Education insisted that the Elementary and Secondary Education Act (ESEA) committed the federal government “to end the paralysis that poverty breeds, a paralysis that is chronic and contagious and runs on from generation to generation.”<sup>2</sup> The Act provided “financial aid to elementary and secondary schools for compensatory education programs intended to assist poor and educationally disadvantaged children.”<sup>3</sup> Lawmakers also believed that schools had become “inflexible, unimaginative bureaucracies” and that the promise of new grants would incentivize creative adaptation to serving the needs of impoverished students.<sup>4</sup>

Congress required that ESEA maintain a “balance between federal power and local responsibility” in order to pass both houses in a post-*Brown* political environment.<sup>5</sup> Federal officials may not have been able to directly control local schools, but they hoped that targeting funds would at least prod local school officials to address the needs of the poor.<sup>6</sup> Yet federal officials underestimated the unwillingness of localities to shift their

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1. *Economic Report of the President, Together with the Annual Report of the Council of Economic Advisers*, 15, 77, (Jan. 1964), [http://www.presidency.ucsb.edu/economic\\_reports/1964.pdf](http://www.presidency.ucsb.edu/economic_reports/1964.pdf). The 1964 Report of the Council of Economic Advisers explained that it would be better to “equip and permit the poor of the Nation to produce and earn” the income needed for a decent life than to give them cash since this would “leave untouched most of the roots of poverty.” *Id.* at 18. See also Margaret Weir, *The Federal Government and Unemployment: The Frustration of Policy Innovation from the New Deal to the Great Society*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* 149, 149-90 (Margaret Weir et. al. eds., 1988); MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 255 (2nd ed. 1986).

2. Harvey Kantor, *Education, Social Reform, and the State: ESEA and Federal Education Policy in the 1960s*, 100 *AM. J. OF EDUC.* 47, 49 (1991).

3. *Id.* at 65; see also Elementary and Secondary Education Act, Pub. L. No. 89-10, § 301(a), § 303(b)(1)-(8), 79 Stat. 27, 39-41 (1965).

4. Kantor, *supra* note 2, at 66.

5. Kantor, *supra* note 2, at 69-71. See generally *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955) (holding that desegregation should occur with “all deliberate speed” through plans developed in federal district courts).

6. Kantor, *supra* note 2, at 71.

priorities no matter the federal incentives.<sup>7</sup> Local officials were most concerned with maintaining and developing the core functions of their schools.<sup>8</sup> When pressured to direct ESEA funds to serve disadvantaged students, school districts set up peripheral programs instead.<sup>9</sup> Some scholars have criticized these peripheral programs for fragmenting and stigmatizing those disadvantaged students ESEA intended to help.<sup>10</sup> Congress allowed for the states to develop procedures for distributing ESEA funds specified for disadvantaged students, thus designating to states the task of designing and operating local programs for the disadvantaged.<sup>11</sup> Existing local biases and local politics of education created obstacles to the federal mandates, and as a result, the rationale behind the war on poverty inevitably failed to bring about the Act's desired effects.

As ESEA exists today, reincarnated as the No Child Left Behind Act of 2001, the particularized purpose to serve low-income or disadvantaged students no longer exists.<sup>12</sup> Rather, Title I's stated purpose is to "ensure that *all* children have a fair, equal, and significant opportunity to obtain a high-quality education."<sup>13</sup> The effect of focusing Title I more broadly on *all* children has been to minimize or eliminate the potential Title I had prior to 2002 to meet the needs of low-income students.<sup>14</sup> Of those provisions which resemble the former purpose, Title I now includes a provision calling for states to coordinate programs that provide services to children and families to meet comprehensive needs that affect student achievement, but states only have to do so "to the extent feasible and necessary as determined by the State educational agency."<sup>15</sup> In essence, the provision to state

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7. For example, Kantor describes local officials who, instead of adapting the core functions of their schools to the law, attempted to "comply with the new guidelines" by creating "separate programs for poor children," and as a result, also "creat[ed] . . . an independent administrative structure that exerted little pressure on the school to change." *Id.*

8. See Kantor, *supra* note 2, at 71-72.

9. *Id.*

10. See, e.g., Marshal Smith, *Selecting Students and Services for Chapter 1 in FEDERAL AID TO THE DISADVANTAGED: WHAT FUTURE FOR CHAPTER 1?* 119, 128-29 (Denis P. Doyle & Bruce S. Cooper, eds., 1988).

11. See Elementary and Secondary Education Act, Pub. L. No. 89-10, § Sec. 205(a)(1)-(2), § 303(b)(1)-(8), 79 Stat. 27, 30-31, 40-41 (1965). Audits from the program's earliest years show this designation sometimes resulted in expropriation. See generally PHYLLIS P. MCCLURE & RUBY MARTIN, *TITLE I OF ESEA: IS IT HELPING POOR CHILDREN?* (2nd ed. 1969) (showing school districts used Title I funds to make capital investments, raise teacher pay, and other general aid instead of helping impoverished students).

12. 20 U.S.C. § 6301 (2002).

13. See *id.* (emphasis added).

14. See GAIL L. SUNDERMAN & JIMMY KIM, *INSPIRING VISION, DISAPPOINTING RESULTS: FOUR STUDIES ON IMPLEMENTING THE NO CHILD LEFT BEHIND ACT 6* (2004), available at <http://files.eric.ed.gov/fulltext/ED489174.pdf> (evaluating the law's unintended consequences for disadvantaged students and already low-performing schools at the local and state level).

15. 20 U.S.C. § 6311(b)(9) (2012).

coordination has little force of its own because even if a state were to have the resources for such coordination, it would only need to coordinate at its election.<sup>16</sup> Moreover, if schools choose not to coordinate programs, or otherwise comply with Title I's requirements, parents of public school students or others aggrieved by such noncompliance have no remedy by which to compel compliance because Title I provides no private right of action.<sup>17</sup> Instead, if schools do not coordinate programs or fail to carry out the other requirements of Title I, the United States Department of Education, which can withhold funds from states failing to comply with Title I requirements, must enforce its provisions.<sup>18</sup> Historically, the Department has rarely elected to exercise this power.<sup>19</sup>

Components of the Title I funding formula limit the impact of the targeting provisions. Most of the funds allocated for Title I are allocated to school districts through the funding formula in Part A of the law.<sup>20</sup> The Title I-A formula consists of four distinct components, each with different eligibility requirements.<sup>21</sup> The Basic Grants component distributes funds to almost all school districts in the country, whereas the other three components—Concentration Grants, Targeted Assistance Grants, and Education Finance Incentive Grants (EFIGs)—distribute funds only to districts with somewhat higher concentrations or numbers of low-income children.<sup>22</sup> The primary factor used in all the formula components is the number of low-income children residing in each school district.<sup>23</sup> Another important factor is the average state per pupil expenditure, which has the effect of channeling more dollars per low-income child to districts in states with high average per pupil expenditure and fewer dollars to districts in states with low average per pupil expenditure.<sup>24</sup> The U.S. Department of

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16. See *id.*

17. See *Ass'n of Cmty. Orgs. for Reform Now v. N.Y.C. Dep't of Educ.*, 269 F. Supp. 2d 338, 347 (S.D.N.Y. 2003) (holding that the NCLB does not reflect the clear and unambiguous intent of Congress to create individually enforceable rights because it does not contain the necessary rights-creating language; its focus is on children collectively, not individually; and its enforcement scheme shows an intent for centralized, not individual, enforcement).

18. See 20 U.S.C. § 6311(g)(2) (2002).

19. See James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 947 (2004).

20. 20 U.S.C. §§ 6331-6339 (2002).

21. See *id.*

22. See *id.* §§ 6334-6337.

23. See *id.* § 6333(c).

24. In calculating the amount of a grant for a local education agency, the statute dictates a formula to determine the grant amount for which the state is eligible. See *id.* § 6333(a)(1). This amount is determined by multiplying the number of qualifying children by "40 percent of the average per-pupil expenditure in the State, except that the amount . . . shall not be less than 32 percent, or more than 48 percent, of the average per pupil expenditure in the United States." See *id.* While the "per pupil expenditure" factor may be viewed as a means by which Title I accounts for the cost of education in each state, the per pupil expenditure is more likely a proxy

Education's national assessment of Title I, published in 2007, has noted that the use of *average* state per pupil expenditures in the Title I formula may be another factor limiting the impact of the targeting provisions.<sup>25</sup> Since many high-poverty districts are in low-spending states, such as Mississippi, Alabama, or Louisiana, the per pupil expenditure factor could blunt the impact of the targeting provisions.<sup>26</sup>

The FIG component of the formula allocates funds first to states, and then sub-allocates those funds to districts within states.<sup>27</sup> While the sub-allocations to districts are weighted based on concentrations of child poverty, the *initial allocation* to the state is *not* weighted.<sup>28</sup> Meaning, the concentration of these dollars only occurs *within states* and *not among* them. In effect, this component cannot concentrate funds nationally.

In a final illustration of the funding scheme's limitations, Title I allows school districts to use *average* salary figures when comparing expenditures among schools and reporting those expenditures to the government.<sup>29</sup> Due to the *averaging* of costs instead of reflecting the actual cost of salaries and budgets for *each* school, there is a transfer of funds from the less to the more advantaged school districts.<sup>30</sup> Further, school districts divide budgets into portions that can be assigned readily to schools.<sup>31</sup> Expenses for teachers and principals are allocated to the individual schools where those teachers and principals work.<sup>32</sup> These expenses "typically make up more than 80 percent of each school's allotment."<sup>33</sup> High-poverty schools may appear to receive the same basic education resources as low-poverty schools within a single school district when in fact they do not. Some of those monies are diverted to higher-salaried teachers at other schools because public school budgets do not reflect the actual cost of sala-

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for the individual state's allocations for education expenditures and income tax structures. See THOMAS W. FAGAN & NANCY L. KOBER, CTR. ON EDUC. POL'Y, TITLE I FUNDS: WHO'S GAINING, WHO'S LOSING & WHY 7-8 (2004) [http://www.cepd.org/cfcontent\\_file.cfm?Attachment=Fagan\\_Report\\_TitleIFunds\\_060104.pdf](http://www.cepd.org/cfcontent_file.cfm?Attachment=Fagan_Report_TitleIFunds_060104.pdf).

25. See STEPHANIE STULLICH, ELIZABETH EISNER & JOSEPH MCCRARY, NATIONAL ASSESSMENT OF TITLE I: FINAL REPORT, VOLUME I: IMPLEMENTATION 17 (2007). As a result, those states that spend more dollars on education receive more Title I funds. See FAGAN & KOBER, *supra* note 24, at 8.

26. See FAGAN & KOBER, *supra* note 24, at 7.

27. See 20 U.S.C. § 6337(b)-(d).

28. 20 U.S.C. § 6337(b)(1)(B).

29. 20 U.S.C. § 6337(b)(2)(A).

30. See Marguerite Roza & Paul T. Hill, *How Within-District Spending Inequities Help Some Schools to Fail*, BROOKINGS PAPERS ON EDUC. POL'Y 201, 212 (2004).

