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Spatial Inequality as Constitutional Infirmity: Equal Protection, Child Poverty and Place

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ARTICLES

SPATIAL INEQUALITY AS CONSTITUTIONAL INFIRMITY: EQUAL PROTECTION, CHILD POVERTY AND PLACE

Lisa R. Pruitt*

ABSTRACT

This is the first in a series of articles that maps legal conceptions of (in)equality onto the socio-geographical concept of spatial inequality, with a view to generating legal remedies for those living in places marked by socioeconomic disadvantage. In particular, this article considers whether the funding and delivery of government services at the county level in the state of Montana violate the state's constitution because of the grossly disparate abilities among Montana counties to finance and provide services. Pruitt's analysis focuses on children as a particularly vulnerable and immobile population, many of whom are deprived of government services based on where they live. Further, it scrutinizes the provision of health and

* Professor of Law, University of California, Davis, School of Law. Thanks to the marvelous team of research assistants who helped with this project, working under short deadlines: Nathalie S. Skibine, Jennifer Masoodi, Justin Kochan, Marta Vanegas, Jennifer Ward, Karli Bobus, and Adam Lunceford. Cindy L. Dole, Michelle Hugard, and Rachel Ray provided editorial assistance. Janet L. Wallace and Yooli Choi deserve special mention for the many roles they played, including those of data masters. Thanks to Alan Brownstein, Lisa Cimbaluk, Beth A. Colgan, Margaret Z. Johns, Courtney G. Joslin, Paul Lachapelle, Carlton Larson, Hari Osofsky, and Kenneth Weaver for helpful conversations and thoughtful comments on earlier drafts. Dan Simmons, Shannon W. McCormack and Sheila Pruitt generously consulted on local taxation issues. The staff of the Montana Law Review and many participants in the live Browning Symposium on rural law provided indispensable local insights. Xong Vang managed the manuscript marvelously through many rounds of revisions. She and Nina Bell produced the graphs and tables. Julie A. Young produced the maps. Erin Murphy was, as usual, librarian extraordinaire. Any remaining errors are mine. For citation, reference or distribution, contact lrpruit@ucdavis.edu.

human services as a category of services to which Montana children experience great variations in access.

County governments in Montana are financed principally by local property tax revenue. Uneven development across the state, from one county to the next, consequently confers on individual counties vastly different capacities to provide services. Because of the lack of centralized funding for services such as public health and other human services, those who live in sparsely populated, relatively undeveloped and property-poor counties are least served by local government. At the same time, wealthy counties—which tend to be more populous—have economies that are more diversified, property tax bases that are more substantial, and a correspondingly greater capacity to deliver services. More densely populated counties also face lower per capita costs for delivering services because they are better able to achieve economies of scale.

To illustrate these disparities, Pruitt discusses in detail the economic and demographic profiles of five Montana counties. These include Yellowstone County, home to Billings, the state's largest city; fast-growing Gallatin County, which exemplifies rural gentrification and the rural resort phenomenon; Stillwater County, a sparsely populated nonmetropolitan county with significant mineral wealth; Big Horn County, a persistent poverty county with a majority American Indian population; and Wheatland County, a tiny county with a dwindling population and an agriculture-based economy.

The legal critique of this spatially and economically uneven landscape relies primarily on the 1972 Montana Constitution, which is among the most progressive state constitutions in the nation. In particular, Pruitt argues that the Constitution's Equal Protection and Dignity Clauses are violated by the county government funding scheme and its consequences. The Montana Equal Protection Clause forbids discrimination based on "race, color, sex, culture, social origin or condition, or political or religious ideas." Pruitt maintains that significant disparities in service provision, which occur arbitrarily across county lines, violate this equality guarantee. Pruitt's second argument is for state provision of a minimal degree of services to children. Relying on the Constitution's Dignity Clause and the doctrine of *parens patriae*, Pruitt argues that children cannot live with dignity unless their fundamental needs are met. She asserts that the typical emphasis on autonomy with respect to the dignity right is misplaced with regard to children. For the child population, Pruitt maintains that a right to dignity should be grounded instead in their inherent dependency and vulnerability, thus imposing a duty on the state to provide children's first-order needs when their parents cannot or do not do so. In addition to this analysis under the Montana Constitution, the article also challenges the orthodoxy of U.S.

constitutional jurisprudence regarding poor people, public benefits, and equal protection.

Finally, Pruitt argues that Montana's school funding scheme, which has been the subject of recent litigation, now represents a better model, though still an imperfect one, for financing public services. This is because the school funding formula seeks to level the funding playing field by providing more state monies, along with federal funds that are somewhat similarly allocated, to school districts based on the rurality and/or the presence of students who are at risk based on poverty or ethnicity. School districts with the highest percentages of at-risk students tend also to be the school districts with poorer property tax bases. By contrast, the scheme for financing county government results in a situation in which more affluent counties are better able to provide services to residents, while those living in the most rural and property-poor counties have access only to very limited health and human services. This finance scheme thus aggravates and further entrenches spatial inequalities, an outcome that is in contrast to the school funding formula, which aims to achieve greater substantive equality by channeling money to the schools with the greatest need.

While this article analyzes spatial inequality in the context of a specific state and with respect to a particular type of government service, the capacity and significance of spatial inequality in relation to legal equality guarantees is not so limited. The services that governments deliver implicate a wide range of rights, which may be violated if the services are not provided in an equitable manner. Pruitt thus calls for all branches and scales of government to be more attentive to the difference place makes in the delivery of services, to ensure even and fair access.

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I. INTRODUCTION

Thoughts of Montana—the “last best place”¹—have long evoked images of natural, scenic beauty, of the “grandeur of . . . mountains and the

1. This is a slogan used to market Montana. See Jim Robbins, *In Montana, A Popular Expression is Taken Off the Endangered List*, N.Y. Times A15 (Aug. 17, 2008). The phrase first became associated

vastness of . . . plains,” as stated in the Preamble to the Montana Constitution.² More recently, thoughts of Montana also bring to mind rural resorts and the super-rich.³ Indeed, as the State’s residents well know, Montana is a place of contrasts: big sky and small towns, dramatic glaciers and flat, open grasslands.⁴ Other contrasts are demographic and economic. While parts of Montana have experienced rural gentrification⁵ in recent decades, and many highly affluent persons have second residences there, Montana is also home to abject poverty. More than 130,000 Montana residents (14% of the population) live in poverty.⁶ Among these are about 40,000 impoverished children.⁷

Montana is the fourth largest state in the nation, with a territory exceeding 147,000 square miles.⁸ With fewer than a million residents,⁹ it is also one of the least densely populated. Only two states (Alaska and Wyoming) have lower population densities.¹⁰ Forty-six of Montana’s 56 counties are nonmetropolitan,¹¹ and these counties are home to about 65% of the State’s population.¹² Just over half of Montana’s residents live in rural

with the State through the book, *The Last Best Place, A Montana Anthology* (William Kittredge & Annick Smith eds., Univ. of Wash. Press 1998).

2. Mont. Const. preamble.

3. See Kirk Johnson, *Economy Crashes the Gates at a Club for the Rich*, N.Y. Times A34 (Nov. 30, 2008) (reporting on the Yellowstone Club’s bankruptcy filing and describing the club’s clientele); Jim Robbins, *Unhappiness after Stream in Montana is Open to All*, N.Y. Times A20 (Dec. 1, 2008) (noting that Huey Lewis and Charles Schwab are owners of large homes in Montana); Ashlea Ebeling, *Home on the Ranch*, 158 Forbes (June 11, 2001) (noting that Ted Turner’s four Montana ranches are worth over \$100 million).

4. On the Montana Tourism website, Governor Brian Schweitzer lists among the State’s attractions “open land, majestic mountains.” Montana Office of Tourism, *Welcome from the Governor*, http://visitmt.com/welcome_from_the_governor (accessed Feb. 10, 2009).

5. See Conor Dougherty, *The New American Gentry: Wealthy Folks Are Colonizing Rural Areas, Bringing Cash, Culture—and Controversy*, Wall Street Journal A1 (Jan. 19, 2008); Lawrence C. Hamilton et al., *Place Matters: Challenges and Opportunities in Four Rural Americas*, http://www.carsey.institute.unh.edu/publications/Report_PlaceMatters.pdf (2008) (dividing rural America into four categories, one of which is “amenity rich” and noting that this category of rural places is thriving by many measures); Lisa R. Pruitt, *Legal Ruralism Blog*, <http://legalruralism.blogspot.com>; *select* rural gentrification (accessed July 13, 2009).

6. U.S. Census Bureau, *American FactFinder*, http://factfinder.census.gov/home/saff/main.html?_lang=en;search=Montana, refer to 2005–2007 ACS data (accessed Mar. 25, 2009) [hereinafter *American FactFinder*].

7. *Id.* Unless otherwise indicated, I use the term “children” to refer to all persons aged 0–17.

8. U.S. Census Bureau, *United States Summary: 2000 Population and Housing Unit Counts 29*, <http://www.census.gov/prod/cen2000/phc3-us-pt1.pdf> (2004).

9. *American FactFinder*, *supra* n. 6; *search* “Montana,” refer to 2005–2007 ACS data (accessed Mar. 25 2009).

10. U.S. Census Bureau, *GCT-PH1-R.: Population, Housing Units, Area, and Density*, <http://ceic.mt.gov/C2000/PL2000/popdensityallstates.pdf> (2000).

11. See *infra* nn. 25–26 and accompanying text (providing definitions).

12. United States Department of Agriculture, Economic Research Service, *Rural Definitions: State Level Maps, Montana* 8, <http://www.ers.usda.gov/Data/Ruraldefinitions/MT.pdf> (2000) [hereinafter *Rural Definitions: State Level Maps, Montana*].

places,¹³ while 67% of its children do.¹⁴ With an average of just over six residents per square mile,¹⁵ Montana's population sparseness creates both economic and spatial challenges. State and local government entities face considerable obstacles as they seek to provide a wide range of services (e.g., education, health care, roads, and public safety) in rural areas, where economies of scale are difficult to achieve.

At the same time, Montana's 1972 Constitution makes big commitments to the State's residents. It is one of the most wide-ranging and progressive state constitutions in that it goes beyond standard constitutional fare such as equal protection,¹⁶ free speech,¹⁷ and an array of guarantees related to the criminal justice system.¹⁸ In addition to these civil and political rights, the Montana Constitution guarantees, for example, the right "of pursuing life's basic necessities,"¹⁹ the right to "individual privacy,"²⁰ the right to dignity,²¹ and the "right to a clean and healthful environment."²²

This article considers the potential of the Montana Constitution to address spatial inequalities among Montanans, particularly as those inequalities affect the State's children. Part II explains the concept of spatial inequality: looking at who gets what in relation to where they live. I also begin there the work of mapping constitutional conceptions of (in)equality

13. *Id.* at 8 (indicating that 50.2% of the state's population is rural). See also Rural Poverty Research Institute, *Demographic and Economic Profile: Montana 7*, [http://www.rupri.org/Forms/Montana 2.pdf](http://www.rupri.org/Forms/Montana2.pdf) (2008). See *infra* n. 24 (U.S. Census Bureau definition of rural). Indeed, the Montana Supreme Court has occasionally invoked the State's rural character in judicial opinions, as in a 1981 marital dissolution case in order to justify its preference to keep a farm or ranch intact, even if it meant the wife received her buy-out in installments. See *Gomke v. Gomke*, 627 P.2d 395, 396–397 (Mont. 1981).

14. William P. O'Hare, *The Forgotten Fifth: Child Poverty in Rural America* 18 tbl. 13, <http://carseyinstitute.unh.edu/publications/Report-OHare-ForgottenFifth.pdf> (Carsey Institute Summer 2009).

15. *Rural Definitions: State Level Maps, Montana*, *supra* n. 12, at 8.

16. Mont. Const. art. II, § 4.

17. *Id.* at art. II, § 7.

18. *Id.* at art. II, §§ 19–28.

19. *Id.* at art. II, § 3.

20. *Id.* at art. II, § 10. The section provides: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." See Patricia A. Cain, *The Right to Privacy Under the Montana Constitution: Sex and Intimacy*, 64 Mont. L. Rev. 99 (2003) (discussing the provision).

21. Mont. Const. art. II, § 4. For a discussion of the dignity right, see Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 Mont. L. Rev. 301 (2000); Heinz Klug, *The Dignity Clause of the Montana Constitution: May Foreign Jurisprudence Lead the Way to an Expanded Interpretation?*, 64 Mont. L. Rev. 133 (2003).

22. Mont. Const. art. II, § 3. This right is listed first among the Constitution's inalienable rights and is expressly guaranteed for "present and future generations." Mont. Const. art IX, § 1, cl. 1. For commentary on this provision, see e.g. Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 Mont. L. Rev. 157 (2003); Bryan P. Wilson, *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 Emory L.J. 627 (2004).

onto spatial inequality. Part III provides a broad overview of poverty and its measures, including U.S. data related to child poverty in particular. Part IV details spatial inequalities among Montana's children, with reference to various measures of well-being (e.g., poverty rate, household income, education level), social and healthcare services, and the condition of Montana's public schools. In addition, Part IV details Montana's county government funding scheme, which creates and/or exacerbates some of these spatial inequalities. In order to further illustrate inequalities across Montana, Part IV also provides detailed snapshots of five counties that represent the State's demographic and economic variety.

Part V turns to a discussion of how law might be used to level the playing field for Montana's children or, at a minimum, to ensure that the basic needs of all Montana children are adequately met. A right to public benefits has not been recognized under the U.S. Constitution, and federal equal protection arguments have rarely succeeded in striking down funding disparities among schools—a context in which they have often been made.²³ This article thus looks primarily to the Montana Constitution to provide a basis for redressing the serious spatial inequalities evident across the State's counties and for ensuring that the essential needs of all children are met. Part V also considers the Montana Constitution's Dignity Clause in relation to the doctrine of *parens patriae* and its potential—as yet unrecognized by courts—to provide a legal basis for protecting children from poverty and its consequences. While I argue that the Montana Constitution provides a more appropriate legal basis for remedying the injustices identified, I nevertheless also briefly consider the impact of spatial inequality on minors in light of the U.S. Constitution.

