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# No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism

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# NO QUICK FIX FOR EQUITY AND EXCELLENCE: THE VIRTUES OF INCREMENTAL SHIFTS IN EDUCATION FEDERALISM

Kimberly Jenkins Robinson\*

Introduction .....	202
I. The Shortcomings of State School Funding Systems .....	206
A. Lower Funding to Districts Serving Students with Greater Needs .....	210
B. Insufficient Linkage of Funding Systems to Desired Educational Outcomes .....	213
C. Low Funding Levels .....	215
D. Ineffective Oversight of State Funding Systems.....	217
II. Designing Effective Incremental Federal Influence Over State Education Funding Systems .....	220
A. Inviting Incentives.....	221
B. Compelling (But Not Unconstitutionally Coercive) Conditions.....	225
C. Meaningful Mandates .....	232
III. The Need for an Incremental Federal Strategy to Influence State School Funding Systems .....	237
A. The Costs of an Incremental Federal Strategy to Influence State School Funding Systems .....	238
B. The Benefits of an Incremental Federal Strategy to Influence State School Funding Systems .....	242
Conclusion .....	250

*Our problems are man-made, therefore they may be solved by man. And man  
can be as big as he wants. No problem of human destiny is beyond human  
beings.*

— John F. Kennedy<sup>1</sup>

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## INTRODUCTION

Disparities in educational opportunity along lines of class, race and neighborhood remain an enduring characteristic of schools and districts throughout the United States.<sup>2</sup> These disparities are shaped in substantial part by the funding mechanisms that govern schools.<sup>3</sup> As the recent report of the U.S. Department of Education's Equity and Excellence Commission noted, "students, families and communities are burdened by the broken system of education funding in America."<sup>4</sup> Although some progress has been made, despite almost half a century of state school finance litigation,<sup>5</sup> most states generally have not taken consistent and sustained action to adopt and maintain funding systems that promote equal access to an excellent education.<sup>6</sup> Furthermore, the education reforms that have been undertaken have not demanded sufficient changes to end the longstanding inequities in how the states fund schools.<sup>7</sup>

The United States should not expect these longstanding disparities and challenges to end without a new commitment and approach to eliminating them. Even though we have learned some important lessons from how states have implemented their education clauses, the laboratory of the states has failed to protect the national interest in an excellent and equitable education system for all children. Given this inconsistent and lackluster state commitment to the education finance systems that the United States needs, the United States must look for new avenues to secure this important national interest. Federal options for addressing spending disparities are particularly crucial because the greatest

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1. President John F. Kennedy, Speech at American University (June 10, 1963).

2. See U.S. DEP'T OF EDUC., EQUITY & EXCELLENCE COMM'N, FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 12, 17 (2013); Kimberly Jenkins Robinson, *How Reconstructing Education Federalism Could Fulfill the Aims of Rodriguez*, in THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY 203, 213 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015); JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 1 (2010).

3. JACK JENNINGS, PRESIDENTS, CONGRESS, AND THE PUBLIC SCHOOLS: THE POLITICS OF EDUCATION REFORM 179-83 (2015); U.S. DEP'T OF EDUC., EQUITY & EXCELLENCE COMM'N, *supra* note 2, at 17-18.

4. U.S. DEP'T OF EDUC., EQUITY & EXCELLENCE COMM'N, *supra* note 2, at 14.

5. See Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson, *Introduction: The Enduring Legacy of San Antonio Independent School District v. Rodriguez*, in THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY, *supra* note 2, at 1, 11-13; see also *Serrano v. Priest*, 10 Cal. App. 3d 1110 (1970). The Serrano litigation was filed in California in 1968. RICHARD VALENCIA, CHICANO STUDENTS AND THE COURTS: THE MEXICAN AMERICAN LEGAL STRUGGLE FOR EDUCATIONAL EQUALITY 85 (2008).

6. U.S. DEP'T OF EDUC., EQUITY & EXCELLENCE COMM'N, *supra* note 2, at 14; Robinson, *supra* note 2, at 212-13.

7. U.S. DEP'T OF EDUC., EQUITY & EXCELLENCE COMM'N, *supra* note 2, at 14; Robinson, *supra* note 2, at 212.

variation in per pupil spending occurs between states, rather than within states.<sup>8</sup> Currently, this variation in funding between states accounts for seventy-eight percent of per pupil spending differences and this variation represents a “historic high” and highlights the inadequacy of state reforms alone to equalize resources.<sup>9</sup> Furthermore, research demonstrates that on international assessments, the achievement of U.S. students at all income levels, including those from upper income families, lags behind their international peers.<sup>10</sup>

Federal reforms are particularly important given the fact that according to a 2016 review of the funding in forty-six states, at least twenty-five states have not returned their per student general aid—the primary type of state funding for schools—to 2008 levels.<sup>11</sup> Seven of these twenty-five states have cut state general aid by ten percent or more.<sup>12</sup> In addition, although most states increased general aid in 2016, twelve states reduced per pupil funding this year.<sup>13</sup> Insufficient financial support for public schools has remained the public’s top education concern for at least a decade.<sup>14</sup>

Some may wonder if the newly-enacted Every Student Succeeds Act (ESSA)<sup>15</sup>—the latest reauthorization of the Elementary and Secondary Education Act of 1965—will provide the push states seem to need to reform funding systems. However, the ESSA does not appear to be a promising avenue to incentivize such reforms.<sup>16</sup> The ESSA repeals the federal accountability system in the No Child Left Behind Act and instead allows states to design their own accountability systems to identify and improve struggling schools.<sup>17</sup> ESSA requires states to increase learning in the five percent of schools that perform the worst on state assessments, schools with high dropout rates, and schools in which a subgroup consistently performs poorly.<sup>18</sup> While states may adopt some targeted interventions, the ESSA’s focus on such a small subset of schools is unlikely to drive states to overhaul entire funding systems that either

8. See Sean P. Corcoran & William N. Evans, *Equity, Adequacy, and the Evolving State Role in Education Finance*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 353, 358 (Helen F. Ladd & Margaret E. Goertz eds., 2015).

9. See Nora E. Gordon, *The Changing Federal Role in Education Finance and Governance*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY, *supra* note 8, at 317, 331.

10. ERIC A. HANUSHEK, PAUL E. PETERSON & LUDGER WOESSMANN, *ENDANGERING PROSPERITY: A GLOBAL VIEW OF THE AMERICAN SCHOOL 2* (2013).

11. MICHAEL LEACHMAN ET AL., *CTR. ON BUDGET & POL’Y PRIORITIES, MOST STATES HAVE CUT SCHOOL FUNDING, AND SOME CONTINUE CUTTING 5* (2016).

12. *Id.*

13. *Id.*

14. PHI DELTA KAPPAN, *THE 47<sup>TH</sup> ANNUAL PDK/GALLUP POLL OF THE PUBLIC’S ATTITUDES TOWARD THE PUBLIC SCHOOLS 22* (2015), [http://pdkpoll2015.pdkintl.org/wp-content/uploads/2015/10/pdkpoll47\\_2015.pdf](http://pdkpoll2015.pdkintl.org/wp-content/uploads/2015/10/pdkpoll47_2015.pdf).

15. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

16. Further analysis of why ESSA is unlikely to spark comprehensive reform of state funding systems is provided below in Part III.B.

17. Every Student Succeeds Act § 5301.

18. *Id.* at § 1005.

consistently favor low-need, high-wealth districts or that do not adequately adjust funding levels to address the greater needs of some students.<sup>19</sup> Thus, the ESSA's narrow focus on low-performing schools provides inadequate incentives to encourage states to reform their funding approaches and to boost overall student achievement.

In light of the need for additional concerted action to spark state reform of school finance systems, some scholars and advocates are beginning to call for the federal government to leverage its influence on states to ensure that they implement equitable school funding systems. In his 2015 book, Jack Jennings, the founder and former CEO of the Center on Education Policy who served for more than a quarter century as a staff director and general counsel for the U.S. House of Representatives Committee on Education and Labor, identified the need for federal reform that promotes both equitable and adequate funding as essential for continued progress in education.<sup>20</sup> In addition, the Equity and Excellence Commission recommended "bold action" on school funding reform that would, among other things, require states to implement funding systems that provide all students the resources they need to meet state standards; incentivize states to increase funding for low-performing, low-income and minority students; and create federal monitoring of these new investments to ensure that they are improving student outcomes.<sup>21</sup>

David Sciarra and Danielle Farrie, who are leading the New Jersey funding litigation, have made similar calls. Sciarra and Farrie, an attorney and scholar of education finance, respectively, recently contended that federal funding should be linked to state finance reform that is closely tied to state education standards.<sup>22</sup> Michael Rebell, scholar and successful litigator of the New York funding litigation, has also called for federal intervention to promote equitable funding systems.<sup>23</sup> Education law scholar Derek Black has proposed reforms to Title I of the Elementary and Secondary Education Act that would incentivize states to adopt progressive funding systems that provide greater funding to

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19. See BRUCE D. BAKER ET AL., *IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 5* (5th ed. 2016) (finding that fourteen states provide less funding to high-poverty districts than low-poverty districts and eighteen states do not vary funding between districts of high and low poverty); Valerie Strauss, *The Successor to No Child Left Behind Has, It Turns Out, Big Problems of Its Own*, WASH. POST: THE ANSWER SHEET (Dec. 7, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/12/07/the-successor-to-no-child-left-behind-has-it-turns-out-big-problems-of-its-own> (noting some of the shortcomings of ESSA).

20. JENNINGS, *supra* note 3 at 179-83, 206-17.

21. U.S. DEP'T OF EDUC., *EQUITY & EXCELLENCE COMM'N*, *supra* note 2, at 19.

22. See David Sciarra & Danielle Farrie, *From Rodriguez to Abbott: New Jersey's Standards-Linked School Funding Reform*, in *THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY*, *supra* note 2, at 119, 139.

23. Michael A. Rebell, *Rodriguez: Past, Present, and Future*, in *THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY*, *supra* note 2, at 65, 72-75.

districts with substantial high-need populations and that reward fiscal effort.<sup>24</sup> A recent paper by Diana Epstein, a Senior Education Policy Analyst at the Center for American Progress, argues that given state reluctance to provide greater aid to districts with more students with greater needs, the federal government should incentivize states to revise their funding systems to accomplish such reforms.<sup>25</sup> These calls for federal influence to promote equitable and adequate school funding systems build upon the scholarship calling for federal action that promotes greater equality of educational opportunity.<sup>26</sup>

In this Article, I join these calls for the federal government to lead states to reform their school funding systems. In doing so, I build upon my recent scholarship that calls for additional federal leadership insisting that states prioritize equity and excellence in education.<sup>27</sup> I recommend that we restructure education federalism by requiring the federal government to serve as the ultimate guarantor of equal access to an excellent education.<sup>28</sup> My theory of education federalism embraces federal policymaking strengths in education, such as federal research, technical, and financial assistance, that support state and local reforms to promote equity and excellence.<sup>29</sup> This theory would retain state and local control over education where states and localities possess superior policymaking strengths, including preserving states as laboratories of reform that determine how to achieve equity and excellence. It also would

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24. Derek W. Black, *Leveraging Federal Funding for Equity and Integration*, in THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY, *supra* note 2, at 227, 242.

25. DIANA EPSTEIN, CTR. FOR AM. PROGRESS, MEASURING INEQUITY IN SCHOOL FUNDING 2 (2011), [https://cdn.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/funding\\_equity.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/funding_equity.pdf).

26. *See, e.g.*, MICHAEL A. REBELL & JESSICA R. WOLFF, MOVING EVERY CHILD AHEAD: FROM NCLB HYPE TO MEANINGFUL EDUCATIONAL OPPORTUNITY 69-81 (2008) (arguing that Congress should enact legislation to guarantee all children meaningful educational opportunity); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 399-406 (2006) (contending that Congress should enact legislation that remedies any impediments to all children receiving the educational prerequisites for national citizenship); Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1652, 1711-26 (2007) (proposing a collaborative enforcement model for a federal right to education); Robinson, *supra* note 2, at 214-223 (proposing a reconstruction of education federalism that would build upon federal policymaking strengths to ensure equal access to an excellent education). *Cf.* Linda Darling Hammond, *Inequality and School Resources: What It Will Take to Close the Opportunity Gap*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE 77, 80-97 (Prudence L. Carter & Kevin G. Welner eds., 2013) (identifying educational opportunity gaps and proposing funding equitable education to close these gaps).

27. Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 985-88 (2015).

28. *See id.* at 1002-05.

29. *See id.* at 985-86, 994-1000, 1003, 1015.

promote new forms of state and local control over education by enhancing state and local capacity for reform.<sup>30</sup>

This Article provides a practical application of my theory for reconstructing education federalism in ways that would support equal access to an excellent education. My analysis serves two goals. First, I present research regarding some of the central school funding system shortcomings that may not be widely understood. The shortcomings that I analyze are: the provision of less revenue to districts with substantial concentrations of students with greater needs; the failure to tailor funding to the objective of the education system; substandard funding amounts; and insufficient oversight of school funding. Second, scholars have increasingly begun to call for a federal role in education funding by proposing a single-step reform. In contrast, I contend that the United States should incrementally increase federal influence over school funding to prompt states to maintain equitable funding systems.

I present this analysis in three parts. In Part I, I identify some of the key shortcomings of state school funding systems. In Part II, I recommend some of the potential reforms to be included in an incremental strategy. I analyze federal incentives, conditional spending legislation, and mandates through the Fourteenth Amendment or a constitutional amendment as potential reforms that could accomplish this incremental federal influence over state funding systems. Each of these efforts aims to ensure that states provide equitable funding leading to excellent schools. In Part III, I explain why an incremental strategy for federal influence on school funding is needed as well as analyze the costs and benefits of this approach.

## I. THE SHORTCOMINGS OF STATE SCHOOL FUNDING SYSTEMS

In this Part, I identify the shortcomings of state school funding systems by examining the nature and causes of disparities within them. I draw upon research of these systems as well as state court challenges to them.<sup>31</sup> I analyze four primary shortcomings: (1) lower funding to districts serving students with greater needs, (2) insufficient linkage of funding systems to desired educational outcomes, (3) low funding levels, and (4) inadequate oversight of state funding systems. These are some of the common shortcomings identified in research that result in inadequate and inequitable school funding systems across the United States. It is these shortcomings that must be addressed by the incremental strategy I recommend.

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30. *See id.* at 1014-15.

31. When the United States Supreme Court held that the federal Constitution does not recognize a fundamental right to education, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973), litigants turned to state court to remedy funding disparities. *See Oglethorpe & Robinson, supra* note 5, at 11-12.

Through this analysis, I seek to increase understanding of what makes funding systems inequitable and inefficient. Thus, I do not dwell upon the common criticism that state funding systems rely too heavily upon local property taxes. Disparities in funding raised from property taxes due to disparities in wealth between districts undoubtedly cause inequities in per pupil funding and in the educational opportunities provided to students.<sup>32</sup> This weakness of state funding systems is well documented and has been noted repeatedly in research and case law.<sup>33</sup> Indeed, the United States Supreme Court in 1973 in *San Antonio Independent School District v. Rodriguez* stated that the United States should consider innovations to school funding that encourage greater excellence and equity in education because the states “may well have relied too long and too heavily on the local property tax.”<sup>34</sup>

Many states have reduced their reliance on local taxes, including property taxes, since *Rodriguez* even while property taxes remain the primary source of local funding for schools.<sup>35</sup> In 2011-12 for example, property taxes served as eighty-one percent of local education revenue and thirty-six percent of total revenue for public schools.<sup>36</sup> In seven states, property taxes constituted fifty percent or more of total spending on public schools and in twenty-eight states property taxes constituted 25 to 49.9 percent of total spending.<sup>37</sup> This entrenched and longstanding reliance on local revenue necessarily causes persistent funding disparities.<sup>38</sup>

32. SEAN P. CORCORAN, CTR. FOR AM. PROGRESS, *The Role of Local Revenues in Funding Disparities Across School Districts*, in *THE STEALTH INEQUITIES OF SCHOOL FUNDING: HOW STATE AND LOCAL SCHOOL FINANCE SYSTEMS PERPETUATE INEQUITABLE STUDENT SPENDING* 55, 85 (Bruce D. Baker & Sean P. Corcoran eds., 2012), <https://cdn.americanprogress.org/wp-content/uploads/2012/09/StealthInequities.pdf>.

