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How Reconstructing Education Federalism Could Fulfill the Aims of Rodriguez

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THE
ENDURING
LEGACY OF
Rodriguez

Creating New Pathways to
Equal Educational Opportunity

CHARLES J. OGLETREE, JR.
KIMBERLY JENKINS ROBINSON
Editors

Harvard Education Press
Cambridge, Massachusetts

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How Reconstructing Education Federalism Could Fulfill the Aims of *Rodriguez*

KIMBERLY JENKINS ROBINSON

THE *RODRIGUEZ* PLAINTIFFS, Mexican American schoolchildren who resided in districts with a low property tax base, challenged the Texas school finance system in federal court because they sought educational opportunities that equaled those of their more affluent and white peers in a nearby neighborhood. Although state school finance litigation and reform has resulted in some reform of school finance systems, the educational opportunity gap that the *Rodriguez* plaintiffs sought to remedy in the early 1970s remains one of the persistent challenges that plague the American education system. Today, it relegates at least ten million students in low-income neighborhoods and millions more minority students to poorly performing teachers, substandard facilities, and other inferior educational opportunities.¹

Why have the disparities that the *Rodriguez* plaintiffs attempted to remedy continued to burden the public school system in the United States? Although these disparities have broad roots, they persist in part because the United States invests more money in high-income districts than in low-income districts, a sharp contrast to other developed nations.² Scholars and court decisions also have documented the sizeable intrastate disparities in educational opportunity. In addition, interstate inequalities represent the largest component of disparities in educational opportunity. The harmful nature of

interstate disparities falls hardest on disadvantaged schoolchildren who have the most educational needs, and states do not possess the resources and capacity to address the full scope of these disparities.³

The central aim of the *Rodriguez* plaintiffs—equal educational opportunity—remains an essential goal of the U.S. education system. Yet it has never been realized. The United States relies heavily on schools to overcome the influence of a child's circumstances, such as family income and structure, on life opportunities despite evidence that schools are not effectively serving this function. Fulfilling the goal of equal educational opportunity will become increasingly important to the nation's interests given the growing need for more highly skilled workers to supply jobs that meet the economy's demands.⁴

As policy makers, scholars, and reformers continue to search for new ideas for how to fulfill the aims of the *Rodriguez* litigation, we must identify all of the root causes for these disparities. I believe that one of the overlooked causes is the nation's approach to education federalism—a balance of power across the federal, state, and local governments that emphasizes substantial state autonomy over education—which has played a significant and influential role in undermining federal reforms that address disparities in educational opportunity. Indeed, in a recent article I analyzed how the nation's approach to education federalism served as one of the principal obstacles to three of the most comprehensive federal attempts to advance equal educational opportunity: school desegregation, federal school finance litigation, and the No Child Left Behind Act of 2001 (NCLB).⁵

In the *Rodriguez* decision, the U.S. Supreme Court held that the plaintiffs did not have a right under the Constitution's Equal Protection Clause, which required the state of Texas to remedy disparities in funding for schools in high-wealth and low-wealth school districts. One of the principal reasons that the Court rejected the plaintiffs' claims was the need to maintain the current balance of power between the federal and state governments over education. Indeed, the Court acknowledged in *Rodriguez* that even though all equal protection claims implicate federalism, "it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us," because upholding the plaintiffs' claims would ultimately lead the Court to invalidate the school systems in all fifty states. Although some contend that these decisions and results are driven more by a lack of political will rather than education federalism, the consistency with

disadvantaged schoolchildren who have not possess the resources and disparities.³

plaintiffs—equal educational opportunity in the U.S. education system. Yet it has relied heavily on schools to overcome such as family income and structure that schools are not effectively providing equal educational opportunity to the nation's interests given the growth of the economy to supply jobs that meet the economic needs of the nation.

As we continue to search for new ideas to address these disparities, we must identify all the ways in which we can ensure equal access to an excellent education. I believe that one of the overlooked aspects of federalism—a balance of power between the federal government and the states—that emphasizes substantial federal involvement has played a significant and influential role in addressing disparities in education. In this article I analyzed how the nation's reliance on federalism is one of the principal obstacles to achieving equal educational opportunity. Attempts to advance equal educational opportunity through federal school finance litigation, such as the case of *San Antonio Independent School District v. Rodriguez* (NCLB),⁵

and the Supreme Court held that the plaintiffs' claim under the Equal Protection Clause, that the disparities in funding for schools in the state of Texas violated the Equal Protection Clause. One of the principal reasons for the plaintiffs' claims was the need to maintain the balance of power between the federal and state governments over education. As stated in *Rodriguez* that even though federalism, "it would be difficult to achieve the impact on our federal system than the plaintiffs' claims would ultimately require in school systems in all fifty states. Although the benefits and results are driven more by a reliance on federalism, the consistency with

which federalism has arisen as a real or imagined obstacle to reforms aimed at ensuring equal educational opportunity suggests that federalism is a significant contributing factor, even if other factors also adversely influenced these reforms.⁶

I contend that the United States should strategically restructure and strengthen the federal role in education to establish the necessary foundation for a national effort to ensure equal access to an excellent education. This restructuring and strengthening of the federal role in education would require shifting some power away from the state and local governments and toward the federal government. The United States would then need to adopt a new understanding of education federalism that embraces the federal government as the guarantor of equal opportunity, because it is the only government with the capacity and sufficient incentive to lead a national effort to achieve this widely supported, yet persistently elusive, goal. Although this would not require federalizing the nation's education system as at least one scholar has recommended, it would require acceptance of a larger federal role in education to hold the states accountable for ensuring that all students receive equal access to an excellent education.⁷

I define equal access to an excellent education as the opportunity for all students to attend a high-quality school that enables them to effectively pursue their life goals, to become engaged citizens, and to develop their abilities to their full potential.⁸ Equal access to an excellent education enables all students to receive "a real and meaningful opportunity to achieve rigorous college- and career-ready standards."⁹ If the United States pursues equal access to an excellent education as the primary goal for its education system, it will break the traditional link between low-income and minority status and inferior educational opportunities. This goal recognizes that educational opportunities should be tailored to meet the individual needs of students that may vary dramatically depending on a variety of factors, including family structure and stability, students' health and nutrition, and neighborhood climate. This goal also embraces closing the opportunity gap as an essential prerequisite for closing the achievement gap. Furthermore, embracing racially and economically diverse schools is essential for achieving this goal given compelling research regarding the harms of racial and class isolation, the benefits of diversity, and evidence of diverse schools providing important educational benefits that cannot be duplicated by alternative reforms.¹⁰ An excellent education for all schoolchildren should be the nation's ultimate

education goal, because all families ultimately want a first-rate education for their children and because the United States would benefit economically, socially, and politically from providing such an education.