Part VI holds up Montana's public school funding system as an example of a more equitable scheme for funding county government and the services it provides on behalf of the state and federal government. Montana's school finance mechanism, which benefits from considerable federal monies that flow into the State for that purpose, takes account of socioeconomic disadvantage and American Indian status as bases of stratification. It also takes into account rural spatiality and the challenges facing small

23. See *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); see generally John E. Coons, William H. Clune III & Stephen D. Sugarman, *Private Wealth and Public Education* (Harv. U. Press 1970) (arguing during the early days of school finance litigation that quality of public education should depend not only on local effort, but on the wealth of the state as a whole) [hereinafter, Coons et al., *Private Wealth*]; Jonathan Kozol, *Savage Inequalities* (Crown Pub. 1991) (discussing spatial inequalities in relation to public education); Anna Williams Shavers, *Rethinking the Equity v. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 Neb. L. Rev. 133, 136–139 (2003) (recounting the history of school finance litigation and detailing, for example, the shift from litigation under the U.S. Constitution to litigation based on state constitutions); but see *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (striking down California's school funding scheme as a violation of the Equal Protection Clause of the U.S. Constitution).

schools, which are unable to achieve economies of scale. The public school funding system is therefore a better, more substantively equitable model than the current system for funding county governments and the critical services they provide.

Part VII offers concluding thoughts about the spatial inequalities revealed by this analysis of Montana's state and local provision of services. It summarizes both causes and consequences of the funding disparities. There, I also discuss what is at stake for Montana—and by extension, the nation—in eliminating child poverty. Finally, I briefly consider the sort of place-specific programs that have proven effective at poverty reduction, and I argue that a multi-scalar strategy represents the best response to this profound problem. Such a strategy would require a higher degree of centralization at the state level, as well as greater local use of federal funds that are currently untapped.

* * *

An explanation of terminology and data sources lays the foundation for the discussion that follows. The U.S. Government uses two numerical thresholds to differentiate rural from urban. The U.S. Census Bureau defines "rural" places as "all territory, population, and housing units located outside of urbanized areas and urban clusters with a population of 2,500 or less."²⁴ The Office of Management and Budget (OMB) uses the terms metropolitan (or "metro") and nonmetropolitan (or "nonmetro") to refer to a similar dichotomy, with the designation at the county level. Metro counties are urbanized areas of 50,000 or more with a total area population of at least 100,000;²⁵ all other counties are nonmetro.²⁶ More people live in "rural" places than in "nonmetro" counties because the former designation encom-

24. U.S. Census Bureau, *Census 2000 Urban and Rural Classification*, http://www.census.gov/geol/www/ua/ua_2k.html (accessed Feb. 18, 2008) (defining "urban" as including "all territory, population, and housing units located within an urbanized area (UA) or an urban cluster (UC)," which "delineates the UA and UC boundaries to encompass densely settled territory, which consists of: (1) core census block groups or blocks that have a population density of at least 1,000 people per square mile, and (2) surrounding census blocks that have an overall density of at least 500 people per square mile.").

25. Office of Management and Budget, *Standards for Defining Metropolitan and Micropolitan Statistical Areas*, <http://www.census.gov/population/www/metroareas/metroarea.html> (updated Aug. 19, 2008).

26. *Id.*; see also *infra* n. 31 and accompanying text (explaining "micropolitan" as a sub-category of nonmetropolitan). More than 55 million people—almost 20% of Americans—live in nonmetro areas, and more than 59 million people—about 21% of Americans—live in rural areas. U.S. Census Bureau, *Geographic Comparison Table, Urban/Rural and Metropolitan/Nonmetropolitan Population*, <http://factfinder.census.gov>; select Get Data under Decennial Census, select Geographic Comparison Tables under Census 2000 Summary File 1 (SF 1) 100-Percent Data, select United States—Urban/rural and Inside/Outside Metropolitan Area (2000) [hereinafter *Geographic Comparison Table*].

passes people living in open territory or towns with fewer than 2,500 residents—even if these rural places are within a metro county.²⁷

The U.S. Department of Agriculture (USDA) and the OMB recognize rural-urban and metropolitan-nonmetropolitan not only as dichotomies, but also as continua.²⁸ The USDA does so with a range that classifies counties on a scale of one to nine. Classification is based upon the county's total population, the size of population cluster (or "degree of urbanization") within the county, and the county's proximity to a metropolitan area.²⁹ At the most urban end are metropolitan counties with populations of one million or more, which are designated "one." At the other end are "completely rural" counties, designated "nine," meaning they have fewer than 2,500 residents in any given population cluster and are not adjacent to a metropolitan county.³⁰ The OMB uses the label "micropolitan" for counties that fall at the cusp of the metro/nonmetro divide. Micropolitan counties are nonmetro counties with a population cluster between 10,000 and 50,000 and a surrounding, economically interdependent population of 100,000 or more.³¹ In this article, I use the word "rural" to refer to the U.S. Census Bureau definition or to the broader concept of rurality, and I use the metro/nonmetro terminology when referencing data reflecting those OMB definitions.

The population, poverty rate, and other data relied on in this article are drawn primarily from the U.S. Census. Data is also occasionally taken from Montana government sources, particularly when they are significantly

27. According to the 2000 Census, 25.7 million "rural" residents live in "metropolitan" areas by virtue of being in a metro county. *Geographic Comparison Table*, *supra* n. 26; see Leslie A. Whitener, Bruce A. Weber & Greg J. Duncan, *Introduction: As the Dust Settles: Welfare Reform and Rural America* 19 n. 4, <http://www.upjohninst.org/publications/ch1/rdwr.pdf> (2002); see also John Cromartie & Shawn Bucholtz, *Defining the "Rural" in Rural America* 33, <http://www.ers.usda.gov/AmberWaves/June08/PDF/RuralAmerica.pdf> (June 2008) (describing the variety of ways in which the federal government defines "rural"); U.S. Dept. of Agric., Econ. Research Serv., *Briefing Room, Measuring Rurality: What is Rural?*, <http://www.ers.usda.gov/Briefing/Rurality/WhatIsRural> (Mar. 22, 2007) (explaining new definitions of urban/rural and metro/nonmetro).

28. This spectrum has also been recognized in case law. See Lisa R. Pruitt, *Gender, Geography & Rural Justice*, 23 Berk. J. Gender, L. & Just. 338, 346–347, n. 37 (2008) (collecting cases and other sources) [hereinafter Pruitt, *Gender, Geography and Rural Justice*].

29. *Id.*

30. U.S. Dept. of Agric., Econ. Research Serv., *Briefing Room, Measuring Rurality: Rural–Urban Continuum Code*, <http://www.ers.usda.gov/briefing/rurality/RuralUrbCon> (Apr. 28, 2004) [hereinafter *Measuring Rurality: Rural–Urban Continuum Codes*].

31. See U.S. Dept. of Agric., Econ. Research Serv., *Briefing Rooms, Measuring Rurality: What is a Micropolitan Area?*, <http://www.ers.usda.gov/Briefing/Rurality/MicropolitanAreas> (Oct. 24, 2006). The OMB classification scheme further includes six categories within the broad "nonmetro" category and three sub-classifications within the broad category of "metro." The nonmetro subcategories vary according to the presence and size of urban populations within a given nonmetro county and the county's proximity to a metropolitan area. See *Measuring Rurality: Rural–Urban Continuum Codes*, *supra* n. 30.

more recent. Less often, the article relies on data from the reports of non-profit organizations, which in turn typically rely on government data. Although data from these various sources are sometimes inconsistent, the differences are rarely significant.³²

While the most recent decennial census data is from 2000, the U.S. Census Bureau issued 2005–2007 American Community Survey (ACS) data for states and more populous government units. This ACS data reflects 2007 estimates based on statistical modeling of 2005 numbers. When available, I sometimes reference the 2005–2007 ACS data in lieu of the 2000 data, or in addition to it. Data unavailability sometimes requires the presentation of U.S. Census Bureau data alongside local fiscal data (e.g., county budgets and tax assessment data) that is not from the same year. The imperfect data match is aggravated by the fact that county fiscal data is also reported for fiscal years that run from July to June, while Census Bureau data is for calendar years. Nevertheless, this minor mismatch does not seriously undermine the reliability of the analysis because available records indicate that economic, demographic, and fiscal changes are rarely significant from year to year.

II. SPATIAL INEQUALITY AS LEGAL CONSTRUCT

A. *Spatial Inequality and Uneven Development*

Just as inequality has long been a subject of legal analysis and scrutiny, so it has also been a topic of sociological inquiry.³³ The notion of inequality in relation to space has recently sparked a new generation of cross-disciplinary research. With the introduction of spatial or geographic concepts, the core question has shifted from “who gets what” to “who gets what *where*?”³⁴

32. Inconsistencies among data sources are occasionally significant. See *infra* n. 462–463 (showing an improbable 18% jump in the child poverty rate in Wheatland County from 16% in 2000 to 34.3% in 2007). A state source showed the Wheatland County child poverty rate to be 40% in 2005. George Haynes & Julia Haraldson, *Poverty in Montana: Statewide Report 2*, <http://www.montana.edu/extension/econ/countydata/statewide.pdf> (2008).

33. Linda M. Lobao, Gregory Hooks & Ann R. Tickamyer, *Advancing the Sociology of Spatial Inequality*, in *The Sociology of Spatial Inequality* 1–3 (Linda M. Lobao et al. eds., Sunny Press 2007) [hereinafter Lobao et al.] (commenting that “[i]nequality—the study of who gets what and why—has been at the heart of sociology since its inception.”); see also Linda Lobao, *Continuity and Change in Place Stratification: Spatial Inequality and Middle-Range Territorial Units*, 69 *Rural Sociology* 1, 4–5 (2004) [hereinafter Lobao, *Continuity*] (noting that “the outpouring of literature suggests that many non-geographer social scientists take this spatial turn as innovative, though certainly it builds from older traditions”).

34. Lobao et al., *supra* n. 33, at 2 (noting that “*where* becomes the focus of Articles addressing theory, research, and policy”).

Rural sociologist Linda M. Lobao defines spatial inequality as “place stratification or inequality within and between territorial units.”³⁵ Sub-national spatial inequality may be assessed across states, counties, or even census blocks as units.³⁶ It may also be considered across the rural-urban divide.³⁷ A closely related concept to spatial inequality is that of uneven development, which describes the variation in degree and type of development from place to place.³⁸ Certainly the rural-urban continuum might be thought of as parallel to the spectrum between undeveloped and highly developed/urbanized.

In analyzing the variable access to resources and opportunities that results from uneven development, the study of spatial inequality accommodates—even invites—examination of geographic space as it intersects with race, ethnicity, class, gender, age, sexuality, and other markers of stratification.³⁹ Indeed, various strands of U.S. civil rights law acknowledge the problem of spatial segregation of minority groups and seek to redress it. The U.S. Supreme Court decision in *Brown v. Board of Education* is probably the best known example of this.⁴⁰

Spatial inequality analysis is grounded in the understanding that particular locales are effectively containers for social, political, economic, and

35. Lobao, *Continuity*, *supra* n. 33, at 1. Lobao addresses two central questions: (1) How do markers of stratification, such as those reflected in economic status, race/ethnicity, gender, health, education, and other statuses, vary across geographic territory?, and (2) How do places themselves become markers of stratification? *Id.*

36. See e.g., Daniel T. Lichter et al., *Race and the Micro-Scale Spatial Concentration of Poverty*, 1 Cambridge J. Regions, Econ. & Soc. 51 (2008) (available at <http://cjres.oxfordjournals.org/cgi/reprint/1/1/51>) (finding that the majority of poor sub-county areas were “hidden” in low poverty counties and that poor minorities, whether in cities or in rural areas, are “highly ghettoized in high-poverty neighborhoods and are highly segregated from whites and the nonpoor population”); Daniel T. Lichter & Domenico Parisi, *Concentrated Rural Poverty and the Geography of Exclusion*, <http://www.aecf.org/~media/PublicationFiles/Carsey%20Institute.pdf> (Fall 2008) (looking at neighborhood or block level data); Daniel T. Lichter & Kenneth M. Johnson, *The Changing Spatial Concentration of America’s Rural Poor Population*, 72 Rural Sociology 331, 338 (2007).

37. Lobao, *Continuity*, *supra* n. 33, at 2 (discussing issues such as “new inequality ‘hot spots’ in the wake of growth,” “persistent poverty across regions,” and “seemingly aspatial government policy [that] may have important spatial outcomes.”).

38. See generally Lobao, *Continuity*, *supra* n. 33 (discussing spatial inequality in relation to development); Neil Smith, *Uneven Development: Nature, Capital and the Production of Space* (U. of Georgia Press 1984).

39. Lobao et al., *supra* n. 33, at 3. One of few scholarly acknowledgements of rural white disadvantage in legal literature is *The Miner’s Canary, Enlisting Race, Resisting Power, Transforming Democracy*. In it, Lani Guinier and Gerald Torres frequently refer to poor rural whites as one of the constituencies who had been disserved by the Texas educational system prior to the so-called 10% plan, which guaranteed admission to the University of Texas of any student in the top 10% of his or her high school graduating class. Lani Guinier & Gerald Torres, *The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy* 68, 72–73, 94, 106–107 (Harv. U. Press 2002).

40. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (rejecting as unconstitutional so-called separate but equal schools); see also *infra* n. 644–645 and accompanying text (discussing additional cases, including those regarding apportionment and voting rights).

legal action.⁴¹ Such containers—or scales—include the household, neighborhood, school district, tribal reservation, city, region, state, nation, and, at the highest scale, the world. Such scales may be “stacked, overlapped, or nested,” functioning as both the cause and effect of inequality.⁴² Just as households are nested in school districts, towns, cities, reservations, and open space, local government units are embedded within the State. The State, in turn, is nested within the nation and the globe, with political, economic, legal, and social actors at all levels influencing status and opportunity.