31. See *id.* at 204.

32. See *id.* at 204-05.

33. *Id.*

ries and budgets.<sup>34</sup> In effect, not all federal dollars make it to the children they were designed to help.<sup>35</sup>

This Article argues that because the United States has included no measure on the effects of disadvantages such as race, ethnicity, national origin, and cultural isolation, and no measure on child poverty, in both the ESEA and the NCLB Title I funding scheme, the United States has failed to address educational funding inequities in public schools. More specifically, this Article suggests that if socioeconomic redistribution of target funds were based on layered disadvantages and patterns of interstate disparities in funding, the outcomes reported in the present-day would likely reflect the goals of the Title I framers. Students in the United States are likely to benefit from a mainstreaming equality funding scheme as applied to the educational funding in Title I, or similar education funding legislation. Mainstreaming equality schemes require that public bodies assess the impact of their policies on equality of opportunity and monitor any adverse impact on the promotion of equality of opportunity.<sup>36</sup>

This Article defends the thesis that Congress should implement a mainstreaming equality scheme as to school funding, define beneficiary groups based on characteristics additional to socioeconomic status, and consider interstate disparities, in order to eradicate educational inequities affecting the most disadvantaged students in the United States. Part I argues that efforts to combat the paralysis of disadvantaged groups have failed and that regardless of socioeconomic indicators, schools continue to fail student populations of color, thus making socioeconomic criteria alone ineffective to counteract inequities. Part II considers methodology for conducting mainstreaming, arguing that the goals and performance indicators in Title I or similar legislation should be directed towards measuring social impact and effectiveness among specifically defined groups based on

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34. See *id.* at 205.

35. See generally Roza & Hill, *supra* note 30, at 206–09.

36. Gender mainstreaming, for example, has received international support as an equity tool. As a concept, mainstreaming has been around for many years in different capacities but did not make its debut as a fully-fledged concept until endorsed at the 1995 United Nations Fourth Conference on Women in Beijing. Since that time, the support for mainstreaming has been great, particularly at the international level, with the Council of Europe, the European Commission, the Commonwealth Secretariat, the World Bank, the International Labor Organization (ILO), and the Organization for Economic Cooperation and Development (OECD) all endorsing its promotion and encouraging its application. See, e.g., COUNCIL OF EUROPE, GENDER MAINSTREAMING: CONCEPTUAL FRAMEWORK, METHODOLOGY AND PRESENTATION OF GOOD PRACTICES, (1999). See also Christopher McCrudden, *Mainstreaming Equality in the Governance of Northern Ireland*, 22 *FORDHAM INT'L L.J.* 1696 (1999). In the gender context, Teresa Rees describes “[t]he essence of the mainstreaming approach” as “seek[ing] to identify . . . hidden, unrecognized and unremarked ways in which systems and structures are biased in favour of men, and to redress the balance. It involves lateral thinking to see how apparently gender-neutral practices, which appear to offer equal access to all, in fact act as exclusionary mechanisms for women.” TERESA L. REES, MAINSTREAMING EQUALITY IN THE EUROPEAN UNION: EDUCATION, TRAINING AND LABOUR MARKET POLICIES 189 (1998).

layered disadvantage, which considers race, class, and other factors, and its multiplicative effects.

## I. TITLE I'S INEFFECTIVE SOCIOECONOMIC PROFILE

The framers of Title I in 1964 proceeded under the presumption that financial resources would ultimately improve student academic achievement.<sup>37</sup> This Article proceeds under the same presumption. Since the passage of Title I, “[t]he most common baseline for the measurement of resources is . . . intrastate equity”—that is, an examination of “how expenditures per pupil vary among districts within the same state.”<sup>38</sup> However, according to Professor Ryan, there are shortfalls to this method of measurement: the differences in student needs and in the costs of providing similar services are two factors that can substantially affect the purchasing power of an education dollar and should be examined more closely.<sup>39</sup>

### A. *Intrastate vs. Interstate Funding Disparities*

In evaluating the effectiveness of the Title I funding scheme, it is important to focus not just on the shortcomings of horizontal equity in intrastate disparities but also on *interstate* disparities.<sup>40</sup> Interstate disparities can vary greatly. A 1991 Congressional report on fiscal inequities in the education of students, stated that the lowest spending district in Mississippi spent \$1,324 per pupil in 1986-87, while in the same year two of the highest spending districts in New York spent \$11,754 and \$10,544 per pupil.<sup>41</sup> “In the 1994-95 school year, for example, average per-pupil spending varied from a low of \$3,431 in Utah to a high of \$9,136 in New Jersey.”<sup>42</sup> “In a classroom of 25 students, this \$5,700 disparity amounts to

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37. See Kantor, *supra* note 2, at 66-69 (discussing framers’ belief that government funds could overcome disadvantage and, at the same time, incentivize local school districts to address the needs of the poorest students, thereby bringing about institutional change in the schools).

38. James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 437 (1999).

39. *Id.* (“That a rural district and an urban district have the same funding per pupil may not be equitable, for example, if it costs more to provide the same services in urban areas and/or if the urban district has students with more expensive needs.”)

40. See *id.* at 437 n.20. In his discussion of school finance reform, Professor Ryan declines to examine interstate disparities on the basis that school finance reform has “traditionally been a state-by-state effort” and “little current prospect for increased federal involvement” caused such focus to be impractical. *Id.* This author acknowledges the impracticalities of an interstate examination under current legislation, but because this Article specifically advocates for federal intervention in the form of a new federal funding scheme, interstate disparities are at the forefront of the discussion.

41. See, e.g., WILLIAM L. TAYLOR & DIANNE M. PICHE, HOUSE COMM. ON EDUC. & LABOR, *SHORTCHANGING CHILDREN: THE IMPACT OF FISCAL INEQUITY ON THE EDUCATION OF STUDENTS AT RISK*, H.R. Doc. No. 102-O, at 19-20 (1991).

42. See Ryan, *supra* note 38, at 437 n.20.



\$142,500 per class.”<sup>43</sup> Twenty years later similar disparities exist. In 2011, Utah spent only \$6,905 per student, the lowest amount in the nation, while New York spent \$16,835 per student and Wyoming spent \$19,534 per student, the highest amount in the nation.<sup>44</sup> In a classroom of 25 students, this \$12,629 disparity amounts to \$315,725 per class. The national average for per-pupil expenditures was \$11,864.<sup>45</sup>

Traditionally, school finance reform has been a state-by-state effort, with no prospect for increased federal involvement in encouraging or requiring interstate equality. States have at times been encouraged by the federal government to equalize their own school funding schemes<sup>46</sup> but the incentive provision in the Improving America’s Schools Act of 1994 (IASA) was not funded, and Title I has not been fully funded since the passage of the No Child Left Behind Act of 2001.<sup>47</sup> Ultimately, the federal government has played no large role in addressing interstate funding disparities. In the case of pre-dominantly minority schools, some spend above per pupil state average expenditures, yet in many cases, the additional spending results from *Milliken II* remedies.<sup>48</sup>

For those states that have made internal efforts to reform school finance, there has been much to surmount based on the unique histories and political climates of individual states. For instance, the State of Alabama has faced obstacles ranging from a constitutional amendment which abolished the state’s guarantee of public education following the *Brown* decision to the more recent ruling by the state supreme court in 2002 that the duty to fund Alabama’s schools rests solely on the state legislature and “no order of a state court, which requires the disbursement of state funds, shall be binding on the state or any state official until the order has been approved by a simple majority of both houses of the Legislature.”<sup>49</sup> This stance reflects the long-time tradition of allowing legislatures to dominate much of the share of state power in Southern states as well as Alabama’s reluctance to allow any state court to rule that the state school-funding scheme is unconstitutional, despite embarrassing disparities.<sup>50</sup> More than

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43. *Id.*

44. Hajime Mitani, *Per-pupil Expenditures Approaching \$10,000*, Editorial Projects in Education (Jan. 21, 2009), <http://www.edweek.org/rc/articles/2009/01/21/sow0121.h27.html>.

45. *See id.*

46. *See* Improving America’s Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518; *see* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

47. *See* David J. Hoff, *Debate Grows on True Costs of School Law*, EDUC. WK., Feb. 4, 2004, at 1 (describing protests among state legislatures regarding costs of NCLBA).

48. *See* *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 267-68 (1977) (specifying a three-part examination by the courts to determine whether de jure racism exists and permitting courts the right to order a remedy to redress the wrong caused by the de jure racism).

49. *Ex parte* James, 836 So. 2d 813, 815 (Ala. 2002) (citing Amendment 582 of the Alabama Constitution); *see also* Siegelman v. Ala. Ass’n of Sch. Bds., 819 So. 2d 568 (Ala. 2001).

50. In 2011, Alabama spent \$6,755 on average per pupil, below the national average of \$7,734 – one of the lowest expenditure rates in the nation. In 2011, Alabama spent \$8,336 per

half of the state's students qualify for free or reduced-price lunches.<sup>51</sup> Alabama's state and local revenues for education are low not only because of the state's relatively low wealth, but also because it taxes itself at a lower rate than all but half a dozen other states.<sup>52</sup> The state has also been criticized in a report by the Public Affairs Research Council of Alabama for the inefficient expenditure of money it does raise because of the state's top-down earmarking.<sup>53</sup> Alabama channels almost all its revenue from its major taxes—income and sales—into public education, but the legislature has nevertheless allocated millions of those dollars for purposes that are not completely educational in nature.<sup>54</sup> When funds fall short for allocation to local school systems, books and classroom supplies for students and maintenance costs are hit the worst since state law in Alabama prohibits reduction in public school employee salaries when there is any cut in state funding.<sup>55</sup> Alabama is by no means the only state with intrastate funding disparities and complex obstacles based on local politics, legislative appropriations, and history. Challenges made by local business leaders, advocacy organizations, and school districts themselves due to intrastate funding disparities have been launched in the states of Kansas, Kentucky, Ohio, Maryland, Massachusetts, New Jersey, New York, North Carolina, Texas, and others, with varying outcomes.<sup>56</sup>

### B. *School Funding Litigation*

One method of addressing inequities in school finance is litigation. Most court-ordered desegregation remedies have much to do with funding inadequacies and reflect principles established in *Milliken II*.<sup>57</sup> After *Milli-*

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pupil, up from \$7,609 in the 2005–2006 school year – but still one of the lowest expenditure rates in the nation. *Alabama State Board of Education Report Card 2007-2008*, ALA. DEP'T OF EDUC. 16 (2008), <http://www.alsde.edu/general/2007-2008ReportCard.pdf>.

51. *Alabama State Board of Education Report Card*, *supra* note 50, at 2 (referring to data from 2006–2008).

52. *See States Ranked by Total State Taxes and Per Capita Amount: 2005*, U.S. CENSUS BUREAU (Dec. 14, 2009), <https://www.census.gov/govs/statetax/05staxrank.html>.

53. *See* The Public Affairs Research Council of Alabama, *How Alabama's Taxes Compare*, THE PARCA REPORT No. 37, at 3 (1999), <http://parca.samford.edu/PARCA2/reports/report37.pdf>.

54. *Id.*

55. *See* The Public Affairs Research Council of Alabama, *How Alabama's Taxes Compare*, THE PARCA REPORT No. 46, at 3–4 (2006), <http://parca.samford.edu/parca2/reports/How%20Alabama's%20Taxes%20Compare%20-%202004%20-%202006.pdf>.

56. *See* *Gannon v. State*, 319 P.3d 1196 (Kan. 2014); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *DeRolph v. Ohio*, 97 Ohio St. 3d (2002); *Md. State Board of Education v. Bradford*, 387 Md. 353 (2005); *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Abbott v. Burke (Abbott I)*, 153 N.J. 480 (1998); *Campaign for Fiscal Equity v. State*, 86 N.Y.2d 307 (1995); *Leandro v. State*, 488 S.E.2d 249 (1997); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391 (Tex. 1989).