33. *See, e.g.*, Hull v. Albrecht, 950 P.2d 1141, 1144-45 (Ariz. 1997) (en banc); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 143-146 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392-93, 397 (Tex. 1989); McCleary v. State, 269 P.3d 227, 252-53 (Wash. 2012) (en banc); U.S. DEP’T OF EDUC., EQUITY & EXCELLENCE COMM’N, *supra* note 2, at 17; BETTY COX ET AL., *THE COSTS OF EDUCATION: REVENUE AND SPENDING IN PUBLIC, PRIVATE AND CHARTER SCHOOLS* 141 (2013); Therese J. McGuire et al., *Local Funding of Schools: The Property Tax and Its Alternatives*, in *HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY*, *supra* note 8, 376, 376; Mildred W. Robinson, *It Takes a Federalist Village: A Revitalized Property Tax as the Linchpin for Stable, Effective K-12 Public Education Funding*, in *THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY*, *supra* note 2, at 167, 168-70; BRUCE D. BAKER, CTR. FOR AM. PROGRESS, *AMERICA’S MOST FINANCIALLY DISADVANTAGED SCHOOL DISTRICTS AND HOW THEY GOT THAT WAY: HOW STATE AND LOCAL GOVERNANCE CAUSES SCHOOL FUNDING DISPARITIES* 5, 18 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/07/BakerSchoolDistricts.pdf>.

34. *Rodriguez*, 411 U.S. at 58.

35. U.S. DEP’T OF EDUC., EQUITY & EXCELLENCE COMM’N, *supra* note 2, at 17; COX ET AL., *supra* note 33, at 34.

36. NAT’L CTR. FOR EDUC. STATISTICS, *THE CONDITION OF EDUCATION 2015*, at 122 (2015), <http://nces.ed.gov/pubs2015/2015144.pdf>.

37. *Id.*

38. COX ET AL., *supra* note 33, at 139-141.



However, disparities in revenue from property taxes do not tell the full story of the inequities within school funding systems because state distributions of aid also sometimes channel greater funding to more affluent districts.<sup>39</sup> The analysis below implicates all funding mechanisms that encourage an inequitable distribution of funds. It seeks to increase understanding of what makes funding systems inequitable beyond this single—albeit important—culprit.

Before turning to this analysis, it is worth noting that in focusing on the need for reforming school funding systems, I build upon the research that finds that money spent well matters for student outcomes.<sup>40</sup> In my recent book co-edited with Professor Charles J. Ogletree, Jr. we note that the school finance debate has largely moved beyond questioning whether money matters to a consensus that money spent well does, in fact, matter.<sup>41</sup> Further evidence that money matters is presented in a 2016 study finding that when children from low-income families are provided with lower pupil-to-teacher ratios and a more equitable distribution of staffing, they experience better academic outcomes and exhibit a smaller gap in achievement with their more affluent peers.<sup>42</sup> This study also found that greater spending leads to smaller class sizes.<sup>43</sup> Other research indicating that money spent well matters can be found in a study by C. Kirabo Jackson and his associates published by the National Bureau of Economic Research. The study found that

[a]lthough we find small effects for children from affluent families, for low-income children, a 10% increase in per pupil spending each year for all 12 years of public school is associated with 0.46 additional years of completed education, 9.6% higher earnings, and a 6.1 percentage point reduction in the annual incidence of adult poverty. The results imply that a 25% increase in per pupil spending throughout one's school years could *eliminate* the average attainment gaps between children from low-income . . . and nonpoor fami-

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39. See BRUCE D. BAKER & SEAN P. CORCORAN, CTR. FOR AM. PROGRESS, *THE STEALTH INEQUITIES OF SCHOOL FUNDING, HOW STATE AND LOCAL SCHOOL FINANCE SYSTEMS PERPETUATE INEQUITABLE STUDENT SPENDING*, *supra* note 32 at 1; Bruce D. Baker, *How State Aid Formulas Undermine Educational Equity in States*, in *THE STEALTH INEQUITIES OF SCHOOL FUNDING: HOW STATE AND LOCAL SCHOOL FINANCE SYSTEMS PERPETUATE INEQUITABLE STUDENT SPENDING*, *supra* note 32, at 17-52 (discussing how six states—Illinois, Missouri, New York, North Carolina, Pennsylvania, and Texas—channel greater statewide funding to lower-poverty districts).

40. JENNINGS, *supra* note 3, at 181-82.

41. Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson, *Creating New Pathways to Equal Educational Opportunity*, in *THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY*, *supra* note 2, at 263, 266-68.

42. BRUCE D. BAKER ET AL., *MIND THE GAP: 20 YEARS OF PROGRESS AND RETRENCHMENT IN SCHOOL FUNDING AND ACHIEVEMENT GAPS 27-28* (Educ. Testing Serv. Research Report Ser. No. RR-16-15, 2016).

43. *Id.* at 28.

lies . . .<sup>44</sup>

Further research also confirms the positive effect of increased funding for obtaining particular resources and student outcomes.<sup>45</sup> In addition, a compelling body of research indicates that states that have implemented substantial changes to the distribution and/or level of education funding typically observe significant improvements in student achievement.<sup>46</sup>

In focusing on how the federal government could lead states to maintain funding systems that promote equity and excellence, I am under no illusion that financial disparities are the sole cause of disparities in educational opportunity and mediocre educational outcomes.<sup>47</sup> A variety of resources exist that money simply cannot buy.<sup>48</sup> For instance, there is strong research evidence that middle-income peers can exert a positive influence on achievement, while lower expectations and motivation are often found in schools where a majority of the children come from low-income households.<sup>49</sup> School cultures that yield productive outcomes for children also are essential, as are out-of-school supports that address impactful disadvantages in health care, nutrition, and early childhood education.<sup>50</sup> Therefore, while a path toward equitable school funding that supports excellent schools is being developed, greater and more consistent socioeconomic integration of students,<sup>51</sup> reforms that encourage positive school cultures, increasing supports for disadvantaged children,<sup>52</sup> as well as an array of additional reforms,<sup>53</sup> must remain on the reform agenda.

44. C. Kirabo Jackson et al., *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, 131 Q.J. OF ECON. 157, 160 (2016) (emphasis added).

45. BRUCE D. BAKER, ALBERT SHANKER INST., *Revisiting That Age-Old Question: Does Money Matter in Education?* iv-v (2012).

46. Bruce Baker & Kevin Welner, *School Finance and Courts: Does Reform Matter, and How Can We Tell?*, 113 TCHRS. C. REC. 2374, 2407 (2011).

47. JENNINGS, *supra* note 3, at 159-84.

48. RYAN, *supra* note 2, at 164-66.

49. *See id.* at 165; RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 18 (2001).

50. *See* REBELL & WOLFF, *supra* note 26, at 72-73, 140.

51. *See* KAHLENBERG, *supra* note 49, at 18; Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 438-39 (2012).

52. REBELL & WOLFF, *supra* note 26, at 72-73, 140.

53. For proposed reforms that could help to close educational opportunity gaps, please see Robinson, *supra* note 27, at 983-1005; Mildred W. Robinson, *supra* note 33, at 174-81; Richard Rothstein, *Why Children from Lower Socioeconomic Classes, on Average, Have Lower Academic Achievement than Middle-Class Children*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE, *supra* note 26, at 61, 62; Sciarra & Farrie, *supra* note 22, at 119, 133-39; Genevieve Siegel-Hawley, *Tearing Down Fences: School Boundary Lines and Equal Educational Opportunity in the Twenty-First Century*, in THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY, *supra* note 2, at 183, 194-99.

With these caveats, I turn to a discussion of the principal funding deficiencies that contribute to inequitable and substandard educational outcomes.

*A. Lower Funding to Districts Serving Students with Greater Needs*

Research reveals that students from disadvantaged backgrounds are more expensive to educate because they bring different challenges and needs to classrooms and schools than students from more privileged backgrounds.<sup>54</sup> Such challenges can include greater mobility, less exposure to complex language, less adult attention, unmet health needs, and inadequate nutrition.<sup>55</sup> Furthermore, students from disadvantaged backgrounds within urban areas also are oftentimes faced with greater crime and substance abuse in their neighborhoods and greater instability at home.<sup>56</sup> Most researchers agree that districts should provide additional resources to enable students within high-poverty districts to master the content of challenging academic standards.<sup>57</sup> Given this research the natural conclusion is that school funding systems should direct more funding to districts serving substantial populations of disadvantaged students as compared to districts with smaller populations of disadvantaged students.<sup>58</sup>

However, the Education Law Center's 2016 report *Is Funding Fair?: A National Report Card* (also known as the *The National Report Card*) reveals that most state funding systems are inadequate in light of this well-supported research. This analysis of 2013 state funding data found that fourteen states provided less funding to districts with higher concentrations of students in poverty, that is, their funding systems were regressive.<sup>59</sup> Eighteen states did not vary their funding level based upon concentrations of student poverty.<sup>60</sup> Only sixteen states provided additional funding for disadvantaged students; that is, their funding systems were progressive.<sup>61</sup> This indicates that at least thirty-two

54. See JENNINGS, *supra* note 3, at 179; Rothstein, *supra* note 53, at 61-69.

55. Rothstein, *supra* note 53, at 62-63.

56. See *id.* at 63; RYAN, *supra* note 2, at 158-59.

57. U.S. DEP'T EDUC., EQUITY & EXCELLENCE COMM'N, *supra* note 2, at 18.

58. See BRUCE D. BAKER ET AL., *supra* note 19, at 6.

59. *Id.* at 5. The regressive states from most regressive to least regressive are: Nevada (71%), North Dakota (77%), Illinois (82%), Maine (83%), Missouri (83%), Vermont (83%), Idaho (86%), Wyoming (87%), Alabama (90%), Virginia (90%), New Hampshire (92%), Iowa (92%), Pennsylvania (93%), and West Virginia (93%). The percentage after each number indicates the percentage of one dollar that students in high-poverty districts receive compared to what students in low-poverty districts receive. *Id.*

60. See *id.* The states with flat funding systems that provide essentially the same funding to high-poverty and low-poverty districts are: Oklahoma (105%), Florida (103%), Louisiana (103%), Montana (103%), Kentucky (102%), California (102%), Oregon (101%), Arkansas (100%), Arizona (100%), Mississippi (99%), Washington (99%), Michigan (99%), Kansas (98%), Maryland (97%), Rhode Island (97%), Texas (95%), South Carolina (95%), and New York (95%). *Id.*

61. See *id.* The progressive states from most to least progressive are: Delaware (181%), Minnesota (133%), Utah (127%), Ohio (127%), New Jersey (124%), South Dakota (122%), Tennessee (114%), Massachusetts (114%), Indiana (113%), North Carolina (112%),

states chose to implement funding systems that did not provide low-income students the resources that they need to compete effectively with more advantaged students.<sup>62</sup> This failure to provide increased funding when districts possess greater numbers of disadvantaged students persists even though most states include some adjustment for the additional cost of educating disadvantaged students.<sup>63</sup> These adjustments too often are insufficient to address the greater needs of children from low-income homes, particularly within schools of concentrated poverty.<sup>64</sup> The *National Report Card* found that only one state (New Jersey) is well positioned across all four measures of funding fairness—funding level, funding distribution, effort, and coverage of public school students—and two states (Wyoming and Vermont) scored well on three of the four measures.<sup>65</sup>

Other research and school funding cases similarly find that less funding is oftentimes allocated to high-poverty districts. The Equity and Excellence Commission noted that “[t]he majority of states do not provide additional funding for students living in high concentrations of poverty.”<sup>66</sup> A four-year study of the Pennsylvania funding system found that from 2010-2013, the 100 lowest-poverty districts had the highest revenue for each year and that funding in these low-poverty districts continued to rise while it stagnated in the highest-poverty districts.<sup>67</sup> Another study of states where low-poverty districts receive greater funding than students in high-poverty districts found that New York allocates over \$2,000 per pupil in state aid to the wealthiest districts in the state, which are some of the wealthiest districts in the United States.<sup>68</sup> Furthermore, these state aid payments “effectively more than double the funding gap between the lowest- and highest-poverty districts in New York.”<sup>69</sup> In addition,

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Nebraska (109%), Georgia (109%), Colorado (108%), Connecticut (107%), Wisconsin (107%), and New Mexico (106%). *Id.*

62. Estimates of the number of states not providing disadvantaged students sufficient funding could be even larger if the research accounted for the estimates indicating that disadvantaged students need approximately forty percent more resources to compete on a level playing field with their advantaged peers. Black, *supra* note 24, at 227, 232.

63. See Matthew G. Springer et al., *History and Scholarship Regarding U.S. Education Finance and Policy*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY, *supra* note 8, at 3, 8-9.

64. See Rothstein, *supra* note 53, at 64-66 (summarizing research that finds that the disadvantages of students from low-income families are compounded when those children are concentrated into certain schools).

65. See BAKER ET AL., *supra* note 19, at 11. Wyoming and Vermont did not score well on the funding distribution measure because they provide less funding to disadvantaged districts, but they scored well on the level of funding, the effort that the state puts into funding, and the percentage of students covered by public school funding. *See id.*

66. U.S. DEP’T EDUC., EQUITY & EXCELLENCE COMM’N, *supra* note 2, at 18.

67. BRUCE BAKER & JESSEE LEVIN, AM. INST. FOR RESEARCH, *Educational Equity, Adequacy, and Equal Opportunity in the Commonwealth: An Evaluation of Pennsylvania’s School Finance System*, 8-9 (2014), <http://www.air.org/sites/default/files/downloads/report/AIR-EEAEO%20in%20the%20Commonwealth%20-%20Full%20Report%2010-09-14.pdf>.

68. Baker, *supra* note 39, at 51.

69. *Id.*

the districts with greater property wealth in Texas have received billions in state aid to lower tax rates in response to a court ruling.<sup>70</sup>

Numerous other states also provide low-poverty districts with substantial state aid even though these districts provide more total funding than other districts.<sup>71</sup> On average for 2007-09 North Carolina allocated similar amounts of aid to its lowest- and highest-poverty districts despite the greater local revenue available to the lowest-poverty districts. Although “other” state aid was directed to the highest-poverty districts, the amount did not overcome the regressive nature of the state’s funding formula. As a result, high-poverty districts received less total aid.<sup>72</sup> By contrast, in Illinois during the same time frame, not only did the lowest-poverty districts receive the most funding but also the lowest-poverty districts had greater local aid than the *total* state and local aid of the highest poverty districts.<sup>73</sup> Although low-poverty, high-spending districts in Arizona generated three times more local funding than high-poverty, low-spending districts, Arizona continued to provide low-poverty, high spending districts with significant state aid for 2007-09.<sup>74</sup>

Other states that once appeared to be moving toward greater equity have regressed in recent years. In Kansas, for example, the state supreme court recently found the state funding system unconstitutional because revisions to its funding formula created—or reinstated—wealth-based disparities that had a disproportionate, adverse impact on poorer districts while wealthier districts were unharmed.<sup>75</sup> Although the Kansas legislature had taken steps to remedy these disparities in response to prior court decisions, it ultimately reinstated prior wealth-based disparities when it ended the state’s capital outlay funding and reduced supplemental general state aid that had been enacted to equalize funding.<sup>76</sup> The Court found that given the legislature’s express acknowledgment of the need for greater equalization, the legislature could not reduce or eliminate state aid aimed at accomplishing equalization absent a cost-based justification.<sup>77</sup> In February 2016, the state’s highest court imposed a deadline of June 30, 2016, to remedy the unconstitutional disparities or face a closure of all public schools.<sup>78</sup> Therefore, the research and case law confirm that lower funding to disadvantaged students is a central funding deficiency in many states.

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70. *Id.* at 34-35, 51 (citing *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, 2006 WL 5436588 (Tex. Dist. July 5, 2006)).

71. *See Baker, supra* note 39, at 19-23 (discussing how Illinois, Missouri, New York, North Carolina, Pennsylvania, and Texas follow this pattern on average for 2007-09).

72. *See id.* at 19.

73. *Id.* at 22.

74. *See BAKER, supra* note 33, at 17.

75. *Gannon v. State*, 319 P.3d 1196, 1239-46 (Kan. 2014).

76. *See id.*

77. *See id.*

78. *See Gannon v. State*, 368 P.3d 1024 (Kan. 2016).

In contrast to the examples above, other states have demonstrated that designing a funding system to address the needs of disadvantaged students is politically possible. After many years without a state education funding formula, Rhode Island in 2010 adopted a formula that includes the cost of instructional services and that adds an additional forty percent of per pupil instructional costs for students who qualified for free or reduced-price school lunches.<sup>79</sup> The state commission and the state board of education were able to garner legislative and gubernatorial support by enlisting independent consultants to help design the formula, focusing on students' needs and the factors that influence learning. They also conducted a transparent process that kept the public informed and that responded to public questions and concerns.<sup>80</sup> Similarly, after numerous successful challenges to funding in state court, the New Jersey legislature adopted a formula linking the amount of funding to the estimated cost of educating students to learn the content of state standards. The formula included additional amounts for students in poverty and high-poverty districts, English language learners, and students with disabilities, although the state has recently begun to fail to fund the formula.<sup>81</sup> These examples and others demonstrate that it is possible to adopt a funding system that provides additional funding to disadvantaged students if appropriate incentives demand one. Therefore, funding reform can effectively reverse the widespread provision of less funding to disadvantaged students.