B. *The Impact of Devolution*

Devolution, the shifting of governmental responsibility from the federal to the state level, is one reason that location dictates resources and opportunity.⁴³ Mildred Warner and Lisa Cimbaluk argue that higher levels of government are better able to address spatial inequality. They cite the historic failures of state and local governments to protect civil liberties, seeing the federal government’s breadth as instrumental in smoothing out spatial inequalities.⁴⁴

41. See Ann R. Tickamyer, *Space Matters! Spatial Inequality in Future Sociology*, 29 *Contemporary Sociology* 805, 806 (Nov. 2000) (“Space can be conceptualized in three ways: as *place*—the particular locale or setting; as *relational units* that organize ideas about places and implicitly or explicitly compare locations, and as *scale*, or the size of the units to be compared.”). Tickamyer and other rural sociologists whose work reflects a spatial turn have relied on the work of critical geographers. See e.g. Edward Soja, *Postmodern Geographies: The Reassertion of Space in Critical and Social Theory* (Verso Press 1989); *Social Relations and Spatial Structures* (D. Gregory & J. Urry eds., Palgrave Macmillan 1985); David Harvey, *The Urbanization of Capital: Studies in the History and Theory of Capitalist Urbanization* (Johns Hopkins U. Press 1985).

42. Tickamyer, *supra* n. 41. Tickamyer observes that “particular places provide a locale that may operate as a container and backdrop for social action, as a set of causal factors that shape social structure and process, and finally as an identifiable territorial manifestation of social relations and practices that define that particular setting.” *Id.* She further notes that “[r]elations of power, structures of inequality, and practices of domination and subordination are embedded in spatial design and relations.” *Id.*

43. See *id.*; Jeffrey S. Sharp & Domenico M. Parisi, *Devolution: Who is Responsible for Rural America?*, in *Challenges for Rural America in the 21st Century* 353 (David A. Brown & Louis Swanson eds., Pa. State U. Press 2003) (defining devolution and providing a brief history of it in the U.S. context).

44. Lisa Cimbaluk & Mildred Warner, *What is the Role of State Aid? Redistribution vs. Development*, 2008 Annual Meeting of Rural Sociological Socy. 1, 1–2 (2008) (on file with author) (citing Louis E. Swanson, *Rural Opportunities, Minimalist Policy and Community-Based Experimentation*, 29 *Policy Stud. J.* 96 (2001)). The authors’ argument that the federal government is better suited to this function is somewhat ironic in that the U.S. Constitution makes no provision for the poor, while some state constitutions do. See *infra* n. 507 and accompanying text and Part V(B).

James Madison’s words in the *Federalist Papers* reflect the idea that the federal government is better situated to address inequalities, in part by limiting local control and the greater tendency to faction associated with it. “Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.” James Madison, *The Federalist Papers*, No. 10 (Nov. 22, 1787). See also Helen Hershkoff, *Welfare*

Through devolution, however, spatial inequality has increasingly become the problem of states.⁴⁵ At least one empirical study concluded that states are capable of adequate redistribution if the level of state aid is sufficiently high.⁴⁶ Yet many states have responded to devolution with further devolution, that is, by delegating many responsibilities to still lower levels of government.⁴⁷ This increasingly leaves municipal and county governments to provide for their citizens, though they are often limited in their ability to do so and are particularly ill suited to doing so in a redistributive fashion.⁴⁸

Further, the capacity of local governments to manage the increased responsibility resulting from devolution is unevenly distributed around the nation, and rural areas face particular struggles in this regard.⁴⁹ This is because the fiscal capacity of a local government to generate tax revenue is indicated by the per capita income of residents,⁵⁰ and residents of remote rural places tend to have lower incomes, higher unemployment rates, and a

Devolution and State Constitutions, 67 Fordham L. Rev. 1403, 1430 (1998–1999) (noting that small communities may not be as good as higher levels of government at protecting civil rights or fostering citizen participation and that they also may “not have the resources to carry out the social welfare preferences of their members”); *id.* at 1430–1431 (noting “the greater likelihood of special interest capture” of local communities); see *infra* n. 542 (discussing the overhaul of Montana’s public defender services from a county-funded system to a state-funded one).

45. In the context of the 2009 economic crisis, many state and local governments cut services to the needy. Erik Eckholm, *States Slashing Social Programs for Vulnerable*, http://www.nytimes.com/2009/04/12/us/12deficit.html?_r=1&hpw (Apr. 12, 2009). Montana did not experience such cuts, largely due to federal stimulus funds that were committed to the State during the 2009 legislative session. See Mike Dennison, *Legislature 2009 Comes to a Close: Budget, Stimulus, Property Tax Measures Approved*, http://www.missoulian.com/Articles/2009/05/04/legislature_sub/other/other28.txt (Apr. 29, 2009).

46. Mildred E. Warner, *State Policy under Devolution: Redistribution and Centralization*, 54 Natl. Tax J. 541 (2001). As for Montana in particular, one study shows that the state’s provision of health and human services is slightly more centralized than the average degree of state centralization of such services. However, Montana’s level of state aid is slightly below the national average among states. Cimbaluk & Warner, *supra* n. 44, at 9 tbl. 3; *id.* at 6 (noting that most counties with high fiscal burdens due to low centralization are in the West and Great Plains).

47. Lisa Cimbaluk, *Fiscal Devolution and U.S. County Governments 1987–2002*, 13–15 (unpublished Master’s Thesis, Cornell U., 2009) (on file with author).

48. *Id.* at 12–15. As a related matter, Michelle Wilde Anderson questions the capacity of county governments to provide services, in part because they are merely administrative arms of state government. See Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. Rev. 1095, 1140 (2007–2008); see also Kenneth L. Weaver & Judith A. Mathre, *Montana’s Local Government Review* 12 (rev. ed. 2008) [hereinafter Weaver & Mathre, *Review*] (noting the impact of devolution on Montana’s local government entities).

49. See Cimbaluk & Warner, *supra* n. 44, at 1–2; Linda M. Lobao & David S. Kraybill, *The Emerging Roles of County Governments in Metropolitan and Nonmetropolitan Areas: Findings from a National Survey*, 19 Econ. Dev. Q. 245 (2005).

50. Mildred E. Warner & James E. Pratt, *Spatial Diversity in Local Government Revenue Effort under Decentralization: A Neural-Network Approach*, 23 Env. & Plan. C: Govt. & Policy 657 (2005); Mildred E. Warner, *Local Government Financial Capacity and the Growing Importance of State Aid*, 13 Rural Dev. Perspectives 27 (1999) (cited in Cimbaluk & Warner, *supra* note 44, at 8).

greater reliance on income transfers.⁵¹ Local government struggles thus stem, in part, from an absence of development,⁵² and a consequent lack of private wealth in particular places, which translates into small public coffers.⁵³ Difficulties in achieving economies of scale to serve spatially dispersed populations aggravate these challenges.⁵⁴

C. *Inequality as a Legal Construct*

While the U.S. Constitution protects the rights of individuals, equal protection doctrine (whether at the federal or state level) is often based on an individual's membership in a protected class, e.g., race, ethnic group, or national origin.⁵⁵ That is, the Constitution seeks to guarantee that individuals are not discriminated against on the basis of their membership in one of these groups. Rather than looking at inequality in relation to a characteristic such as gender or race, my analysis considers inequality across space and among particular places. I examine advantage and disadvantage in relation to state provision of services based on place of residence.⁵⁶ In doing

51. Lobao & Kraybill, *supra* n. 49.

52. See generally Lisa Cimbaluk, *Developmental Effects of Federal Aid and Local Effort under Devolution, 1987–2002*, at 10–11 (2009) (collecting sources) (on file with author).

53. Scholars discuss this phenomenon in the context of metropolitan areas, considering in particular whether more affluent suburbs should subsidize cities. See Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 Harv. L. Rev. 1662 (1978–1979); Andrew E. Haughwout & Robert P. Inman, *Should Suburbs Help Their Central City?*, Brookings-Wharton Papers on Urban Affairs 45 (2002) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=348980).

54. See generally Barry L. Locke & Jim Winship, *Social Work in Rural America: Lessons from the Past and Trends for the Future*, in *Rural Social Work Practice* (Nancy Lohmann & Roger A. Lohmann eds., Colum. U. Press 2005) (discussing the challenges of rural social work); LISA R. PRUITT, *Place Matters: Domestic Violence and Rural Difference*, 23 Wis. J. L. G. & Socy. 347, Part II(C) (2008) (collecting sources); LISA R. PRUITT, *Missing the Mark: Welfare Reform and Rural Poverty*, 10 J. of Gender, Race & Justice 439, 472 (2007) [hereinafter *Missing the Mark*] (citing Nancy M. Pindus, The Urban Institute, *Implementing Welfare Reform in Rural Communities* 12, <http://www.urban.org/UploadedPDF/rural-welfare-reform.pdf> (2001)).

55. See *infra* n. 630–631 and accompanying text; see also *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (noting the Supreme Court's "antipathy toward legislative classifications which [*sic*] discriminate on the basis of certain 'suspect' personal characteristics").

56. This is similar to the legal analysis in school funding cases, although they do not refer to spatial inequality as such. See e.g. *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 480–483 (Ark. 2002) (describing Arkansas' public education funding system and finding that in 2001 Arkansas public schools received 30% of their revenue from local funds, 60% from state funds, and 10% from federal funds); *Tenn. Small Sch. Sys. v. McWhorter*, 851 S.W.2d 139, 143–148 (Tenn. 1993) (describing Tennessee public education funding system; finding in 1993, Tennessee public schools received 45% of their revenue from state funds, 45% from local funds, and 10% from the federal funds). The U.S. Supreme Court has rejected the legal relevance of spatiality in relation to equal protection on at least one occasion. *McGowan v. Maryland*, 366 U.S. 420 (1961) (finding no invidious discrimination in the context of a challenge to Sunday closure laws which permitted the Sunday sale of merchandise associated with bathing beaches and writing in dicta that the "Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite"). See also Anderson, *supra* n. 48 (discussing provision of services based on location inside

so, I begin an exploration of how differing conceptions of inequality, as spatial and legal constructs, might be brought together to provide remedies to those whom government under-serves based on geography or place.

The following Part details the spatial inequalities experienced by a population whose lives are greatly influenced by space and place: rural residents.⁵⁷ Various features of rural living aggravate the physical, and even psychological, vulnerability of rural residents.⁵⁸ The particular focus here is on children, a population who are even more vulnerable on the basis of age.

III. CHILD POVERTY AND THE RURAL-URBAN AXIS

The lives and welfare of rural people are the subjects of less scholarly and media attention than those of their urban counterparts. This oversight may be due in part to positive associations with rural settings.⁵⁹ This neglect may also be because the spatial isolation that marks rural living often conceals rural poverty, as does our nation's increasing metrocentricism.⁶⁰ Nevertheless, economic distress⁶¹ and social problems are prevalent in rural

or outside a city). Sandra Fredman asserts that a "key insight" of substantive equality is that a group characteristic such as gender or race is not the issue, the attendant disadvantage is. Sandra Fredman, *Providing Equality: Substantive Equality and the Positive Duty to Provide*, 21 S. Afr. J. Hum. Rts. 163 (2005). Similarly, the focus of this spatial analysis is the disadvantage associated with place, not on the place per se.

57. For a full discussion of the concepts of space and place as used by critical geographers and increasingly by legal scholars, see e.g. Pruitt, *Gender, Geography and Rural Justice*, *supra* n. 28, at Part III; Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 Yale J. Intl. L. 421 (2007).

58. See Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2007 Utah L. Rev. 421 (2007) [hereinafter Pruitt, *Toward a Feminist Theory*]; Pruitt, *Gender, Geography and Rural Justice*, *supra* n. 28, at 359, 384–385, 388.

59. See Daniel T. Lichter, Vincent J. Roscigno, & Dennis J. Condran, *Rural Children and Youth at Risk in Challenges for Rural America in the 21st Century* 97 (David L. Brown & Louis E. Swanson eds., Pa. State U. Press 2003) [hereinafter Lichter et al., *Rural Children and Youth at Risk*]; Raymond T. Coward & William M. Smith Jr., *Families in Rural Society, in Rural Society in the U.S.: Issues for the 1980s* 77 (Don Dillman & Daryl Hobbs eds., Westview Press 1982); Lisa R. Pruitt, *Rural Rhetoric*, 39 Conn. L. Rev. 159, 168–172 (2006) (collecting sources); W.K. Kellogg Found., *Perceptions of Rural America* 7, <http://www.wkkf.org/pubs/FoodRur/Pub2973.pdf> (2004) (finding most people associate the word "rural" with traditional values such as family, community, and religion).

60. See Pruitt, *Toward a Feminist Theory of the Rural*, *supra* n. 58 (arguing that feminist legal scholarship overlooks the power of geography and, in particular, the legal relevance of rurality to many of the junctures where women encounter the law); Katherine Porter, *Going Broke the Hard Way: The Economics of Rural Failure*, 2005 Wis. L. Rev. 969, 970 (2005) (arguing that an implicit assumption of legal scholarship is that laws are assessed by their impact in urban places); Lisa R. Pruitt, *The Forgotten Fifth: Rural Youth and Substance Abuse*, 20 Stan. L. & Policy Rev. 359 (2009) [hereinafter Pruitt, *The Forgotten Fifth*]; see also Erik Eckholm, *Working Poor and Young Hit Hard in Downturn*, N.Y. Times A26 (Nov. 9, 2008) (available at <http://www.nytimes.com/2008/11/09/us/09young.html>) (reporting from Philadelphia, with a focus on urban youth).

61. See U.S. Dept. of Agric., Econ. Research Serv., *Rural Income, Poverty, and Welfare: Rural Poverty*, <http://www.ers.usda.gov/briefing/IncomePovertyWelfare/ruralpoverty/> (updated Jan. 29, 2004)

life,⁶² though they are typically manifest somewhat differently than in urban places.⁶³ The following sections provide an overview of the ways poverty is measured, followed by detailed information about the spatiality of child poverty in the United States.

A. *Measuring Poverty*

The U.S. government assesses poverty at the scale of both the individual and the family unit.⁶⁴ It sets the so-called poverty line by considering the income that is sufficient to purchase basic food, shelter, clothing, and other essential goods and services. The 2007 poverty level for a family of four was \$21,203,⁶⁵ while the poverty level for an individual was \$10,590.⁶⁶

A county-level poverty rate alone does not reveal the severity, concentration, or durability of poverty in a particular locale.⁶⁷ The federal govern-

[hereinafter *Rural Income, Poverty, and Welfare*]; The Rural Great Plains Collaborative Project, *A Rural Road: Exploring Economic Opportunity, Social Networks, Services and Supports that Affect Rural Families*, <http://www.aecf.org/upload/publicationfiles/rf2022k565.pdf> (2001) [hereinafter *A Rural Road*].