57. *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977).

ken II, the goal of litigation was often to secure funding from the state to pay for remedial plans designed to improve the quality of facilities and instruction at racially isolated schools, thus seeking adequacy through remedial funding. However, in 1995, the Court substantially restricted the power of district courts to order *Milliken II*-type remedies in *Jenkins v. Missouri*.<sup>58</sup> Once court-ordered desegregation decrees are lifted, districts that have been receiving additional funding through court orders will likely be unable to secure the same level of funding from state legislatures. In a number of cases, districts and states have entered into agreements under which the state has agreed to pay the district a substantial sum over a period of several years in exchange for being released from any further desegregation obligations.<sup>59</sup> Also, opposition from the individual states' legislatures is all but invited by the court decisions, as George Brown notes, "[S]tate supreme courts show [a] pattern of expansive declarations of right and duty coupled with an insistence that solutions must come from the legislative rather than the judicial branch."<sup>60</sup> That is, "legislative inertia and unwarranted judicial deference to the political branches in the remedial phase hinder the school finance plaintiff's prospects for securing a constitutional remedy."<sup>61</sup> Battles in state legislatures, which follow such typical court decisions, have evidenced a particular pattern for minority school districts.<sup>62</sup> For "minority districts that were successful in court faced protracted legislative battles that were more intense and longer-lasting than those typically faced by successful white districts."<sup>63</sup> In a case study on schools in St. Louis, Missouri, Wells and Crain found it implausible that state officials would continue to pump monies into city school districts after a dismissal of the court order, stating "State and local politicians . . . are on a mission to end the [desegregation] case for political and economic reasons . . . . Thus, the idea that any state money not spent on desegregation would be spent on schools, particularly urban schools, seems

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58. *Missouri v. Jenkins (Jenkins II)*, 515 U.S. 70 (1995) (finding that the district court's remedial plan was designed with the purpose of attracting non-minority students from outside the district and was thus beyond the scope of the court's remedial authority).

59. Scott Stephens, Mario G. Ortiz, and April McClellan-Copeland, *Judge Lifts Historic Desegregation Order; Court Control to End in 2000*, *PLAIN DEALER*, Mar. 28, 1998, at 1A. See *Reed v. Rhodes*, 1 F. Supp.2d 705, 757 (N.D. Ohio, 1998) (court declares Cleveland "unitary," but rules that state and district funding must fulfill earlier agreement to provide \$40 million a year in extra state funding until the year 2000).

60. George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 544 (1994).

61. Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1072 (1991).

62. See Ryan, *supra* note 38, at 457-71 (explaining that minority districts that were successful in court faced protracted legislative battles that were more intense than those typically faced by white or integrated districts).

63. See *id.* at 457-58.

a little farfetched.”<sup>64</sup> Despite favorable outcomes where school finance challenges were won by minority school districts in New Jersey<sup>65</sup> and Texas,<sup>66</sup> the local public in each area nevertheless viewed “subsequent legislative reforms in racial terms, regardless of the actual scope and targets of those reforms.”<sup>67</sup> Support of the reforms varied significantly depending on locals’ racial group identification.<sup>68</sup> Wells and Crain also acknowledged the influence of racial politics over legislative reform in Missouri: “The racial politics of Missouri, with its mostly white and rural constituents, makes it difficult for elected officials to fund urban educational programs in the absence of court orders that say they must.”<sup>69</sup> The public’s views on race are consequently real obstacles to challenging school funding schemes.

Since the passage of Title I, the Supreme Court has held in *San Antonio Independent School District Rodriguez* that a rational basis exists for financing education from local property taxes, namely local control.<sup>70</sup> Local control has in some cases been notorious for its inequities, as in Alabama, discussed above, yet nevertheless reflects local dominant political will. In other states, local control has allowed funding schemes that redistribute wealth, as in Vermont.<sup>71</sup> Dissatisfaction with approaches on either extreme of the spectrum has led to challenges, and parties challenging education financing must pursue actions under state constitutional law. Some state supreme courts have held their state’s funding schemes to be unconstitutional.<sup>72</sup> After Kentucky’s state funding scheme was found to be unconstitutional by the state’s supreme court, Kentucky’s new finance

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64. AMY STUART WELLS & ROBERT L. CRAIN, *STEPPING OVER THE COLOR LINE: AFRICAN AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS* 336-337 (1997).

65. See *Abbott V*, 153 N.J. 480.

66. See *Edgewood I*, 777 S.W.2d 391.

67. Ryan, *supra* note 38 at 458.

68. See *id.*

69. WELLS & CRAIN, *supra* note 64, at 114.

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

71. See Ryan, *supra* note 38, at 467-68. Ryan describes steps taken in Vermont, known as the “Robin Hood approach,” to be more extensive than efforts by any other state. Under Vermont’s plan, the state ensures that each student receive a little more than \$5,000 in funding at a set tax rate. Localities may tax above the set rate and spend more than \$5,000, but wealthier districts must share additional tax revenues in order to support the plan. For instance, “forty-one ‘gold towns,’ many near ski resorts, will have to share tax revenues with 211 ‘receiving’ towns.” *Id.*

72. See, e.g., *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Sec’y of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Helena Elementary v. State*, 769 P.2d 684 (Mont. 1989); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990) (*Abbott II*); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); *Tenn. Small Sch. Sys. v. McWhorter*, 851 S.W.2d 139 (Tenn. 1993); *Edgewood I*, 777 S.W.2d 391; *Brigham v. State*, 692 A.2d 384 (Vt. 1997).

scheme conditioned educational aid on a district's wealth.<sup>73</sup> In Massachusetts, the Massachusetts Educational Reform Act (MERA), like Kentucky's scheme, was passed in response to the state's supreme court ruling that inadequate resources were preventing Massachusetts from meeting its constitutional duty to prepare its children.<sup>74</sup> For school finance, MERA instituted a new foundation budget for each district.<sup>75</sup> The foundation budget is the total amount of money that the legislature believes a district needs in order to fund its educational programs, as calculated by a complex formula.<sup>76</sup> Formula factors include payroll, nonsalary expenses, professional development costs, maintenance, books, and equipment.<sup>77</sup> Erin E. Kelly explains the formula as one similar to Kentucky's funding scheme:

MERA . . . requires a minimum local contribution to the foundation budget to receive state aid. The required contribution accounts for a municipality's property wealth and income level. Once the state determines [that] . . . contribution, [it] subtracts that amount from the foundation budget and funds the difference. . . .<sup>78</sup>

Although MERA provides that a district's foundation budget cannot grow by more than 4.5% over the preceding year, it does not cap the dollar amount of revenue that wealthy districts can raise.

In addition, the MERA formula "assumes specific salaries for all personnel and that each district has a 3.5% special education enrollment," it also assumes that the cost of books and equipment is the same for each district.<sup>79</sup> Thus, there is no consideration of need within an individual district or school and in effect, as Kelly points out, no means by which the

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73. See *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 215 (Ky. 1989) (invalidating the "whole gamut" of the state's education system, including its financing structure, on the grounds that it violated equality and equality requirements derived from the state constitution's education clause). See *Kentucky Education Reform Act of 1990*, ch. 476, 1990 Ky. Act. 120 (codified as amended in scattered sections of KY. REV. STAT. ANN. §§156.005-446.260 (LexisNexis 2009)); Jacob E. Adams, Jr., *Spending School Reform Dollars in Kentucky: Familiar Patterns and New Programs, But Is This Reform?*, 16 EDUC. EVALUATION & POL'Y ANALYSIS 375, 377 (1994).

74. See *McDuffy v. Sec'y of Educ.*, 615 N.E.2d 516 (Mass. 1993)

75. See MASS. ANN. LAWS CH. 70, §§ 1, 2 (LexisNexis 2009).

76. See *id.*, § 2.

77. *Id.*

78. Erin E. Kelly, Note, *All Students Are Not Created Equal: The Inequitable Combination of Property-Tax-Based School Finance Systems and Local Control*, DUKE L. J., 411-412 (1995). See also MASS. ANN. LAWS CH. 70 § 3 (LexisNexis 2009).

79. Kelly at 412 See also MASS. ANN. LAWS CH. 70, § 2 (LexisNexis 2009). See generally Thomas A. Downes & Thomas F. Pogue, *Adjusting School Aid Formulas for the Higher Cost of Educating Disadvantaged Students*, 47 NAT'L TAX J. 89 (1994) (discussing the way a formula's failure to compensate for cost differentials among districts leads to inadequate state aid).

state may prioritize assistance to the poorest schools.<sup>80</sup> As a result, “the amount of state aid allotments typically are determined by what wealthy school districts believe poor districts need.”<sup>81</sup>

In 2005, MERA was challenged by litigation and the Massachusetts Supreme Court passed down a ruling that recognized serious remaining inequities, despite Massachusetts exceeding the national average in education spending per student and its students outranking all other states in the National Assessment of Educational Progress rankings for reading and math.<sup>82</sup> But ultimately, the court rejected the lower court’s ruling that the state was still not meeting its constitutional obligations.<sup>83</sup> The court also rejected the lower court’s recommendation that a major costing-out study should be conducted to determine full adequacy, appearing concerned that such a study would ignite an endless struggle between the legislature and the governor over the details of school finance.<sup>84</sup>

There is no question that each reform scheme implemented in these states has been imperfect. But despite the shortcomings of its funding formula discussed above, KERA was touted as a progressive and successful model for other states.<sup>85</sup> Less attention, however, has been paid to the more recent backsliding: “The increased school funding that started . . . in the early 1990s was being choked” off by 1995 as “the legislature cut state taxes by . . . a hefty \$150 million annually, eliminating 25 percent of the increase approved only a few years before.”<sup>86</sup> With the recession that began in 2000, Kentucky cut funding,<sup>87</sup> as “[t]eacher salaries, which had

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80. See Kelly, *supra* note 78, at 412.

81. Kelly, *supra* note 78, at 414; see JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS* 213–16 (1991).

82. See *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1137–39 (Mass. 2005); see generally Diana Pullin, *Ensuring an Adequate Education: Opportunity to Learn, Law, and Social Science*, 27 B.C. THIRD WORLD L.J. 83, 96–106 (2007) (discussing the *Hancock* decision); NATIONAL ASSESSMENT OF EDUCATION PROGRESS, THE NATION’S REPORT CARD: READING 2005, 14, 16 available at <http://nces.ed.gov/nationsreportcard/pdf/main2005/2006451.pdf> (among the highest average reading scores for fourth and eighth graders of all states); see NATIONAL ASSESSMENT OF EDUCATION PROGRESS, THE NATION’S REPORT CARD: MATHEMATICS 2005, 14, 16 available at <http://nces.ed.gov/nationsreportcard/pdf/main2005/2006453.pdf> (among the highest average math scores for fourth and eighth graders of all states); National Center for Education Statistics, which is maintained by the U.S. Department of Education and the Common Core of Data (CCD). In 2005, Massachusetts spent \$9,930 per students, and the U.S. average for education spending per student was \$8,973. See *id.*

83. *Hancock*, 822 N.E.2d at 1140.