My proposal for disrupting education federalism is particularly timely. First, the United States is undergoing an unprecedented expansion of the federal role in education and an accompanying shift in its approach to education federalism. The American Recovery and Reinvestment Act of 2009, also known as the stimulus bill, authorized an unprecedented \$100 billion to invest in education funding, tuition tax credits, and college grants. President Barack Obama trumpeted this as “the largest investment in education in our nation’s history.” The stimulus bill included \$4.35 billion for the Race to the Top (RTTT) program, which represented far more discretionary funding than all of Secretary of Education Arne Duncan’s predecessors. Although RTTT has its shortcomings, it has sparked significant education reform, including greater state support for the Common Core State Standards, charter schools, and revisions to state laws regarding the use of student testing data to evaluate teachers. In a number of states and districts, the two years following the creation of RTTT sparked more reform than those locations had seen in the preceding twenty years.¹¹ The stimulus bill built on the expansion of the federal role in education established in the No Child Left Behind Act of 2001. NCLB represents the most expansive federal education reform law in the history of the United States. For example, the law’s far-reaching provisions require annual testing in math and reading in grades 3 through 8 and once in grades 10 through 12 and periodically in science. NCLB also instituted public reporting of results of student assessments on the content of state standards; launched disaggregation of this data for a variety of student characteristics, including race and ethnicity; created accountability interventions for Title I schools; and set minimum requirements for highly-qualified teachers.¹²

Second, there is currently a national focus on improving educational performance of poor schoolchildren and reducing the achievement and opportunity gaps. For instance, a 2013 report from the Equity and Excellence Commission, a panel of education policy experts convened by President Obama, proposed a variety of far-reaching reforms that would greatly expand federal responsibility for equal educational opportunity.¹³ Scholars similarly have offered a variety of thoughtful proposals for how to reduce the opportunity gap that would require greatly expanding federal authority over education and

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ultimately want a first-rate education for all. The United States would benefit economically, so that all children could enjoy such an education.

Education federalism is particularly timely, given the accompanying expansion of the federal role in education. The Recovery and Reinvestment Act of 2009, which authorized an unprecedented \$100 billion in education tax credits, and college grants. President Obama's stimulus bill included \$4.35 billion for the Department of Education, which represented far more discretionary funding than any of Arne Duncan's predecessors. In the past few years, it has sparked significant education reform, including support for the Common Core State Standards, changes to state laws regarding the use of student data, and in a number of states and districts, the implementation of RTTT sparked more reform than had occurred in preceding twenty years.¹¹ The stimulus bill's role in education established in the No Child Left Behind represents the most expansive federal role in the history of the United States. For example, it requires annual testing in math and reading in grades 3 through 12 and periodically public reporting of results of student assessment standards; launched disaggregation of this data by characteristics, including race and ethnicity; set standards for Title I schools; and set minimum standards for teachers.¹²

The current focus on improving educational performance, reducing the achievement and opportunity gap, and reforming the Equity and Excellence Commission reports convened by President Obama, programs that would greatly expand federal authority over education and opportunity.¹³ Scholars similarly have offered proposals for how to reduce the opportunity gap by increasing federal authority over education and

thereby restructuring education federalism.¹⁴ Here I strengthen these calls for reform by explaining why disrupting education federalism is necessary for a successful national effort to ensure equal access to an excellent education and identifying the essential elements for a successful comprehensive effort to achieve this goal.

In offering a proposal for restructuring education federalism, I build on Yale Law professor Heather Gerken's argument that scholars developing and critiquing federalism theory should consider the appropriate balance of institutional arrangements for a specific context.¹⁵ Therefore, I only propose a shift in the balance of federal, state, and local authority in order to strengthen the federal role in ensuring equal access to an excellent education.

UNDERSTANDING THE CURRENT STRUCTURE OF EDUCATION FEDERALISM AND ITS BENEFITS

Historically, the hallmarks of education federalism in the United States have been decentralized state and local control over public schools and a limited federal role. The constitutional foundations for this approach lie in the omission of education from the purview of federal authority and the Tenth Amendment's reservation of authority for the states in all areas that the Constitution does not assign to Congress.¹⁶

However, three trends are noteworthy to understand the current structure of education federalism. First, the federal role in education has grown exponentially from its original narrow role. After *Brown v. Board of Education* in 1954, Congress passed several statutes that fostered federal responsibility for equal educational opportunity, including the Elementary and Secondary Education Act of 1965 (ESEA). In the last two decades, Congress has expanded the federal role to encourage higher standards and greater accountability for the education of all children, most recently through NCLB and its waivers and the RTTT program.¹⁷

Second, state control over education has risen substantially over the last half century or more of school reform. School finance litigation and reform encouraged centralization of education authority with state officials who eventually became the primary funders of public schools.¹⁸ States currently contribute 45.2 percent of school funding, and local government provides 44.6 percent. The federal government provides 10.2 percent of funds for education, and this represents an increase in federal education funding over the

last decade, although not a steady one.¹⁹ The increase in the state proportion of funding led to an increase in state authority over schools. State-created standards and tests also have expanded state influence over the curriculum.²⁰

Finally, the third trend necessarily follows from the first two. The rise in federal and state authority over education has led to a substantial decrease in local control of schools for the last half century. Local authority over education is primarily focused on the daily administrative responsibilities for running schools, including implementing federal and state categorical programs and court orders; hiring and supervising staff; constructing, acquiring, and maintaining school buildings; managing vendor contracts; and transporting students. Most local school boards also may raise funds for public schools through property taxes.²¹