62. See Pruitt, *The Forgotten Fifth*, *supra* n. 60; Pruitt, *Place Matters*, *supra* n. 54.

63. Rural poverty is rarely aggravated by crowding or visible homelessness, for example. *A Rural Road*, *supra* n. 61 at 15. Also, rural poverty is often not accompanied by high rates of unemployment. *Id.* (noting that rural communities, especially in the West, are often marked by a high incidence of adults holding multiple low-wage jobs); see also fig. 10 (showing unemployment figures for several Montana counties, which indicate remarkably low unemployment rates in even high poverty counties); but see generally Cynthia M. Duncan, *Worlds Apart* (Yale Univ. Press 2000) (observing similarities and differences among two persistently poor rural areas in Appalachia and the Mississippi Delta and one poor rural area in New England and finding high unemployment in the two persistently poor places).

64. The U.S. Census Bureau establishes a federal poverty threshold, which it adjusts each year for inflation. The Bureau uses the poverty threshold for statistical calculations concerning the number of people in poverty, and the Office of Management and Budget uses it as the “official poverty line.” The United States Department of Health and Human Services also releases annual poverty guidelines that it uses to determine individual financial eligibility for programs such as Head Start, the Food Stamp Program, and the National School Lunch Program for free and reduced price meals. U.S. Dept. of Health & Human Servs., *The 2009 HHS Poverty Guidelines*, <http://aspe.hhs.gov/poverty/09poverty.shtml> (accessed Apr. 17, 2009). The figures produced by each agency are very similar, but not identical. U.S. Dept. of Health & Human Servs., *The 2009 HHS Poverty Guidelines: One Version of the [U.S.] Federal Poverty Measure*, <http://aspe.hhs.gov/poverty/09poverty.shtml> (accessed Apr. 17, 2009).

65. U.S. Census Bureau, *Poverty Thresholds for 2007 by Size of Family and Number of Related Children under 18 Years*, <http://www.census.gov/hhes/www/poverty/threshld/thresh07.html> (accessed Aug. 26, 2008). In the same year, the Department of Health and Human Services poverty guideline set poverty at \$10,210 for one person, with an additional \$3,480 per additional person in the household, making the poverty level for a family of four \$20,650. U.S. Dept. of Health & Human Servs., *The 2007 HHS Poverty Guidelines. One Version of the [U.S.] Federal Poverty Measure*, <http://aspe.hhs.gov/poverty/07poverty.shtml> (2007). For a critique of the government’s failure to take into account differences in rural and urban costs of living, see Dean Jolliffe, *The Cost of Living and the Geographic Distribution of Poverty*, <http://www.ers.usda.gov/publications/err26/err26.pdf> (2006).

66. U.S. Census Bureau, *Poverty Thresholds*, *supra* n. 65.

67. Calvin Beale & Robert Gibbs, *Severity and Concentration of Persistent High Poverty in Nonmetro Areas*, <http://www.ers.usda.gov/AmberWaves/February06/DataFeature> (Feb. 2006). In 2007,

ment thus uses several measures and designations to track poverty, including its spatial concentration, its depth, and its persistence over time in a particular place. Concentrations of poor people magnify the effects of poverty due to the associated absence of infrastructure to support their needs.⁶⁸ The durability of poverty in particular places, characterized as “persistent poverty,” also reveals poverty’s power and influence.⁶⁹ The following sections discuss these and other poverty metrics.

1. Poverty Concentration

Demographers, economists, and sociologists often reference poverty concentration, with most government analysis done at the county level.⁷⁰ To some extent this county-level data reveals the degree to which the poor are spatially separated from the non-poor—that is, the extent to which they live in what is effectively a node of poverty. The degree of spatial separation between the poor and the non-poor is significant because the greater the separation, the more limited the exposure to the “cultural and economic mainstream of society.”⁷¹ Because nonmetro residents are more likely than their metro counterparts to live in high-poverty counties,⁷² the rural poor tend to be spatially marginalized just as they are also socially marginalized. This is similar, of course, to the spatial marginality that many communities of color experience.⁷³

Some recent analyses look beyond county-level data to consider poverty concentration at the neighborhood level. One such study found that most poor areas at the sub-county level were effectively concealed within otherwise low-poverty counties.⁷⁴ The study revealed that “half of all rural poor are segregated in high poverty areas,” while rates of concentration are

the Department of Health and Human Services set the guideline at \$10,210 for one person. U.S. Dept. of Health & Human Servs., *The 2009 HHS Poverty Guidelines*, *supra* n. 64.

68. See Lichter & Johnson, *supra* n. 36, at 340.

69. Beale & Gibbs, *supra* n. 67.

70. *Id.*; U.S. Dept. of Agric., Econ. Research Serv., *Rural Poverty at a Glance 4*, http://www.ers.usda.gov/publications/rdr100/rdr100_lowres.pdf (July 2004) [hereinafter *Rural Poverty at a Glance 2004*]; U.S. Dept. of Agric., Econ. Research Serv., *Rural Children at a Glance 1*, <http://www.ers.usda.gov/publications/EIB1/EIB1.pdf> (Mar. 2005) [hereinafter *Rural Children at a Glance*].

71. Lichter & Johnson, *supra* n. 36, at 347; see also Lichter & Johnson, *supra* n. 36, at 353; Lichter & Parisi, *supra* n. 36, at 1.

72. Lichter & Johnson, *supra* n. 36, at 344. Nearly 30% of the nonmetro poor live in counties with poverty rates of 20% or higher, while this is true of only 16% of the total population and only 13% of the metro population. *Id.* at 345. See also *infra* n. 84 and accompanying text.

73. See e.g. Daniel Lichter et al., *National Estimates of Racial Segregation in Rural and Small-Town America*, 44 *Demography* 563, 567 (2007) (finding more spatial concentration of Blacks than of Latina/os).

74. Daniel T. Lichter et al., *Micro-scale Spatial Concentration*, *supra* n. 36; see Janet M. Fitchen, *Endangered Spaces, Enduring Places: Change, Identity, and Survival in Rural America* 116–118 (Westview Press 1991) (giving examples from New York state of how county-level data can be deceptive).

even greater for rural minorities.⁷⁵ This article nevertheless, looks at county-level data because it is the scale at which many state services are funded and delivered.⁷⁶

Concentration of poverty is highly significant because opportunities for upward mobility are more limited in economically distressed places, where poverty is more often intergenerational.⁷⁷ Residents of such places are less mobile; they are effectively “trapped in place.”⁷⁸ Professors Daniel Lichter and Domenico Parisi characterize such communities as frequently “lack[ing] adequate institutional support services (e.g., health care and educational programs), good jobs that pay a living wage, and a stable middle-class population that provides role models and active networks to job opportunities.”⁷⁹ In short, they are without the sort of opportunities that foster positive human or community development, and they thus require more intensive effort and investment to break the cycle of poverty.⁸⁰ Again, these challenges bear similarities to those associated with racial segregation.⁸¹

2. High Poverty

The United States Department of Agriculture (USDA) Economic Reporting Service characterizes a poverty rate of 20% or more as “high pov-

75. Lichter & Parisi, *supra* n. 36, at 1. This phenomenon is reflected in school district data. The poverty rates in the Gallatin County high schools featured there are 6% and 12%, reflecting different economic circumstances of different communities within an affluent county. See fig. 19. Much greater differences in poverty rates are evident among Stillwater County schools, where the poverty rate of students in elementary school is as high as 20% at Cooke City Elementary and as low as 3% at Fishtail Elementary. See *Federal Education Budget Project*, Montana School Districts, http://www.newamerica.net/files/ebp_spreadsheets/FEBP-MT.xls; select Cooke City Elementary, Montana, select Fishtail Elementary, Montana (accessed Mar. 31, 2009) [hereinafter *Federal Education Budget Project*]. The range in Wheatland County is from 11% poverty at Harlowton Elementary to 41% at Judith Gap Elementary. *Id.* at select Harlowton Elementary, Montana, select Judith Gap Elementary, Montana.

76. One exception is funding for public education, which varies from school district to school district even within a given county. See *infra* Part VI.

77. Lichter & Johnson, *supra* n. 36, at 336.

78. *Id.* at 1; Lichter et al., *Micro-scale Spatial Concentration*, *supra* n. 36, at 51.

79. Lichter & Parisi, *supra* n. 36, at 1.

80. See Mindy S. Crandall & Bruce A. Weber, *Local Social and Economic Conditions, Spatial Concentrations of Poverty, and Poverty Dynamics*, 86 *Amer. J. Agric. Econ.* 1276, 1281 (2004), discussed *infra* at n. 726. This is recognized in the U.S. government’s approach to school funding on the basis of student poverty. Under No Child Left Behind, Title I funding can include “base” Title I funding, “concentration grants” for school-wide funding in school districts with higher levels of poverty, and “targeted grants” for districts with impoverished students, but with too few such students to qualify for school-wide funding. U.S. Dept. of Educ., *Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A)*, <http://www.ed.gov/programs/titleiparta/index.html> (accessed May 24, 2009); see *infra* n. 697 (quoting Amartya Sen).

81. See *infra* n. 616–619 and accompanying text (discussing *Plyler v. Doe* and *Brown v. Bd of Educ.*).

erty.”⁸² Between the 1990 and 2000 censuses, the number of high poverty counties dropped precipitously, from 852 to 494.⁸³ Of the counties that remain high poverty, 85% are nonmetro.⁸⁴ Among these high-poverty nonmetro counties, over 80 have poverty rates greater than 30%, and twelve have poverty rates greater than 40%.⁸⁵

3. Deep Poverty

Depth of poverty is a measure that essentially demarcates the “poorest of the poor.”⁸⁶ This metric reflects the “poor’s average difference from either the median of income or the threshold of poverty.”⁸⁷ It thus indicates how far people have fallen into poverty.

As used by the United States Government, depth of poverty references income as a fraction of the base poverty level.⁸⁸ In 2006, almost 39 million Americans (13%) lived below the federal poverty line.⁸⁹ Nearly 17 million of them (6%) lived on less than half of the amount that demarcates the federal poverty line,⁹⁰ the threshold at which the U.S. government designates “deep poverty.”⁹¹ The State of Montana, on the other hand,

82. See *Rural Income, Poverty, and Welfare*, *supra* n. 61. Nearly 450 nonmetro counties were classified as high-poverty in 2000. *Id.* Of these, three-fourths were further classified as Black, Hispanic, or American Indian high-poverty counties. High-poverty areas that reflect the income of racial or ethnic minorities are “identified by one of two conditions: (1) over half of the poor population in the county is from one of these minority groups or (2) over half of the poor population is non-Hispanic White, but the high-poverty rate of a minority group pushes the county’s poverty rate over 20 percent.” *Id.*

83. Lichter & Johnson, *supra* n. 36, at 341.

84. *Id.* at 344. Among counties with even higher poverty rates—40% and above—the declines during the 1990s were even sharper, from 52 counties down to 12. *Id.* at 341–344.

85. Hous. Assistance Council, *Taking Stock: Rural People, Poverty and Housing at the Turn of the 21st Century* 20, <http://ruralhome.org/pubs/hsganalysis/ts2000/index.htm> (2002) [hereinafter *Taking Stock*] (noting that “[t]hese counties with extreme poverty rates are disproportionately concentrated in the nation’s high need rural areas, particularly those with large Native American populations”).

86. David J. Cheal, *New Poverty: Families in Postmodern Society* 48 (Greenwood Press 1996).

87. David Brady, *Rethinking the Sociological Measurement of Poverty*, 81 *Social Forces* 715, 728 (2003).

88. Depth of poverty is generally expressed in relation to poverty concentration. For example, the U.S. government will note the percentage of families in a given place (the concentration) whose incomes are a certain degree below the poverty line (the depth). Thus, the U.S. Census reports that 5.2% of the population lived below 50% of the poverty level in 2007. U.S. Census Bureau, *Number and Percent of People Below 50 Percent of Poverty Level: 1975 to 2007*, <http://www.census.gov/hhes/www/poverty/histpov/perindex.html>; *select* Table 22 (accessed Apr. 19, 2009).

89. Coalition of Human Needs, *Depth of Poverty by State 2006*, <http://www.chn.org/pdf/2007/depth/statepov.pdf> (2007).

90. *Id.* (noting that approximately 54,000 Montanans (6%) lived below 50% of the federal poverty level in 2006).

91. Signe-Mary McKernan & Caroline Ratcliffe, *The Effect of Specific Welfare Policies on Poverty I* (The Urban Inst. 2006); Natl. Ctr. for Law & Econ. Just., *Poverty in the United States: A Snapshot*, <http://www.nclaj.org/poverty-in-the-us.php> (accessed Mar. 2, 2009). Among the federal government’s uses of the depth-of-poverty metric is that made by the Department of Housing and Urban Development

characterizes as “very low income,” any family whose income is under \$15,000.⁹²

4. *Persistent Poverty*

The term “persistent poverty” applies to counties where the poverty rate has been 20% or higher in each of the last four decennial censuses.⁹³ Persistent poverty counties are characterized by “substandard social service systems and ineffective political leadership,” along with “extreme income inequality grounded in class difference.”⁹⁴ Currently, 12% of United States counties are designated persistently poor.⁹⁵ Ninety percent of them are nonmetro, and they are home to 4% of the nation’s population.⁹⁶ The data regarding children living in persistent poverty is more sobering still. In 730 counties—82% of them nonmetro—the last four decennial censuses have shown more than 20% of children living below the poverty line.⁹⁷

Minority populations are much more likely than non-Hispanic whites to live in persistent poverty counties.⁹⁸ More than half of all nonmetro American Indians and blacks who live below the poverty line reside in persistent poverty counties.⁹⁹ In these persistent poverty counties, many incomes that are above the poverty level are only marginally so. Less than half of those living in persistent poverty counties have incomes that are at least twice the poverty threshold, whereas 66% of those in all other nonmetropolitan counties have incomes at that level.¹⁰⁰

(HUD). HUD determines subsidy eligibility based on depth of poverty as reflected in the local area median income. Margery Austin Turner & G. Thomas Kinglsey, *Federal Programs for Addressing Low-Income Housing Needs: A Policy Primer 3* (2008). Under the three-tier HUD scheme, “low-income is less than 80 percent of median, very low income is less than 50 percent of median, and extremely low income is less than 30 percent of median.” *Id.* at 19.