84. See *id.* at 1156–58.

85. See Ryan, *supra* note 38, at 466.

86. PETER SCHRAG, *FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA’S SCHOOLS* 94 (2003).

87. See JASON BAILEY, KENTUCKY CENTER FOR ECONOMIC POLICY, *VAST INEQUALITY IN WEALTH MEANS POOR SCHOOL DISTRICTS ARE LESS ABLE TO RELY ON LOCAL PROPERTY TAXES*, (Dec. 11, 2013), available at [http://www.kypolicy.us/sites/kcep/files/School%20Property%20Taxes\\_0.pdf](http://www.kypolicy.us/sites/kcep/files/School%20Property%20Taxes_0.pdf)

been rising toward the national average, began to slip again, and measures . . . to pay bonuses to teachers willing to work in hard-to-staff schools, to compensate teacher mentors, and to create an independent standards commission to oversee the state's . . . schools of education were voted down."<sup>88</sup> By 2002 Kentucky paid its teachers at 85 percent of the national average compared to 87 percent of the national average in 1987.<sup>89</sup> The idea of educational adequacy had been woven throughout the 1989 *Rose* decision, but as Peter Schrag reports, no one in Kentucky, until the economic downturn of the 2000s, had defined adequacy as it related to the funding mechanism and fiscal equity.<sup>90</sup>

In 2014, the Kansas Supreme Court ruled its state's school funding system unconstitutional because it treats poor districts inequitably.<sup>91</sup> In response, the Kansas Governor signed into law a bill providing additional monies to poor districts to satisfy the ruling, but the broader question of whether public schools statewide are sufficiently funded is pending before a Kansas state court.<sup>92</sup>

However, no state statutory duty exists to provide funding based on the adequacy of education as measured by outcomes. Plaintiffs continue to seek remedies, if not on constitutional grounds, by combing state statutes for violations of the most basic guidelines provided by the states to school districts, as exemplified in pending litigation in the State of Michigan regarding the statutory requirement that districts provide remedial assistance to students who are not performing at grade level in the fourth and seventh grades.<sup>93</sup> Political power plays, unwillingness to redistribute funds, and budgetary cutbacks in hard times substantially limit any commitment to fund individual state's school districts equitably with the goal of adequacy for all children. Local state patterns have their own unique circumstances, but the gamble on the educational product offered to any child in America becomes even more varied when comparing individual states to each other.

### C. Interstate Funding Disparities

School funding litigation, state supreme court decisions and the subsequent reform efforts by state legislatures indicate the ongoing struggle to ensure fiscal equity between the poorest and wealthiest districts within individual states. Title I funding formulas also target funds based on the con-

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88. SHRAG, *supra* note 86, at 94.

89. Frederick M. Hess, *Adequacy Judgments and School Reform*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 159, 181, (Brookings Institution Press, 2007).

90. SCHRAG, *supra* note 86, at 94-95.

91. *Gannon v. State*, 319 P.3d 1196 (2014).

92. *See id.* at 1196; *see* Senate Substitute, H.R. 2506, Reg. Sess. (Kan. 2014).

93. *See* M.C.L.A. § 380.1278(8) (West 2015); *see* S.S. ex. rel. L.M. v. State, No. 12-009231-CZ, 2014 Mich. App. LEXIS 2148 (Mich. Ct. App. Nov. 6, 2014).

centration of children living in poverty within specific districts of individual states.<sup>94</sup> However, wide-ranging disparities occur not only between the typical urban and rural districts and wealthier suburban districts<sup>95</sup> within states but also in patterns between geographical regions of the United States. Some regions and states have harnessed local control and used that local power to deny adequate educations for *all* children.<sup>96</sup> These local sentiments and political plays are evidenced in the range of funds appropriated for school districts across the country. This Article will examine more closely those interstate disparities and also focus specifically on indicators of chronic challenges. Data used in this analysis is from the 2010 school year.

Within the Northeastern region of the United States, several states have managed to maintain spending at or above the national average for per pupil expenditures. Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont ensured this funding for 100 percent of their students.<sup>97</sup> For all seven states designated in this region—Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode

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94. See 20 U.S.C. § 6333(c)(1)(A) (2012).

95. See Bruce J. Biddle and David C. Berliner, *What Research Says About Unequal Funding Between Schools*, WESTED, 1, 3, [http://www.wested.org/online\\_pubs/pp-03-01.pdf](http://www.wested.org/online_pubs/pp-03-01.pdf); see, e.g., Karen Eppley, *Rural Schools and High Quality Teacher Provision of No Child Left Behind: A Critical Policy Analysis*, 24(4) J. RES. IN RURAL EDUC. 1, 2-6, (2009) (considering how high quality teaching may be achieved and accounted for in rural districts as opposed to urban districts). As evidenced in the tables in this article, states located in certain geographic regions of the United States average education expenditures per pupil well below the national average. While it may be the case the cost of serving a student in some states is less than the cost of serving a student in others where the cost of living is higher, this Article puts forth the idea that the education expenditures per pupil also reflects the individual state's – or, its state legislature's – commitment to the public education of its citizens. The amount of per pupil expenditures has a direct effect on the dollar amount of the Title I funding state receives, because the funding formula is tied to the state's per pupil expenditures. See *supra* text accompanying note 24.

96. See Alabama Accountability Act, H.R. 2013-64, § 8(a)(1),(2), § 9(a)(3), 2013, Reg. Sess. (Ala. 2013). The Alabama Accountability Act created a refundable tax credit of about \$3,500 for parents transferring children from failing public schools to private schools, diverting funds from the Alabama State Education Trust Fund to pay the tax credits. See also Kim Chandler, *Southern Poverty Law Center Files Lawsuit Challenging Alabama Accountability Act*, AL.COM (Aug. 19, 2013), [http://blog.al.com/wire/2013/08/southern\\_poverty\\_law\\_center\\_fi.html](http://blog.al.com/wire/2013/08/southern_poverty_law_center_fi.html). Where, for example, nonpublic schools in rural areas do not elect to participate in the program, students attending failing schools have few options and some nonpublic schools could choose not to accept students from failing schools, further limiting students' options.

97. See *infra* Table I. The data compiled in the Tables found in this Article is from the National Center for Education Statistics, which is maintained by the U.S. Department of Education and the Common Core of Data (CCD). The CCD is a program of the U.S. Department of Education's National Center for Education Statistics that annually collects fiscal and non-fiscal data about all public schools, public school districts, and state education agencies in the United States. The data are supplied by state education agency officials and include information that describes schools and school districts, including name, address, and phone number; descriptive information about students and staff, including demographics; and fiscal data, including revenues and current expenditures. See <http://nces.ed.gov/ccd/> for more information. Data may also be



Island, and Vermont—the average expense per pupil was about \$15,216 dollars.<sup>98</sup> The national average of per pupil spending in 2010 was \$11,824.<sup>99</sup>

In the Mid-Atlantic, the six states of Delaware, Maryland, New Jersey, Pennsylvania, Virginia, West Virginia, and the District of Columbia spent on average about \$13,481 dollars per student, still above the national average of pupil spending.<sup>100</sup> In 2010, one hundred percent of students in Maryland and the District of Columbia attended school in districts where per-pupil expenditures were at or above the U.S. average, while New Jersey almost hit the 100 percent mark at 99.9 percent of its students attending such schools.<sup>101</sup> Delaware sent about 88 percent of its students to schools that met the national average for student expenditures.<sup>102</sup> Slightly above 70 percent of students attended such school districts in Virginia, the same in Pennsylvania and just above 88 percent in West Virginia.<sup>103</sup>

Midwestern states send fewer students to schools where spending is as high as in the Northeast and Mid-Atlantic. The highest percentage of students attending schools in districts where per pupil expenditures are at or above the national average is in Wisconsin, where the percentage is about seventy-two percent.<sup>104</sup> Illinois ranks next for spending closest to the national average, sending about 66 percent of its students to schools that meet the national average for student expenditures.<sup>105</sup> In Michigan, only about 27 percent of students attend school in districts where student expenditures are at or above the national average.<sup>106</sup> In Ohio, about 43 percent of students attend such schools. Indiana sends about 17 percent of its students.<sup>107</sup> All together, the five states of Illinois, Indiana, Michigan, Ohio, and Wisconsin spend on average about \$11,306 per pupil, which places the student expenditures slightly below the national average in 2010.<sup>108</sup>

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accessed and filtered at “Education Counts Research Center,” EDUCATION WK., available at <http://www.edcounts.org/createtable/step1.php?clear=1>.

98. See *infra* Table I.

99. See *infra* Table I. (showing author’s calculations of averages and analysis of data from the National Center for Education Statistics, U.S. Department of Education); see *Education Counts Research Center*, *supra* note 97. Cf. Hajime Mitani, *Per Pupil Expenditures Approaching \$10,000*, EPE RESEARCH CENTER, Jan. 21, 2009, <http://www.edweek.org/rc/Articles/2009/01/21/sow0121.h27.html>, (describing national average of per pupil spending in 2009).

100. See *infra* Table I.

101. See *infra* Table I.

102. See *infra* Table I.

103. See *infra* Table I.

104. See *infra* Table I.

105. See *infra* Table I.

106. See *infra* Table I.

107. See *infra* Table I.

108. See *infra* Table I.

The Southeastern region includes thirteen states, including Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas. The percentage of students in schools spending at or above the national average drops significantly in these states.<sup>109</sup> In Georgia, just 22 percent of students attend school districts where per pupil expenditures are at or below the national average.<sup>110</sup> Other states' averages were even less in 2010: Missouri sent 15 percent of its students to school districts meeting the national average, Texas sent slightly less than 18 percent, South Carolina about 13 percent, Louisiana about 51 percent, and Arkansas about 14 percent.<sup>111</sup> North Carolina managed about seven percent, Kentucky about twelve percent, Florida about two percent, Alabama about six percent, Oklahoma about three percent, and Mississippi about three percent.<sup>112</sup> In Tennessee, just over one percent of students attend school in districts spending at or above the national average. All thirteen states averaged below the national average at about \$9,964,<sup>113</sup> with North Carolina averaging the lowest amount of the thirteen states at \$8,713 per pupil.<sup>114</sup>

The Plains and Mountains region are comprised of the eight states of Colorado, Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota, and Wyoming. Wyoming sent all of its students to school districts spending at or above the national expenditures,<sup>115</sup> while the other states averaged sending many fewer students to such schools. North Dakota sent about 30 percent of its students to schools spending at or above the national average and Montana sent about 27 percent, while Minnesota sent about 34 percent, and Nebraska about 32 percent.<sup>116</sup> Kansas sent about 36 percent of its students, South Dakota sent about 12 percent, Iowa about 12 percent, and Colorado about 7 percent.<sup>117</sup> All eight states averaged about \$12,950.<sup>118</sup> At the lowest-end, Colorado averaged about \$9,306.<sup>119</sup>

Much further west, Hawaii sent all students to schools meeting the national average, while Alaska was close behind, sending about ninety-six percent of its students.<sup>120</sup> There is a large difference, however, between Alaska and Hawaii and the other western states of Arizona, California,

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109. *See infra* Table I.

110. *See infra* Table I.

111. *See infra* Table I.

112. *See infra* Table I.

113. *See infra* Table I.

114. *See infra* Table I.

115. *See infra* Table I.

116. *See infra* Table I.

117. *See infra* Table I.

118. *See infra* Table I.

119. *See infra* Table I.

120. *See infra* Table I.