The nation's current approach to education federalism has been praised for its ability to reap several benefits. Some find this approach superior, based on Justice Louis Brandeis's view that state and local governments may serve as experimental "laboratories" that can help solve the nation's economic and social challenges. States and localities have adopted a diverse array of governance structures for education that are designed to respond to state and local interests and preferences. This decentralized approach also allows state and local governments to adopt a variety of curricula, teaching, and learning approaches.²²

Others praise the current structure of education federalism for its ability to produce the most effective outcomes. For example, proponents of localism contend that local decision making can produce more effective policy reforms because those most affected by the decision shape the reform. Still others contend that a decentralized approach to education is more effective at identifying the most successful educational approaches given the existing uncertainties regarding how best to educate children. Localism also can create an efficient allocation of goods and services by allowing local governments to compete for citizens by offering an attractive array of public services. When localities offer diverse learning options, some citizens can shop for the best schools or relocate so that their children can attend schools that best serve their educational needs.²³

Additionally, state and local control over education is commended for its ability to foster greater accountability to citizens. Individuals exert greater influence over local government policy than over federal or state government. Local control can enable parents to become involved in and influence their

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education federalism has been praised for its benefits. Some find this approach superior, arguing that state and local governments may be better able to design policies that can help solve the nation's economic and social problems. Many localities have adopted a diverse array of educational approaches that are designed to respond to local needs. This decentralized approach also allows localities to adopt a variety of curricula, teaching

methods, and approaches to education federalism for its ability to provide more effective services. For example, proponents of local control argue that localizing decision-making can produce more effective policy outcomes. Localism also can create more effective services by allowing local governments to tailor public services to local needs. When localities are given more authority, some citizens can shop for the best schools, and children can attend schools that best serve their needs.

Local control over education is commended for its ability to provide more effective services to citizens. Individuals exert greater influence over their children's education than over federal or state government. Local control allows parents to become involved in and influence their

child's education and school. Many parents regularly interact with and monitor their child's school, and this involvement can improve student performance.²⁴

The tradition of local control of education also remains an important value for many within the American public. Many view state and local control over public elementary and secondary education as a central component of state and local government. While public opinion polls reveal an increasing comfort with federal involvement in education, the polls continue to indicate that Americans generally prefer state and local control over education. In addition, state and local authority over education has resulted in diversity in education governance that influences the impact the federal government can have on education.²⁵

REASONS FOR REEXAMINING EDUCATION FEDERALISM

Given these benefits, why should the nation reexamine the structure of education federalism and consider increasing federal authority over education as part of a national plan to ensure equal access to an excellent education? This reexamination is needed for at least five reasons.

The Inconsistencies in the Benefits of Education Federalism

Although education federalism undoubtedly reaps some of the benefits that it is designed to accomplish, the current approach does not consistently yield the benefits that it is supposed to secure. For instance, education federalism has been praised for its ability to allow the state and local governments to serve as "laboratories" of reform. However, research reveals that in the area of school finance reform, most reforms have been fairly limited in scope and that the reliance on property taxes to fund schools remains the prevailing approach to local school funding.²⁶ This approach has continued despite the Supreme Court's 1973 call for school finance reform in *Rodriguez*: "The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity."²⁷

Even when plaintiffs have prevailed in litigation that sought to reform school finance systems, most states typically have maintained the same fundamental and unequal structure for school finance. Additionally, in a substantial

majority of the states, funding inequities between wealthy and poor districts and schools persist.²⁸ In 2012, only fifteen states provided more funding to districts with high concentrations of poverty than those with low concentrations of poverty, despite consistent research that low-income students require more resources for a successful education than do their more affluent peers. The 2013 Equity and Excellence Commission report notes that substantial reform is needed because, apart from a few exceptions, states fail to link their school finance systems to the costs that they would need to invest to educate all children in compliance with state standards.²⁹ Given decades of reforms that have not made consistent and substantial inroads on these challenges, the states are not serving as effective laboratories for school finance reform.

Education federalism also is supposed to yield an efficient and effective education system. However, the U.S. education system regularly falls short of achieving these goals. The substantial percentage of poorly educated students inflicts substantial costs on the nation, resulting in numerous inefficiencies. For example, substantially increasing the high school graduation rate could save the nation \$7.9 to \$10.8 billion annually in food stamps, housing assistance, and welfare assistance. The nation forfeits \$156 billion in income and tax revenues during the life span of each annual cohort of students who do not graduate from high school. This cohort also costs the public \$23 billion in health-care costs and \$110 billion in diminished health quality and longevity. By increasing the high school graduation rate by 1 percent for men age twenty to sixty, the nation could save \$1.4 billion each year from reduced criminal behavior.³⁰

Local participation in the governance of school districts also is quite low and thus does not accomplish the accountability that it is supposed to secure. The growing federal and state influence over education has led some scholars to contend that "local control" no longer exists in American education and, in fact, has not existed for quite some time. Typically, no more than 10 to 15 percent of voters participate in school board elections, and school board meetings also often experience low citizen attendance. In low-income communities in particular, community participation regularly can yield little influence due to the lack of political power and financial means of residents. Although the quality of schools certainly influences where many families purchase homes, low-income families typically lack the financial ability to choose the best schools because such schools are zoned for more expensive housing options.³¹

In noting the benefits that it is doing some important work in education system innovation, such as state and local reform, it fosters more state decisions than does these benefits and fits suggests that restructured to

Education Federalism and Equal Education

Elsewhere I have argued that the federal role in education is to three of the purposes of school desegregation. The Supreme Court's certifications for reform in key Supreme Court cases to the 1995 decision on federalism and education, of the reasons for doing, these opinions on education was solved already been established educational system additional federal educational opportunities language learning long-standing standards for to adopt rigorous

Certainly, these reforms, a lash against co

equities between wealthy and poor districts. Only fifteen states provided more funding to students of poverty than those with low concentrations of poverty. Research that low-income students require more education than do their more affluent peers. A Commission report notes that substantial reform, with a few exceptions, states fail to link their investments that they would need to invest to educate their students to state standards.²⁹ Given decades of reforms and substantial inroads on these challenges, the current structure of education federalism is a laboratory for school finance reform.