### *B. Insufficient Linkage of Funding Systems to Desired Educational Outcomes*

Standards describing what schoolchildren should know and be able to do at each grade level have become an accepted component of the American education landscape. The development of these standards grew out of the publication of the 1983 report *A Nation at Risk*, which cautioned the public about the potential harms from increasing mediocrity in public schools.<sup>82</sup> By the late 1980s, states began to develop standards to direct all children toward greater excellence and equality in education.<sup>83</sup> Today, all states have embraced content and performance standards as well as accountability measures linked to these standards.<sup>84</sup> Debate persists around whether the individual, state-developed standards or the common core standards (a set of state-developed, rigorous academic standards in math and English language arts) should guide

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79. KENNETH K. WONG, CTR. FOR AM. PROGRESS, *THE DESIGN OF THE RHODE ISLAND SCHOOL FUNDING FORMULA: TOWARD A COHERENT SYSTEM OF ALLOCATING STATE AID TO PUBLIC SCHOOLS*, 11-14 (2011).

80. *Id.* at 19-20.

81. Sciarra & Farrie, *supra* note 22, at 119, 128-133.

82. U.S. DEP'T EDUC., NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 5* (1983).

83. RYAN, *supra* note 2, at 242.

84. *Id.* at 244.

schools.<sup>85</sup> Whether common assessments or other measures should be used to assess student knowledge of the standards is also contested.<sup>86</sup>

Despite the well-entrenched nature of state standards, most school finance systems have not been modified to provide what it costs for all children to learn the content within standards. The Equity and Excellence Commission found that, with only limited exceptions, states fund education through systems that are *not connected* to the cost of teaching the content of established high academic standards and to the resources that would enable the success of the diverse array of students, including disadvantaged students, students with disabilities, and students who are learning English.<sup>87</sup> This finding reveals that most states have not adapted their funding to effectively achieve what has become one of the most important, and widely accepted, goals for the U.S. education system.

School finance research confirms that state funding systems are not effectively linked to the desired educational outcomes or meeting students' needs, including successfully providing the content within state standards. One researcher explains how funding amounts are determined by noting that "[t]he current approach to funding public education essentially consists of two steps: determining how much money is available each year and dividing that amount by the number of students."<sup>88</sup> Similarly, education scholar Paul Hill, in his article "Spending Money When It Is Not Clear What Works," has analyzed how funding systems for schools are developed, and highlighted the dearth of analysis of what schools need and the costs to meet those needs.<sup>89</sup> Some states have made improvements in their school funding system in past decades and have linked their formulas to state standards.<sup>90</sup> Yet research reveals that most states still refuse to design, enact, and maintain funding systems that enable

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85. *About the Standards*, COMMON CORE STATE STANDARDS INITIATIVE (2016), <http://www.corestandards.org/about-the-standards>.

86. See Kate Zernike, *Rejecting Test, Massachusetts Shifts Its Model*, N.Y. TIMES, Nov. 22, 2015, at A1; Liana Heitin, *Common Core Trickles into All States*, EDUC. WK., July 8, 2015, at 1.

87. U.S. DEP'T EDUC., EQUITY & EXCELLENCE COMM'N, *supra* note 2, at 17.

88. COX ET AL., *supra* note 33, at 158. The Supreme Court of Washington concluded in 2012 that the state's funding formulas were not linked to providing each student with the resources that she or he would need to meet the state's performance standards. *McCleary v. State*, 269 P.3d 227, 253-257 (Wash. 2012) (en banc). The Supreme Court of Washington further noted that a state legislator who served on the Basic Education Finance Task Force commented that "there's no relationship between what we say we want a K-12 system to deliver and the mechanism that we use to determine the resources that we fund the system with." *Id.* at 254.

89. Paul T. Hill, *Spending Money When It Is Not Clear What Works*, 83 PEABODY J. OF EDUC. 238, 239 (2008) ("The amounts we spend and the ways we spend them do not derive from analysis of what is needed and what it should cost.").

90. See, e.g., *Sciarrà & Farrie*, *supra* note 22, at 128-33; *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 735-736 (Tenn. 1995) (noting the passage of a new Basic Education Program that when fully funded would provide a basic education for all children in K through 12th grade in Tennessee).

students to learn the content of rigorous standards that aim to prepare students for postsecondary education and college.<sup>91</sup>

Instead, too often politics drives state funding systems in ways that benefit wealthier districts. Politics often pushes funding systems to ensure every district gets a piece of the state aid pie, sometimes without regard to the ability of a district to fund its schools.<sup>92</sup> This can occur when states include a minimum funding amount that ensures that even districts with little need for state funding still receive it.<sup>93</sup> In addition, when reforms are enacted, states sometimes maintain funding levels for districts from a prior selected year, also known as “hold-harmless” provisions.<sup>94</sup> Some states also adopt specific, but limited, provisions that solely benefit the wealthiest districts. For instance, although Arizona does not adjust its funding formula to provide additional funds to low-income students, it does provide an adjustment to pay for more experienced teachers who more frequently select schools with students with fewer needs.<sup>95</sup> Likewise in Kansas, districts with the highest property values are authorized to adopt a special tax that raises additional revenue for teacher compensation given the higher housing prices. Due to the history of housing discrimination in neighborhoods surrounding Kansas City, this enables largely white neighborhoods to raise additional money to hire teachers while nearby minority districts lack this capacity.<sup>96</sup>

The persistent refusal of states to link funding systems to desired educational outcomes sets up children to fail to meet state standards. This refusal can also harm teachers whose reviews and salaries are increasingly linked to student performance on these standards.<sup>97</sup>

### C. Low Funding Levels

States also provide disparate per pupil funding levels with some states providing very low funding levels. Even when *The National Report Card* controlled for “student poverty, regional wage variation, and school district size and density,” the report found substantial disparities in funding between similarly situated students.<sup>98</sup> The five states with the highest funding levels—Alaska, New York, New Jersey, Connecticut, and Wyoming—provided per student funding on average at \$15,738.40 while the five states with the lowest

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91. Sciarra & Farrie, *supra* note 22, at 125.

92. Baker, *supra* note 39, at 37.

93. *Id.* at 25-26. For example, Pennsylvania provides approximately \$500 in state aid without regard to district property wealth, affluence and income. *See id.* at 38.

94. *Id.* at 26.

95. *Id.* at 25.

96. *Id.*

97. *See* David N. Figlio & Lawrence W. Kenny, *Individual Teacher Incentives and Student Performance*, 91 J. PUB. ECON. 901, 902 (2007) (noting that some states have recently adopted merit pay for teachers and finding a positive association between individual merit pay for teachers and student performance).

98. BAKER ET AL., *supra* note 19, at 3.



funding levels—Idaho, Utah, Arizona, North Carolina and Oklahoma—provided \$6338.60 per student.<sup>99</sup> This amounts to a \$9399.80 per pupil difference between the lowest and highest funded states. Given that the average class size for secondary schools is 26.8 and for elementary schools it is 21.2,<sup>100</sup> this disparity undoubtedly translates to substantial disparities in access to resources at the classroom levels as well as at the school and district levels. In addition, *The National Report Card* reveals that the relative amount of funding by states remains relatively stable with low-spending states typically remaining at the bottom while higher-spending states remain at the top with a few exceptions.<sup>101</sup>

Although there is not widespread agreement on a minimum national funding level, education scholars Allan Odden, Lawrence Picus, and Michael Goetz conducted a study of the cost of achieving school finance adequacy in all fifty states and the District of Columbia.<sup>102</sup> They recommended a minimal funding level of \$9940 based on 2005-06 expenditures to ensure that approximately ninety percent of students successfully meet advanced state proficiency standards.<sup>103</sup> They determined this figure by conducting an analysis of the cost of implementing “the evidence-based method,” which assesses the cost of implementing a wide variety of programmatic recommendations based upon research.<sup>104</sup> These recommendations included class sizes of fifteen for grades K to 3 and twenty-five for grades 4 to 12, all day kindergarten, at least one planning period for all teachers, and additional help for students who need additional assistance.<sup>105</sup> Using \$9940 as the minimum benchmark, more than thirty states provided funding below this level in 2005-06.<sup>106</sup>

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99. *Id.* at 4. In 2013, Alaska provided \$17,331 per pupil; New York, \$16,726; New Jersey, \$15,394; Connecticut, \$14,886; and Wyoming, \$14,355. *Id.* At the low end, in 2013, Idaho provided \$5746 per pupil; Utah, \$6295; Arizona, \$6405; North Carolina \$6547; and Oklahoma, \$6700. *Id.*

100. Tbl. 209.30. Highest Degree Earned, Years of Full-Time Teaching Experience, and Average Class Size for Teachers in Public Elementary and Secondary Schools, by State: 2011-12, NAT'L CTR. FOR EDUC. STATISTICS: DIGEST OF EDUCATION STATISTICS, [https://nces.ed.gov/programs/digest/d14/tables/dt14\\_209.30.asp?current=yes](https://nces.ed.gov/programs/digest/d14/tables/dt14_209.30.asp?current=yes).

101. BAKER ET AL., *supra* note 19, at 3.

102. See Allan R. Odden et al., *A 50-State Strategy to Achieve School Finance Adequacy*, 24 EDUC. POL'Y 628 (2010).

103. See *id.* at 630, 647.

104. *Id.* at 630.

105. See *id.* at 630-34.

106. See *id.* at 646-47. The states that funded below this amount in 2005-06 in alphabetical order, and the funding shortfall from the adequate amount, are: Alabama (\$1157), Alaska (\$505), Arizona (\$3533), Arkansas (\$586), California (\$2814), Colorado (\$40), Florida (\$1424), Georgia (\$1280), Idaho (\$1291), Illinois (\$1555), Indiana (\$775), Iowa (\$549), Kansas (\$422), Kentucky (\$838), Louisiana (\$677), Maryland (\$628), Michigan (\$633), Mississippi (\$1901), Missouri (\$897), Nebraska (\$522), Nevada (\$2281), New Mexico (\$677), North Carolina (\$1295), North Dakota (\$154), Oklahoma (\$1778), Oregon (\$1046), South Carolina (\$729), Tennessee (\$1937), Texas (\$1678), Utah (\$2709), Virginia (\$49), and Washington (\$1331). *Id.*

The Center for American Progress has recommended a minimum funding level of \$7500 per pupil for a district to be eligible for Title I funding.<sup>107</sup> Even at this lower threshold, eleven states would have fallen below this amount in 2013.<sup>108</sup> In addition, the Center found that nineteen states had at least one district falling below this benchmark, which is a reminder that the funding averages do not capture the intrastate disparities that are commonplace throughout the United States.<sup>109</sup>

Moreover, as noted in the introduction, at least twenty-five states provide lower state funding per student than in 2008.<sup>110</sup> In other words, more than half of the states are not providing the funding that they believed was appropriate eight years ago. Such a drop in funding should raise concerns given the relatively poor performance of U.S. students on international assessments.<sup>111</sup>

#### *D. Ineffective Oversight of State Funding Systems*

Too often, states do not regularly review their funding systems to ensure that the funding is effectively designed to meet the needs of today's students. Although some states have adopted systems to monitor and audit the results of their funding systems,<sup>112</sup> other states have demonstrated a history and practice of failure to review and reform their funding systems. The Supreme Court of Washington found the legislature had failed to link the funding system to standards that had been adopted long before the court declared the funding system unconstitutional.<sup>113</sup> This failure persisted for many years despite two committees that operated a decade apart declaring the funding system deeply flawed and out of date.<sup>114</sup> Thus, even when a state reviews its funding, the

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107. CAP Educ. Pol'y Team, *A Fresh Look at School Funding*, CTR. FOR AM. PROGRESS 6 (May 18, 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/05/ESEAFundingEquity-brief.pdf>.

108. BAKER ET AL., *supra* note 19, at 4. Those states are: Idaho (\$5746); Utah (\$6295); Arizona (\$6405); North Carolina (\$6547); Oklahoma (\$6700); Mississippi (\$6746); Tennessee (\$6766); Florida (\$7033); Nevada (\$7205); California (\$7348); and Texas (\$7404). *Id.*

109. CAP Educ. Pol'y Team, *supra* note 107, at 6.

110. LEACHMAN ET AL., *supra* note 11, at 5.

111. HANUSHEK, PETERSON & WOESSMANN, *supra* note 10, at 39-41.

112. *See, e.g.*, Hull v. Albrecht, 960 P.2d 634, 637 (Ariz. 1998) (en banc) (noting that the newly-created School Facilities Board must monitor whether each school district's facilities comply with the new adequacy standards); Tennessee Small Sch. Sys. v. McWherter, 894 S.W.2d 734, 736, 739 (Tenn. 1995) (noting that the legislation adopted by the Tennessee legislature in response to a successful school finance lawsuit provides for an annual determination of the cost components of the funding law and "performance audits that objectively measure results"); McCleary v. State, 269 P.3d 227, 251 (Wash. 2012) (en banc) (noting that the legislature has an obligation to reexamine the basic education program "from time to time"); State v. Campbell Cty. Sch. Dist., 19 P.3d 518, 526 (Wyo. 2001) (requiring that the cost-based model for funding and the funding statute be adjusted every five years to ensure that it accurately reflects education costs).

113. *McCleary*, 269 P.3d at 253-54.

114. *Id.*

results of the review may be inadequate to prompt legislative reform for a long time. When the Washington legislature did eventually respond to reforms recommended by a state task force, it failed to fully fund the initiatives, thus prompting the court to declare the system unconstitutional for its failure to provide for the costs of a basic education.<sup>115</sup>

Alabama provides another cautionary tale on inadequate legislative oversight of a funding system. In declaring the Alabama funding system unconstitutional, the state supreme court found in a 1993 decision that the chief mechanism for ensuring equalization of funding—the level of local effort required and the assessed value of property—had not been adjusted by the legislature since 1938.<sup>116</sup> Thus, the Alabama legislature allowed more than a half a century to pass without updating its finance system to better reflect the needs of students. Then-Governor Guy Hunt described the funding system in Alabama as “hopelessly out-of-date” and “too arbitrary” in his deposition for the funding litigation.<sup>117</sup> The Alabama legislature eventually amended the school funding system in response to the court’s ruling.<sup>118</sup> However, when the Alabama Supreme Court returned the system to the sole discretion of the legislature in its 2002 decision,<sup>119</sup> it undoubtedly returned the system to a legislature that had a long history and pervasive culture of neglecting the importance of funding for ensuring an excellent education for the children of Alabama. Alabama earned an F in 2016 in *The National Report Card* for paying ninety cents to low-poverty districts for every dollar paid to high-poverty districts, and it remained in the bottom third for the level of funding at \$7670 per pupil.<sup>120</sup>

In contrast, some states do understand the need for consistent review and modification of the state’s funding system. A 2009 ruling in the long-running school finance litigation in New Jersey noted that its finding that the funding formula was constitutional was closely linked to the State’s commitment to reexamine the formula after its early implementation years and to revise the formula as needed in light of the review’s outcomes.<sup>121</sup> The recently enacted Rhode Island funding formula includes annual adjustments for core instructional services.<sup>122</sup> The Wyoming Supreme Court also held that, given the state’s reliance on a cost of education model to fund education that emphasized

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115. *Id.* at 261-62.

116. Opinion of the Justices, 624 So.2d 107, 119 (Ala. 1993).

117. *See id.* at 119 n.21.

118. *See, e.g.*, The Educational Reform Act of 1994, Ala. Code 1975, § 16-6A-2 et seq.; The Education Accountability Act of 1995, Ala. Code 1975, § 16-6B-1 et seq.; The Foundation Program Act of 1995, Ala. Code 1975, § 16-13-230 et seq., cited in *Ex parte James*, 836 So.2d 813, 819 n.6 (Ala. 2002).

119. *See Ex parte James*, 836 So.2d at 819.

120. BAKER ET AL., *supra* note 19, at 4-5.

121. *Abbott v. Burke*, 971 A.2d 989, 1006 (N.J. 2009).