92. Haynes & Haraldson, *supra* n. 32.

93. Beale & Gibbs, *supra* n. 67; *see also* Mark Harvey et al., *The Short-term Impact of Welfare Reform in Persistently Poor Areas*, in *Rural Dimensions of Welfare Reform* 375, 404 (Bruce A. Weber et al. eds., W. E. Upjohn Inst. 2002).

94. Kathleen Pickering et al., *Welfare Reform in Persistent Rural Poverty* 30 (Pa. St. Univ. Press 2006); *see also generally* Duncan, *Worlds Apart*, *supra* n. 63 (reporting on a longitudinal study of two persistent poverty counties).

95. *Rural Income, Poverty, and Welfare*, *supra* n. 61 (reporting a total 386 counties).

96. Lichter & Johnson, *supra* n. 36, at 338.

97. *Id.* Of these nonmetro high poverty counties, 376 are among the 386 total persistent poverty counties. *Id.* at 340 tbl. 3.

98. Beale & Gibbs, *supra* n. 67.

99. *Id.* For nonmetro poor Hispanics, the percentage is 30%. *Id.* This compares to only one in seven nonmetro, poor non-Hispanic whites living in persistent poverty. *Id.*

100. *Id.*

B. Spatial Inequality as Reflected in Child Poverty

Child poverty is a profound problem in the United States, with rates for minors in poverty typically exceeding those for the general population.¹⁰¹ Nationally, 18.3% of children live in poverty.¹⁰² As with poverty rates across all age groups, rates of child poverty in nonmetropolitan counties have long exceeded those in metropolitan counties.¹⁰³ In 2003, 2.7 million rural children were living in poverty, and they comprised more than a third of the total rural poor.¹⁰⁴

Child poverty tends to increase with the degree of rurality so that the least rural counties, often adjacent to metropolitan counties,¹⁰⁵ experience lower poverty rates than those which are more rural.¹⁰⁶ For example, in 2000, the poverty rate for children in completely rural counties was 22%.¹⁰⁷ That rate was 9% higher than the child poverty rate in suburban communities,¹⁰⁸ and it was close to the rate of child poverty in urban communities.¹⁰⁹ The child poverty rate declined between 1990 and 2000, with the most rural communities experiencing the greatest drops.¹¹⁰ Nevertheless, as of 2000, 750 nonmetropolitan counties still had child poverty rates of 21% or higher.¹¹¹

Among the estimated 2.25 million nonmetropolitan children living in poverty in the U.S. in 2005,¹¹² 56% were living in high poverty counties.¹¹³

101. *Rural Children at a Glance*, *supra* n. 70, at 1 (reporting figures of 21% and 18% respectively). The rate of poverty for children under age five was 20.8% in 2007. U.S. Census Bureau, *Percent in Poverty, 2007, Children Under Age 5*, http://www.census.gov/did/www/saige/data/statecounty/maps/iy2007/und5_Pct_Poor2007.pdf (2008). See also *infra* n. 116 and accompanying text.

102. *American FactFinder*, *supra* n. 6; refer to 2005–2007, refer to ACS data for the United States, refer to Economic Characteristics.

103. The Annie E. Casey Found., *Strengthening Rural Families: the High Cost of Being Poor* 1, http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/ae/81.pdf (2004) (noting that rates of rural child poverty are higher than urban child poverty, including within each minority group). In 2005, 20% of nonmetro children under the age of 18 were living in impoverished households, compared to 17.2% of their metro counterparts. Cornelia Butler Flora, Jan L. Flora & Susan Flora, *Rural Communities: Legacy & Change* 99–102, tbl. 4.1, fig. 4.1 (3d ed., Westview Press 2008).

104. See *Rural Children at a Glance*, *supra* n. 70, at 1. In 2003, the rate of poverty was 18% among children, but only 12.5% among all age groups. *Id.*

105. See *supra* n. 30.

106. *Rural Children at a Glance*, *supra* n. 70, at 3. In 2000, the child poverty rates in non-metro counties with populations of 20,000 or more was 18%, while the rate in completely rural counties was 22%. *Id.* at 3.

107. See *id.*

108. Sarah Savage, *Children in Central Cities and Rural Communities Experience High Rates of Poverty* 1, http://www.carseyinstitute.unh.edu/publications/FS_RuralChildPoverty_08.pdf (Summer 2008).

109. *Id.* (reporting that 25% of children in urban communities live in poverty).

110. *Id.* at 3.

111. *Id.*

112. Lichter & Johnson, *supra* n. 36, at 339 n. 9.

Among the nonmetro children living in persistently poor counties, one-third were poor, which was approximately twice the rate for all children.¹¹⁴ In addition, nonmetro poor children were disproportionately exposed to very high concentrations of poverty: almost 8% of them resided in counties where the poverty rate exceeded 40%.¹¹⁵

C. *The Consequences of Child Poverty*

The myriad consequences of child poverty include hunger and poor nutrition, as well as inferior health and education outcomes.¹¹⁶ In 2008, 17.1 million households were “food insecure,” with 16.7 million children living in such households.¹¹⁷ Of these, 5.2 million children lived in households with “very low food insecurity.”¹¹⁸ These USDA designations are essentially euphemisms for hunger.¹¹⁹ Even when poor children do not go hungry, they are less likely than other children to be well-nourished in the sense of having access to healthy food.¹²⁰

Poor children are more likely than those who are not poor to experience delayed medical care, to have no usual place of health care, and to make high use of emergency room services.¹²¹ In 2001, 22% of the 9.2 million children without health insurance lived in nonmetro places.¹²² Spe-

113. *Id.* at 345.

114. *Id.* at 339.

115. *Id.* at 345.

116. Savage, *supra* n. 108, at 1; *see also* April Land, *Children in Poverty: In Search of State and Federal Constitutional Protection in the Wake of Welfare “Reforms,”* 2000 Utah L. Rev. 779 (2000) (collecting sources); Susan Pace Hamill, *The Vast Injustice Perpetuated by State and Local Tax Policy,* 37 Hofstra L. Rev. 117 (2008) (collecting sources). The consequences of child poverty are especially devastating for very young children. *See e.g.* Kenneth Y. Chay, Jonathan Guryam & Bhashkar Mazumder, *Birth Cohort and the Black-White Achievement Gap: The Role of Health Soon After Birth,* http://www.chicagofed.org/publications/workingpapers/wp2008_20.pdf (Oct. 2008).

117. U.S. Dept. of Agric., Econ. Research Serv., *Food Security in the United States: Statistics and Graphics,* http://www.ers.usda.gov/Briefing/FoodSecurity/stats_graphs.htm#how_many (accessed Jan. 4, 2009); *select* “Food Security Status of U.S. Households, 2008”

118. *Id.* *select* “How Many People Lived in Food-Insecure Households?”

119. Food insecurity is defined as at times being “uncertain of having, or unable to acquire, enough food for all household members because they had insufficient money and other resources for food.” *Id.* at 4–5. Very low food security occurs when “food intake of one or more members was reduced and eating patterns disrupted because of insufficient money and other resources for food.” *Id.* at 4.

120. *See e.g.* Kai A. Schafft et al., *Food Deserts and Overweight Schoolchildren: Evidence from Pennsylvania,* 74 Rural Sociology 153 (2009) (finding that school districts in areas with no nearby supermarket were “structurally and economically disadvantaged” and had higher rates of childhood obesity). These problems are aggravated by the challenge of rural spatiality. Natl. Pub. Radio, Morning Edition, *California’s Central Valley Disconnect: Rich Land, Poor Nutrition* (July 10, 2009) (available at <http://www.npr.org/templates/story/story.php?storyId=106061080>).

121. *Rural Children at a Glance,* *supra* n. 70, at 5.

122. *Id.*

cialized care and mental health services are in particularly short supply in rural locales.

Like adequate nutrition and health care, early childhood development is critical to later functioning.¹²³ Yet children in poverty are less likely to develop cognitive and academic skills.¹²⁴ A child who enters kindergarten significantly lacking school readiness skills is unlikely to close the consequent readiness gap,¹²⁵ even if the child is later lifted out of poverty.¹²⁶ Early childhood education that is of poor quality is also associated with higher rates of juvenile delinquency and arrest.¹²⁷

IV. THE MONTANA SITUATION: SPATIAL INEQUALITY UNDER THE BIG SKY

More than 18% of Montana children live in poverty,¹²⁸ and 1.7% reside in persistent poverty counties.¹²⁹ The rate of poverty for children under five is higher still, at 19%.¹³⁰ While these rates are similar to na-

123. Shelley Waters Boots, Jennifer Macomber & Anna Danziger, *Family Security: Supporting Parents' Employment and Children's Development* 14, <http://www.urban.org/Publications/900832.html> (The Urban Inst., July 2008) (substantiating the efficacy of the HeadStart program); Child Welfare League, *Child Care and Development: Facts and Figures*, <http://www.cwla.org/programs/daycare/facts.htm> (finding high-risk participants in "quality intervention program were less likely to need special education throughout school, drop out of high school, and commit crimes" than were control group; at age 27, they also earned higher salaries than control group"); David C. Illig & Cal. Research Bureau, *Birth to Kindergarten: The Importance of the Early Years*, <http://www.library.ca.gov/CRB/98/01/98001.pdf> (Feb. 1998) (suggesting that benefits of childhood intervention programs outweigh their costs).

124. Patrice L. Engle & Maureen M. Black, *The Effect of Poverty on Child Development and Educational Outcomes*, 1136 *Annals N.Y. Acad. Sci.* 243, 244 (2008); see also Children's Def. Fund, *Child Poverty in America* 3, <http://www.childrensdefense.org/child-research-data-publications/data/child-poverty-in-america.pdf> (2008) (noting that "only 15 percent of low-income eighth grade students were proficient in reading, compared with 39 percent of their higher income classmates" and "only 15 percent of low-income eighth grade students were proficient in math, compared with 42 percent of higher-income students").

125. Engle & Black, *supra* n. 124, at 244.

126. *Id.* at 247.

127. Children's Def. Fund, *Cradle to Prison Pipeline: Montana* 1, <http://www.childrensdefense.org/child-research-data-publications/data/cradle-prison-pipeline-montana-2008-fact-sheet.pdf> (2007).

128. *American FactFinder*, *supra* n. 6; search "Montana," refer to 2005–2007 ACS data, refer to Economic Characteristics. This is up from the data in a Montana report, which showed 17.2% of children living in poverty in 2005. Haynes & Haraldson, *supra* n. 32, at 1.

129. Three counties in Montana are categorized as persistently poor—Glacier, Blaine, and Big Horn. Rural Poverty Research Inst., *Demographic and Economic Profile: Montana* 7, <http://www.rupri.org/Forms/Montana.pdf> (2006). According to the 2000 Census, 822 children in Blaine County lived below the poverty line (36.5%). In Big Horn County, 1,646 children lived below the poverty line (37%). Finally, in Glacier County, 1,495 children lived in poverty (32.7%). These 3,963 Montana children represent approximately 9.6% of the Montana children living in poverty. *American FactFinder*, *supra* n. 6; search "Big Horn, Montana," "Blaine, Montana," and "Glacier, Montana," refer to 2000 data, refer to Economic Characteristics.

130. *American FactFinder*, *supra* n. 6; search "Montana" refer to 2005–2007 ACS data, refer to Economic Characteristics.

tional rates of child poverty,¹³¹ Montana differs from the national profile in that its urban child poverty rate is lower than its rural rate. In rural parts of Montana, 20.4% of children live below the poverty line, compared with 11.4% of suburban children and 17% of urban children.¹³² Nationally, the rates for each of these categories of places are 21.9% (rural), 12.9% (suburban), and 24.6% (urban).¹³³

This greater incidence of rural child poverty is not surprising given that Montana is a rural state by many measures.¹³⁴ Montana has only four metropolitan counties (Missoula, Cascade, Carbon, and Yellowstone), and six micropolitan¹³⁵ counties (Flathead, Lewis & Clark, Jefferson, Silver Bow, Gallatin, and Hill).¹³⁶ The State's largest city is Billings, with a 2005 population of about 95,000.¹³⁷ The remaining 46 counties are nonmetro, and 12 are high-poverty counties.¹³⁸ Most of these high-poverty counties are very rural, scoring eight or nine on the urban-to-rural continuum that runs from one to nine.¹³⁹ Roosevelt County had the highest poverty rate among Montana counties in 2007, at 30.3%.¹⁴⁰ Three Montana counties, all nonmetropolitan,¹⁴¹ share the persistent poverty designation:¹⁴² Big Horn, Glacier, and Blaine. Map 1 depicts the poverty rate for each Montana County.

Like poverty rates for the general population, child poverty rates in Montana fluctuate dramatically from county to county. This is depicted in

131. *Supra* n. 102 and accompanying text.

132. Savage, *supra* n. 108, at 2.

133. *Id.*

134. Rural Definitions: State Level Maps, Montana, *supra* n. 12, at 8.

135. *Id.*; see *supra* n. 26 (defining "micropolitan").

136. Rural Policy Research Inst., *Demographic and Economic Profile: Montana 1*, <http://www.rupri.org/Forms/Montana.pdf> (May 2006).

137. *America FactFinder*, *supra* n. 6; search "Billings, Montana," refer to 2005–2007 ACS data.

138. The USDA's Economic Research Service classified 440 of 2,308 nonmetro counties in the U.S. as "high poverty" counties. Nationally, nonmetro counties have average poverty rates of 14.6%. *Rural Income, Poverty, and Welfare*, *supra* n. 61.