Education federalism is supposed to yield an efficient and effective education system. The U.S. education system regularly falls short of this goal. An estimated 25 percent of the total percentage of poorly educated students in the U.S. education system, resulting in numerous inefficiencies. Raising the high school graduation rate could save the nation annually in food stamps, housing assistance, and other social programs. The nation forfeits \$156 billion in income and productivity each year from each annual cohort of students who do not graduate. This cohort also costs the public \$23 billion in diminished health quality and lost productivity. Raising the high school graduation rate by 1 percent for men would save \$1.4 billion each year from reduced health care costs.

The accountability of school districts also is quite low. The current structure of education federalism is supposed to secure local control and accountability. Influence over education has led some scholars to argue that local control no longer exists in American education and that it is being eroded over time. Typically, no more than 10 to 15 percent of the population in school board elections, and school board elections have low citizen attendance. In low-income communities, citizen participation regularly can yield little influence. The current structure of education federalism certainly influences where many families live. Many families typically lack the financial ability to live in the best schools. Such schools are zoned for more expensive housing.

In noting that education federalism does not consistently yield the benefits that it is designed to secure, I am not suggesting that it does not yield some important benefits. Certainly, the decentralized nature of the American education system fosters some state and local experimentation and innovation, such as curricular reform, teaching innovations, and other state and local reforms. The current structure of education federalism undeniably fosters more state and local control and accountability for state and local decisions than does a completely federalized system of education.³² Although these benefits are worth preserving, the inconsistency in reaping these benefits suggests that it is worth reexamining how education federalism could be restructured to more reliably secure such benefits.

Education Federalism as a Roadblock to Equal Educational Opportunity

Elsewhere I have analyzed how a preference for local control and a limited federal role in education have functioned as one of several critical roadblocks to three of the primary reforms that promote equal educational opportunity: school desegregation, school finance litigation in federal court, and NCLB. The Supreme Court relied on education federalism as one of the primary justifications for rejecting a federal right to education in *Rodriguez*. Similarly, key Supreme Court decisions, from the 1974 decision in *Milliken v. Bradley* to the 1995 decision in *Missouri v. Jenkins*, have relied on the structure of education federalism and the American tradition of local control of education as one of the reasons for severely curtailing effective school desegregation. In so doing, these opinions clung to a form of dual federalism which insisted that education was solely a state and local function. However, dual federalism had already been eschewed in prior Court decisions that prohibited segregated educational systems and in federal legislation and enforcement that provided additional federal funding for low-income students and that required equal educational opportunity for girls, women, disabled students, and English language learners.³³ Even when Congress was adopting NCLB, the nation's long-standing approach to education federalism insisted that states decide the standards for students and teachers, which resulted in many states failing to adopt rigorous standards for either students or teachers.³⁴

Certainly, education federalism does not stand alone as an obstacle to these reforms. Numerous other obstacles, including state and local backlash against court-ordered desegregation, the challenges of court-mandated

school reform, and inadequate funding for NCLB, also undermined the effectiveness of these reforms.³⁵ Nevertheless, education federalism was one of the central obstacles to the effectiveness of these reforms.

Education Federalism Allows States to Make Equal Educational Opportunity a Low Priority

Throughout this nation's history—even acknowledging state reforms in education and school funding—the states have not taken sustained and comprehensive action to ensure that all students receive equal access to an excellent education. Redistributive goals and equity concerns are simply not consistent state priorities for education.³⁶ Indeed, the 2013 report from the Equity and Excellence Commission found that “any honest assessment must acknowledge that our efforts to date to confront the vast gaps in educational outcomes separating different groups of young Americans have yet to include a serious and sustained commitment to ending the appalling inequities—in school funding, in early education, in teacher quality, in resources for teachers and students and in governance—that contribute so mightily to these gaps.”³⁷ Furthermore, intrastate reforms cannot address significant and harmful interstate disparities in funding.³⁸

The limited scope of many reforms also reveals that the United States has lacked the political will and investments in enforcement to adopt and implement the type of reforms that would make equal access to an excellent education a reality.³⁹ Given this generally consistent failure to undertake comprehensive and sustained reform, the United States should not expect different results from a system that has failed to ensure equal access to an excellent education for many generations of schoolchildren. Instead, an assessment of how education federalism could be restructured to support a comprehensive national effort to achieve this goal is long overdue.

Education Federalism Invites Inequality

Primary state and local control over education essentially invite inequality in educational opportunity because of pervasive state insistence that local governments raise education funds and state funding formulas which do not effectively equalize the resulting disparities in revenue. Although some influential victories have occurred, school finance litigation has mostly failed to change the basic organizational structure of school finance systems and their reliance on property taxes to fund schools. Instead, this litigation at best has

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States to Make Equal Priority

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erations of schoolchildren. Instead, an as-
ralism could be restructured to support a
achieve this goal is long overdue.

Inequality

Over education essentially invite inequality
use of pervasive state insistence that local
s and state funding formulas which do not
disparities in revenue. Although some influ-
school finance litigation has mostly failed to
structure of school finance systems and their
d schools. Instead, this litigation at best has

obtained limited increases in funding for property-poor districts while allow-
ing property-rich districts to maintain the same funding level or to raise their
funding rate at a slower pace.⁴⁰

Evidence of the persistent inequalities in school funding can be found
in the 2013 Equity and Excellence Commission report. The report found
that “no other developed nation has inequities nearly as deep or systemic;
no other developed nation has, despite some efforts to the contrary, so thor-
oughly stacked the odds against so many of its children.” These dispari-
ties are due in substantial part to the continued state reliance on property
taxes to fund schools. As a result, many predominantly low-income and
minority schools predictably produce poor outcomes because they typically
lack both the resources to ensure that their students obtain an effective ed-
ucation and the capacity to undertake effective reforms even when these
reforms are well conceived.⁴¹