122. WONG, *supra* note 79, at 12.

teacher salaries and that included other educational costs, the legislature needed to recalibrate the model every five years after its implementation.<sup>123</sup>

Further evidence of the lack of effective oversight of funding systems may be found in the fact that many states lack reliable mechanisms to ensure that funds are efficiently used to increase student outcomes. The Equity and Excellence Commission noted that “[m]ost states do not properly ensure the efficient use of resources to attain high achievement for all students.”<sup>124</sup> Similarly, a 2014 report from the Center for American Progress assessed educational outcomes relative to a district’s expenditures for more than eighty percent of all U.S. students (more than 41 million students) in over 7000 districts.<sup>125</sup> It found that only Florida and Texas consistently assess the efficiency of districts and schools at producing student outcomes.<sup>126</sup> This reveals a lack of attention by many states to whether their education investments are yielding effective results.<sup>127</sup> The study found that over 275 districts earned a highly inefficient rating on all of the productivity measures and thousands were found inefficient on one measure.<sup>128</sup> Furthermore, in over half of the states that were analyzed, “there was no clear relationship between spending and achievement after adjusting for other variables.”<sup>129</sup> In addition, high spending was not consistently correlated with high achievement as the highest third in achievement only included thirty-seven percent of the 2397 districts in the highest third for expenditures.<sup>130</sup>

This study also found that low productivity was not distributed equally along lines of race and class. Instead, districts with low productivity were more likely to educate low-income students.<sup>131</sup> Similarly, African American students were eight times more likely to attend the least productive districts than the

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123. *State v. Campbell Cty. Sch. Dist.*, 19 P.3d 518, 543 (Wyo. 2001).

124. U.S. DEP’T EDUC., EQUITY & EXCELLENCE COMM’N, *supra* note 2, at 17.

125. ULRICH BOSER, CTR. FOR AM. PROGRESS, RETURN ON EDUCATIONAL INVESTMENT: 2014: A DISTRICT-BY-DISTRICT EVALUATION OF U.S. EDUCATIONAL PRODUCTIVITY, 17 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/07/ROI-report.pdf>.

126. *Id.* at 15.

127. *Id.* at 19-27. This study adopted three measures of efficiency. First, the study considered how much achievement was produced for each dollar spent and adjusted the spending data to account for the greater costs of educating special education students, English language learners, and low-income students. *Id.* at 19-20. Second, the study also measured outcomes in light of dollars spent but used a regression analysis to control for factors that the district does not determine, such as the greater costs of educating special education or low-income students. *Id.* at 20-21. This regression analysis attempted to account for spending differences within states. Finally, the study applied “a regression analysis to predict the achievement a district should have relative to other districts in the state given its spending and percentage of students in special programs.” *Id.* at 21-22.

128. *Id.* at 25.

129. *Id.* at 27.

130. *Id.* at 25.

131. *Id.* at 28.

most productive and Hispanic students were twice as likely to attend the least productive districts than the most productive.<sup>132</sup>

Research also reveals how funds are spent inefficiently within education.<sup>133</sup> Paul Hill has noted that there is a lack of knowledge about how money is currently used and how it should be used to achieve desired outcomes.<sup>134</sup> Some district leaders fail to effectively link reform strategies and the distribution of resources.<sup>135</sup> Another common inefficiency is the focus on urban school systems as providers of jobs rather than providers of education.<sup>136</sup> Some districts also are investing resources in reforms that have little impact on instructional practices or student achievement.<sup>137</sup> Yet, scholars have provided research and analyses that offer roadmaps for linking resources and reforms that can increase student achievement.<sup>138</sup> The persistence of inequitable and inefficient funding systems confirms the lack of effective oversight of state and district funding systems. This fact also confirms that states and districts simply lack sufficient incentives, resources, or both to adopt more effective and efficient practices. Part II considers some of the potential reforms that could be included within an incremental federal strategy to influence state funding systems.

## II. DESIGNING EFFECTIVE INCREMENTAL FEDERAL INFLUENCE OVER STATE EDUCATION FUNDING SYSTEMS

In this Part, I provide a preliminary proposal for an incremental federal strategy for leading states to adopt funding systems that promote equal access to an excellent education. I consider how the federal government could employ

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132. *Id.*

133. RYAN, *supra* note 2, at 161-64.

134. Hill, *supra* note 89, at 239-40.

135. MARGUERITE ROZA, CTR. ON REINVENTING PUB. EDUC., ALLOCATION ANATOMY: HOW DISTRICT POLICIES THAT DEPLOY RESOURCES CAN SUPPORT (OR UNDERMINE) DISTRICT REFORM STRATEGIES 23-28 (2008).

136. See RYAN, *supra* note 2, at 161-62 (citing, e.g. JEAN ANYON, GHETTO SCHOOLING: A POLITICAL ECONOMY OF URBAN EDUCATIONAL REFORM 3-38, 157-162 (1997); AMY STUART WELLS & ROBERT L. CRAIN, STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS 130-131 (1997) (St. Louis); Gerald W. Bracey, *A Lesson in Throwing Money*, 79 PHI DELTA KAPPAN 789 (1998) (Kansas City); JENNIFER K. HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND PUBLIC SCHOOLS 85 (2004) (Atlanta, Baltimore, and Detroit)).

137. Allan Odden, *Redesigning School Finance Systems: Lessons From CPRE Research*, CPRE POL'Y BRIEFS 2-3 (2007).

138. See, e.g., BAKER ET AL., *supra* note 42, at 27-28 (finding that states with lower student-to-teacher ratios and fairer staffing distributions yielded both smaller academic outcome gaps and superior academic outcomes); Hill, *supra* note 89, at 246-49 (recommending rigorous testing of novel instructional programs, encouragement of experimentation with the use of funds, replication of effective programs and elimination of ineffective programs); Odden, *supra* note 137, at 10-12 (recommending reforms that could realign funding systems in ways that effectively and efficiently support student learning).

incentives, conditions, and mandates within this strategy. Before assessing the potential effectiveness of these tools, it is important to emphasize that designing and implementing the appropriate reforms will depend in part on the effectiveness of each preceding reform. I offer these preliminary proposals as an invitation to broader and more sustained conversation about the appropriate array of reforms. I am confident that further revisions will be necessary to the preliminary ideas presented here depending on how effective each reform is. Nevertheless, at the outset it is important to consider the full array of possible reforms that will be necessary to avoid the mistake of trying to engineer one reform that fully solves the problem, only to find that no single reform is up to the task. It is essential to emphasize that this is an incremental approach so that lawmakers, policymakers, and reformers do not abandon this important goal because one reform does not serve as a cure-all to achieve it.

I analyze these reforms as potential avenues for implementing the theory of education federalism that I proposed within *Disrupting Education Federalism*.<sup>139</sup> My theory of education federalism envisions a stronger federal role in education that builds on research regarding the strengths of federal law and policymaking and that creates a collaborative federal-state partnership for education. This partnership would expand the capacity of states to serve as laboratories of innovation and reform due to an increase in federal research, technical and financial assistance.<sup>140</sup> In addition, my theory of education federalism embraces the federal government as the ultimate guarantor of equal access to an excellent education given the stronger federal commitment to equal educational opportunity and the persuasive evidence that the states have not consistently prioritized this goal in their policymaking agenda.<sup>141</sup> In that article, I did not examine the types of reforms that could be used to implement my proposed theory. I begin that analysis here by analyzing potential federal incentives, conditions, and mandates.

#### A. *Inviting Incentives*

The first set of federal actions that influence state funding systems should invite state reform. An invitation sends a message that the federal government is encouraging state reform of funding systems but has not yet decided to insist on state reform. Such an invitation could most effectively be offered in several ways. First, the federal government should increase public understanding of this issue by focusing attention on the scope and nature of the disparities in funding and their effects on children, families, and ultimately the nation.<sup>142</sup> This will require the federal government to create and publish studies, reports, news articles, and press releases that explain in an uncomplicated fashion where and how state funding systems are creating disparities in educational opportunity.

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139. Robinson, *supra* note 27, at 983-1005.

140. *See id.* at 1015-16.

141. *See id.* at 1002-05.

142. *See id.* at 985-88.

The importance of a clear and cohesive presentation of these issues is essential for the American public to understand why this information is relevant and warrants a response. State school funding systems are oftentimes complex labyrinths that can sometimes cause even the most astute social scientist to become lost. Yet, the *impacts* of funding disparities on children are straightforward and comprehensible by the American public.

Historically, the federal government has established a strong record of employing a variety of mediums to convey a message regarding reforms that are in the national interest.<sup>143</sup> In addition, the executive branch could undertake this effort without legislative action and thus could initiate this critical first step at any time.

Second, the federal government should provide incentives for reform by offering the states rigorous research and high-quality technical assistance on models of funding systems that help to promote equal access to an excellent education.<sup>144</sup> This research would draw upon the superior federal research capacity.<sup>145</sup> Research and technical assistance also prevent the states from starting from scratch as they search for effective reforms.<sup>146</sup> In addition, research and technical assistance addresses the capacity limitations that state departments of education experienced as they tried to implement the reforms within NCLB.<sup>147</sup>

Third, federal incentives also should include funding available for grants that serve at least two purposes. Federal grants could support expert analysis of state funding systems to identify the weaknesses and strengths of the funding systems,<sup>148</sup> just as experts are often employed in state funding litigation to identify strengths and weaknesses, and recommend potential reforms. Most state funding systems have evolved over time, and as demographics and circumstances have evolved some legislatures may be unaware of the adverse effects of their funding systems. Federal grants could provide the funding to pay education experts to work with states to increase understanding of funding systems, including who is advantaged and disadvantaged by the systems, how the systems are affecting the state economy, and the potential costs for reforms. State lawmakers and policymakers could share this information with those living within the state so that residents understand the reasons that reforms are being considered and eventually adopted. Federal grants also could provide compensation to experts to recommend a menu of possible reforms, just as they do in state school finance litigation.

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143. *See id.* at 987-88.

144. *See id.* at 994-97.

145. PAUL MANNA, COLLISION COURSE: FEDERAL EDUCATION POLICY MEETS STATE AND LOCAL REALITIES 160 (2011).

146. *See* Robinson, *supra* note 27, at 994-97.

147. MANNA, *supra* note 145, at 49.

148. JENNINGS, *supra* note 3, at 183.

In addition, federal funding could reward innovation in state reform of funding systems. Such a grant program should require submission of a high-quality and comprehensive plan that is supported by rigorous research and expert analysis. The plan should provide such analyses as: how the current funding approach benefits and harms children; how harmful aspects of the system will be reformed to reduce inequities and promote educational achievement and excellence; how the proposed funding reforms are linked to desired educational outcomes, including how funding is linked to standards; research supporting the effectiveness of the proposed reforms; a roadmap for raising any additional necessary funding; and, accountability measures to help ensure that the money under the revised system is well spent. The complexity that such plans would necessarily require warrants substantial technical assistance and support from the U.S. Department of Education.

The additional advantage of grants to reward innovation in designing state funding systems is that they help to spark state and local dialogues about existing systems. This dialogue must be informed by expert analysis regarding the ways that each state's funding system affects state and national economic, political and national security interests, and privileges some children while shortchanging others. Such dialogues should encourage state lawmakers and governors to take up the mantle of funding reform.

Federal grant funding that rewards innovation would build on lessons learned from past Race to the Top (RTTT) initiatives. RTTT sparked reform of state education laws and policies that enabled states to earn higher scores on their Race to the Top applications.<sup>149</sup> However, states have begun to pull back from some of these new reforms because of their failure to receive the anticipated funding and political opposition to the reforms. The most notable example of this is the Common Core Standards, which states were encouraged to adopt to strengthen their RTTT applications.<sup>150</sup> Forty-eight states originally agreed to adopt the Common Core Standards.<sup>151</sup> Since the original overwhelming support, the number of adopting states has dropped to forty-two as opposition to the swift implementation and common assessments has grown.<sup>152</sup> Those states that did not receive substantial RTTT funding

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149. See Gordon, *supra* note 9, at 317, 330; Patrick McGuinn, *Stimulating Reform: Race to the Top, Competitive Grants and the Obama Education Agenda*, 26 EDUC. POL'Y 136, 143-147 (2012).

150. See McGuinn, *supra* note 149, at 144.

151. See *id.*

152. See Lauren Camera, *Oklahoma, Louisiana Center Stage in Common-Core Fight*, EDUC. WK., Sept. 10, 2014, at 21; Catherine Gewertz, *As Common Core Testing Season Begins, Some Teachers Feel Pressured to Cover Content*, EDUC. WK., Feb. 25, 2015, at 6; see also *Standards in Your State*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/standards-in-your-state> (highlighting the forty-two states that have adopted the common core standards along with Washington, D.C.) (last visited Oct. 3, 2016). However, recent evidence indicates that in some states that have chosen not to adopt the Common Core standards educators are incorporating Common Core materials and curricula. Heitin, *supra* note 86, at 1.



undoubtedly will be wary of undertaking meaningful reform in the future on the mere hope of being financially rewarded by the federal government. Furthermore, Congress appears to have grown weary of funding the RTTT effort. In the 2015 omnibus spending bill,<sup>153</sup> Congress refused to fund President Obama's proposed \$300 million for a Race to the Top—Equity and Opportunity initiative.<sup>154</sup>

An additional lesson from RTTT is that federal grants should avoid the winners-losers paradigm of competitive grant funding. This aspect of RTTT received substantial criticism, in part because often the states that most need the assistance lose in a competitive grant program.<sup>155</sup> Furthermore, the existence of rejected grant applicants can cause a competitive grant program to lose congressional support by those within Congress who do not like funding a program with rejected applicants or who do not receive funding for their state.<sup>156</sup> A program to reward innovation in designing and implementing a state funding system that promotes equal access to an excellent education need not produce a substantial number of rejected applicants. Instead, funding should be available to all states that design and implement comprehensive plans with the elements noted above. Undoubtedly, all states would not submit an effective plan, perhaps due to political opposition from those who benefit from the status quo, or a state's unwillingness to prioritize educational equity and excellence. Nevertheless, any state that meets the established criteria should be rewarded for taking this important initial step.

Another lesson from RTTT is that the funding should not be given through a one-time payment or even occur only over a year or two. Such one-time payments limit the federal government's ability to hold states accountable for the commitments that enabled them to receive the initial grant. This reduction in federal influence should be avoided given the historical track record of states seeking ways to take federal money while avoiding federal reforms.<sup>157</sup>

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153. Valerie Strauss, *Obama's Race to the Top Loses All Funding in 2015 Omnibus Spending Bill*, WASH. POST. (Dec. 10, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/12/10/obamas-race-to-the-top-loses-all-funding-in-2015-omnibus-spending-bill>.

154. See *id.*; U.S. DEP'T OF EDUC., *Race to the Top—Equity and Opportunity: Support to Close Achievement and Opportunity Gaps*, <http://www.ed.gov/racetothetop-equity-opportunity> (last visited Oct. 3, 2016).

155. See Michele McNeil, *Losing States in Race to Top Scramble to Meet Promises*, EDUC. WK., Feb. 22, 2011, at 24; Elaine Weiss, *Mismatches in Race to the Top Limit Educational Improvement*, ECON. POL'Y INST. (Sept. 12, 2013), <http://www.epi.org/publication/race-to-the-top-goals>; see also Maurice A. Dyson, *Are We Really Racing to the Top or Leaving Behind the Bottom?: Challenging Conventional Wisdom and Leaving Behind Institutional Repression*, 40 WASH. U. J.L. & POL'Y 181, 239 (2012) (summarizing some of the criticisms of RTTT).

156. See McGuinn, *supra* note 149, at 151.

157. See *id.* at 152. In addition, *National Federation of Independent Business v. Sebelius (NFIB)*, 132 S. Ct. 2566 (2012), may limit the ability of federal agencies to insist on compliance with federal conditions. See Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS*

Ultimately, RTTT has shown the importance of sustaining long-term and meaningful reforms that are effectively implemented.<sup>158</sup> Therefore, federal grant funding should be provided over several years and include clear guidance on what conditions must be met for subsequent grant payments to be made.

Even if additional measures are subsequently added, the incentives that are adopted should remain in place. The incentives can provide ongoing encouragement to states that initially reject reform to join in a growing national effort to adopt funding systems that promote equity and excellence.

### B. *Compelling (But Not Unconstitutionally Coercive) Conditions*

The federal government could also attach conditions to federal funding that lead states to adopt funding systems that promote equity and excellence. Such conditions could be attached in several ways. Conditions could be included in the ESEA either as a separate program or as part of Title I, which is the largest program in the ESEA.<sup>159</sup> They also could be attached to any funding that states receive for education.<sup>160</sup> As I see these three options as the most fruitful, I explore each of them below. Given that the scope and nature of such conditions should be informed by the insights from the incentives, I will only briefly analyze some possibilities for enacting such conditions.