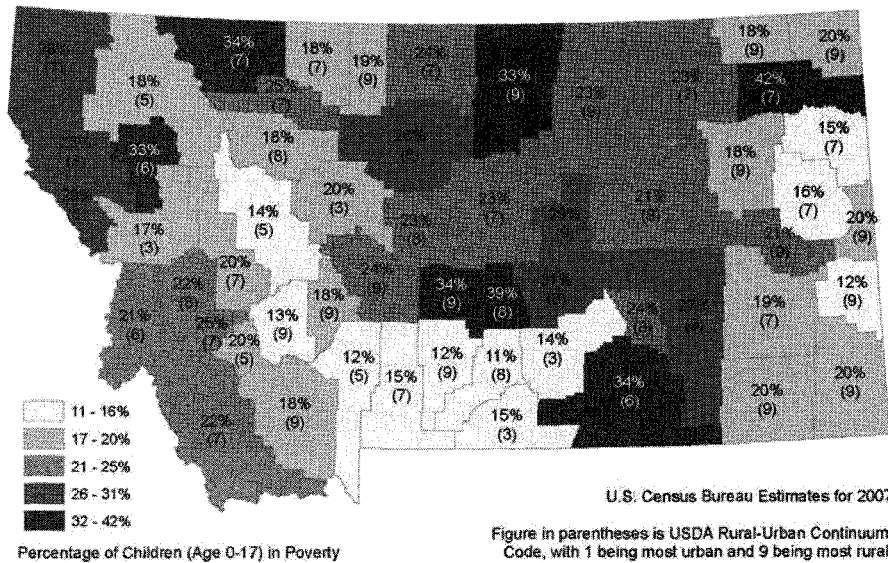
139. *Supra* n. 30 (describing the continuum in greater detail). Nationally, the Economic Research Service "high poverty" designation is given to any nonmetro (category 4–9) county meeting the high poverty criteria. In Montana, the 12 counties identified as high poverty counties are primarily rural. Six of them are category nine (most rural designation) counties (Rosebud, Blaine, Garfield, Liberty, Petroleum, and Wheatland); three are category eight counties (Chouteau, Golden Valley, and Judith Basin); two are category seven counties (Glacier and Roosevelt); and one is a category six county (Big Horn). U.S. Dept. Agric., Econ. Research Serv., *Briefing Room, 2003 Rural-Urban Codes for Montana*, <http://www.ers.usda.gov/Data/RuralUrbanContinuumCodes/2003/LookUpRUCC.asp?C=R&ST=MT> (Aug. 18, 2003) [hereinafter *2003 Rural-Urban Codes for Montana*].

140. U.S. Dept. Agric., Econ. Research Serv., *2007 County-Level Poverty Rates for Montana*, <http://www.ers.usda.gov/data/povertyrates/>; select Montana (Dec. 5, 2008) [hereinafter *2007 County-Level Poverty Rates for Montana*].

141. *American FactFinder*, *supra* n. 6; search "Big Horn County, Montana," search "Glacier County, Montana," search "Blaine County, Montana," refer to 2000 data.

142. *Rural Poverty at a Glance 2004*, *supra* n. 70, at 4.

MAP 2
COUNTY-LEVEL CHILD POVERTY IN MONTANA (2007)



ter (11.1%).¹⁴⁸ The reasons for these counties' affluence are discussed in greater detail below.¹⁴⁹

In 2000, 20.2% of Montana households earned less than \$15,000 per year,¹⁵⁰ which means they are classified as extremely low income households.¹⁵¹ When tracked by county, the percentage of extremely low income households in Montana ranged from 14.2% to 33.9%.¹⁵² Six of the seven counties with the highest rates of extremely low income households are among Montana's 12 rural, high-poverty counties.¹⁵³ Among the 10 Montana counties with the lowest rates of extremely low income households are

148. *Id.* The third lowest child poverty rate is in Fallon County, at 11.7%. Fallon County is in far eastern Montana, on the state line with North Dakota. It is a very rural county, with only 1,410 households and 2,837 residents. *American FactFinder*, *supra* n. 6; search "Fallon County, Montana," refer to 2000 data. Its relative affluence is apparently explained by the presence of oil and gas; Fallon County has the second greatest oil production in the state and is also a major producer of natural gas. 51 Mont. Dept. of Natural Resources & Conserv., Oil and Gas Conserv. Div., *Annual Review* 12:1 (2007) (reporting production of 7.2 million barrels of oil in 2007).

149. *See infra* Part IV(D).

150. Haynes & Haraldson, *supra* n. 32, at 12.

151. Mont. Dept. of Commerce, *State of Montana Analysis of Impediments to Fair Housing and Fair Housing Choice* 17, http://housing.mt.gov/Hous_CP_AnalysisImpedFrHsg.asp (Nov. 2004).

152. *Id.* at 19.

153. *Id.* These were, in order (1) Petroleum County, 33.9%; (2) Roosevelt County, 31.3%; (3) Garfield County, 30.7%; (4) Glacier County, 28.6%; (5) Blaine County, 28.2%; (7) Wheatland County, 27.7%. *Id.* (giving percentages of extremely low income households in each county).

seven of the State's 10 micropolitan and metropolitan counties.¹⁵⁴ Gallatin County had the lowest percentage of extremely low income households at 14.2%.¹⁵⁵

Three other indicators of well-being are food security, quality of child care, and access to health care. Regarding the first, almost 10% of Montana households experienced food insecurity¹⁵⁶ between 2004 and 2006.¹⁵⁷ This figure is below the national average of 11.3%.¹⁵⁸ The percentage of Montana households experiencing very low food security, however, exceeded the national average for that period: 4.3% (Montana)¹⁵⁹ compared with 3.9% (nationwide).¹⁶⁰

Quality child care is also critical to child well-being, and it lays the foundation for future performance. Poor quality care is associated with delayed language and reading skills,¹⁶¹ lower mathematical ability, poorer cognitive skills,¹⁶² and behavioral problems, including aggression.¹⁶³ Children in adequate formal care programs perform better academically and socially than children in informal care situations.¹⁶⁴

Montana mothers work outside the home at rates commensurate with the national average, and national data indicate that rural women with children under the age of six work outside the home at rates higher than urban

154. These were, in order, (46) Carbon County, 19.8%; (47) Missoula County, 19.6%; (48) Flathead County, 18.2%; (49) Yellowstone County, 18.2%; (53) Lewis and Clark County, 16.1%; (54) Jefferson County, 15.3%; and (56) Gallatin County, 14.2%. *Id.* (reporting percentage of households in the county that qualify as extremely low income households).

155. *Id.*

156. Mark Nord, Margaret Andrews & Steven Carlson, *Household Food Security in the United States* 54–55, <http://www.ers.usda.gov/Publications/ERR49/ERR49.pdf> (Nov. 2007); *see also supra* n. 119 (defining term).

157. Nord et al, *supra* n. 156, at 55. Still, food insecurity in Montana declined between the 2001–2003 and 2004–2006 ERS reporting periods, and it was one of only four states to experience a significant decline in the prevalence of food insecurity between these periods. *Id.* at 54.

158. *Id.* at 55.

159. *Id.* Very low food security occurs when “food intake of one or more members was reduced and eating patterns disrupted because of insufficient money and other resources for food.” *Id.* at 4.

160. *Id.* at 55.

161. Children's Def. Fund, *Child Poverty in America* 2, http://cdf.childrensdefense.org/site/DocServer/Child_Poverty_in_America__August_2008_.pdf?docID=8341 (Aug. 26, 2008) [hereinafter *Child Poverty in America*] (noting that young children in poverty “are considerably less likely to recognize all letters, count to twenty or higher or be able to write their first names”).

162. Children's Def. Fund, *Child Care Basics* 2, <http://www.childrensdefense.org/child-research-data-publications/data/child-care-basics.pdf> (Apr. 2005).

163. *Id.*; *Child Poverty in America*, *supra* n. 161, at 2 (noting that “[l]arge differences between children in poor and non-poor families in indicators such as physical aggression have been documented at ages as young as 17 months”). Early displays of aggressive behavior are “highly predictive of criminal behavior later in life.” *Child Poverty in America*, *supra* n. 161, at 3.

164. *Child Care Basics*, *supra* n.162, at 2; *see also supra* n. 123 (discussing HeadStart and other early intervention programs).

women.¹⁶⁵ Yet the Montana child care situation is relatively poor compared to national metrics. Among Montana children ages three to four, only 39% were enrolled in nursery school, preschool, or kindergarten in 2006, compared to a national average of 46%.¹⁶⁶ The maximum annual income eligibility for child care assistance in Montana for a family of three was \$22,536 in 2004, a figure that is just more than half of the State's median household income.¹⁶⁷ Thus, relatively few families qualify for this public benefit.

Nationally, 11% of both rural and urban children lack health insurance,¹⁶⁸ a statistic that obscures some rural-urban differences in coverage.¹⁶⁹ When the data are analyzed according to relative rurality of the county, the rates of uninsured children in the most rural counties reach 15.2%, compared with 9.9% uninsured in the most urban counties.¹⁷⁰ In 2007, Montana compared poorly to other states, ranking 41 out of 50 in health care coverage.¹⁷¹ Among children who live in poverty, 29% lacked health insurance,¹⁷² while nearly one-sixth of all rural children were uninsured.¹⁷³ This number is surprisingly low in light of other metrics, presumably because Montana almost doubled its participants in the State Children's Health Insurance Program (CHIP) between 2002 and 2008.¹⁷⁴ An additional 20,000 Montana children will also benefit from the federal ex-

165. See Kristin Smith, *Carsey Institute, Employment Rates Higher Among Rural Mothers Than Urban Mothers* 1, http://www.carseyinstitute.unh.edu/publications/FS_ruralmothers_07.pdf (Fall 2007) (reporting that rural mothers consistently have been employed at higher rates than urban mothers for 25 years, even as a higher percentage of all urban women (62%) were employed than rural women (60%) in 2004); Kristin Smith, *Carsey Institute, Working Hard for the Money: Trends in Women's Employment: 1970–2007* 3, <http://www.carseyinstitute.unh.edu/publications/Report-Smith-WorkingHard.pdf> (2008) (reporting that more than 70% of rural women with children under the age of six work for pay).

166. The Annie E. Casey Found., *Kids Count Data Center, Comparison by Topic*, http://www.kidscount.org/datacenter/compare_results.jsp?i=430; *select* Education, *select* Children enrolled in nursery school, preschool or kindergarten, by Age Group (accessed Mar. 10, 2009).

167. Children's Def. Fund, *Montana: Early Childhood Development Facts* 1, <http://cdf.childrensdefense.org/site/DocServer/mt.pdf?docID=771> (Mar. 2005). Both federal and state funds finance the program, and it faced the prospect of state budget cuts during the 2009 legislative session. Jennifer McKee, IR State Bureau, *Day Care Wants Increase in Program Funds*, http://www.helenair.com/Articles/2009/01/19/state/55st_090110_daycare.txt (Jan. 19, 2009).

168. William P. O'Hare, *Rural Children Increasingly Rely on Medicaid and State Child Health Care Programs for Medical Care* 2, http://www.carseyinstitute.unh.edu/documents/RuralChildHealth_final.pdf (Spring 2007) [hereinafter O'Hare, *Medicaid*].

169. *Id.* at 3.

170. *Id.*

171. *Id.* at 4.

172. Mont. Kids Count, *2007 Montana Kids Count* 7, <http://www.kidscount.org/kcnetwork/issues/documents/montana.pdf> (2007).

173. O'Hare, *Medicaid*, *supra* n. 168, at 4.

174. Mont. Dept. of Pub. Health & Human Servs., *DHPPS Program Statistics*, <http://www.dphhs.mt.gov/statisticalinformation/tanfstats/tanfstatistics.shtml>; *select* "State Fiscal Year 2002 Statistics," *select* Table 12 (accessed Jan. 4, 2009) (showing 7,914 CHIP enrollees); *Id.* *select* "State Fiscal Year 2008 Statistics," *select* Table 12, showing 13,289 enrollees.

pansion of the Children's Health Insurance Program (CHIP) and Medicaid.¹⁷⁵ The program was further bolstered during the 2009 Montana legislative session, which fully implemented a voter-approved Healthy Montana Kids program.¹⁷⁶

A. Race and Ethnicity

Inequalities associated with race and ethnicity intersect with spatial inequalities, and each may exacerbate the other. The racial/ethnic minority groups most associated with Montana are American Indians, who comprise 6.2% of the State's population.¹⁷⁷ About 65% of the State's American Indians live on one of seven reservations that lie within Montana's territory: Blackfeet, Crow, Flathead, Fort Belknap, Fort Peck, Northern Cheyenne, and Rocky Boys.¹⁷⁸ Reservations are rural places by any measure,¹⁷⁹ and 3% of all rural children are American Indian.¹⁸⁰

Nationally, "Native American high-poverty" counties have the highest percentage of people living in deep poverty, with 20% living on an income that is less than 75% of the poverty line.¹⁸¹ These counties also have con-

175. An additional 20,000 Montana children are expected to be covered by SCHIP after the U.S. House voted in January 2009, to expand the program. Mike Dennison, Helenair, *CHIP Expansion Passes US House 289-139*, http://www.helenair.com/Articles/2009/01/15/state/65st_090115_chip.txt (Jan. 15, 2009).

176. Dennison, *Legislature 2009 comes to a close*, *supra* n. 45.

177. *American FactFinder*, *supra* n. 6; search "Montana," refer to 2005-2007 ACS data, refer to ACS Demographic Estimates. Nationally, only .8% of the U.S. population is American Indian or Alaska Native. *Id.* at search "United States," refer to 2005-2007 data, refer to ACS Demographic Estimates.

178. *Monetary Contributions of Reservations to the State of Montana 1-2* (Bureau of Bus. & Econ. Research, Univ. of Mont. Nov. 2007).

179. Joanna M. Wagner, *Improving Native American Access to Federal Funding for Economic Development through Partnerships with Rural Communities*, 32 *Am. Indian L. Rev.* 525, 531 (2007). Indeed, because reservations are territory, they are an excellent example of the intersection of spatiality with race or ethnicity.