The harms from persistent and pervasive disparities in educational oppor-
tunity are not limited to schoolchildren, their families, and their commu-
nities. These disparities also harm nationwide interests in a strong economy
and a just society. The United States needs to maintain international aca-
demic competitiveness to attract businesses and prevent the loss of jobs to
other, more educated nations. Research reveals that the long-term vigor of
the U.S. economy will depend on the advanced skills that are typically pro-
vided in higher education and that are needed for upper-level technical oc-
cupations. Yet, international assessments reveal that the performance of U.S.
students is often average or below average when compared with students from
other countries, which will make it difficult for American students to com-
pete successfully.⁴² Eric A. Hanushek, Paul E. Peterson, and Ludger Woess-
man summarize the lackluster performance of U.S. students on international
assessments, noting that “the evidence of international comparison is now
clear. American students lag badly and pervasively. Our students lag behind
students not just in Asia, but in Europe and other parts of the Americas. It
is not just disadvantaged students or a group of weak students who lag, but
also American students from advantaged backgrounds. Americans are badly
underrepresented among the world’s highest achievers.”⁴³

Although some scholars challenge such conclusions from international as-
sessments as overblown and simplistic, others conclude that these less-than-
stellar outcomes indicate that the U.S. education system is failing to prepare
many of its students to compete successfully for jobs with other students

from around the world.⁴⁴ The nation also has a strong interest in ensuring that entire segments of the public are not denied the American Dream due to their family income and racial/ethnic background.

Education Federalism Should Be Guided by Research Rather Than Politics

The expansion of the federal role in education has largely been guided by politics, and politics, indisputably, will continue to play an influential role in education reform. Nevertheless, the expanding federal role should be guided primarily by rigorous research regarding the strengths of federal policy making, just as research about the importance of educational opportunities for disabled students informed Congress's passage of the Education for All Handicapped Children Act of 1975. Although federal education law and policy are also influenced by politics, the federal government has demonstrated a willingness to leverage politics and research to address the needs of the disadvantaged within American society when politics has prevented effective reform at the state and local levels.⁴⁵

A THEORY FOR DISRUPTING EDUCATION FEDERALISM

Education federalism should be restructured to embrace greater federal leadership and responsibility for a national effort to provide equal access to an excellent education. Any substantial strengthening and reform of the federal role in education will transform the nature of education federalism, because substantive changes to federal authority over education directly affect the scope of state and local authority over education. These shifts in education federalism have occurred throughout U.S. history, including federally mandated school desegregation and NCLB.⁴⁶ This broad theory could be used to guide development of federal legislation, new initiatives by the Department of Education, or, most likely, a combination of the two. I focus here on future action by Congress and the executive branch, rather than doctrinal reform through the courts, because the legislative and executive branch enjoy numerous policy-making strengths over courts.⁴⁷

The following six policy-making areas identify how the federal government's role in education should be expanded to ensure equal access to an excellent education:

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tion also has a strong interest in ensuring that all children are not denied the American Dream due to their racial or ethnic background.

Be Guided by Politics

Education in the United States has largely been guided by politics. As such, it will continue to play an influential role in the future. In the process, the expanding federal role should be guided by research regarding the strengths of federal policy and the importance of educational opportunity. Following Congress's passage of the Education for All Handicapped Children Act in 1975, although federal education law and policy have expanded, the federal government has demonstrated a reluctance to use politics and research to address the needs of a diverse society when politics has prevented effective policy at the state and local levels.⁴⁵

RECONSTRUCTING EDUCATION FEDERALISM

Education federalism is structured to embrace greater federal leadership and a coordinated effort to provide equal access to an excellent education. The goal is to strengthen and reform the federal role in education, the nature of education federalism, because federal authority over education directly affects the federal role over education. These shifts in education policy are a part of U.S. history, including federally mandated desegregation.⁴⁶ This broad theory could be used to guide new initiatives by the Department of Education, a combination of the two. I focus here on further strengthening the executive branch, rather than doctrinal reform, as the legislative and executive branch enjoy greater authority over courts.⁴⁷

Policy areas identify how the federal government has expanded to ensure equal access to an excellent

1. Prioritizing a national goal of ensuring that all children have equal access to an excellent education and acknowledging that achieving this goal will require disrupting education federalism.⁴⁸
2. Incentivizing development of common opportunity-to-learn (OTL) standards that identify the education resources states must provide.⁴⁹
3. Focusing rigorous research and technical assistance on the most effective approaches to ensuring equal access to an excellent education.⁵⁰
4. Distributing financial assistance with the goal of closing the opportunity and achievement gaps.⁵¹
5. Demanding continuous improvement from states to ensure equal access to an excellent education through federal oversight that utilizes a collaborative enforcement model.⁵²
6. Establishing the federal government as the final guarantor of equal access to an excellent education by strengthening the relationship between federal influence and responsibility.⁵³

Each of these elements either suggests how to leverage existing strengths of federal policy making more effectively or fills in important gaps of federal policy making and enforcement.⁵⁴

Prioritizing a National Goal of Ensuring Equal Access to an Excellent Education

Some national leaders already have noted the importance of a national goal of ensuring that all children are provided equal access to an excellent education.⁵⁵ However, some key points are missing from this rhetoric that must be emphasized to support the type of comprehensive reforms I envision. For instance, the nation's top education leaders, including the president, the secretary of education, and members of Congress, must initiate a national conversation on why the United States should no longer tolerate long-standing disparities in educational opportunity and why federal action is needed to address them. Initiating such a conversation also requires the federal government to prioritize equal access to an excellent education on its national policy-making agenda.

Federal and national education leaders also must make the case that the entire nation would benefit from ending inequitable disparities in education, because research reveals that reforms to help those who are disadvantaged typically do not succeed unless they benefit more privileged Americans.⁵⁶

Therefore, the federal government must convince the more affluent segments of American society that a more equitable distribution of educational opportunity would inure to their benefit. This could be accomplished in part by publicizing existing research which quantifies the myriad high costs that the United States pays for offering many schoolchildren a substandard education and which acknowledges that even many advantaged children are not competing effectively with their international peers.⁵⁷

Federal leadership also must explain why a reexamination and restructuring of education federalism is warranted. This discussion should highlight federal willingness to shoulder greater responsibility for leading the national effort to achieve this goal. It also should emphasize that effective, comprehensive reform must involve a shoulder-to-shoulder partnership among the federal, state, and local governments.