As a threshold matter, any conditions that seek to promote equal access to an excellent education must be adopted consistent with the Supreme Court's analysis in *NFIB*.<sup>161</sup> In that case, the Supreme Court for the first time struck down a component of a Spending Clause statute because it was unconstitutionally coercive.<sup>162</sup> However, as I have explained in *Disrupting Education Federalism*, although *NFIB* will inform any expansion of the federal role in education, it will not prevent such an expansion for several reasons.<sup>163</sup> Even as the Court struck down the penalty on states that chose not to participate in the Affordable Care Act's expansion of Medicaid, the Court in *NFIB* reminded Congress that it could attach conditions to new funds, in contrast to the Affordable Care Act's conditioning of old funds on new conditions.<sup>164</sup> Thus, even if Congress enacted new conditions that rivaled or exceeded the funding available in Title I, the states would retain "a genuine choice whether to participate."<sup>165</sup> This remains the core Spending Clause requirement, even as

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IMPLICATIONS 227, 300 (Nathaniel Persily et al. eds., 2013); McGuinn, *supra* note 149, at 152.

158. Patrick McGuinn, *Fight Club*, 12 EDUC. NEXT 25, 30 (2012).

159. See Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 614 (2013).

160. *See id.* at 642.

161. *NFIB*, 132 S. Ct. 2566.

162. *See id.* at 2602-06.

163. Robinson, *supra* note 27, at 1010-12.

164. *See NFIB*, 132 S. Ct. at 2603-04.

165. *See id.* at 2607.

*NFIB* provides much-needed insight into when the states are denied a genuine choice.

In addition, *NFIB* struck down the Medicaid penalty because the cumulative effect of several aspects of the penalty led it to become compulsory, including the large, well-entrenched nature of the Medicaid program and the inclusion of new and unanticipated conditions that threatened the loss of new and old funding.<sup>166</sup> *NFIB* signals that Congress would need to replicate all of these troublesome aspects to violate the Spending Clause, which seems particularly unlikely given the comparatively small amount of funding for even the largest education program, Title I, when assessed alongside the large amount of Medicaid funding.<sup>167</sup> Given the low likelihood of this occurring post-*NFIB*, Congress retains broad authority to pursue a comprehensive education agenda that promotes both equity and excellence, including one that seeks to influence state funding of education.<sup>168</sup>

One of the most effective vehicles for attaching federal conditions would be a future reauthorization of the Elementary and Secondary Education Act because the ESEA reaches all 50 states and the District of Columbia.<sup>169</sup> Given the much-delayed recent reauthorization of the ESEA and its emphasis on decreasing the federal presence in education, an ESEA that includes direct federal influence over state funding is unrealistic today. Yet, the federal role in education has historically gone through cycles of great expansion and contraction<sup>170</sup> that over time have resulted in a gradually expanding federal role in education. Therefore, the recent contraction in the ESSA should not be seen as a signal that a future expansion of the federal role, including one over state funding systems, is impossible or even unlikely. Undoubtedly, the federal role in education today would surprise those lawmakers who passed the original ESEA.

Federal funding through ESEA could help states address a substantial component of state funding shortfalls identified by expert analysis of state funding systems. As Part I explained, two of the primary shortfalls of state funding for education are providing less or equal funding to low-income students with greater needs and low funding levels.<sup>171</sup> Federal aid could help to close these funding gaps when combined with additional state investments in education. In addition, federal conditions on funding could insist that states assess and explain how their funding systems are closely linked to the state's desired education outcomes. One advantage of employing ESEA conditions to encourage states to adopt funding systems that promote equity and excellence

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166. Pasachoff, *supra* note 159, at 593-94.

167. Robinson, *supra* note 27, at 1011.

168. *Id.*

169. See U.S. DEP'T OF EDUC., ESEA TITLE I LEA ALLOCATIONS—FY 2015 (2015), <http://www2.ed.gov/notclamped/about/overview/budget/titlei/fy15/index.html>.

170. See McGuinn *supra* note 149, at 152 (citing PAUL PETERSON ET AL., WHEN FEDERALISM WORKS (1986)).

171. See *infra* Parts I.A and I.C.

is that the need to reauthorize ESEA can encourage compromise on these conditions. However, it also is possible that such conditions could stall future ESEA reauthorizations given the recent eight-year delay in reauthorizing the statute.<sup>172</sup>

To be clear, my proposal does not envision the federal government defining all goals of state education systems or the standards or curriculum for any state. Given the substantial evidence in Part I.B. that many state funding systems are not linked to their purported goals, each state would define its goals and would explain how the funding system is closely linked to those goals before it qualified for federal funding. However, I am proposing that to receive federal aid, states should be required to embrace a goal of providing equal access to an excellent education. Prior federal legislation has embraced this goal and it is undoubtedly the goal of lawmakers when they reauthorize the ESEA.<sup>173</sup>

Congress could add conditions to the ESEA by including a new program focused on supporting state development and implementation of funding systems that advance equity and excellence. Although this would be a part of ESEA, it would operate as one of the many separate programs within the law.<sup>174</sup> States would have the option to reject such funding and the conditions attached to it even while continuing to accept other programs within the ESEA, consistent with past education spending programs and *NFIB*.<sup>175</sup> Given the incentives that will exist for states to reject such funding, the funding should be sufficiently substantial to encourage meaningful participation by the states. It is impossible to estimate the dollar amount of such funding, but for impactful reforms of state funding systems to occur the amount would likely need to rival, or even exceed, the funding within Title I, which in fiscal year 2015 was \$14.4 billion.<sup>176</sup>

Alternatively, in a future reauthorization of Title I, Congress could include within Title I conditions that require states to adopt funding systems that promote equal access to an excellent education. Past ESEA reauthorizations

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172. See Strauss, *supra* note 19.

173. See, e.g., Every Student Succeeds Act, Pub. L. No. 114-95, § 1001, 129 Stat. 1802 (2015) (including in the purpose of Title I “The purpose of this title is to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps”); No Child Left Behind Act, 20 U.S.C. § 6301 (repealed Dec. 10, 2015) (“The purpose of this subchapter is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”).

174. See Pasachoff, *supra* note 159, at 614 (noting some of the many programs in the ESEA, including support for improving teacher quality, English language learners, technology, homeless children, and drug-free schools).

175. *Id.* at 622-24.

176. See U.S. DEP’T EDUC., EDUCATION DEPARTMENT BUDGET HISTORY TBL. (Sept. 25 2015), <http://www2.ed.gov/about/overview/budget/history/edhistory.pdf> (\$14,409,802,000 was appropriated in fiscal year 2015).

and other education laws either ended prior programs and began new ones under new conditions or modified an existing program.<sup>177</sup> Given this trend and the warning *NFIB* sends about conditioning new funds on old money,<sup>178</sup> any new conditions should be attached to a new Title I program rather than funding that states have already accepted.

Scholars and researchers have proposed reforms of Title I that would allow it to serve as a vehicle for leading states to reform their funding systems.<sup>179</sup> Derek Black identified some of the ways that Title I exacerbates funding inequities. He proposed revising Title I to ensure greater funding for students with greater needs and students living in concentrations of poverty as well as to encourage integration of schools.<sup>180</sup> Scholar and now California Supreme Court Justice Goodwin Liu recommended a variety of reforms for Title I to address its shortcomings, including the ways in which it favors high spending, low-poverty states over low spending, high poverty states.<sup>181</sup> Among other reforms, he contended that Congress should remove the state expenditure factor from Title I to provide high poverty states more funding per child, rather than less; incorporate cost factors that are determined by research and updated regularly; and, provide additional funding for poverty concentration grants.<sup>182</sup>

Several ideas for reforming the comparability requirement in Title I, which does not effectively ensure that Title I schools are funded at comparable levels to non-Title I schools, also have been suggested.<sup>183</sup> Cassandra Jones Havard has

177. See Pasachoff, *supra* note 159 at 617, 633-34.

178. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2603 (2012).

179. See, e.g., Marguerite Roza, CTR. FOR AM. PROGRESS, *What if We Closed the Title I Loophole?*, in ENSURING EQUAL OPPORTUNITY IN PUBLIC EDUCATION: HOW LOCAL SCHOOL DISTRICT FUNDING PRACTICES HURT DISADVANTAGED STUDENTS AND WHAT FEDERAL POLICY CAN DO ABOUT IT, 59, 73 (2008) ("Forcing districts to equalize dollar expenditures would restore the original intent of comparability, wouldn't impose new accounting metrics (since it relies only on dollar expenditures), and would allow districts both flexibility in meeting the requirement and the possibility of future innovation."); Alliance for Excellent Educ., *Overlooked and Underpaid: How Title I Shortchanges High Schools, and What ESEA Can Do About It*, POLICY BRIEF 1, 5 (2011) (proposing that Title I should automatically provide funds to high schools with a 35% or higher poverty rate based on the feeder-patterns for high schools rather than on free and reduced-price lunch eligibility); THE FORDHAM INST., FUND THE CHILD: TACKLING INEQUITY & ANTIQUITY IN SCHOOL FINANCE 56-57 (2006) (recommending that Title I funding first require states to show true equity based on actual salary costs); see also Paul T. Hill, CTR. ON EDUC. POL'Y, *Rethinking the Federal Role in Elementary and Secondary Education*, in THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY AND SECONDARY EDUCATION 45, 49 (2001) (recommending that the federal government should "enforce the principle of comparability, so that real-dollar spending is equal for all children before federal funds are applied").

180. Black, *supra* note 24, at 227.

181. See Goodwin Liu, *Improving Title I Funding Equity Across States, Districts, and Schools*, 93 IOWA L. REV. 974, 983-85 (2007).

182. See *id.* at 1011-12.

183. See Ross Wiener, CTR. FOR AM. PROGRES, *Strengthening Comparability: Advancing Equity in Public Education*, in ENSURING EQUAL OPPORTUNITY IN PUBLIC EDUCATION: HOW LOCAL SCHOOL DISTRICT FUNDING PRACTICES HURT DISADVANTAGED STUDENTS AND WHAT FEDERAL POLICY CAN DO ABOUT IT, *supra* note 179, at 33, 46 (2008)

recommended greater agency oversight for Title I because the Title I comparability requirement has been ineffective due to poor enforcement.<sup>184</sup> Congress could address this concern by providing funding for the Department of Education to enforce the comparability requirements. Congress should build upon these promising recommendations if it chooses to leverage Title I as a vehicle for influencing state funding of schools.

If conditions encouraging states to adopt funding systems that promote equal access to an excellent education were included as a new program within the ESEA or Title I, the critical question that remains is the nature and scope of the conditions. Vague conditions that merely require advancing equity and excellence in funding are unlikely to result in meaningful reforms, just as the current watered-down comparability requirements are doing little to require equitable funding.<sup>185</sup> Instead, conditions within ESEA should require states to address the primary shortcomings of funding systems that I have outlined in Part I. Substantial scholarly consensus exists on the need for progressive funding systems to target additional funding to students with greater needs.<sup>186</sup> Therefore, adopting and maintaining a progressive funding system should be an essential condition for any new ESEA program or for a modification to Title I.

Before turning to considering conditions on funding outside of the ESEA, it is worth noting that ESSA's provisions that directly seek to influence school funding are unlikely to have a substantial impact on persistent funding disparities. ESSA continues the maintenance of effort requirements that were included in NCLB and prior ESEA reauthorizations.<sup>187</sup> This requirement seeks to prevent states and districts from reducing education funding. However, the federal regulations governing this standard only mandate that a district keep its funding at ninety percent of spending for the prior year.<sup>188</sup> Not only are districts unlikely to experience such a dramatic decrease within one year, but also a district could reduce their funds over several years and replace them with federal funds without violating this standard.<sup>189</sup>

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("All expenditures on instruction—staff, materials, technology, and so forth—should be included in determining comparability. Combining all expenditures into a single comparability determination will ensure fiscal equity while not impinging on schools' flexibility and discretion in allocating funds."); Hill, *supra* note 89, at 246 (contending that "gross school funding inequities within districts could be eliminated practically overnight" by the Executive Branch issuing new guidelines that require "comparability in terms of real dollars").

184. See Cassandra Jones Havard, *Funny Money: How Federal Education Funding Hurts Poor and Minority Students*, 19 TEMP. POL. & CIV. RTS. L. REV. 123, 146 (2009).

185. Black, *supra* note 24, at 231.

186. See, e.g., JENNINGS, *supra* note 3, at 179-80; Black, *supra* note 24, at 242; Sciarra & Farrie, *supra* note 22, at 120.

187. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015); Black, *supra* note 24, at 238-39.

188. 34 C.F.R. § 299.5(a) (2016).

189. Black, *supra* note 24, at 238.

ESSA also retains a “supplement-not-supplant” provision that aims to prevent states and districts from reducing their education budgets and replacing the cuts with federal money.<sup>190</sup> However, the Department of Education has not enforced this requirement in some time.<sup>191</sup> The Department in 2016 is undertaking negotiated rulemaking to adopt new regulations governing supplement-not-supplant.<sup>192</sup> This will provide the Department an opportunity to strengthen the requirements for proving comparable funding between Title I and non-Title I schools within a district. ESSA specifically disavows that anything within Title I requires or prohibits “equalized spending per pupil” by a state, district or school.<sup>193</sup> Unless the Department’s negotiated rulemaking process leads it to adopt requirements for substantially equal funding between districts within a state, the supplement-not-supplant requirement will not address the persistent interdistrict disparities that direct less funding to low-income districts.<sup>194</sup>

ESSA also requires States to publish in an annual state report card the per-pupil expenditures for federal, state and local funds, including actual personnel and non-personnel expenditures, for every district and school in the state.<sup>195</sup> This provision aims to provide the public with greater transparency on how education funds are spent. However, ESSA does not actually require that states take action to reduce any disparities. Therefore, this provision leaves to state legislatures, policymakers and ultimately the public to decide what action to take, if any, in light of the spending disparities. Given the historic tolerance for funding disparities for generations of students, it seems unlikely that merely publishing information on funding differences will be sufficient to spark lasting reforms.

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190. See Every Student Succeeds Act § 1118(b); U.S. Department of Education, Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, Negotiated Rulemaking Committee, *Issue Paper: Supplement Not Supplant*, <http://www2.ed.gov/policy/elsec/leg/essa/session/nrmissuespapers32016.pdf> (noting that the ESSA supplement-not-supplant provision states that a district must “demonstrate that the methodology used to allocate State and local funds to each [Title I school] ensures that such school receives all of the State and local funds it would otherwise receive if it were not receiving assistance under [Title I]”). ESSA revised the supplement not supplant requirement to allow a district to adopt a single method to establish that a Title I school is receiving the same state and local funds as a non-Title I school, in contrast to the prior interpretation of the requirement that used distinct tests for schoolwide program schools and targeted assistance schools. Every Student Succeeds Act § 1118(b).

191. Black, *supra* note 24, at 239.

192. Andrew Ujifusa & Alyson Klein, *ESSA Rulemaking: A Guide to Negotiations*, EDUC. WK., Mar. 16, 2016, at 14.

193. Every Student Succeeds Act § 1404.

194. BAKER ET AL., *supra* note 19, at 8. In the background paper for the negotiated rulemaking, the Department noted that Title I schools often receive less funding than other schools in the state. See *id.* This may be a signal that the Department plans to address these intrastate funding disparities. Only time will tell if the Department will take steps to address these disparities that undermine that goals of Title I.

195. Every Student Succeeds Act § 1111(h)(1)(C)(x).

Finally, the most ambitious way to include federal conditions on state funding systems would be to pass a separate statute that conditions all federal education funding on states adopting and implementing a funding system that promotes equal access to an excellent education. Such a requirement would be analogous to the requirement that recipients of federal funds must not discriminate on the basis of race, color or national origin in Title VI of the Civil Rights Act.<sup>196</sup> Similar requirements prohibit federal fund recipients from discriminating on the basis of sex in education programs and activities in Title IX of the Education Amendments of 1972<sup>197</sup> or disability in Section 504 of the Rehabilitation Act of 1973.<sup>198</sup>

New stand-alone conditions would enjoy a distinct advantage over conditions in the ESEA because they would only need to be enacted once. This would enable the conditions to become an embedded and accepted part of the political, legal and policy landscape. Although executive officials would have the authority to vary their interpretation of the conditions, the central importance of having a funding system that promotes equity and excellence would endure. The longevity of enforcement also would provide the executive branch ample time to understand how it can most effectively enforce the statute, just as it has learned these lessons under Titles VI and IX and Section 504. Administrative agencies, rather than Congress, would be best equipped to use their expertise to clarify the requirements of conditions.

A stand-alone statute would require even greater political support than conditions within the ESEA. A stand-alone bill also could be easily defeated. In contrast, the ESEA reauthorization will periodically continue to resurface.