Idaho, Nevada, New Mexico, Oregon, Utah, and Washington. California manages to send about 20 percent of its students to schools meeting the national average in per-pupil expenditures, while Oregon averages 22 percent, and Washington about 27 percent.<sup>121</sup> New Mexico sends about 17 percent of its students to schools spending at or above the average, Nevada sends about five percent, and Idaho sends just about four percent of its students.<sup>122</sup> Arizona meets or exceeds the national average expenditure at about five percent.<sup>123</sup> Together, the states averaged \$10,076 per student,<sup>124</sup> below the national average. At the high end, Alaska averaged \$16,675 per student, while Utah, spending just \$7,042 per student, sat at the very bottom for all states in the nation and sent just one percent of its students to school districts spending at or above the national average.<sup>125</sup>

All states categorized as a part of the Southeast and West regions, with the exception of Alaska and Hawaii, spent below the average per pupil expenditure.<sup>126</sup> On average, states in the Northeast spent the most of any other region in the country. Alaska, the District of Columbia, Montana and Wyoming all ranked in the top ten, along with six Northeastern states.<sup>127</sup>

#### D. Chronic Challenge Indicators

High school completion rates, per capita income, and parents' education levels are just a few indicators of stagnant social circumstances for populations in some states and in specific urban or even rural areas.<sup>128</sup>

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121. See *infra* Table I.

122. See *infra* Table I.

123. See *infra* Table I.

124. See *infra* Table I.

125. See *infra* Table I.

126. See *infra* Table I.

127. See *infra* Table I.

128. See Selcuk R. Sirin, *Socioeconomic Status and Academic Achievement: A Meta-Analytic Review of Research*, 75 REV. OF EDUC. RES., 417, 417-453 (2005) (conducting a meta-analysis of studies examining the relationship of socioeconomic status to academic outcomes and showing that various components of socioeconomic status, including income, parental education, and parental occupation, have different effects on academic outcomes); see also Vincent J. Roscigno, *Family/School Inequality and African-American/Hispanic Achievement*, 47 SOCIAL PROBLEMS, 266, 266-90 (2000) (finding that parental education was a stronger predictor of reading and math achievement than family income for Black and Hispanic students). See also Inna Altschul, *Linking Socioeconomic Status to the Academic Achievement of Mexican American Youth Through Parent Involvement in Education*, 3 J. Soc'y for Soc. Work and Res., 3, 13, 25 (2012). As an example of a more specific socioeconomic component for a particular racial group, Altschul examined the effects of paternal and maternal education and occupation separately and those components' effect on outcomes for Mexican American and Latino youth. Altschul finds that "in Mexican American families, maternal occupation had a much stronger positive effect on youth's achievement than other measures of SES, and exceeded the effect of income, which had the second largest influence on achievement." See *id.* at 25.

Where the states themselves do not correct these conditions for the population by ensuring educational equity and adequacy, it seems these obstacles might be better tackled by a federal funding policy targeted to mend those failures in order to achieve greater national consistency.

Statewide graduation rates in 2010 place those states graduating the fewest students as (starting with the lowest): the District of Columbia (57 percent), New Mexico (59.4 percent), South Carolina (61.5 percent), Nevada (which graduated 62.7 percent of students), Georgia (64 percent), Mississippi (64.4 percent), Louisiana (67 percent), Arizona (67.2 percent), Hawaii (67.2 percent), and Alaska (68.7 percent).<sup>129</sup>

Next in line were Michigan, Utah, North Carolina, Rhode Island, Washington, Arkansas, Florida, New York, California, Delaware, Oklahoma, Ohio, and West Virginia, all of which produced a graduation rate of between 70.9 and 74.7 percent.<sup>130</sup> Texas, Colorado, Oregon, South Dakota, Kentucky, Virginia, Wyoming, Illinois, Indiana, New Hampshire, Maryland, Nebraska, Montana, and Massachusetts graduated between 74.8 and 79.9 percent of students above the national average.<sup>131</sup> Among the most successful states at graduating students were Idaho, Kansas, Tennessee, Minnesota, Maine, Missouri, Connecticut, Pennsylvania, New Jersey, Iowa, Wisconsin, North Dakota and Vermont.<sup>132</sup>

All those states with the lowest graduation rates spent less than the national average on per pupil expenditures, with the exception of the District of Columbia.<sup>133</sup> Six of the ten states with the highest graduation rates spent above the national average, with the exception of Minnesota, Iowa, Missouri, and North Dakota.<sup>134</sup> Most of these states sent the majority of their students to schools spending at or above the national average.<sup>135</sup> Average expenditure appears to have had little to no effect, however, in the rates of graduation between White and Black students in schools, as all states, on average, are about 1.3 times more likely to graduate White students, sometimes even two times more likely.<sup>136</sup> Discrepancies between

129. See *infra* Table II.

130. See *infra* Table II.

131. See *infra* Table II.

132. Graduation rates for the top thirteen states graduating 80 percent or more of students were as follows: Idaho (80.0), Kansas (80.0), Tennessee (80.3), Minnesota (80.4), Maine (80.5), Missouri (80.7), Connecticut (82.2), Pennsylvania (83.0), New Jersey (83.1), Iowa (83.2), Wisconsin (83.7), North Dakota (84.0) and Vermont (85.0). See *infra* Table II.

133. See *infra* Table II.

134. New Jersey spent \$15,384 per pupil; Wisconsin spent \$12,607; Minnesota \$11,034; North Dakota \$10,885; Connecticut \$14,273; Vermont \$18,924; Nebraska \$13,549; Pennsylvania \$13,356; South Dakota \$11,859; New Hampshire \$14,045. See *infra* Table II.

135. See *infra* Table II.

136. See *infra* Table II. For example, in 2010, Maine graduated about 81 percent of White students and about 26 percent of Black students. Montana graduated about 81 percent of White students and about 42 percent of Black students. Nebraska graduated about 81 percent of White students and about 44 percent of Black students. See *infra* Table II.

the percentage of White student graduates and Black student graduates ranged from one percent in Vermont to almost 55 percentage points in Maine.<sup>137</sup> For instance, in Wisconsin, where the state graduated almost 84 percent of *all* its students, 87 percent of White students graduated in 2010 while just 52 percent of Black students graduated.<sup>138</sup> Having graduated about 80 percent of White students, Colorado, Michigan, Montana, Nebraska, North Carolina, and Ohio graduated about 50 percent or less of Black students.<sup>139</sup> In states spending less on per pupil expenditures, such as Georgia and Nevada, where fewer students overall were likely to graduate, the discrepancy between racial graduation rates was less but still evidenced a gap.<sup>140</sup> In Georgia, about 57 percent of Black students graduated, compared to 71 percent of Whites; in Nevada, just 45 percent of Black students graduated while 69.1 percent of Whites graduated.<sup>141</sup> Those numbers were more exaggerated where the students were Black males, who graduated at even lower rates, compared to their Black female and White classmates.<sup>142</sup> This pattern was true across all fifty states.<sup>143</sup> In just a few states the graduation rate of Black males slightly exceeded the graduation rate of Hispanic males.<sup>144</sup>

Of the states with the lowest graduation rates of all students, every state except Washington ranked below average for the percentage of children with at least one parent with a postsecondary degree.<sup>145</sup> In 2010, the average was 44.6 percent.<sup>146</sup> Of those states graduating the most students in 2010, the majority had about 50 percent or more of children with at least one parent with a postsecondary degree.<sup>147</sup> The majority of students in every state had a least one parent employed, with the District of Columbia and Mississippi among the lowest.<sup>148</sup> In 2010, 61.2 percent of children in school in the District of Columbia had at least one parent with steady employment.<sup>149</sup> In Mississippi, just 66.1 percent of children had at least one parent with steady employment. Mississippi also ranked at the bottom for the total percentage of children living in non-low-income families.<sup>150</sup>

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137. See *infra* Table II.

138. See *infra* Table II.

139. See *infra* Table II.

140. See *infra* Table II.

141. See *infra* Table II.

142. See *infra* Table IV.

143. See *infra* Table II.

144. See *infra* Table II.

145. See *infra* Table III.

146. See *infra* Table III.

147. See *infra* Table III.

148. See *infra* Table III.

149. See *infra* Table III.

150. See *infra* Table III.

Just 42.1 percent of children lived in such circumstances in Mississippi in 2010.<sup>151</sup> Other states with low graduation rates fell in line not far away: New Mexico had just 45 percent of children living outside of low-income families; in South Carolina: 48.9 percent; Nevada: 53.7 percent; District of Columbia: 48.4 percent; Louisiana: 50.7 percent; and Georgia: 51 percent<sup>152</sup>—all ranking below the national average of 55.8 percent of families.<sup>153</sup>

Evidently, there is no set national standard for funding the education of a single American student nor is there a national standard for the expected graduation rate, with standards falling much lower for those students of color and for those who grow up in particular regions of the country. Further, evidence from school funding litigation suggests that court orders cannot resolve or change minds on the question of transferring monies from students in high-wealth districts within states to low-wealth districts or to school districts with smaller populations of disadvantaged students to those with higher numbers of these students. Legislators and their constituents are not open to changes as suggested by court systems brought about through school funding litigation.<sup>154</sup> In essence, incentives have not surmounted the appeal of local control, even for a goal as worthy and necessary as serving the most disadvantaged students.

## II. MAINSTREAMING EQUALITY METHODOLOGY FOR THE STATES

Current school funding schemes have proven insufficient to achieve the results intended by the Title I framers, which necessitates an alternative approach. Outside of the United States, governments have developed mainstreaming initiatives in the face of stagnant and ineffective anti-discrimination laws and equality policies.<sup>155</sup> These initiatives range from providing reports on the impacts of government policies and programs on women, for example,<sup>156</sup> to the creation of a statutory duty imposed on authorities to ensure that any enactment “be interpreted and administered”

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151. See *infra* Table III.

152. See *infra* Table III.

153. See *infra* Table III.

154. For example, despite a Kansas state court panel ruling in 2014 that the state’s schools were unconstitutionally underfunded, the Kansas Governor cut public school spending by 1.5 percent in early 2015. John Eligon, *School Cash Insufficient in Kansas, State Court Finds*, NY TIMES, Dec. 30, 2014, <http://www.nytimes.com/2014/12/31/us/school-cash-insufficient-in-kansas-court-finds-.html>; John Eligon, *Education is Newest Target of Kansas Budget Cuts*, N.Y. TIMES, Feb. 11, 2015, [http://www.nytimes.com/2015/02/12/us/politics/education-is-newest-target-of-kansas-budget-cuts.html?\\_r=0](http://www.nytimes.com/2015/02/12/us/politics/education-is-newest-target-of-kansas-budget-cuts.html?_r=0).

155. See Christopher McCrudden, *Mainstreaming Equality in the Governance of Northern Ireland*, 22 FORDHAM INT’L L.J. 1696, 1697-1704 (1999).