Fortunately, the federal government has proven its ability to herald the importance of new educational goals and approaches in the national interest. Research and history confirm that agenda setting serves as one of the strengths of the federal government in education policy making. For instance, President Lyndon Johnson successfully convinced Congress to advance equal educational opportunity for low-income schoolchildren through the ESEA, which includes Title I, and the Economic Opportunity Act, which includes programs like Head Start and Upward Bound. President George W. Bush championed NCLB and its insistence on proficiency for all children in math and reading, public reporting of testing data disaggregated by subgroups, and a range of accountability interventions for failing schools.⁵⁸ Therefore, a federal call to implement a comprehensive plan to ensure equal access to an excellent education should build on the lessons learned from these and other federal reforms that set the nation's education agenda.

Incentivizing Development of Common Opportunity-to-Learn Standards

A federal effort to ensure equal access to an excellent education should incentivize the states to develop common opportunity-to-learn standards that would identify the in-school and out-of-school resources students should receive in order to meet rigorous achievement standards. Most states are implementing the Common Core standards, which were developed by a group of assessment specialists and academics in response to a request from the Council of Chief State School Officers and the National Governors

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of education. Common OTL standards would preserve the ability of states to adopt a variety of educational governance, funding, and policy-making structures. Once the states develop the standards, states would implement plans to identify the gap between existing resources and the OTL standards, determine the cost of bridging the gap, and raise funds and implement reforms to close the gap. Any federal support for common OTL standards should encourage state-level innovation and experimentation regarding how each state implements the standards, thus preserving the states as laboratories for education reform.

Others also have called for OTL standards and proposed possible content, including the Schott Foundation's National Opportunity to Learn Campaign and education law scholars Michael Rebell and Jessica Wolff.⁶² In contrast to these proposals, I recommend that the federal government provide incentives for states to develop common OTL standards. As a result, these standards would not be federally defined, as the National Opportunity to Learn Campaign and Rebell and Wolff recommend, or designed individually by each state, as with Goals 2000 and IASA.

Although securing federal support to incentivize the states to adopt common OTL standards will likely involve a tough political battle, the battle would begin with greater ammunition and more favorable conditions than did the previous effort. When OTL standards were first considered in the mid-1990s, vigorous debates were ongoing about the content and implementation of academic standards and the appropriate federal role regarding those standards. Today, although some states have chosen not to adopt the Common Core standards, and some opposition has arisen regarding concerns such as the pace of implementation, all states have adopted academic standards, and the states are far closer to adopting common academic standards than ever before. These standards provide a foundation for the states to engage in a joint effort to identify what educational resources student need. State leadership also could draw on the lessons from school finance litigation that define the educational opportunities students must receive to meet state constitutional obligations for education, which was not available when OTL standards were first introduced through federal legislation.⁶³

The Need for Additional Federal Research and Technical Assistance
Although the federal government currently provides research and technical assistance to states and school districts, I recommend that federal research

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would preserve the ability of states to set standards, funding, and policy-making standards, states would implement common standards and the OTL standards, and raise funds and implement reforms to support for common OTL standards and experimentation regarding how to best preserve the states as laboratories.

standards and proposed possible content, National Opportunity to Learn Campaign. See, e.g., *Rebell and Jessica Wolff*.⁶² In contrast, the federal government provides support for common OTL standards. As a result, these standards, as the National Opportunity to Learn Campaign, or designed individually by the states.

Incentivize the states to adopt common standards. A tough political battle, the battle to create more favorable conditions than current standards were first considered in the early 1990s. The issue of setting the content and implementing the appropriate federal role regarding standards states have chosen not to adopt the current position has arisen regarding common standards. In fact, all states have adopted academic standards. Adopting common academic standards provide a foundation for the states to expand educational resources student need. Lessons from school finance litigation indicate that students must receive to meet state standards which was not available when OTL standards were first enacted by federal legislation.⁶³

Research and Technical Assistance
 This section provides research and technical assistance. I recommend that federal research

and technical assistance should be refocused to help identify the most effective approaches for ensuring equal access to an excellent education and to expand state capacity to achieve this goal. Substantial variations exist in the educational, economic, and administrative capacities of states. One of the principal hindrances to NCLB's success is insufficient capacity at the state and local levels to implement the required changes. Therefore, federally supported research and technical assistance must help state and local governments develop the capacity to implement effective reforms.⁶⁴

Congress has begun to recognize the need for federal support for high-quality education research to enable the United States to reach its essential educational goals, as evidenced by passage of the Education Sciences Reform Act of 2002 (ESRA). Rigorous, objective research that supports a national effort to ensure equal access to an excellent education should build on this success while also establishing an agenda that identifies the critical research states need to understand as they enact reforms to achieve this goal. Federal research should examine the essential characteristics of an excellent education and the most cost-effective and efficient state funding approaches, including models from other nations. A federal research agenda also should identify the primary state and local impediments to ensuring equal access to an excellent education and how to overcome them.⁶⁵ Establishing a federal research agenda such as this would capitalize on the federal government's substantial comparative advantage over states and localities in conducting and supporting research while eliminating the inefficiencies and costs of each state conducting its own research.⁶⁶

In addition to research assistance, the federal government should build on its current technical assistance by offering states support for implementing reforms that ensure equal access to an excellent education. This technical assistance is essential for expanding the limited capacity of state education agencies that typically have focused on distributing and monitoring funds and that typically "possess little expertise in actually working on substantively important education initiatives."⁶⁷ States may need federal technical assistance on the most effective and efficient funding mechanisms and how to develop data collection systems that enable states and localities to document the scope of opportunity gaps and the effectiveness of efforts to reduce those gaps. Federal technical assistance should help to avoid any unnecessary diversion of resources and duplication of effort that would occur if each state had to develop such technical expertise on its own.⁶⁸