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196. Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI §§ 601-605 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7). In 2014, the U.S. Department of Education's Office for Civil Rights issued a Dear Colleague letter on the applicability of the Title VI disparate impact regulation on the distribution of educational resources. *See* U.S. Dep't of Education, Office for Civil Rights, Dear Colleague Letter on Resource Comparability (Oct. 1, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>. The letter notes the persistence in disparities in resources along lines of race, color, and national origin and the obligation of school districts that receive federal funds to remedy these disparities. *Id.* In footnote one, the letter noted that although the letter focuses on school districts, states and individual schools also are required to comply with Title VI and the disparate impact regulation. *Id.* The letter then states, "In particular, State education officials should examine policies and practices for resource allocation among districts to ensure that differences among districts do not have the unjustified effect of discriminating on the basis of race." *Id.* Although OCR enforcement of the disparate impact requirements under Title VI could be used as a powerful tool to ensure that states address ways in which their funding systems have a disparate impact on the basis of race, color, and national origin, it is as yet unclear if OCR possesses both the resources or political will to enforce the Dear Colleague letter in this fashion. Furthermore, if it finds the resources and political will to bring enforcement actions against states, this would only address one aspect of the many shortcomings within state funding systems.

197. Title IX of the Education Amendments of 1972, Pub. L. No. 92-318 (codified as amended at 20 U.S.C. §§ 1681-1688 (2012)).

198. Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504 (codified as amended at 29 U.S.C. § 794 (2006)).



Most importantly, the most effective testing ground for the terms of a stand-alone requirement that encompasses federal influence over school funding would be to include conditions within the ESEA. This would allow Congress and the federal Department of Education to test the appropriate scope and nature of federal involvement in school funding without making a multigenerational commitment to the initial approach. It would enable Congress, the Department of Education and the states to learn from initial efforts and modify subsequent reforms in light of those lessons. Only after Congress, the Department of Education, and the states have determined the most effective approaches for federal involvement that encourages states to adopt equitable funding approaches should this federal role be enacted as stand-alone conditions for receipt of any federal education funds.

### C. *Meaningful Mandates*

My incremental approach makes room for moving beyond incentives and conditions to mandates. A federal mandate that requires states to adopt a funding system that promotes equal access to an excellent education could be adopted through several legal avenues. I briefly explore the possibilities for a federal statute that would accomplish this goal and a constitutional amendment on this issue. Any new federal mandates must build on the lessons and insights of prior reforms. Therefore, my thoughts on this approach are particularly contingent on the impact of and response to those reforms.

I include federal mandates as a third option for reform in light of the federalism concerns such a mandate would create. Even though I have proposed a theory for restructuring education federalism that makes the federal government the ultimate guarantor of equal access to an excellent education, I acknowledge that this approach raises federalism concerns. I do not believe that a restructuring of education federalism will happen overnight. Consequently, this Article builds on my theory by developing an approach for federal leadership to reform state funding that can help to address the federalism concerns that a federal mandate would raise.

A federal statute that requires states to adopt funding systems that promote equal access to education could be adopted by Congress through its Section 5 authority under the Fourteenth Amendment.<sup>199</sup> Numerous scholars have proposed recognition of a right to education under the Fourteenth Amendment that could be advanced through federal legislation. Areto Imoukhuede has argued that a right to an education of high quality should be recognized within the due process right to human dignity.<sup>200</sup> Barry Friedman and Sara Solow contend that the jurisprudence of the Due Process Clause of the Fourteenth Amendment supports the recognition of a “federal constitutional right to a minimally adequate education” that includes a right to the foundations needed

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199. U.S. CONST. amend. XIV, §§ 2, 5.

200. Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467, 505 (2014).

for every student to attain a basic achievement level, including “qualified teachers, . . . contemporary schoolbooks and buildings, . . . [and] remedial programs and specialized forms of instruction.”<sup>201</sup> Susan Bitensky also has persuasively argued that the Due Process Clause (among other constitutional rights) supports the recognition of a substantive due process right to education, and contends that this right would require the federal government to ensure that every child receives a quality education.<sup>202</sup> Michael Rebell has argued that the Equal Protection Clause guarantees that children have a right to “meaningful educational opportunities that include a range of comprehensive services.”<sup>203</sup> Goodwin Liu has presented compelling arguments that the Fourteenth Amendment includes a congressional duty to ensure that all schoolchildren receive “adequate educational opportunity for equal citizenship.”<sup>204</sup>

In a 2007 article I proposed that Congress codify a federal right to education through legislation, although I proposed such legislation through the Spending Clause.<sup>205</sup> Although that article proposed new conditions for federal funds similar to those envisioned in subpart B above, many of the insights and recommendations within that article remain germane for a federal mandate under the Fourteenth Amendment. I believe that Congress should establish a high standard for what a federal right to education guarantees for children and that such a high standard is essential if the right is going to have a much-needed impact on school funding.<sup>206</sup> I also believe that a collaborative approach to enforcement would reap numerous benefits that a litigation-focused approach would lack, including the avoidance of a zero-sum game for reform and the ability to include input from all interested parties rather than simply from the litigants before a court.<sup>207</sup>

Alternatively, a constitutional amendment guaranteeing a fundamental right to education also could require states to adopt funding systems that ensure equal access to an excellent education. An education amendment raises a host of complex and interconnected issues that are beyond the scope of this article.<sup>208</sup> I am exploring these issues in a forthcoming co-edited book with

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201. Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 149 (2013).

202. Susan Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 579-618, 632 (1992).

203. Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 90 (2012).

204. Liu, *supra* note 26, at 335.

205. Robinson, *supra* note 26, at 1722-26.

206. *See id.* at 1712-15.

207. *See id.* at 1726-37.

208. For insights on an education amendment to the United States Constitution, see JENNINGS, *supra* note 3, at 214-17; SOUTHERN EDUCATION FOUNDATION, NO TIME TO LOSE: WHY AMERICA NEEDS AN EDUCATION AMENDMENT TO THE UNITED STATES CONSTITUTION TO IMPROVE PUBLIC EDUCATION (2009); QUALITY EDUCATION AS A CONSTITUTIONAL RIGHT:

Charles Ogletree, Jr. that brings together many leading constitutional law scholars to share their insights on such an amendment.<sup>209</sup> Here, I simply note some of the issues that we consider in that book. First, the book considers arguments as to whether and why a U.S. education amendment might be necessary in light of the persistent disparities in educational opportunity and the lagging achievement of students in the United States on international assessments. Second, the book analyzes a variety of options for what the amendment might guarantee. Finally, the book considers the enforcement issues that such an amendment would raise and the potential federalism implications. Throughout the book, authors highlight the lessons that the United States should draw from past and ongoing state school finance litigation.

In designing any federal mandate to influence state education funding, the federal government should draw upon lessons from state funding case law and reforms. For instance, federal mandates should not demand perfect equality for all students because such a standard is quite difficult to maintain.<sup>210</sup> Instead, substantial equality should be deemed adequate<sup>211</sup> although that standard should not be used as a gateway for ever-widening disparities. In addition, the federal government also should follow the lead of states by focusing more attention on equal access to an excellent education than equal outcomes because states possess a greater ability to influence access rather than outcomes.<sup>212</sup>

Even if a federal mandate were adopted, states must retain flexibility to reform their funding systems in ways that address their primary shortcomings. Undoubtedly, states will initially struggle to redesign their systems in ways that ensure equal access to an excellent education, just as numerous states repeatedly failed to meet their state constitutional obligations when courts ordered them to conform the systems to those obligations.<sup>213</sup> The Federal government should follow the lead of state courts that have provided legislatures flexibility to design remedies in response to court decisions without allowing them to circumvent constitutional obligations. The Kansas Supreme Court recently noted that the Kansas legislature had a variety of options to cure

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CREATING A GRASSROOTS MOVEMENT TO TRANSFORM PUBLIC SCHOOLS (Theresa Perry et al. eds., 2008).

209. *THE ROAD TO PROGRESS: THE CASE FOR A U.S. EDUCATION AMENDMENT TO THE CONSTITUTION* (tentative title) (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., forthcoming 2018).

210. *See, e.g.*, *Campbell Cty. Sch. Dist. v. State*, 181 P.3d 43, 49 (Wyo. 2008).

211. *See, e.g.*, *Gannon v. State*, 319 P.3d 1196, 1239 (Kan. 2014); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 814 (Ariz. 1994) (en banc); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993).

212. *See, e.g.*, *McCleary v. State*, 269 P.3d 227, 251 (Wash. 2012) (en banc).

213. *See, e.g.*, RYAN, *supra* note 2, at 153; *Gannon*, 319 P.3d at 1232 (describing the repeated attempts of the Kansas legislature to revise its funding system in response to court order); *Hull v. Albrecht*, 960 P.2d 634, 636 (Ariz. 1998) (en banc) (summarizing the repeatedly unsuccessful attempts of the Arizona legislature to reform the school funding system consistent with court order).

the constitutional deficiencies that it had identified and reaffirmed that it was the legislature's prerogative—not the court's—to choose appropriate reforms.<sup>214</sup>

Flexibility in designing reforms of state funding systems is important for several reasons. Different performance standards will lead to disparate funding systems when those systems are linked to ensuring that students achieve the state performance standards.<sup>215</sup> Even given the substantial number of states that have adopted the common core standards,<sup>216</sup> the continued divergence in standards, goals, implementation approaches, assessments, and political economies may encourage states to adopt a variety of disparate funding systems. Flexibility also enables states to take care in designing systems that address their shortcomings while also avoiding unintended adverse impacts.<sup>217</sup> States should be permitted to determine the funding system that best serves the citizens of the state as well as the national interest in ensuring equal access to an excellent education.

However, retaining flexibility for states should not be used as a shield that prevents federal accountability for the funding systems needed for equitable and excellent schools, just as the NCLB requirement of state-determined “challenging” academic standards was used by some states as a means to establish academic standards that were not demanding.<sup>218</sup> As a result, once a federal mandate is enacted, the federal government will need to retain some influence over state funding systems to ensure that reforms are passed, funded, and implemented, just as state courts have needed to retain jurisdiction over school funding systems to ensure that states take action consistent with the guiding principles in court opinions.<sup>219</sup> Retaining this influence ensures that the federal government will remain vigilant in its efforts to guide the states toward more equitable and excellent funding systems.<sup>220</sup>

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214. See *Gannon*, 319 P.3d at 1247.

215. See Jaekyung Lee, *Dual Standards of School Performance and Funding?: Empirical Searches of School Funding Adequacy in Kentucky and Maine*, 18 EDUC. ECON. 207, 221 (2010).

216. See *Standards in Your State*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/standards-in-your-state> (last visited Oct. 3, 2016) (highlighting the forty-two states that have adopted the common core standards along with Washington, D.C.).

217. See Joydeep Roy, *Impact of School Finance Reform on Resource Equalization and Academic Performance: Evidence from Michigan*, 6 EDUC. FIN. & POL'Y 137, 165 (2011).

218. See RYAN, *supra* note 2, at 252-53.

219. See, e.g., *McCleary v. State*, 269 P.3d 227, 260-62 (Wash. 2012) (en banc); *Gannon v. State*, 319 P.3d 1196, 1205-06 (Kan. 2014) (describing how the court had twice previously retained jurisdiction to monitor compliance with its orders in *Montoy v. State*, 112 P.3d 923 (Kan. 2005), and *Montoy v. State*, 138 P.3d 755 (Kan. 2006)).

220. See James E. Ryan, *Standards, Testing and School Finance Litigation*, 86 TEX. L. REV. 1223, 1260 (2008) (noting the importance of “continued vigilance on the part of courts” for successful school finance litigation).

Ongoing federal oversight of state funding systems is particularly important because state legislatures sometimes adopt effective funding systems but then take steps to defund some aspects of the new reforms. In 2005 the Kansas legislature adopted what is commonly referred to as “capital outlay equalization payments” that sought to address disparities in the ability of districts to raise funds given disparities in taxable property wealth.<sup>221</sup> However, beginning in fiscal year 2010 the legislature ended all equalization payments until the Kansas Supreme Court declared this action unlawful because it “returns the qualifying districts to[an unreasonable, wealth-based inequity].”<sup>222</sup> Furthermore, judicial oversight and media coverage helped to prevent the Kansas legislature from securing a lower cost study that would have caused a leveling down of funding levels. Instead, the study confirmed the results of the legislature’s own independent consultants.<sup>223</sup> As I noted in Part I.A., in February 2016, the Kansas Supreme Court took the extreme measure of threatening closure of the Kansas schools if the Kansas legislature did not produce a funding scheme consistent with the Court’s requirements by June 30, 2016.<sup>224</sup> Similarly, the New Jersey legislature has not fully funded its progressive funding reforms.<sup>225</sup> These examples suggest that ongoing federal oversight and accountability mechanisms will be necessary to ensure that states do not backslide after they enact funding formulas that provide equitable and excellent schools.

Finally, flexibility for states is important because beneficial aspects of local control of education should endure within the United States.<sup>226</sup> The federal government can support local control of schools while nevertheless preventing states from hiding behind local control as a shield to insulate harmful funding disparities. It can do so by encouraging, and then insisting on a system of funding that promotes equal access to an excellent education while allowing states the freedom to determine how they will achieve this essential national goal. This form of local control would allow states and districts to exceed the floor established by the federal government but would not allow states and districts to fall below that floor.<sup>227</sup> As numerous state courts have recognized, local control does not have to be reduced to mitigate disparities in funding,<sup>228</sup> even though some states have chosen to reduce local control to mitigate

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221. See *Gannon*, 319 P.3d at 1241-42.

222. See *id.* at 1241-43.

223. BAKER & LEVIN, *supra* note 67, at vi.

224. *Gannon v. State*, 368 P.3d 1024, 1062 (Kan. 2016).

225. Sciarra & Farrie, *supra* note 22, at 131-33.

226. See, e.g., *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 815 (Ariz. 1994).

227. *Hull v. Albrecht*, 950 P.2d 1141, 1146 (Ariz. 1997) (en banc) (“Local control does not include the power to choose substandard facilities. Local control includes the power to choose facilities beyond the standard.”).

228. See, e.g., *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 155 (Tenn. 1993).

spending disparities.<sup>229</sup> State courts also have acknowledged that local control is illusory for those districts without an adequate tax base to provide equitable resources for their schools, when compared with other districts with a larger tax base.<sup>230</sup> Given the inherent infirmities of local funding and disparate local abilities to raise funds,<sup>231</sup> local control can be fostered even when states do not rely heavily on local funding of schools. There is no national requirement that local governments only control the funding that they raise. Consequently, local control can remain while the federal government simultaneously insists that states create and sustain funding systems that provide equal access to an excellent education. Part III examines the costs and benefits of this incremental approach and contends that the benefits substantially outweigh its costs.

### III. THE NEED FOR AN INCREMENTAL FEDERAL STRATEGY TO INFLUENCE STATE SCHOOL FUNDING SYSTEMS

Scholars and reformers typically recommend a single-step reform for expanding federal influence over state funding systems in ways that would reduce inequitable funding disparities.<sup>232</sup> However, the challenges outlined in Part I coalesce in disparate ways in fifty funding systems throughout the United States. Consequently, it would be exceedingly difficult, if not impossible, for a single reform to lead all states to adopt equitable funding systems that promote educational excellence.

Given the complex dynamic of nationwide reform, in this Part I explore the costs and benefits of an incremental strategy for an increasingly insistent federal call and then demand for reform of state funding systems. An effective incremental federal strategy to influence and ultimately require reform of state school funding systems could be implemented over many years and multiple Congresses and administrations. The ultimate goal of this strategy would be that all states adopt and maintain funding systems that provide equal access to an excellent education for all children.

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229. See Roy, *supra* note 217, at 163.

230. See, e.g., Serrano v. Priest, 557 P.2d 929, 948 (Cal. 1976); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 155 (Tenn. 1993).

231. See McCleary v. State, 269 P.3d 227, 252-53 (Wash. 2012) (en banc).

232. See, e.g., Sciarra & Farrie, *supra* note 22, at 139 (recommending that the federal government condition funding to states on the requirement that states link funding systems to the resources that all children need to learn the content of state standards); EPSTEIN, *supra* note 25, at 2 (proposing that the federal government incentivize states to provide greater funding to students with greater needs). I previously proposed a single reform that sought to indirectly accomplish this result. See Robinson, *supra* note 26, at 1711-26 (proposing a collaborative enforcement model for a federal right to education). Some notable exceptions to this trend are the report of the Equity and Excellence Commission which recommends an array of reforms to encourage states to improve state funding systems, see U.S. DEP'T EDUC., EQUITY & EXCELLENCE, *supra* note 2, at 19-20, and the proposals of Jack Jennings for federal aid that enhances teaching and learning as well as new legal and constitutional provisions that guarantee a good education, see JENNINGS, *supra* note 3, at 185-217.