156. See, e.g., Margaret Alston, *Gender Mainstreaming in Practice: A View from Rural Australia*, 18(2) NWSA J. 123, 133 (2006) (discussing the “Women’s Budget,” initially adopted in 1984 adopted by the Victoria, Australia, Office of the Status of Women, requiring federal departments to report on the amount of money spent on women).

in accordance with the principle that “material inequalities between certain groups” “be progressively reduced.”<sup>157</sup> As Christopher McCrudden acknowledges, mainstreaming “is a concept subject to varying interpretations,” but “in essence mainstreaming requires that equality be seen as an integral part of all public policy making and implementation.”<sup>158</sup> This would compel the “‘evaluation of policy processes’” and the incorporation of an “‘equality perspective’” “‘in all policies at all levels and at all stages.’”<sup>159</sup>

#### A. *The Mainstreaming Equality Method*

Mainstreaming moves the focus from the results of disadvantage toward its causes. A mainstreaming funding scheme for United States schools would function to preempt and correct inequity caused by politics or by the existing financial structures of individual states. The mainstreaming of school funds should also be allocated based on multiple other indicators of disadvantage. This approach would go beyond adding one-dimensional terms like “race/ethnicity” or “social class” to a long list of other variables and instead assess the effects of policies on specific indicators of disadvantage and look for multiplicative effects. Much like intersectionality,<sup>160</sup> which seeks to reveal the effects of interlocking forms of disadvantage, this approach would address the manner in which racism, class oppression, and other discriminatory systems create inequalities that structure the relative positions of children in society. In addition, the approach would require “questions about deprivation, privilege, discrimination, and aspirations, to permit characterizing people more fully, and as more than the sum or product of their parts.”<sup>161</sup>

Olena Hankivsky summarizes the considerations of policymakers when thinking about intersectionality in the context of mainstreaming. She writes that “the mapping of multiple forms of discrimination allows for the understanding of [for example] gender relations in their specific context, and . . . their relationship to other structures of inequality such as class, ethnicity, nationality . . . among others.”<sup>162</sup> Abroad, national gov-

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157. McCrudden, *supra* note 155, at 1717–18 (discussing PAFT).

158. *Id.* at 1699.

159. *Id.* at 1703 (quoting RAPPORTEUR GROUP ON EQUALITY BETWEEN WOMEN AND MEN, COUNCIL OF EUROPE, *Gender Mainstreaming*, 98 GR-EG 1, 6 (Mar. 26, 1998)).

160. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

161. Nancy Krieger & Sally Zierler, *Accounting for Health of Women*, 1 CURRENT ISSUES IN PUB. HEALTH 251, 253 (1995).

162. Olena Hankivsky, *Gender vs. Diversity Mainstreaming: A Preliminary Examination*, 38 CANADIAN J. OF POL. SCI. 977, 993–94 (2005). Hankivsky advocates for “diversity mainstreaming,” also building on Crenshaw’s concept of intersectionality, as an alternative application of mainstreaming as juxtaposed to an application focused exclusively on gender.

ernments have utilized both gender mainstreaming and diversity mainstreaming, as discussed by Hankivsky. For example, in Pakistan, mainstreaming is used to address issues of disability in the Sightsavers' Lady Health Workers Programme.<sup>163</sup>

The original drafters of Title I limited their targeted funds to the population of children living below the poverty line, as does Title I of the No Child Left Behind Act, and both attempts lack targeted provisions to fund on the basis of multiple indicators of disadvantage.<sup>164</sup> There is no doubt that children in the United States who are identified as living in poverty are more often than not "multiply-burdened" or "multiply-disadvantaged",<sup>165</sup> growing up in predicaments and with particular educational needs which cannot be represented solely by a caregiver's income. As discussed in detail above, the educational predicament of a child living in poverty and the likelihood of that child to experience educational adequacy in his or her lifetime could essentially depend on the very square mile in which that child resides and the neighborhood school to which she or he belongs, as allocated funds to the individual school may have less to do with the number of children living in poverty in attendance and more to do with the experience levels of the teachers and staff employed there.

Further, the educational predicament of a child in poverty may depend on his or her state's taxing structure and the whims of legislators to "earmark" education funds for other purposes. Interstate funding disparities also make it less likely for a child to receive an equitable education if he or she lives in one of the Southern states or in some states in the Western United States.<sup>166</sup> The child may be more likely to do without essential supplies or other advantages enjoyed by students elsewhere. Other students may live in culturally isolated areas, and suffer from an inability to compete. Children of color are much less likely to graduate<sup>167</sup> and there is no consideration of race in current Title I targeted funding. These decreased odds of graduating exist for children of color in *all* school districts, no matter the rate of spending. The likelihood of not graduating is increased when the students are male, making it imperative that race and gender be considered together as indicators of disadvantage when allocations are made to schools in order to ensure educational adequacy for those students.<sup>168</sup> This list is most certainly incomplete, but highlights the limitations of the current Title I formulas, which are narrow and normative in vision. The formula must be adjusted so to address the consequences faced

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163. See Clara Fischer, *Intersectional Mainstreaming and Sightsavers' Lady Health Workers Programme in Pakistan*, 20 *GENDER AND DEV.* 563 (2012).

164. This approach may also garner greater political will in light of recent decisions regarding affirmative action policies in the U.S. by the Supreme Court.

165. Crenshaw, *supra* note 160, at 140, 145.

166. See discussion *supra* Sections I.B-C.

167. See discussion *supra* Section I.D.

168. See discussion *supra* Section I.D.



by students who are disadvantaged by multiple experiences—such as those affected by living in a state with one of the lowest tax rates in the country, in addition to race, gender, and other factors.

B. *Mainstreaming Equality for Disadvantage in Federal School Funding*

The processes and approaches to mainstreaming continue to be played out in practice, and research on best practices is in development.<sup>169</sup> Yet some factors have been identified as increasing the effectiveness of a mainstreaming equality scheme. Following her study of mainstreaming applications in Australia and Northern Ireland, Tahnya Barnett Donaghy identified four factors as essential to effective implementation of a mainstreaming scheme: political will, a statutory duty to mainstream, allocation of resources, and methods of enforcement.<sup>170</sup> Three other elements have the potential to undermine the mainstreaming scheme: a hostile government, lack of adequate resources, and lack of a formal requirement, such as a statutory duty, that policymakers embrace and effect mainstreaming schemes.<sup>171</sup> Political will is essential to the achievement of educational equity and adequacy for all children. Lawmakers must grasp the varied experiences of children in the United States and consider their place of origin, race, gender, family income-level, family education level, and other situational factors. Lawmakers must recognize that the paralysis that was labeled as originating from the condition of poverty by politicians in Washington in 1965 is not just about earnings and income but societal institutions—some of which are state legislatures themselves that have created systems in which the educational needs of all children cannot be satisfied. It is difficult to imagine how a child in a poor county in Alabama, which generates less than \$500 in revenue per pupil,<sup>172</sup> can have a chance, not to mention the odds when that child might be Black and male or fall into any other category indicating educational disadvantage. Funding formulas must not be based on the experience of the average child but must instead be built from the experiences of the most disadvantaged child. It is upon this base that equitable funds and the standard of adequacy must be grounded.

The next challenge for the United States federal government is to commit funds where fiscal formulas are devised. With the existence of a statutory duty, this budgeting is more likely to occur. Historically, a lack of resources has been the main cause of failed efforts to solve funding gaps

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169. See Tahnya Barnett Donaghy, *Applications of Mainstreaming in Australia and Northern Ireland*, 25 INT'L POL. SCI. REV. 393, 394 (2004).

170. *Id.*

171. *Id.*

172. In 2013, Coosa County, Alabama, contributed \$407 in local tax revenue to the total per pupil expenditure for students. Evan Belanger, *Map: See Which Alabama School Systems Spend the Most – And the Least – Educating Your Children*, AL.COM (July 18, 2014), [http://www.al.com/news/index.ssf/2014/07/post\\_13.html](http://www.al.com/news/index.ssf/2014/07/post_13.html).

between the poorest and wealthiest school districts.<sup>173</sup> It is left to policy-makers' imaginations what successes might have been if programs had been fully funded. Thus, the creation of a duty becomes both the most essential ingredient and the most essential commitment of the federal government in establishing a mainstreaming equality scheme for school funding. Current policies that are a part of the No Child Left Behind Act and most other state funding schemes function as mere policy guidelines. Absent a formal duty to fund, these guidelines fall short in application. The United States is susceptible to ideological differences in its party system at the federal, state, and local levels. When considering the politics of local school districts, it becomes even more apparent that whatever funding scheme is implemented must be one that will overcome flux and change in both national and state political leadership and also in local school leadership.

Northern Ireland chose the mainstreaming mechanism embodied in its Section 75 statutory duty precisely because it would be durable through different political arrangements.<sup>174</sup> Northern Ireland's statutory duty requires public authorities to regard the need to promote equality of opportunity between: (1) persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; (2) men and women generally; (3) persons with a disability and persons without; (4) persons with dependents and persons without.<sup>175</sup> This statutory equality duty has implications for elementary and secondary education in Northern Ireland, as it applies to all public authorities, including the Department of Education.<sup>176</sup> Each public authority is required to produce an Equality Scheme, outlining how they will implement Section 75.<sup>177</sup> These schemes identify areas of concern, including those where equality-impact assessments will occur.<sup>178</sup> For example, one such equality-impact assessment reviewing education curriculum found the lack of an explicit requirement to address racial equality issues in statutory curriculum and those findings were later factored into the curriculum review, which ultimately informed the content of the new statutory curriculum.<sup>179</sup>

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173. See Note, *Unfulfilled Promises*, *supra* note 61, at 1073-75.

174. Tanya Barnett Donaghy, "Mainstreaming: Northern Ireland's participative democratic approach," *Policy & Politics*, 32 (1) (2004), 49-62.

175. Northern Ireland Act 1998, c. 47, § 75, Part 1(a)-(d), available at <http://www.legislation.gov.uk/ukpga/1998/47/section/75>.

176. See Ombudsman (Northern Ireland) Order 1996, sch. 2, available at <http://www.legislation.gov.uk/nisi/1996/1298/contents>.

177. See Northern Ireland Act 1998, c. 47, § 75(4), sch. 9(4), available at <http://www.legislation.gov.uk/ukpga/1998/47/schedule/9/paragraph/4>.

178. See *id.*

179. See Laura Lundy, *Human Rights and Pluralism in Education: Prospects Under Devolution*, in, *DEVOLUTION AND PLURALISM IN EDUCATION IN NORTHERN IRELAND* 25, 31 (Caitlin Donnelly et. al., eds., 2006).

A similar delineation of areas for impact assessments would allow for regular measurements of equity and adequacy for specific groups and for the effects of interlocking forms of disadvantage. Congress would regularly assess the effect of policies on layered disadvantage, focusing on the mechanisms and processes that deprive students of advantages otherwise available to those who are a part of the mainstream. Targeting layered disadvantage would function similarly to the policy of the New Targeted Social Need (New TSN) in Northern Ireland, which performs in addition to the mainstreaming equality provisions of Section 75 of the Northern Ireland Act of 1998.<sup>180</sup> Targeted social need (TSN) has been used in policies throughout the United Kingdom in order to counteract the divide of resources and jobs between the regions, as the South is much more prosperous than the North.<sup>181</sup> In efforts to counteract the effects of such a divide, financial allocations have been budgeted based on indicators such as regional income, employment ratios, health deprivation and disability, education, skills and training, housing, geographical access to services, and child poverty.<sup>182</sup> While such factors may be useful to Congressional assessments and budgeting formulas, factoring educational disadvantage in the United States must also encompass circumstances of cultural isolation and the ability to compete.<sup>183</sup> Other indicators might include national origin, race, ethnicity, or gender based on gaps evidenced in assessment outcomes of these characteristics. Indicators should also consider interstate disparities, as well as economic stagnation as controlled by local circumstances, whether in the form of lack of industry, employment, chronic population imprisonment and low education levels. Poverty must not be thought of as a mere lack of resources, conditions and amenities, as originally defined in Title I, but also in terms of the extent of deprivation which leads *in effect* to people being excluded from mainstream society.

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180. See New TSN Unit, *Promoting Social Inclusion: Consultation on Future Priorities* BELFAST: OFFICE OF THE FIRST MINISTER AND DEPUTY MINISTER (2001), available at <http://www.newtsnni.gov.uk/psi>.