Federal Financial Assistance to Close Opportunity and Achievement Gaps

Federal financial assistance will be essential for expanding the capacity of states to participate in a comprehensive national effort to ensure equal access to an excellent education. The federal financial contribution should include both incentives and assistance to address opportunity and achievement gaps. Financial incentives would draw attention to this critical issue and motivate states to implement reforms, just as incentives motivated reform through RTTT. Financial assistance also would expand the potential reform options beyond what states could implement with their own state resources and would supply political cover for politicians who support reform.⁶⁹

The federal government should generously increase its contribution to education costs while continuing to share these costs with the state governments. Additional financial support for education would leverage the federal government's superior ability to redistribute resources among the states. Past experience reveals that federal resources can be an effective means for influencing state and local education policy. Generous federal financial assistance would fund a larger percentage of the costs of reforms than it did with past education reforms, which typically failed to deliver the substantial funds anticipated when the laws were enacted. The level of generosity of federal funding should be based on the disparate capacities of states to close opportunity and achievement gaps. Additionally, a blend of federal and state funding would encourage greater efficiency than full federal funding because it should encourage both governments to contain costs.⁷⁰

Demanding Continuous Improvement Through a Federal Collaborative Enforcement Model

A federally led effort to ensure equal access to an excellent education should include federal monitoring of, and accountability for, state progress. In addition to fostering improvement, such oversight also would enable the federal government to identify states' needs for research, technical, and financial assistance.⁷¹

Federal monitoring should focus on a collaborative enforcement approach to resolve any disputes regarding how states achieve this goal. The theory I propose here should be implemented by including a collaborative enforcement model similar to the one I proposed in a 2007 article.⁷² With such an

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tial for expanding the capacity of national effort to ensure equal access. Financial contribution should include opportunity and achievement gaps. In addition to this critical issue and motivate incentives motivated reform through expand the potential reform opportunity with their own state resources and those who support reform.⁶⁹

As the federal government increases its contribution to education, these costs with the state government. Education would leverage the federal resources among the states. Past experience can be an effective means for increasing federal generosity. Generous federal financial assistance would reduce the costs of reforms than it did with the federal government. The level of generosity of federal assistance would be determined by the capacities of states to close opportunity gaps. A blend of federal and state funding would be necessary to maintain full federal funding because it would maintain costs.⁷⁰

Implementation Through a Collaborative Model

Access to an excellent education should be a responsibility for, state progress. In addition, federal oversight also would enable the federal government to fund research, technical, and financial assistance.

A collaborative enforcement approach would enable states to achieve this goal. The theory of implementation, including a collaborative enforcement approach, is discussed in a 2007 article.⁷² With such an

approach, the federal government would establish a periodic, state reporting obligation that would describe progress on achieving the goal, identify any impediments to progress, and note plans for reform. Input also would be sought from education reform organizations, civil rights groups, and citizens so that the federal government would have a full picture of state efforts.

A panel or commission would then assess state reforms and provide recommendations, not mandates, for how states could improve their efforts. In addition, the collaborative enforcement approach would view penalties as an undesirable last resort and would embrace flexibility in negotiating compliance with federal funding conditions when warranted by unique state and local conditions. A collaborative enforcement model also would require the Department of Education to develop systems to ensure consistency in federal oversight so that the inconsistent enforcement that undermined NCLB's implementation and prior authorizations of the ESEA is not repeated.⁷³

The Federal Government as the Final Guarantor of Equal Access to an Excellent Education

By enacting federal legislation, programs, and initiatives that embrace the elements discussed above, the federal government would reestablish itself as the final guarantor of equal access to an excellent education. Historically, ensuring equal educational opportunity was one of the principle rationales for federal involvement in education by assisting vulnerable groups when the states have failed to act in the national interest. Yet, an increasing focus on standards and accountability has shifted federal attention away from issues of educational equity, while federal reforms have unsuccessfully attempted to ensure a quality education for all schoolchildren.⁷⁴ Although the federal government consistently should aim to maintain excellence, it also needs to reassert itself as the final guarantor of equal educational opportunity. In making this recommendation, I join with other scholars, such as Michael Rebell and Goodwin Liu, whose proposals call on the federal government to guarantee some form of equal educational opportunity.⁷⁵

History suggests that the federal government is likely to be the only level of government to engage in the leadership and substantial redistribution of resources that equal access to an excellent education will require. Local politics often hinders substantial efforts to redistribute resources. Thus, it is not

surprising that it took federal legislation to initiate numerous past reform efforts that addressed disparities in educational opportunity, such as those that assist disadvantaged students, girls and women, and disabled children. The federal government possesses an unparalleled ability to mobilize national, state, and local reform when the nation is confronted with an educational crisis.⁷⁶ Therefore, my call for a stronger federal role in education builds on the historical federal role in advancing educational equity and the superior ability of the federal government to accomplish a redistribution of educational opportunity.

By focusing its attention on the policy-making areas identified above, the federal government would shoulder the primary burden for a national effort to ensure equal access to an excellent education and draw on its strengths in education policy making. Federal leadership would incentivize the states to engage in a collaborative partnership with the federal government to achieve this goal. At the same time, states, facing compelling incentives to join the national effort, would retain substantial control over education in choosing among a wide array of reforms.

Some may argue that the states should bear the primary burden for ensuring equal access to an excellent education because education remains primarily a state function. I reject this dualist understanding of education and highlight here the long history that reveals that the states will not rectify opportunity and achievement gaps on their own. Embracing federal leadership on these issues builds on the growing consensus reflected in NCLB and other federal education legislation: the federal government should exercise a substantial role in education law and policy.⁷⁷

Others may contend that the federal government should rein in its growing role in education. In some ways, this criticism points to the failures of past initiatives as evidence that the federal government's role in education should be curtailed. Most recently, some scholars condemn the shortcomings and implementation of NCLB and RTTT. Undeniably, the federal government has undertaken a variety of unsuccessful education reforms.⁷⁸ Yet, an established track record in education over the last fifty years has given the United States ample evidence to identify the strengths and weaknesses of federal education policy making. My theory embraces a variety of federal policy-making strengths and builds on the federal government's superior and more consistent reform record on issues of educational equity in the face of inconsistent and overwhelmingly ineffective state reform.⁷⁹

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to initiate numerous past reform efforts, such as those that benefited women, and disabled children. The federal government's ability to mobilize national resources is confronted with an educational agenda. The federal role in education builds on the federal government's superior ability to accomplish a redistribution of educational resources.