A. *The Costs of an Incremental Federal Strategy to Influence State School Funding Systems*

An incremental federal strategy to influence state funding systems undoubtedly inflicts costs. First, if an incremental approach to federal influence upon state education funding is adopted, states and districts committed to retaining their current systems would gain ample time to develop strategies for avoiding federal incentives and circumventing federal mandates, just as states, districts, and families implemented such strategies after the Supreme Court's pronouncements in *Brown v. Board of Education I* and *II*.<sup>233</sup> Beneficiaries of the current funding systems oftentimes have been successful in resisting comprehensive reforms for decades. This is evidenced by the limited reforms enacted by most legislatures, even in the face of a plaintiff victory in school finance litigation against the state.<sup>234</sup> Furthermore, districts that are primarily urban and minority have rarely been able to succeed in school funding litigation and have encountered more strenuous and lengthier legislative delays than victorious white districts.<sup>235</sup>

The No Child Left Behind Act (NCLB) provides anecdotal evidence that states may adopt delay tactics when implementing federal legislation. NCLB allowed schools to establish their own timetable for how they would accomplish 100 percent student proficiency by 2014.<sup>236</sup> Some states required significant annual gains, while other states predicted large gains close to 2014.<sup>237</sup> Although state leaders defended the plans with large, late gains as recognizing the time that reform may take, others contended that such plans were simply waiting for the NCLB requirements to be revised.<sup>238</sup> States also were criticized for selecting a high number for the number of students that must be present for a student subgroup to be counted for school accountability measures (also known as the "n size"), given that privacy concerns could not justify setting this number at 45, 50, or 75 students as some states did.<sup>239</sup> Such actions indicate that states can develop creative measures to circumvent federal funding conditions while still accepting federal funds.

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233. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 345-48, 351-57 (2004) (discussing the many efforts to evade the Court's rulings in *Brown I* and *II*); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 126, 128-31, 306-07 (2004) (describing the resistance to *Brown I* and *II*).

234. RYAN, *supra* note 2, at 153. This finding suggests that reforms that benefit urban, minority districts will meet great resistance, whether the strategy is short- or long-term.

235. *Id.* at 171.

236. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1111(b)(2)(F), 115 Stat. 1425, 1447-48 (2002).

237. MANNA, *supra* note 145, at 71-72, 158.

238. See *id.*

239. See *id.* at 73-74.

In addition to local and state-level resistance to reform, it would not be surprising if campaigns are mounted against those federal lawmakers who vote in favor of meaningful federal reform. This opposition could be met with evidence regarding the greater benefits that will accrue from providing all students equal access to an excellent education and the costs of the current disparities in educational opportunity. However, the electorate often votes contrary to national interests when potential reforms threaten their benefits from the status quo. Therefore, federal lawmakers must be prepared to respond effectively to scare tactics and to wealthy donors that oppose reform.

Another important cost of a gradual approach to federal influence over funding systems is that it will allow the current inequities in funding to continue to harm children. Tomorrow's jobs increasingly demand high-level skills. Higher skills and educational outcomes will be needed for employment and to maintain a good quality of life.<sup>240</sup> Yet, many disadvantaged students attend schools that employ less qualified and less effective teachers.<sup>241</sup> Such schools also educate students with greater mobility and more behavior and learning challenges.<sup>242</sup> Excellent schools are essential for those students to successfully enter college or the workforce and disadvantaged students also need the out-of-school supports that can address the challenges associated with poverty.<sup>243</sup>

The harms of inadequate and inequitable funding for schools extend beyond individual students and families. The interests of the United States also are harmed by these challenges. National security is threatened by our inadequate education system, as documented by a task force report from the Council of Foreign Relations:

The Task Force members believe America's educational failures pose five distinct threats to national security: threats to economic growth and competitiveness, U.S. physical safety, intellectual property, U.S. global awareness, and U.S. unity and cohesion. The Task Force does not deny America's military might, but military might is no longer sufficient to guarantee security. Rather, national security today is closely linked with human capital, and the human capital of a nation is as strong or as weak as its public schools.<sup>244</sup>

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240. GREG J. DUNCAN & RICHARD J. MURNANE, *RESTORING OPPORTUNITY: THE CRISIS OF INEQUALITY AND THE CHALLENGE FOR AMERICAN EDUCATION* 125 (2015).

241. LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA'S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 43 (2010).

242. *See* DUNCAN & MURNANE, *supra* note 240, at 125.

243. REBELL & WOLFF, *supra* note 26, at 72-73; Rothstein, *supra* note 53, at 62-63.

244. COUNCIL ON FOREIGN RELATIONS, *U.S. EDUCATION REFORM AND NATIONAL SECURITY* 7 (2012).



The U.S. education system also is proving inadequate to prepare many individuals for military service, given that one in five students who seeks to enter the military is not academically prepared to do so.<sup>245</sup>

Research reveals other additional costs for the continued inadequacies of the education system that an incremental federal strategy may allow to persist.<sup>246</sup> Less educated workers are less productive, thus reducing the economic gains of their labor.<sup>247</sup> Those with lower educational levels commit crime more frequently<sup>248</sup> and participate less often in civic activities such as voting.<sup>249</sup> One study found that the level of education an individual achieves has significant and independent effects on participation in civic activities and civic attitudes. This research confirms the importance of a strong education system for an effective democracy.<sup>250</sup> These harms will continue and compound

245. Gerard Robinson, *The Closing of the Military Mind?*, AEIDEAS (Feb. 24, 2016), <http://www.aei.org/publication/the-closing-of-the-military-mind/> (citing THE EDUCATION TRUST, SHUT OUT OF THE MILITARY: TODAY'S HIGH SCHOOL EDUCATION DOES NOT MEAN THAT YOU ARE READY FOR THE MILITARY (2010)). The Education Trust Report found that those who were unprepared to enter the military also were unprepared for a wide array of civilian jobs. See THE EDUCATION TRUST, SHUT OUT OF THE MILITARY: TODAY'S HIGH SCHOOL EDUCATION DOES NOT MEAN THAT YOU ARE READY FOR THE MILITARY I (2010).

246. See Robinson, *supra* note 27, at 974 (noting studies on the costs of an inadequate education including additional crime, higher health care costs, lost income and tax collections, and greater public assistance) (citing Jane Waldfogel et al., *Welfare and the Costs of Public Assistance*, in THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 160, 173 (Clive R. Belfied & Henry M. Levin, eds., 2007)) [hereinafter THE PRICE WE PAY]; Enrico Moretti, *Crime and Costs of Criminal Justice*, in THE PRICE WE PAY, at 142, 157; Peter Muennig, *Consequences in Health Status and Costs*, in THE PRICE WE PAY, at 125, 137; Celia Elena Rouse, *Consequences for the Labor Market*, in THE PRICE WE PAY, at 99, 101).

247. See Enrico Moretti, *Workers' Education, Spillovers, and Productivity: Evidence from Plant-Level Production Function*, 94 AM. ECON. REV. 656, 683 (2004) (finding greater productivity in plants in cities where the percentage of college graduates increased at a faster rate when compared to similar plants where the percentage of college graduates increased more slowly).

248. See Randi Hjalmarsson et al., *The Effect of Education on Criminal Convictions and Incarceration: Causal Evidence from Micro-Data*, 125 ECON. J. 1290, 1325 (2014) (finding that "more schooling has a significant negative effect on the likelihood of male conviction and incarceration. The magnitude of the effects for males is quite substantial . . ."); Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155, 183 (2004) (finding after a study of three data sources that "schooling significantly reduces criminal activity").

249. See Kevin Milligan et al., *Does Education Improve Citizenship?: Evidence from the United States and the United Kingdom*, 88 J. PUB. ECON. 1667, 1692-93 (2004) (finding a strong relationship in the United States "between education and voting" and claiming, "education increases citizens' attention to public affairs and to following politics. More educated citizens appear to have more information on candidates and campaigns. . . . [T]hese results lend support to the notion that education has social externalities through the production of a better polity."); PEW RESEARCH CENTER, NONVOTERS: WHO THEY ARE, WHAT THEY THINK 2 (2012) (finding that voter participation is lower among less educated individuals in the United States).

250. Thomas S. Dee, *Are There Civic Returns to Education?*, 88 J. PUB. ECON. 1697, 1717 (2004).

as long as state funding systems remain inadequate and inequitable. Undoubtedly, the United States would greatly benefit from an immediate fix to inadequate and inequitable funding models that harm the nation's interests.

Finally, an incremental approach also would not satisfy those who seek immediate results from the sacrifices required by substantial reforms. Evidence of the need to provide immediate benefits from education reforms can be seen when observing the actions of educators. Superintendent of Boston Public Schools, Thomas Payzant, once commented,

Most educators would readily agree that change in schools is a multi-year process. But the reality is that most school districts are under enormous pressure to reinvent themselves every year, often as part of a political reaction to deal with funding realities, disaffected parents, or demands of state and local bureaucracies.<sup>251</sup>

The need for immediate results also is evident by the fact that reformers often promise that they will “close the achievement gap” or make all children college-ready, despite the elusive nature of similar achievements for generations.<sup>252</sup> Michelle Rhee predicted the achievement of the District of Columbia Public Schools would rise within five years to the highest achievement in the United States.<sup>253</sup> Despite ongoing reforms within education, many reforms fail to take root and are simply replaced with new reforms when a new leader or board takes charge.<sup>254</sup>

These and similar efforts respond to the reality that “it’s difficult to get people excited about modest, gradual improvement. And it takes courage even to try.”<sup>255</sup> The public also could misread an incremental federal approach to influencing state school funding as a signal that reforming state systems is not important or impactful.

Nevertheless, it is important to resist promises of a quick fix of state school funding systems that would only engender backlash when quick results are not forthcoming. In reality, funding mechanisms are deeply entrenched within state education systems and they have created longstanding beneficiaries who will vehemently oppose change. Therefore, the initiation of any federal involvement in encouraging state reform of their funding systems must acknowledge that relatively slow but steady progress will provide the only means for lasting change.

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251. Thomas W. Payzant, *Continuous Improvement: Sustaining Education Reform Long Enough to Make a Difference*, 9 VOICES URB. EDUC. 36, 37 (2005).

252. Matthew Di Carlo, *The Fatal Flaw of Education Reform*, ALBERT SHANKER INST. BLOG (Sept. 11, 2014), <http://www.shankerinstitute.org/blog/fatal-flaw-education-reform>.

253. *Id.*

254. Robert Rothman, *How Can Reforms Last?*, 9 VOICES URB. EDUC. 2, 2 (2005).

255. Di Carlo, *supra* note 252.

*B. The Benefits of an Incremental Federal Strategy to Influence State School Funding Systems*

Although it is important to acknowledge the costs of an incremental federal strategy to influence state school funding systems, the benefits of such an approach outweigh its costs. The federal government has not previously exercised substantial, direct influence over state funding systems. It undoubtedly will take a significant amount of time for the American public to become comfortable with this new federal role, just as it has taken decades for the federal role in education to evolve from the Elementary and Secondary Education Act of 1965 (ESEA) to its current role in the ESSA, which is the recent reauthorization of the ESEA. I believe that a gradual increase in federal influence over state school funding would be more politically palatable and sustainable in the long run. Political support and sustainability are essential for the reforms to have adequate time to yield meaningful and comprehensive restructuring of systems that have privileged more affluent children and lacked sufficient linkage to education goals and research for many generations.

First, an incremental approach can enable the federal government to adopt modest preliminary reforms that will limit federalism alarms and help to avoid a backlash against federal involvement in education. In this regard, NCLB<sup>256</sup> and the subsequent ESSA<sup>257</sup> provide an important cautionary tale. ESSA represents a backlash against the substantial expansion of the federal role in education in NCLB and against Secretary Arne Duncan's use of his authority to grant waivers to NCLB when Congress failed to reauthorize the law.<sup>258</sup> Both the comments of lawmakers and the structure of the bipartisan effort enacted in the ESSA reflect an intentional effort to decrease federal involvement in education.

During the congressional consideration of ESEA reauthorization, the central question was not whether but how much Congress should reduce the federal role in education in light of the shortcomings of NCLB.<sup>259</sup> Senator Lamar Alexander (R-TN), who served as Chair of the Senate Committee on Health, Education, Labor, and Pensions, specifically noted the backlash against the Obama Administration's involvement in education, including its support for the Common Core Standards and revising teacher evaluations during a statement he made on the floor of the Senate.<sup>260</sup> He further noted the need to shrink the federal role in education by commenting that the new law

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256. No Child Left Behind Act of 2001, Pub. L. No. 107-110 (codified as amended in scattered sections of 20 U.S.C.) (repealed Dec. 10, 2015).

257. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

258. See Strauss, *supra* note 19.

259. See Alia Wong, *The Bloated Rhetoric of No Child Left Behind's Demise*, THE ATLANTIC (Dec. 9, 2015), <http://www.theatlantic.com/education/archive/2015/12/the-bloated-rhetoric-of-no-child-left-behinds-demise/419688>.

260. 161 CONG. REC. S8509 (daily ed. Dec. 9, 2015) (statement of Sen. Alexander, R-TN) ("We have learned something else in the last 10 or 15 years: Too much Washington involvement causes a backlash. . . . Now Washington is out of it, and it is up to Tennessee

gets rid of the waivers the U.S. Department of Education has been using to act, in effect, as a national school board, causing Governors to have to come to Washington and play “Mother May I” if they want to evaluate teachers or fix low-performing schools or set their own academic standards. And it is true that it moves a great many decisions at home. It is the single biggest step toward local control of schools in 25 years.<sup>261</sup>

Other senators echoed similar sentiments at the hearings on reauthorization of the ESEA and the impact of NCLB<sup>262</sup> or on the floor of the Senate when debating the ESEA reauthorization.<sup>263</sup>

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and Washington and every State to decide for themselves what their academic standards ought to be. The same is true with teacher evaluation.”).

261. 161 CONG. REC. S8509 (daily ed. Dec. 9, 2015) (statement of Sen. Alexander, R-TN). Senator Alexander also emphasized the need to return to state and local control of education during the hearings on ESSA. See *Fixing No Child Left Behind: Testing and Accountability Before the S. Comm. on Health, Educ., Labor, & Pensions*, 114th Cong. 24-50 (2015) (statement of Sen. Alexander, R-TN), <http://www.help.senate.gov/hearings/fixing-no-child-left-behind-testing-and-accountability> (“Washington sometimes forgets, but governors never do: that the federal government has limited involvement in elementary and secondary education, contributing ten percent of the bill.”); *Fixing No Child Left Behind: Innovation to Better Meet the Needs of Students Before the S. Comm. on Health, Educ., Labor, & Pensions*, 114th Cong. (2015) reprinted in 161 CONG. REC. S765 (daily ed. Feb. 4, 2015) (statement of Sen. Alexander, R-TN) (“My own view is that the government ought to be an enabler and encourager, rather than a mandator, of innovation.”). See also Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607, 652-679 (2015) (arguing that the use of waivers to induce states to agree to new education policies was beyond the Secretary of Education’s statutory authority and unconstitutional).

262. See, e.g., *No Child Left Behind: Early Lessons from State Flexibility Waivers Before the S. Comm. on Health, Educ., Labor, & Pensions*, 113th Cong. 30-31 (2013) (statement of Sen. Paul, R-KY) (“All of these ideas are ideas of decentralization. They’re an idea and a conclusion that the Federal Government has been an abject failure in this, that No Child Left Behind was a mistake, and that what we need to have is more local control of schools.”); *Every Student Succeeds Act: Hearing on Examining Elementary and Secondary Education Act (ESEA) Reauthorization, Focusing on Standards and Assessments Before the S. Comm. on Health, Educ., Labor, & Pensions*, 111th Cong. 3 (2010) (statement of Sen. Enzi, R-WY) (“However, the Federal Government should stay out of the way of these efforts. As we work on the reauthorization of ESEA, we should find ways to assist States, not require or coerce them with this difficult, but important, work.”).