180. *Rural Children at a Glance*, *supra* n. 70, at 2. In 2003, more than a third of these children lived in single-parent families. *Id.* at 2. Of American Indian children in mother-only families, 41% live in poverty. *Id.* at 4. Montana's Native American women have higher fertility rates than other women in Montana, with 98 births per 1000 Native American women of childbearing age compared to 60.7 births per 1000 for all Montana women of childbearing age. *Mont. Kids Count, 2008 Montana Kids Count Data Book 9* <http://www.montanakidscount.org/Portals/6/2008%20Montana%20Kids%20Count%20Data%20Book.pdf> (2008) [hereinafter *Montana Kids Count*]. The fertility rate for Native American teens in Montana is much higher than the fertility rate for all teen females in the state, with 100.9 births per 1000 Native American teen females compared with 35.9 births per 1000 for all teen females in the state. *Id.* Babies born to Montana's Native American women are more likely to be categorized as low birth weight, and they have a higher infant mortality rate as compared to other Montana population groups. *Id.*

181. U.S. Dept. of Agric., Econ. Research Serv., *Rural Income, Poverty and Welfare: High-Poverty Counties*, <http://www.ers.usda.gov/Briefing/IncomePovertyWelfare/HighPoverty/Analysis.htm> (updated Jan. 29, 2004) [hereinafter *High-Poverty Counties*]

sistently high rates of child poverty.¹⁸² Indeed, several of the greatest spatial concentrations of poverty in Montana are on reservations or otherwise within counties that have significant American Indian populations. Half of Montana's 12 nonmetropolitan, high-poverty counties are classified as "Native American high poverty" counties,¹⁸³ while the populations of the other half are overwhelmingly white. The "Native American high poverty" counties are so classified because they have either a majority of residents who are American Indian or because the income levels of American Indian residents push the county into the high-poverty category.¹⁸⁴ American Indians comprise a majority of two of Montana's three persistent poverty counties, Big Horn and Glacier, and they comprise 45% of a third, Blaine County.¹⁸⁵ American Indians are also a majority of the population in Roosevelt County,¹⁸⁶ which in 2007 had the State's highest child poverty rate at more than 40%.¹⁸⁷

Six other Montana counties shared the high-poverty designation in the 2000 Census.¹⁸⁸ These are largely white farming and ranching communities in the central and north central parts of the State, where income historically fluctuates with commodity prices.¹⁸⁹ According to 2007 Census Bureau estimates, the overall poverty rates for five of these six counties have

182. *Id.* Native American high-poverty counties have 5.9 poor children for each poor person aged 65 or older. This compares with ratios of 4.2 for every poor older person in Hispanic high-poverty counties and 2.6 in nonmetro counties that are not high poverty. *Id.*

183. These counties are Big Horn, Blaine, Chouteau, Glacier, Roosevelt, and Rosebud. According to the 2000 census, the overall poverty rates for these counties were 29.2%, 28.1%, 20.5%, 27.3%, 32.4%, and 22.4% respectively. *Rural Income, Poverty & Welfare, supra* n. 61; *select* Native American high poverty counties map, *select* view a list of these counties. The 2007 poverty rates reflect some changes on overall poverty rates for these counties, and would possibly remove Chouteau and Rosebud counties from the high-poverty county list because they show overall poverty rates of 18.1% and 19%. All counties still show high rates of poverty for children at 34%, 32.5%, 26.1%, 34%, 41.7%, and 27.3%, respectively. *2007 County-Level Poverty Rates for Montana, supra* n. 140.

184. *High-Poverty Counties, supra* n. 181.

185. *Id.*; *select* Native American high poverty counties map, *select* view a list of these counties. Showing 3,126 Native Americans in Blaine County out of a total population of 6,945, or 45% of the total population.

186. *Rural Income, Poverty, & Welfare, supra* n. 61 *select* Native American high poverty counties map, *select* view a list of these counties. Showing 3,126 Native Americans in Blaine County out of a total population of 6,945, or 45% of the total population.

187. *2007 County-Level Poverty Rates for Montana, supra* n. 140 (estimating the child poverty rate for Roosevelt County at 41.7% and the general poverty rate at 30.3%).

188. According to the 2000 Census, the overall poverty rates for these counties were Garfield 21.5%, Golden Valley 25.8%, Judith Basin 21.2%, Liberty 20.3%, Petroleum 23.2%, and Wheatland 20.4%. *Rural Income, Poverty & Welfare, supra* n. 61; *select* other high-poverty counties map, *select* view a list of these counties.

189. *High-Poverty Counties, supra* n. 181; *select* other high-poverty counties map, *select* view a list of these counties.

dropped below 20%.¹⁹⁰ Nevertheless, the most recent estimates for five of the six counties show poverty rates for children in excess of 20%, with one county, Golden Valley, at almost 39%.¹⁹¹

B. Funding of Public Services

1. State and Local Government Funding

To the extent that any government entity provides the health and human services most needed and used by Montana children, state and county government units finance and deliver the services.¹⁹² Because of Montana's rural character, only a few cities play a significant role in providing services.¹⁹³ As a consequence of devolution, the federal government's role in providing services has been diminished,¹⁹⁴ although it provides at least partial financing for programs such as TANF, SNAP, and Medicaid, which are discussed in more detail below.¹⁹⁵ Programs like these and others are administered by the State, and many services are delivered through Offices of Public Assistance.¹⁹⁶ Forty-three such offices are scat-

190. U.S. Census Bureau, *Small Area Income & Poverty Estimates, State and County Estimates for 2007*, <http://www.census.gov/did/www/saipe/data/statecounty/data/2007.html>; *select* est07all.xls (updated Jan. 2, 2009). However, Lake County was added to the list of high poverty counties in 2007. *Id.*

191. *Id.* These are Garfield 21.1%, Golden Valley 38.9%, Judith Basin 22.8%, Petroleum 20.8%, and Wheatland 34.3%. Liberty County is now slightly below the 20% threshold, with 19.2% of children in poverty. *Id.*

192. See James J. Lopach, *Local Government under the 1972 Montana Constitution*, 51 Mont. L. Rev. 458, 467–468 (1990) (noting that counties were not designed to be “true local governments” but were created to help the state “administer important state duties and services outside the capital;” also observing that counties have ordinance-making power only over animal control). Professor Michelle Wilde Anderson elsewhere asserts that county government does not facilitate a meaningful voice in political participation because counties are merely “passive administrative subdivisions of state government.” Anderson, *supra* n. 48, at 1140.

193. Among these are the cities of Butte and Anaconda. Butte-Silver Bow and Anaconda-Deer Lodge are the State's only two consolidated city-county governments. Weaver & Mathre, *Review, supra* n. 48, at 3. See also *infra* n. 344–350 (discussing initiative of Billings and Yellowstone County to provide public health services through RiverStone Health).

194. See *supra* n. 44 (discussing Cimbaluk & Warner).

195. See *infra* n. 241–244 and accompanying text (discussing TANF, SNAP and other federal assistance programs); see also *infra* n. 257 (discussing federal assistance programs for American Indian populations).

196. Mont. Dept. of Pub. Health & Human Servs., <http://www.dphhs.mt.gov/index.shtml>; *select* Get Public Assistance (accessed May 24, 2009). When seeking information about DPHHS public services in a particular county, *select* Contact Us, *select* Regional Offices, *select* DPHHS Services by County. This brings up the same list of services for each county, suggesting that all services are available to residents of all counties. These services include: *Blind & Low Vision Services, Child & Family Services, Child Care Licensing, Child Care Resource & Referral, Child Support Enforcement, Developmental Disabilities Program, Human & Community Services, Human Resource Development Council, Montana Area Agencies on Aging, Montana Telecommunications Access Program, Prevention Resource Center County Directory, Senior & Long Term Care, and Vocational Rehabilitation Programs.* *Id.*

tered throughout the State,¹⁹⁷ with several serving multiple counties.¹⁹⁸ Further highlighting the challenge of rural service delivery is the fact that some of these offices are open only by appointment or only one day each month.¹⁹⁹ In addition, the Child and Family Services Division (CFSD) of the State's Department of Health and Human Services is responsible for child protective, foster care, and adoption services.²⁰⁰ Five regional offices administer services, and forty one counties have points-of-contact for service delivery.²⁰¹

With regards to health services, state law mandates that each county establish a Board of Health.²⁰² The role of the Board is to ensure compliance with all State and federal regulations pertaining to emergency preparedness, communicable diseases, sanitation standards of public and private places, environmental safety standards, and waste disposal.²⁰³ Montana law allows for some flexibility in the formation of the boards, permitting city-county and multi-county Boards of Health.²⁰⁴ Many counties choose to band together to form "health districts" through which a single Board of Health serves several counties.²⁰⁵

Each Board of Health is charged with hiring a health officer, defined as "a physician or a person with a master's degree in public health or the

197. Mont. Dept. of Pub. Health & Human Servs., Co. Offices of Pub. Assistance, <http://www.dphhs.mt.gov/contactus/humancommunityservices.shtml#hcsddaniels> (accessed July 15, 2009). Glacier and Rosebud counties each have two offices. *Id.* Under the Montana Code Annotated, "[t]here must be established in each county . . . one or more local offices of public assistance. If conditions warrant, two or more counties may be combined into one administrative unit and the department may use the same local office of public assistance and staff to administer public assistance in the combined counties." Mont. Code. Ann. § 53-2-301.

198. Those counties whose residents have to travel to another county to access services tend to be sparsely populated. These include Wheatland, Granite, Madison, Broadwater, Golden Valley, Judith Basin and Petroleum. *Id.*

199. *Id.* For example, the Terry, Montana, office is open for McCone County residents only on the first Monday of each month. *Id.* The Baker office is open to Powder River County residents only from 10 am until noon on two days each month. *Id.* The Baker office is open to Carter County residents only two days each month, by appointment. *Id.*

200. Mont. Dept. of Pub. Health & Human Servs., Child and Family Servs. Div., *Organizational Chart* (Jan. 30, 2007) (on file with author). The five regional offices are in Helena, Miles City, Billings, Great Falls, and Missoula. These regional offices also deliver services to the elderly and handicapped, as well as services such as vocational rehabilitation programs.

201. Telephone interview with Kathy Munson, Office Manager, Montana Department of Children and Family Services (Aug. 21, 2009).

202. Mont. Code. Ann. § 50-2-104.

203. *Id.* at § 50-2-116.

204. *Id.* at §§ 50-2-104 to 50-2-107.

205. *Id.* at § 50-2-107. For example, Fergus, Golden Valley, Judith, Petroleum, Musselshell and Wheatland counties established the Central Montana Health District. The Central Montana Health District has one Board of Health that serves all of its counties and employs one public health nurse to serve as its public health officer. Telephone Interview with Sue Woods, Public Health Nurse, Central Montana Health District (Aug. 3, 2009).

equivalent and with appropriate experience.”²⁰⁶ In many counties, the public health officer is a trained public health nurse, although this individual’s role is often primarily administrative in nature. Any county wishing to provide direct medical services to its residents—something the health officer typically does not do—can employ a public health nurse or similar personnel at its own expense.²⁰⁷ Additional funding for public health professionals may be available to counties through federal programs, such as the Supplemental Nutrition Program for Women, Infants and Children (WIC), or through matching State block grants, such as the Maternal Child Health Program.²⁰⁸

In addition to these state services, Montana counties may tax residents to provide additional services. Under the Montana Code Annotated, counties may levy taxes for certain purposes,²⁰⁹ including elementary education equalization and state funding program support,²¹⁰ operating detention facilities,²¹¹ establishing literacy programs,²¹² and providing health care facilities.²¹³ In *Montana’s Local Government Review*, Kenneth Weaver & Judith Mathre observe that county governments—even in the State’s most rural reaches—are increasingly expected to provide an array of services, including “public safety, judicial functions, public health programs, social services, land use planning and regulation, solid waste management, and animal control.”²¹⁴ They note the particular importance of the “county’s role in providing hospital and ambulance services, as well as a county rest home for the aged, or assisted living facility.”²¹⁵ At the same time, each

206. Mont. Code. Ann. § 50–2–116.

207. Interview with Sue Woods, *supra* n. 205.

208. See Women, Infants and Children Home Page, <http://www.fns.usda.gov/wic/> (accessed Aug. 20, 2009). WIC provides federal grants to states for supplemental foods, health care referrals, and nutrition education for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age five who are found to be at nutritional risk.

209. Mont. Code. Ann § 15–10–420. This provision limits the total mills that may be levied each budget year by all local government jurisdictions to that number of mills necessary to raise the same amount of property tax revenue realized the preceding year with an adjustment permitted to offset one half of the average inflation of the preceding three years. Thus, while counties are authorized by the state to impose property tax mill levies for specific services or purposes, this section of the state code limits the total amount of revenue that can be collected, unless approved by a specific local election on the question. See Mont. Code. Ann § 15–10–425.

210. *Id.* at § 20–9–331.

211. *Id.* at § 41–5–1803.

212. *Id.* at § 20–7–714.

213. *Id.* at § 7–6–2512.

214. Weaver & Mathre, *Review, supra* n. 48, at 2 (suggesting that the expectations are not only from local citizens, but also from “national and state mandates”).

215. *Id.*

county also employs up to ten elected county officials, e.g., sheriff, county attorney, clerk and recorder, and auditor.²¹⁶

Pursuant to the Montana Code Annotated, each county relinquishes “dedicated revenue” in exchange for a share in the so-called state general fund.²¹⁷ This is called an “entitlement share,” and it is essentially a state revenue sharing scheme that distributes to the counties a portion of state taxes.²¹⁸ Each county’s entitlement share is based on the county’s prior year revenue from various sources, including gambling machine revenues, filing and registration fees, and certain revenues generated by income from public lands.²¹⁹ Thus, any given county’s entitlement share from the State is linked to that county’s local revenue stream pattern, with relatively little variation from year to year. The entitlement share is thus not a vehicle for significant re-distribution of state funds.

Further, the entitlement share is only one part of each county’s revenue stream. Property taxes, which are locally imposed and collected, typically provide the greatest single source of county revenue.²²⁰ Indeed, property taxes finance 60–65% of the operating budget by which a county provides services.²²¹ Property tax revenue is a function of (1) the taxable value of

216. *Id.* at 3. Weaver and Mathre argue that the salaries of these officials are a relatively small part of any county’s budget and therefore that consolidation of counties would not lead to great cost savings because the cost of providing services would remain similar across “one huge consolidated county” as it is for two “component counties.” *Id.* at 9–10. While the cost of county officials’ salaries and of running a court house may be a relatively small part of the budget of a more populous county, they are a much more significant part of the budget for a sparsely populated county that operates on a low budget. For a debate on the relative merits of small administrative units versus larger ones in relation to rural local governments, see Tom Brokaw, *Small-Town Big Spending*, N.Y. Times A27 (Apr. 20, 2009); Bill Bishop, *Brokaw Says Big Counties Cheaper Than Small. They Aren’t*, Daily Yonder (Apr. 29, 2009) (available at <http://www.dailyyonder.com/brokaw-says-big-counties-cheaper-small-they-arent/2009/04/29/2088>).