Among the areas identified above, the federal government's primary burden for a national effort to improve education and draw on its strengths in this area would incentivize the states to join the federal government to achieve these goals. Compelling incentives to join the federal government in choosing to bear the primary burden for education because education remains primarily a state responsibility. The states will not rectify opportunity on their own. Embracing federal leadership and the consensus reflected in NCLB and other federal legislation, the federal government should exercise a substantial role.

The federal government should rein in its growth and criticism points to the failures of the federal government's role in education. The scholars condemn the shortcomings of the federal government. Undeniably, the federal government's successful education reforms.⁷⁸ Yet, the federal government over the last fifty years has given the states the opportunity to identify the strengths and weaknesses of education. The theory embraces a variety of federal roles, including the federal government's superior and ability to accomplish educational equity in the face of state reform.⁷⁹

Today, although the federal government invests in education, this investment is quite limited relative to state and local investments. Increasing federal demands for its limited contribution have enabled the federal government to avoid shouldering a substantial portion of the costs and burdens associated with accomplishing the nation's education goals while still enjoying the ability to set the education agenda and demand results.⁸⁰ Having the federal government as the final guarantor of equal access to an excellent education would strengthen the relationship between growing federal influence in education and greater federal responsibility for accomplishing national objectives. This transformation would greatly improve on the nation's current cooperative federalism approach to education.

Finally, even though the U.S. Supreme Court, for the first time, has placed limitations on Spending Clause legislation in *National Federation of Independent Business v. Sebelius (NFIB)*, that decision still leaves the executive branch and Congress ample constitutional room to restructure and expand their authority over education.⁸¹ I agree with scholars Samuel Bagenstos and Eloise Pasachoff, who contend that for the Court to find a statute unconstitutional under the Spending Clause after *NFIB*, a federal education program would have to take an existing, large, well-entrenched program, add new and unforeseen conditions that are so substantial as to constitute an independent program, and present the possibility of losing all funds for both the old and new programs as conditions for any state not wanting to follow the new conditions.⁸² The need to run afoul of multiple concerns simultaneously will leave Congress with ample room to enact far-reaching education legislation.

RECONSTRUCTING EDUCATION FEDERALISM WOULD EMPOWER STATE AND LOCAL CONTROL, ACCOUNTABILITY, AND INNOVATION

In this chapter, I offer ways to reduce harmful aspects of state and local control of education while simultaneously empowering beneficial and collaborative aspects. States admittedly would lose some control over education because they would be accountable to the federal government for ending long-standing disparities in educational opportunity. At the same time, other aspects of state and local control of education would remain. States would retain authority to control education policy making through education governance, the nature and content of a school finance system, state assessments

and graduation standards, and a wide variety of teaching and curricular decisions. Localities would continue to administer education, manage the daily operation of schools, hire teachers and staff, build and maintain schools, and transport students.⁸³ Maintaining these functions under state and local authority fosters continuance of most of the existing levels of state and local control, accountability, and innovation for education.

Most importantly, placing primary responsibility on the federal government for leading a national effort to close the opportunity and achievement gaps would foster new types of state and local control over education. Currently, substantial disparities exist in each state's capacity to offer high-quality educational opportunities. With the federal government in the lead role, state and local governments would both have a greater and more equal capacity to offer all children an excellent education.⁸⁴ This enhanced capacity would empower states and localities to engage in innovative reforms previously hindered by capacity limitations; they would decide how they want to achieve equal access to an excellent education and thus continue to function as laboratories of reform—but with new federal research, technical expertise, and financial assistance to support the identification and implementation of appropriate reforms.

Such reforms might diminish some state and local accountability for education. Federal accountability is more diffuse and less effective than state and local accountability because federal officials are more removed from state and local electorates and are held accountable for a wider range of decisions.⁸⁵ However, it is important to note two responses to this concern. First, the public has not effectively held state and local officials accountable for closing the opportunity gap; therefore, adding an additional layer (even if diffuse) of accountability could facilitate achievement of this objective. Second, state and local officials would be charged with designing and implementing plans to achieve this goal, and thus critical aspects of state and local accountability would be preserved.⁸⁶ Federal leadership and support to accomplish this goal ultimately would increase total government accountability.

CONCLUSION

Disrupting the nation's long-standing approach to education federalism and reconstructing it in ways that support the nation's education goals will be essential to successful education reform. My theory for reconstructing

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responsibility on the federal government to close the opportunity and achievement gaps and local control over education. Currently, each state's capacity to offer high-quality education is limited. The federal government in the lead role, state governments have a greater and more equal capacity to provide education.⁸⁴ This enhanced capacity would be realized through innovative reforms previously hindered. States should decide how they want to achieve these goals and thus continue to function as laboratories of research, technical expertise, and experimentation and implementation of ap-

providing state and local accountability for education. These are more diffuse and less effective than state-level accountability. State officials are more removed from state-level decisions and thus less accountable for a wider range of decisions.⁸⁵ Responses to this concern. First, the current system is not holding local officials accountable for closing the achievement gap. Adding an additional layer (even if diffuse) of accountability hinders the achievement of this objective. Second, state-level accountability through designing and implementing plans and monitoring progress in aspects of state and local accountability is essential for leadership and support to accomplish this goal and to ensure government accountability.

My approach to education federalism to support the nation's education goals will be a reform. My theory for reconstructing

education federalism envisions the federal, state, and local governments joining together in a shoulder-to-shoulder partnership to build an education system in which all schoolchildren receive equal access to an excellent education. In recommending the federal government as the final guarantor of equal educational opportunity, I offer innovative ways to incentivize and empower state and local governments to close opportunity and achievement gaps.

Though we continue to seek new ways to expand educational opportunity and improve educational quality, and support for federal involvement in education has been growing, the United States has lacked a theory for how the federal role should evolve.⁸⁷ And while the nation currently lacks sufficient political will to adopt all aspects of my theory, the pioneering ideas I present here seek to contribute to the growing momentum for reform by moving our national dialogue away from educational paralysis and toward educational excellence.