181. See *Targeting Social Need*, in 2 EMPLOYMENT EQUALITY REVIEW: POLICY ASPECTS OF EMPLOYMENT EQUALITY IN NORTHERN IRELAND 153 (Eithne McLaugh & Padraic Quirk, eds., 1996), at 153; Rosemary Kilpatrick & Alex Barr, *School Exclusions: Reversing the Trend?*, in DEVOLUTION AND PLURALISM IN EDUCATION IN NORTHERN IRELAND 50, 50 (Caitlin Donnelly et. al., eds., 2006).

182. See generally John Rhodes, Peter Tyler & Angela Brennan, *The Single Regeneration Budget: Final Evaluation*, DEP'T OF LAND ECON. (2007), available at <http://www.landecon.cam.ac.uk/research/reuag/uars/projects/urgsr.htm> (measuring the impact of these elements would include the extent to which a district's population has been ranked within the top most deprived in the country, how widespread the high levels of deprivation are within a region, income scale, meaning the number of income deprived people in the region, and the employment scale, or unemployment).

183. See *Milliken II*, 433 U.S. at 267.

Studies show that there can be no effective enforcement of a mainstreaming scheme without a statutory duty.<sup>184</sup> In fact, most mainstreaming schemes have failed without the provision of an enforcement mechanism.<sup>185</sup> Methods of enforcement may include a detailed statutory scheme, outlining for public authorities specific timelines and guidelines for implementation of the funding scheme and detailed instructions for implementation in related regulations. In addition, the U.S. Department of Education or other enforcement body, along with a congressional committee, would monitor the implementation of the legislation and its effectiveness. For example, Section 75 of the Northern Ireland Act of 1998 created the Equality Commission.<sup>186</sup> Schedule 9 of the Act outlines the specific roles of the Equality Commission, specifying that the Commission is to offer advice on and review the effectiveness of the duties:

The Equality Commission for Northern Ireland shall—  
keep under review the effectiveness of the duties imposed by section 75;  
offer advice to public authorities and others in connection with those duties; and  
carry out the functions conferred on it by the following provisions of this Schedule.<sup>187</sup>

The enforcement body for the U.S. scheme would also report to Congress in a consultative capacity on the implementation and effects of the funding scheme. When the enforcement body suspects that a public authority has not carried out its duty under the statute, it may investigate.<sup>188</sup> Congress may also consider employing a consultative element similar to that used in Section 75 as a means by which Congress can accept recommendations and reports from policy organizations also evaluating the effectiveness of the funding scheme. Specifically, Paragraph 5 of Section 9 requires:

[b]efore submitting a scheme a public authority shall consult, in accordance with any directions given by the Commission—  
(a) representatives of persons likely to be affected by the scheme; and

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184. See Donaghy, *supra* note 169, at 399.

185. See, e.g., Donaghy, *supra* note 169 at 405-06 (discussing mainstreaming in Australia).

186. Northern Ireland Act 1998, c. 47, § 73, available at <http://www.legislation.gov.uk/ukpga/1998/47/section/73>.

187. Northern Ireland Act 1998, c. 47, § 75, sch. 9, available at <http://www.legislation.gov.uk/ukpga/1998/47/schedule/9>.

188. *Id.* at §§ 9-10, available at <http://www.legislation.gov.uk/ukpga/1998/47/schedule/9/paragraph/10>.

(b) such other persons as may be specified in the directions.<sup>189</sup>

Congress may additionally provide a provision of grants to consultative policy groups so that the study of the implementation of the mainstreaming funding scheme across the states may be monitored and studied.<sup>190</sup> This is an essential element in the funding scheme because a detailed understanding and engagement with all communities is necessary to ensure all indicators listed within the funding scheme carry the adequate number of dollars to each student no matter the student's county or region in the United States. Moreover, continual assessment and re-assessment of indicators of disadvantage and evaluations of layered disadvantage will be required in order to ensure that student needs are adequately met.

Amid wide reports that funds for the federal Title I program have been insufficient to improve student achievement in identified schools under the No Child Left Behind Act,<sup>191</sup> and the accompanying lawsuits in various states, it is imperative that Congress commit to a mainstreaming equality funding scheme for public education. Congress should also consider increasing the amount it already contributes to public education in order to counteract some of the fiscal inefficiencies at the local level and the opposition by state taxpayers to allow redistribution of funds between wealthy and poor school districts. Currently, less than eight percent of funding for public elementary and secondary education comes from the federal government.<sup>192</sup> In designing a statutory duty for mainstreaming equality and the consequent allocation of targeted funds, Congress should prioritize interstate disparities, disbursing federal funds among the states in order to concentrate funds on a national basis and to combat interstate disparities. Funds would then also be disbursed according to a new formula which, unlike the current Title I-A formula, would target funds based on new definitions of layered disadvantage, as outlined above. The implementation must be effective, and thus the statute must also allow and fund a sufficient number of staff at the state education agencies to oversee the implementation of this specialized mainstreaming scheme.

## CONCLUSION

Congress required that ESEA maintain a balance between federal power and local responsibility in order to pass both houses in a post-*Brown* political environment. Yet for decades since, this concept of local control

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189. *Id.* at § 5 available at <http://www.legislation.gov.uk/ukpga/1998/47/schedule/9/paragraph/5>.

190. Northern Ireland has provided a similar provision in Section 9 of Schedule 9. See <http://www.legislation.gov.uk/ukpga/1998/47/schedule/9/paragraph/9>.

191. See William J. Mathis, *The Cost of Implementing the Federal No Child Left Behind Act: Different Assumptions, Different Answers*, 80(2) PEABODY J. OF EDUC. 90, 95-96 (2005).

192. *Federal Role in Education*, U.S. DEPARTMENT OF EDUCATION, (Feb. 13, 2012) <http://www2.ed.gov/about/overview/fed/role.html?src=ln>, last visited August 1, 2014.

has undermined the very intent of the Congressional legislation and has at the same time justified the wide disparities caused by local property taxes. State high courts that have invalidated property-tax finance systems properly held that expenditure disparities create wealth-based differences in educational opportunities. While the legislative responses to these decisions have given poor districts more revenue in order to reduce spending variations and enrich educational programs, some of the modified funding formulas do not ensure that substantive change will occur due to other obstacles at the local level.

Title I's provision for state coordination to serve disadvantaged populations has little force of its own because even if states have the resources for such coordination, their participation is at their own election.<sup>193</sup> The statute does not mandate that states receiving Title I funds use those funds to serve low-income students in specific ways, but rather, the statute permits various uses for the funds and uses general terms such as "provide services."<sup>194</sup> In many cases, states work at different capacities in terms of implementing the systems required to enforce the federal legislation. Again, these frustrations often go to inadequate funding and insufficient human resources. Due to tensions over local control, other state education agencies are still reluctant to intrude too much in local schools, even low-performing ones.<sup>195</sup>

A new approach is required to combat the paralysis of poverty originally targeted by Title I legislation in 1965. However, the United States must reevaluate its definition of poverty and acknowledge that poverty in the United States is intricately linked to disadvantage as it relates to race and class and other discriminatory systems.<sup>196</sup> A federal mainstreaming

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193. See 20 U.S.C. § 6314 (2002) (permitting use of funds for general school population); 20 U.S.C. § 6315 ("may use funds received under this part only for programs that provide services to eligible children") (emphasis added).

194. See *id.*

195. See generally, Richard Briffault, *The Local School District in American Law*, in *BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS* 24, 24-34; 39-40 (William G. Howell, ed. 2005). When the state takes over a local district, it may be met with ire from the public, as is the storied case of the emergency manager appointments of Detroit Public Schools. See Ann Zaniwieski, *4th new leader for DPS; Snyder's move upsets*, *DETROIT FREE PRESS*, Jan. 13, 2015, <http://www.freep.com/story/news/local/michigan/detroit/2015/01/13/dps-gets-new-emergency-manager/21697931/>. Sometimes local districts contest the extent of their responsibilities as local entities as compared to the state. See, e.g., *Dupree v. Alma Sch. Dist.*, 651 S.W.2d 90, 93-96 (Ark.1983) (rejecting the rationale of local control as justification for funding disparities, and holding that the Arkansas system of school funding failed even a rational basis test); see also *Bismarck v. State*, 511 N.W.2d 247, 260-61 (N.D. 1994) (applying intermediate scrutiny and rejecting the state's rationale of local control, holding that local control in North Dakota "is undercut and limited by the legislature's enactment of requirements for statewide uniformity of education").

196. In Northern Ireland, for example, the government initiated mainstreaming to combat religious discrimination but has since expanded its mainstreaming scheme to "consider simultaneously age, race, disability, religion, political opinion, marital status, dependent status, and sex-

equality school funding scheme will create a moral imperative and mission at the federal level. The funding scheme will contribute the lion's share of funding to those schools serving students categorized as disadvantaged. States will receive weighted funds based on this disadvantage, of which one consideration would be interstate disparities. To ensure fair interstate disbursement federal funds should be disbursed within states based on each individual schools' assessed disadvantage rather than disadvantage by school district due to the extreme disparities which often exist within districts. This method will require school districts to change their budgeting methods. Instead of reporting district spending based on district averages and average per pupil expenditures, school districts will report actual spending for each school. As a result, targeted federal funds will arrive not at schools with already rich resources, such as veteran and high-paid teachers, but in the accounts of the most needy institutions. Through the implementation of a mainstreaming school funding scheme based on layered disadvantage and its multiplicative effects, long-time disparities between public schools in the United States may at last be countered and corrected.

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ual orientation at each stage of the policy-making process." Donaghy, *supra* note 169, at 395, 398-400.

TABLE 1

U.S. States	2010	2010	2010
	Education spending per student (in U.S. dollars)	Percent of students in districts with per-pupil expenditures at or above the U.S. average	Statewide graduation rate - Cumulative promotion index (CPI)
<b>NORTHEAST</b>			
Connecticut	14273	100	82.2
Maine	14914	82.4	80.5
Massachusetts	13507	99.3	79.9
New Hampshire	14045	70.2	78.3
New York	16239	100	73.3
Rhode Island	14571	96.1	71.9
Vermont	18924	88	85
<i>Regional Average*</i>	15210		
<b>MID-ATLANTIC</b>			
Delaware	12017	87.5	73.9
Maryland	12953	100	78.6
New Jersey	15384	99.9	83.1
Pennsylvania	13356	70.6	83
Virginia	9786	70.6	77.5
West Virginia	13854	88.4	74.7
District of Columbia	17020	100	57
<i>Regional Average</i>	13481		
<b>MIDWEST</b>			
Illinois	11372	66.2	77.8
Indiana	10672	16.7	78
Michigan	10700	26.8	70.9
Ohio	11719	43.4	74.1
Wisconsin	12067	71.5	83.7
<i>Regional Average</i>	11306		
<b>SOUTHEAST</b>			
Alabama	10166	6.4	69.4
Arkansas	11275	14.3	72.3
Florida	9572	2.4	72.9
Georgia	9606	22	64
Kentucky	10139	11.8	77.2
Louisiana	12341	50.5	67
Mississippi	9756	2.8	64.4
Missouri	10747	15	80.7
North Carolina	8713	7.3	71.7
Oklahoma	9430	2.6	73.9
South Carolina	10073	13.4	61.5
Tennessee	8831	1.1	80.3
Texas	8882	17.7	74.8
<i>Regional Average</i>	9964		
<b>PLAINS AND MOUNTAINS</b>			
Colorado	9306	7.4	75.6
Iowa	11640	11.6	83.2
Kansas	11785	36.1	80