263. See, e.g., 161 CONG. REC. S5133 (daily ed. July 16, 2015) (statement of Sen. McConnell, R-KY) (“It is a bipartisan bill that would take decisionmaking power away from distant Federal bureaucrats and empower parents, teachers, States, and school boards instead . . . . It is a bipartisan bill that would substitute one-size-fits-all Washington mandates for greater State and local flexibility.”); 161 CONG. REC. S5038 (daily ed. July 14, 2015) (statement of Sen. Lee, R-UT) (“Mr. President, parents and teachers all across America are frustrated by Washington, D.C.’s heavyhanded, overly prescriptive approach to public education policy. I have heard from countless moms and dads in Utah who feel as though anonymous Federal Government officials, living and working 2000 miles away, have a greater say in the education of their children than they do.”); 161 CONG. REC. S4680 (daily ed. July 7, 2015) (statement of Sen. Collins, R-ME) (“The bottom line is that Washington should not be imposing a top-down, one-size-fits-all approach to assessment. . . . Providing a

Similarly, in the House, the Chair of the House Committee on Education and the Workforce, Representative John Kline (R-MN) emphasized in his opening remarks in a February 2015 markup of the Student Success Act (which later became the Every Student Succeeds Act) that the bill would assist in providing all children an effective education “by reducing the federal footprint, restoring local control, and empowering parents and education leaders.”<sup>264</sup> He further noted that the Secretary of Education had “impose[d] his will on schools” and that the new bill would prevent such coercive practices.<sup>265</sup> He later reemphasized the importance of reducing the federal role in education on the floor of the House by stating, “Mr. Speaker, the American people are tired of waiting for us to replace a flawed education law. They are tired of the Federal intrusion, of the conditional waivers, and of the Federal coercion.”<sup>266</sup>

Other congressional representatives also noted the importance of reducing the federal role in education at the House hearings on education issues that preceded reauthorization<sup>267</sup> or on the floor of the House as ESSA was debated.<sup>268</sup>

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good education for every child must remain a national priority so that each child reaches his or her full potential, has a wide range of opportunities, and can compete in an increasingly global economy. The Every Child Achieve Act honors these guiding principles while returning greater control and flexibility to our States, to local school boards, and to educators.”). *See also* 161 CONG. REC. S5137-38 (July 16, 2015) (statement of Sen. Murray, D-WA) (“Our bipartisan bill gives States more flexibility while also including Federal guardrails to make sure all students have access to a quality public education.”); 161 CONG. REC. S8597 (Dec. 10, 2015) (statement of Sen. Booker, D-NJ) (“Local teachers, principals, and parents are best equipped to know how best to turn around a failing school, and this bill gives them the arsenal to do so. I believe the new accountability provisions empower local leaders, with State and Federal guidance, to pursue the improvement strategies best suited to their local needs.”); 161 CONG. REC. S8528-29 (daily ed. Dec. 9, 2015) (statement of Sen. Cornyn, R-TX) (commenting on the accomplishments of Congress in 2015 but noting, “[W]e found places where we can work together in order to deliver results for the American people, and the Every Student Succeeds Act is an example of that. It replaced a law which was sorely in need of reform, and it stopped Washington from imposing common core mandates on our classrooms. It will ensure that power is devolved from Washington back to the local communities, to parents and teachers, where that power should exist.”).

264. Kline Statement: Markup of H.R. 5, the Student Success Act, EDUCATION AND THE WORKFORCE: COMMITTEE STATEMENTS (Feb. 11, 2015), <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=398350>.

265. *See id.*

266. 161 CONG. REC. H8885 (daily ed. Dec. 2, 2015) (statement of Rep. Kline, R-MN). *See also* 161 CONG. REC. H1142 (daily ed. Feb. 25, 2015) (statement of Rep. Kline, R-MN) (“Unfortunately, past efforts have largely failed because they are based on the idea that Washington knows what is best for children. We have doubled down on this approach repeatedly, and it is not working. . . . Success in school should be determined by those who teach inside our classrooms, by administrators who understand the challenges facing their communities, by parents who know better than anyone the needs of their children. If every child is going to receive a quality education, then we need to place less faith—less faith—in the Secretary of Education and more faith in parents, teachers, and State and local leaders.”).

267. *See, e.g., Mark-up of H.R. 5 Student Success Act Before the H. Comm. on Educ. and the Workforce*, 114th Cong. (2015) (statement of Rep. Rokita, R-IN) (“The Student

Success Act gets Washington bureaucrats out of the business of running schools and places control back in the hands of the parents and teachers who know their children best. . . . I would like to highlight several of the legislation's key reforms that will repair the nation's broken education system. First, the Student Success Act reduces the federal footprint and restores control of the classroom to parents and state and local education leaders. It prohibits the federal government from encouraging one-size-fits-all prescriptions that may help students in California, but may worsen outcomes for students in Indiana. The bill repeals ineffective federal requirements governing accountability, teacher quality, and local spending that hamstringing the ability of states and school districts to improve student learning for their unique student populations."); *Raising the Bar: Exploring State and Local Efforts to Improve Accountability Before the H. Comm. on Educ. & the Workforce*, 113th Cong. 6 (2013) (statement of Rep. Miller, D-CA) ("We all agree, Democrats, Republicans, and the administration, that the federal role should shift in this reauthorization. States, districts, and schools should be able to manage their schools in a way that current law doesn't allow."); *Education Reforms: Ensuring the Education System is Accountable to Parents and Communities Before the Subcommittee on Early Childhood Elementary & Secondary Educ. of the Comm. on Educ. & the Workforce*, 112th Cong. 2 (2011) (statement of Rep. Hunter, R-CA) ("Decades of growing Federal intervention in the Nation's classrooms have done little to boost student achievement levels and make our schools more successful. . . . The four components of the existing Federal measures of accountability, academic standards, assessments, adequate yearly progress and school improvement, constitute a one-size-fits-all approach that is ineffective in gauging the performance of schools. Not only is this Federal accountability system entirely too rigid, it also fails to take into account the various challenges facing schools.").

268. *See, e.g.*, 161 CONG. REC. H8868 (daily ed. Dec. 2, 2015) (statement of Rep. Dold, R-IL) ("Mr. Speaker, this bill goes a long way to rectifying the problems that were created by No Child Left Behind. We have seen 14 years now of Federal encroachment on local schools, one-size-fits-all testing, and local school districts that are not allowed to apply local solutions to local problems. . . . More importantly, the bill will allow States to develop their own academic content and achievement standards that are designed to suit the needs of their students. Teachers and administrators will be given the freedom to truly educate their students and will be able to innovate and develop real solutions to their problems without fear of a bureaucrat in Washington looking over their shoulder."); 161 CONG. REC. H8886 (daily ed. Dec. 2, 2015) (statement of Rep. Fudge, D-OH) (stating that ESSA "will establish a more appropriate Federal role in education by ending the era of mandated high-stakes testing, limiting the power of the Secretary of Education to dictate cookie-cutter standards, repealing dozens of ineffective and duplicative programs, and ensuring resources are delivered to where they are most effective and necessary."); 161 CONG. REC. H8888 (daily ed. Dec. 2, 2015) (statement of Rep. Guthrie, R-KY) ("States and local school districts need flexibility to deliver a quality education to our students. This agreement does just that. It gets the Federal Government out of our classrooms and puts the decision-making back into the hands of our State and local leaders."); 161 CONG. REC. H8886 (daily ed. Dec. 2, 2015) (statement of Rep. Rokita, R-IN Chairman of the Early Childhood, Elementary, and Secondary Educ. Subcomm.) ("This bill empowers States, and it ends the federally mandated high-stakes testing, which is the core, which is the heart of No Child Left Behind. . . ."); 161 CONG. REC. H8888 (daily ed. Dec. 2, 2015) (statement of Rep. Takano, D-CA) ("Having served in the classroom during the implementation of No Child Left Behind, I can say without hesitation that our current education system needs a reset. While well-intentioned, No Child Left Behind created a punitive approach to education policy that punishes underperforming schools instead of helping them to improve. That rigid, test-driven approach to accountability, combined with heavy handed intervention from the Federal Government, has failed to close the achievement gaps in our country. This reauthorization replaces our test-and-punish system with a more flexible test-and-reveal approach that returns decisionmaking to States and school districts. It will empower educators who best understand their students' needs to develop new ways to meet local challenges."); 161 CONG.

The effects of this backlash against a strong federal role in education have continued even though the ESSA has been signed into law. Hearings continue on Capitol Hill about the implementation of ESSA and lawmakers continue to emphasize the importance of reducing the federal role in education. On February 10, 2016, the House Subcommittee on Early Childhood, Elementary, and Secondary Education, which is a subcommittee of the House Committee on Education and the Workforce, held a hearing on “Next Steps for K-12 Education: Implementing the Promise to Restore State and Local Control.”<sup>269</sup> Committee Representative Todd Rokita (R-IN) opened the hearing with these comments:

After years of flawed policies and federal intrusions into the nation’s classrooms, Congress passed the Every Student Succeeds Act based on the principle that responsibility of K-12 education must be returned to state and local leaders. The new law repeals onerous federal requirements and ensures important decisions affecting education – like standards, accountability, and school improvement – are made by state and local leaders, not Washington bureaucrats.<sup>270</sup>

Congressman Rokita further noted that Congress bore responsibility to hold the Department of Education accountable for the law’s implementation and to make sure that the promise of local and state control over education was kept.<sup>271</sup> All of these congressional statements make clear that through the ESSA, Congress has intentionally reduced federal involvement in education so that state and local leaders will once again be the primary decision makers for education.

Numerous provisions within the ESSA also reflect the backlash against substantial federal involvement in education and a preference for restoring state and local control. It contains several provisions that limit the role of both the Department of Education and the Secretary of Education. The central structure of Title I, a program that provides additional funding to children from low-income households, provides for state plans that determine not only the standards for student achievement but also the accountability mechanisms for

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REC. H8886 (daily ed. Dec. 2, 2015) (statement of Rep. Thompson D-PA) (“The Every Student Succeeds Act will establish a more appropriate Federal role in education by ending the era of mandated high-stakes testing, limiting the power of the Secretary of Education to dictate cookie-cutter standards, repeal dozens of ineffective and duplicative programs, and ensuring resources are delivered to where they are most effective and necessary.”).

269. *Next Steps for K-12 Education: Implementing the Promise to Restore State and Local Control: Hearing Before the H. Subcomm. on Early Childhood, Elementary, and Secondary Educ.*, 114th Cong. (2016), <http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=400160>.

270. *Id.* (statement of Rep. Rokita R-IN).

271. *Id.*

districts and schools when students do not meet state standards.<sup>272</sup> This system replaces the NCLB federal accountability standards.<sup>273</sup> To solidify state control over standards, Congress included a provision in ESSA that indicates that the law does not prohibit a state from revising their standards or withdrawing from participation in the common core state standards.<sup>274</sup> It also forbids any federal employee from taking action against a state that takes such action.<sup>275</sup> ESSA also maintains the prohibition from past ESEAs that prevented the federal government from controlling the curriculum, allocation of resources or program of instruction adopted by a state, locality or school.<sup>276</sup> A modest and incremental increase in federal involvement in education funding should cause less backlash than the broad expansion of the federal role in NCLB.

Second, an incremental strategy would also enjoy greater political economy because it permits states to adopt substantial but gradual reforms of state funding systems rather than completely overturning longstanding systems overnight. As discussed in Part III below, the success and longevity of state strategies will require increased public understanding of the adverse impacts of current funding systems and the benefits of reform. Gradual reforms allow the public to digest this new information and participate in a dialogue about the most effective reforms for their state in light of the state's budget, demographics, and constitutional provisions. This public awareness must include research and data on how reforming state funding systems could enhance the projected economic outlook for the state and its ability to prepare all students more effectively for the global workforce and higher education. This information can help the residents of each state begin to embrace both a role for state government in ensuring equal access to an excellent education as well as the policies required to effectuate that role. Therefore, an incremental federal approach can increase the political economy of state reforms because it will help states to gradually build the political will that is essential for sustaining long-term reform.

Third, an incremental federal strategy allows for the latter stages of reforms to incorporate the lessons learned from the preliminary ones. Federal influence over state funding systems would travel mostly uncharted territory. NCLB again provides instructive insights on what should be avoided. NCLB

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272. Every Student Succeeds Act, Pub. L. No. 114-95, §§ 1003, 1005, 129 Stat. 1802 (2015).

273. *See* 20 U.S.C. § 6316(b)(1)(A), (5), (7), (8) (repealed Dec. 10, 2015). The accountability approach in NCLB required that students be offered the ability to transfer in the second consecutive year that a school or subgroup did not make adequate yearly progress on state assessments. 20 U.S.C. § 6316(b)(1)(A), (5) (repealed Dec. 10, 2015). After three consecutive years of such performance, students in the schools had to be offered tutoring. *Id.* Later accountability measures included more intrusive interventions such as corrective action and restructuring approaches that had to be selected from a list of options included in NCLB. 20 U.S.C. § 6316(b)(7), (8) (repealed Dec. 10, 2015).

274. Every Student Succeeds Act § 8036.

275. *Id.*

276. Every Student Succeeds Act § 8024.



represented the first time federal law had identified the responses that districts and schools must take when a school or district failed to reach its achievement targets. However, the reforms generally were structured as penalties for schools and districts that did not meet adequate yearly progress.<sup>277</sup> The interventions also created perverse incentives to lower standards and cut scores.<sup>278</sup> If NCLB had included either greater flexibility in determining the necessary interventions or a mechanism for revisiting and changing the interventions that were not working, the statute might have achieved more of its goals. Instead, Congress attempted to define *ex ante* exactly what should happen with and to a failing school. This oftentimes was viewed as a straightjacket on schools and districts rather than a parachute that softens the impact of new and innovative reforms. Any federal influence over state funding systems should not attempt to solve the diverse array of funding challenges at the outset of the reform strategy. Instead, a gradual approach that is reviewed regularly and reformed as needed should continuously incorporate the insights and research on the impact of federal action as well as research regarding state successes and challenges.

Fourth, just as federal influence over state funding systems would usher in a mostly novel federal role in education, most states have not yet engaged in a deliberate effort to adopt and maintain funding systems that promote equal access to an excellent education. Undoubtedly, trial and error will occur because each state must navigate its specific state constitutional requirements, existing funding laws, demographics, the economy, and the political landscape. State reforms of funding systems in response to plaintiff victories typically have taken many years to satisfy new constitutional requirements.<sup>279</sup> The New Jersey funding litigation, which is viewed as one of the most successful efforts, has required many trips to court and the legislature for well over two decades.<sup>280</sup> The myriad challenges of implementing an equitable funding system will endure and thus an incremental federal strategy should build upon important lessons from state finance litigation and allow states sufficient time to respond to new federal incentives and reforms.

Fifth, an incremental approach also would avoid a large influx of funding that may not be spent wisely. As Derek Black explains in his 2016 article titled *Taking Teacher Quality Seriously*, research reveals that additional funding secured from litigation victories is sometimes simply channeled into the existing salary structure for teachers that provides the largest raises to senior teachers.<sup>281</sup> This approach does not help to reduce disparities in access to qualified teachers. It also fails to incentivize effective teachers to teach in high-need schools, to retain new teachers when attrition is often high, and to attract

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277. MANNA, *supra* note 145, at 158.

278. RYAN, *supra* note 2, at 250-52.

279. *Id.*, at 145, 152-55.

280. Sciarra & Farrie, *supra* note 22, at 126-33.

281. Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1603, 1643-45 (2016) (citing David P. Sims, *Suing for Your Supper?: Resource Allocation, Teacher Compensation and Finance Lawsuits*, 30 ECON. EDUC. REV. 1034, 1042 (2011)).

skilled professionals into teaching which could assist in closing educational opportunity gaps.<sup>282</sup> By avoiding a large, one-time overhaul, an incremental approach encourages monitoring of reforms and adjustments to direct new funds and reforms toward their most productive use.

Finally, an incremental federal strategy to influence state funding systems may result in more progressive and comprehensive reforms because neither the federal reforms nor the state reforms attempt to instantly overhaul state funding systems. The federal reforms would embrace incrementalism and would tackle various aspects of the necessary reforms over many years. Similarly, state reforms would occur over time in ways that could increase the likelihood that far-reaching changes are ultimately embraced that eventually make equal access to an excellent education a reality for all children.

This analysis reveals that the numerous advantages to an incremental federal strategy outweigh the potential costs. Although a gradual approach should still reap some significant immediate benefits, in communities where those benefits are not immediate, the increasing focus on reform can provide leverage to pressure governors and state legislatures to act. In addition, far more children will lose out on an equitable and excellent education if a comprehensive and relatively quick federal approach ignites such opposition that the United States never regains its appetite to adopt federal reforms to influence state funding systems. Therefore, even with its costs, an incremental strategy approach remains the optimal course of action.

#### CONCLUSION

It is imperative that the United States ensures that all states adopt and maintain funding systems that provide equal access to an excellent education. Inequitable funding systems that handicap the achievement of students and undermine the national aims of public schools must be eliminated so that U.S. students can successfully compete in the global workforce.<sup>283</sup> Scholars and reformers have oftentimes focused on developing a single strategy for tackling this complex problem. However, a single reform, even a multifaceted one, would be insufficient to tackle the myriad shortcomings of school funding systems. This Article has explained why the wisest path to effective reform is an incremental approach that gradually increases federal influence over state funding systems in ways that require equitable and excellent schools. Over time, this approach would place growing pressure on states to reform funding systems in ways that benefit all children and the entire nation.

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282. *See id.*

283. BAKER & CORCORAN, *supra* note 39, at 10.