Minnesota	11034	34.4	80.4
Montana	14281	26.9	79.1
Nebraska	13549	32.2	78.8
North Dakota	13119	30.1	84
South Dakota	11859	12.3	76.3
Wyoming	18814	100	77.6
<i>Regional Average</i>	12950		
WEST			
Alaska	16675	96.2	68.7
Arizona	8698	5.1	67.2
California	8482	20.3	73.7
Hawaii	12366	100	67.2
Idaho	8818	3.5	80
Nevada	8419	4.6	62.7
New Mexico	10970	17.4	59.4
Oregon	10142	21.7	75.6
Utah	7042	1	71.3
Washington	9145	27.4	72.1
<i>Regional Average</i>	10076		
UNITED STATES			
Average	11824	43.7	74.7
<p>*The "Regional Averages" listed in this table are the author's calculations based on data available at the National Center for Education Statistics, U.S. Department of Education. All other data is from the National Center for Education Statistics. Data may be accessed and filtered at "Education Counts Research Center," Education Week, available at <a href="http://www.edcounts.org/createtable/step1.php">http://www.edcounts.org/createtable/step1.php</a>.</p>			

TABLE II

	2010	2010	2010	2010
U.S. State	Statewide graduation rate - Cumulative promotion index (CPI)	Graduation rate for white students - Cumulative promotion index (CPI)	Graduation rate for black students - Cumulative promotion index (CPI)	Graduation rate for Hispanic students - Cumulative promotion index (CPI)
Alabama	69.4	75.6	61.7	57.6
Alaska	68.7	73.6	61.2	65.8
Arizona	67.2	67.7	58.9	64.6
Arkansas	72.3	75.9	63	68.9
California	73.7	80.2	56.8	66

Colorado	75.6	77.1	50.8	61.2
Connecticut	82.2	85.4	61	73.2
Delaware	73.9	76.5	67.8	69.1
District of Columbia	57	99.3	61.9	63.2
Florida	72.9	76.4	70.1	77.1
Georgia	64	71.1	56.5	55.8
Hawaii	67.2	59.4	97.7	31.5
Idaho	80	80.1	61.3	69.2
Illinois	77.8	82	67.6	75.4
Indiana	78	80.9	68.9	67.7
Iowa	83.2	84.9	59.4	66.9
Kansas	80	84.6	62.7	65.3
Kentucky	77.2	79.3	73.7	76.4
Louisiana	67	71.8	59.8	40.4
Maine	80.5	80.9	26.4	— [1]
Maryland	78.6	82.9	66.9	76.7
Massachusetts	79.9	85	68.9	56.4
Michigan	70.9	76.2	50.1	59.1
Minnesota	80.4	84.5	53.9	49.2
Mississippi	64.4	69.5	59.7	59.2
Missouri	80.7	83.2	64.9	68.5
Montana	79.1	80.9	41.6	63.7
Nebraska	78.8	81.1	43.5	72.9
Nevada	62.7	69.1	45	54.9
New Hampshire	78.3	78.3	62.5	37.6
New Jersey	83.1	87.3	66	69.4
New Mexico	59.4	62.2	55.8	54.6
New York	73.3	83.8	72.7	74.8
North Carolina	71.7	81.2	48.4	63.5
North Dakota	84	88.5	81	73.7
Ohio	74.1	80.4	54.3	54.1
Oklahoma	73.9	75.5	53.6	67.3
Oregon	75.6	78	69.8	67.1
Pennsylvania	83	86.4	68.1	65.5
Rhode Island	71.9	74.7	55	58.2

South Carolina	61.5	67.4	54.3	58.7
South Dakota	76.3	81.3	57.3	65.3
Tennessee	80.3	81.6	74.6	67.4
Texas	74.8	74	61.1	73.3
Utah	71.3	80.2	60	56.7
Vermont	85	84.2	85.2	— [1]
Virginia	77.5	82.4	65.4	77
Washington	72.1	72.9	50.8	55.1
West Virginia	74.7	74.6	69.2	61.5
Wisconsin	83.7	87.4	52.3	63
Wyoming	77.6	80.6	55.7	64.9
U.S. Average	74.7	79.6	61.7	68.1
[1] Value not reported because of insufficient data for reliable estimate.				
<p>*All data is from the National Center for Education Statistics. Data may be accessed and filtered at "Education Counts Research Center," Education Week, available at <a href="http://www.edcounts.org/createtable/step1.php">http://www.edcounts.org/createtable/step1.php</a>.</p>				

TABLE III

	2010	2010	2010
	Percent of children who live in non-low-income families	Percent of children with at least one parent with a postsecondary degree	Percent of children with at least one parent with steady employment
U.S. States			
Alabama	49.7	39.7	67.8
Alaska	66.9	42.5	68.1
Arizona	48.2	38.4	69.7
Arkansas	45.2	35.2	69.2

California	53.7	39.2	68.3
Colorado	61.3	51.5	75.1
Connecticut	71.7	55.4	74.8
Delaware	60.9	42.8	73.1
District of Columbia	48.4	40.4	61.2
Florida	51.6	43.8	70.1
Georgia	51	42.4	70.1
Hawaii	68.1	47.9	75.9
Idaho	51.6	47.8	71.5
Illinois	59.1	47.1	72.3
Indiana	52.7	41.2	70.6
Iowa	63.5	55.2	79
Kansas	57.8	49.8	77.7
Kentucky	51.7	40.2	67.9
Louisiana	50.7	33.8	69.6
Maine	57.6	49.6	71.8
Maryland	70.2	50.9	77.5
Massachusetts	70.5	60.5	72.8
Michigan	55.1	46.8	67.2
Minnesota	66.5	58.1	76.5
Mississippi	42.1	37.5	66.1
Missouri	55.1	44.4	73.1
Montana	55.9	50.8	71.4
Nebraska	58.3	51.6	80.5
Nevada	53.7	32.9	68
New Hampshire	73.5	58.1	79.1
New Jersey	69.6	55.3	75.9
New Mexico	45	34	68.6
New York	58.7	49.6	71.9
North Carolina	51.3	44.5	69.3
North Dakota	65.5	61.5	81.4
Ohio	54.8	45.6	70.4
Oklahoma	48.7	38.3	72.5
Oregon	52.5	42.8	67.2
Pennsylvania	60.5	48.4	72.6

Rhode Island	60.1	50.6	68.9
South Carolina	48.9	41.2	67.6
South Dakota	57.4	55.8	80
Tennessee	49.7	40.4	67.8
Texas	49.1	36	72.7
Utah	59.2	53.2	78.2
Vermont	60.7	55.9	74.3
Virginia	66.4	52.5	77.5
Washington	60.8	48.1	71.3
West Virginia	51.4	35	68.2
Wisconsin	60.2	50.6	74.5
Wyoming	62.5	50.5	81.9
U.S. Average	55.8	44.6	71.5
<p>*All data is from the National Center for Education Statistics. Data may be accessed and filtered at "Education Counts Research Center," Education Week, <i>available at</i> <a href="http://www.edcounts.org/createtable/step1.php">http://www.edcounts.org/createtable/step1.php</a>.</p>			

TABLE IV

	2010	2010	2010	2010	2010	2010
	Graduation rate for male Hispanic students - Cumulative promotion index (CPI)	Graduation rate for male black students - Cumulative promotion index (CPI)	Graduation rate for male white students - Cumulative promotion index (CPI)	Graduation rate for female Hispanic students - Cumulative promotion index (CPI)	Graduation rate for female black students - Cumulative promotion index (CPI)	Graduation rate for female white students - Cumulative promotion index (CPI)
Alabama	48.9	54	72.1	51.9	66.5	77.1
Alaska	64.4	— [1]	71	71.5	65.6	78.4
Arizona	60.9	54.3	66	68.4	62.8	69.1
Arkansas	62.3	52.9	73	69.9	69.3	76.4
California	60.8	49.8	77.8	69.9	59.1	82
Colorado	— [1]	49.5	74.7	65.3	52	79.7
Connecticut	— [2]	— [2]	— [2]	— [2]	— [2]	— [2]
Delaware	64.1	68.1	72.3	— [1]	71.9	80.4
District of Columbia	48.9	— [1]	95.2	77.6	— [1]	95.7
Florida	73.7	63.4	73.3	81.2	76.7	79.9
Georgia	48.5	49.8	67.2	57	62.9	75.1
Hawaii	26.1	93.4	59.6	37.6	— [1]	59.3
Idaho	67.6	47.6	77.1	70.3	— [1]	82.9
Illinois	70.9	60.5	80.2	79.8	70.5	83
Indiana	— [1]	58.9	77.2	72.1	71.5	82.9
Iowa	— [1]	51.3	82.8	69.4	— [1]	85.5
Kansas	60.2	55.5	81.8	72.2	63.5	84.6
Kentucky	— [1]	66.9	76.3	78.8	78.9	81.7
Louisiana	34.9	52.5	66.1	34.5	67.2	77.6
Maine	— [1]	— [1]	79.3	— [1]	— [1]	83.6
Maryland	66.1	61.7	80.6	80.3	72.5	85
Massachusetts	50.5	62.6	81.9	59.5	72.5	86.8
Michigan	— [1]	43.5	73.1	— [1]	51.9	79.1
Minnesota	—	— [1]	82.5	— [1]	57.3	86
Mississippi	53.2	50.9	65.7	65.3	67.7	73
Missouri	— [1]	62.4	81	68.4	69	84.1
Montana	— [1]	34.7	79.3	74.6	— [1]	81.1
Nebraska	64.5	32.2	76.7	75	46.3	83.6
Nevada	51.6	41.3	66.3	58.3	47.8	72
New Hampshire	42.8	59	74.9	— [1]	55.9	81.7
New Jersey	64.5	60.6	85.6	71.2	67.3	87.5
New Mexico	49.6	49.2	59.6	57.2	56.1	65.5
New York	73	71.5	83.4	75.8	73.9	86.8

North Carolina	54.8	43.6	78.1	64.8	53.3	83.8
North Dakota	— [1]	— [1]	83.9	— [1]	83.5	91.8
Ohio	45.6	45.2	79.4	46.6	54.3	82.1
Oklahoma	60.8	45.5	70.7	65.4	58.4	77.6
Oregon	60.3	68.9	74.7	73	76.6	81.4
Pennsylvania	58.3	62.6	84.9	66.7	74.2	86.9
Rhode Island	52.2	49	70.3	60.5	55.6	78.7
South Carolina	48.2	47.8	63.4	64.2	61.5	72
South Dakota	— [1]	51.4	77.8	84.6	63.4	82.6
Tennessee	63.9	67.9	79.7	— [1]	81.2	83.2
Texas	68.8	57.2	72.3	75.8	64.4	74.9
Utah	51.4	— [1]	76.3	62.5	58.3	83.2
Vermont	43.8	81.1	81.7	— [1]	— [1]	84.2
Virginia	— [1]	58.4	79.2	— [1]	69.1	85.3
Washington	46.1	40.1	68.9	52.8	52.7	75.9
West Virginia	58.1	66.7	71.2	56.1	70.5	77.5
Wisconsin	— [1]	46.3	85.4	65.3	55.9	88
Wyoming	63.9	— [1]	78.2	71.3	— [1]	81.9
U.S.	63.3	55.6	77	71.3	66.1	81.6
[1] Value not reported because of insufficient data for reliable estimate.						

[2] Value not calculated because necessary data field(s) not reported in the U.S. Department of Education's Common Core of Data and not provided by state education agency.