217. Mont. Code Ann. § 15–1–120.

218. Kenneth L. Weaver, *Governing Montana at the Grassroots: Local Government Structure, Process and Politics* 165 (2d ed., MSU Bozeman Local Government Center 2005) [hereinafter Weaver, *Grassroots*].

219. Mont. Code Ann. § 15–1–121; see *infra* n. 233 and accompanying text.

220. Weaver, *Grassroots*, *supra* n. 218, at 163. In spite of the inequalities among counties that are created by this funding scheme, the combination of property and discrete tourism-related taxes that fund Montana’s state and local government has been assessed as one of the least regressive schemes in the country. Hamill, *supra* n. 116, at 143 n. 96 (concluding that, among the tax schemes of all 50 states, Montana is in a group with seven other states that has “among the least regressive in the country and also impose[s] some of the smallest tax burdens on the poorest households.”) The tax gap between the poorest and wealthiest Montana households is 0.6%, with the poorest households paying 4.9% and the wealthiest paying 5.5%. *Id.* at 143 n. 96. The property tax burden on lower middle class households is 2–3%. *Id.* at app. E, tbl. 3.

221. Weaver & Mathre, *Review*, *supra* n. 48, at 8–9 (noting that the greatest portion of the more than \$1 billion in property taxes collected each year goes to fund K–12 education (64%), while about 18% goes to county government and about 12% is disbursed to support cities and towns).

the property in the county,²²² which is divided by 1000 and expressed as the “mill value”²²³ and (2) the rate at which it is taxed, which in Montana is referred to as the mill levy.²²⁴ Just as the taxable value of property varies from county to county, so do the mills levied.²²⁵ In Fiscal Year 2007, the average mills levied (effectively the tax rate) for both county and municipal governments was approximately 156 mills, or 15.6%.²²⁶ The taxable value of the property also varied greatly from county to county, with a 2007 average of \$35 million (or \$35,000 if expressed as mill value).²²⁷

Weaver and Mathre note that low taxable values of property result in low revenues and a limited capacity for funding local services.²²⁸ This is particularly so, of course, when the mills levied by the particular county are also low. Weaver and Mathre provide Rosebud County as an example of a county with a good industrial base—albeit a single, huge generating facility—that is heavily taxed, thus enabling the County to provide “relatively advantageous service delivery programs.”²²⁹ They contrast Rosebud County with counties that have little or no industry, whose residents must consequently pay higher residential property taxes, while enjoying “minimum essential county services.”²³⁰ Part IV(D) of this article, which com-

222. The taxable value of the property is determined by multiplying the property’s assessed or market value by a tax rate that is fixed for that class of property. See *Understanding Montana School Finance and School District Budgets*, *infra* n. 300, at 30. The tax rate for most classes of property is about 3%, but it is higher for some classes, such as telecommunication utilities and electric generating properties (6%); pipelines and non-electric generating properties of electric utilities (12%), and net proceeds of mine and mining claims (100%). *Id.* at 30–31.

223. Weaver, *Grassroots*, *supra* n. 218, at 163–164; see also *Understanding Montana School Finance and School District Budgets*, *infra* n. 300, at 32 (expressing mill value as taxable value multiplied times .001).

224. Weaver, *Grassroots*, *supra* n. 218, at 163.

225. Montana also uses the phrase “tax rate” to refer to the rate by which property’s assessed value is converted to its taxable value. See Mont. Dept. of Revenue, *Biennial Report July 1, 2006 to June 30, 2008* 112 (revised January 13, 2009) [hereinafter Montana, *Biennial Report*].

226. Montana State University, Local Government Center, *Montana Local Government Profiles (Fiscal Year 2007)* [hereinafter *Montana Local Govt. Profiles, Fiscal Year 2007*]. (Montana State University, Local Government Center 2007).

227. Weaver, *Grassroots*, *supra* n. 218, at 163–164 (reporting a range from a low mill value of about \$1,548 (or \$1.54 million if expressed as taxable value) in Petroleum County to a high of about \$205,000 in Yellowstone County). For Fiscal Year 2004, the average mill value of 127 municipalities (not including the two consolidated governments) was \$4,972. It varied from a low of \$36 in Ismay, the state’s smallest town, to a high of more than \$121,000 in the largest city, Billings. *Id.* See also *Montana Local Govt. Profiles, Fiscal Year 2007*, *infra* n. 226.

228. *Id.*; Weaver & Mathre, *Review*, *supra* n. 48, at 9. The way in which the value of local property limits the ability of a locale to generate revenue under such funding schemes was the focus of Justice Marshall’s dissent in *San Antonio Ind. Schools v. Rodriguez*. See *infra* nn. 632, 653 and accompanying text.

229. *Id.*

230. *Id.* Weaver and Mathre note that this has occasionally raised the question of whether Montana has “too many, too small” governments, but they do not mention any complaints about the inequities created by these differing tax bases and corresponding ability to provide services. *Id.* at 9. They note

pares taxable valuations, mills levied, and total funds appropriated²³¹ in five particular counties, further illustrates the disparate property tax bases among Montana counties. Also discussed in Part IV(D) is each county's relative ability to provide services as a function of property tax revenue.²³²

2. Federal Funding

The federal government controls almost a third of Montana's territory,²³³ and the State and its local government entities consequently receive significant funds annually from the U.S. government. In 2005, the State received \$55.3 million pursuant to a range of federal statutory schemes associated with public lands.²³⁴ Among these are the Mineral Leasing Act and the Secure Rural Schools and Community Self-Determination Act.²³⁵

that Montana's county government had an average per capita cost of \$1,077 in Fiscal Year 2005. *Id.* at 10. This is similar to the per capita costs of the county governments in Big Horn County and Wheatland County, but much higher than the per capita costs of counties such as Yellowstone and Gallatin. *See* fig. 18. Coons et al. refer to this as "greater tax effort" in the context of school finance; they similarly found poorer districts exerting greater effort to raise funds to pay for schools. John E. Coons, William H. Clune III & Stephen D. Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal. L. Rev. 305, 316–317 (1969) [hereinafter Coons et al., *Educational Opportunity*].

231. Total funds appropriated may include mill levies for up to 23 different funds, though not every county levies mills for each of these. The 23 are the general fund, public safety, road fund, poor fund, district court, bridge fund, weed fund, fair fund, library fund, extension fund, airport fund, health/sanitation, mental health, planning fund, hospital fund, bond/interest, senior citizens, comprehensive insurance, health insurance, PERS, ambulance fund, museum fund, and miscellaneous other tax-supported funds. *Montana Local Govt. Profiles, Fiscal Year 2007, supra* n. 226.

232. *See infra* Part IV(D).

233. More than one third of Montana is public land. In a state of nearly 93 million acres, 59.3% is private land, 5.9% is state land, 29.3% is federal land, and 4.3% is managed as Indian trust, tribal, and allotted lands. Mont. Nat. Resource Info. Sys., *Montana Public Land Ownership: Land Ownership, in Acres, of Each Montana County*, http://nris.mt.gov/MontanaFacts/county_own.html (Feb. 2003).

234. These funds are paid to Montana pursuant to a number of programs, including the Taylor Grazing Act, the Bankhead-Jones Farm Tenant Act, the Mineral Leasing Act, the Refuge Revenue Sharing Act, the Secure Rural Schools and Community Self-Determination Act, and Payments in Lieu of Taxes (PILT). Paul R. Lachapelle & Mary A. Anderson, *Public Lands in Montana: A Guide for Counties and Communities* 34–51 (Montana State University Extension and Local Government Center 2007). For Fiscal Year 2005, Montana received \$42.4 million in federal funds pursuant to these programs. *Id.* at 51.

235. *Id.* Montana received an additional \$12.9 million in federal funds pursuant to the Secure Rural Schools and Community Self-Determination Act. *Id.* at 37. Under the 1908 Forest Service Law, counties and schools received a quarter of the gross revenues generated on national forest land. 16 U.S.C. § 500 (2006). As timber harvests declined, states reliant on this revenue suffered. The Secure Rural Schools and Community Self-Determination Act provides revenue assistance to rural counties affected by the reduction in funding from timber harvests. Pub. L. No. 106-393, 114 Stat. 1607 (2000). The Act's goal was to stabilize federal payments to counties dependent on goods "and services from public land" with the additional aim of diversifying local economies. Montana received about \$98 million in funding under that Act. U.S. Dept. Agric., *Sustaining Forests and Communities: Secure Rural Schools and Community Self-Determination Act 2000–2007*, <http://www.fs.fed.us/srs/docs/secure-rural-schools-report-2000-2007.pdf> (accessed Mar. 21, 2009). Of that payment, 80–85% is allocated for roads and

The U.S. Department of the Interior pays Montana a significant portion of the total federal funds it receives pursuant to the Payments in Lieu of Taxes (PILT) program. Because federal land is exempt from local or state property taxes,²³⁶ the PILT program aims to offset local governments' losses in property taxes. PILT does not provide the full tax equivalent of privately owned land and is only available to local governments that provide services such as public safety, housing, social services, and transportation.²³⁷ PILT payments must be distributed proportionally to units of local government and to school districts that lost real property taxes as a result of the federal land ownership. Recipients may use the funds for any governmental purpose. The local governments receive PILT payments directly,²³⁸ although under Montana law, they must pay these funds into state coffers before they are re-distributed back to counties as part of entitlement funds.²³⁹ The federal government paid Montana's local government entities more than \$27 million in Fiscal Year 2008.²⁴⁰

Additionally, federal funds flow to Montana—as they do to other states—pursuant to programs aimed at providing direct benefits to low-income residents, with some emphasis on families and children. These programs include Temporary Assistance to Needy Families (TANF), Medicaid,

schools, and the remaining money may finance local projects. Counties receiving less than \$100,000 may elect to use the entire sum for roads and schools. Lachapelle & Anderson, *supra* n. 234, at 34.

236. Lachapelle & Anderson, *supra* n. 234, at 12.

237. *Id.* at 38.

238. U.S. Department of the Interior, *Payments in Lieu of Taxes (PILT) FAQ*, <http://www.doi.gov/pilt/faq.html> (updated Oct. 21, 2008). In 2008, Congress distributed \$228.5 million in PILT money to approximately 1,850 local governments. *Id.* PILT payments are determined by multiplying \$2.29 by the number of acres of qualified federal land in the county, reduced by the amount of funds received by the county in the prior Fiscal Year under certain other federal land receipt sharing programs. Qualifying federal land includes lands in the National Forest System, National Park System, lands administered by the BLM, lands in federal water resource projects, dredge areas maintained by the U.S. Corps of Engineers, inactive or semi-active Army installations, and some lands donated to the federal government. *Id.* Alternatively, the payments may also be calculated by multiplying \$0.32 by the number of acres of qualified federal land in the county, with no deduction. *Id.* at *select* computations. Both calculations are subject to a ceiling that is computed by multiplying the county population by a dollar value that is annually adjusted for inflation. *Id.*

239. *See supra* nn. 217–218 and accompanying text.

240. U.S. Dept. of the Interior, *\$139 Million Distributed to State and County Governments in Full Compensation for Fiscal Year 2008 Payments in Lieu of Taxes*, <http://www.blm.gov/or/news/files/11-20-08PILT.pdf> (accessed Jan. 4, 2010); Larry Kline, *Montana Counties Get Unexpected Federal Funds*, *Helena Independent Record* (Nov. 30, 2008) (available at http://www.helenair.com/Articles/2008/11/30/top/60lo_081130_countycash.txt). In Lewis and Clark County, for example, where the federal government owns two-thirds of the land, officials used 2008 PILT funding to repay a loan from the county's capital fund; the loan funds had been used to complete a new hall and grandstands at the county fairgrounds. According to county officials in Montana, the money distributed in 2008 saved jobs and will pay for equipment replacement. *Id.* Although previously underfunded, Congress funded PILT fully in 2008 as part of the economic bailout package. *Id.*

and Low Income Energy Assistance Program.²⁴¹ Federal food programs include Supplemental Nutrition Assistance Program (SNAP, formerly Food Stamps), Free and Reduced Price School Lunches,²⁴² Summer Meal Program, Milk Program, and the Supplemental Nutrition Program for Women, Infants, and Children (WIC).²⁴³ Eligibility for all programs is income-based or, in the case of SNAP, based on both income and assets.²⁴⁴ As noted above, these programs are administered at the local level by the State Offices of Public Assistance.²⁴⁵

While many of these federal programs are long-standing,²⁴⁶ they do not serve a significant number of residents. Relatively few residents of even the poorest counties receive TANF, although slightly more receive SNAP, and many more receive Free and Reduced Price Lunches.²⁴⁷ Further, a spring 2009 survey found that many Montanans who are eligible for various federal assistance programs are not receiving the aid.²⁴⁸ For exam-

241. Government Benefits, *Montana*, <http://www.govbenefits.gov>; *select Benefits, select By State, select Montana* (accessed Apr. 1, 2009).

242. Eligibility for a free lunch is established if total family income is 130% of the federal poverty level or less. Eligibility for a reduced price lunch is established if the total family income is 131–185% of the federal poverty level. Child Nutrition Programs-Income Eligibility Guidelines, 73 Fed. Reg. 19186, 19186 (Apr. 9, 2008) (to be codified at 7 C.F.R. pt. 210). Nationally, 31% of rural school children and 25% of their urban counterparts receive a free or reduced price lunch. Kristin Smith & Sarah Savage, *Food Stamp and School Lunch Programs Alleviate Food Insecurity in Rural America 2* (Carsey Inst., Summer 2007).

243. Government Benefits, *Montana*, <http://www.govbenefits.gov>; *select Benefits, select By State, select Montana* (accessed Apr. 1, 2009).

244. *Id.* The asset limit for SNAP eligibility is \$2,001 in the bank, or \$3,001 if children or elderly persons are present in the household. *Id.*

245. *See supra* n. 197.

246. As of spring 2009, federal spending on health and human services programs had increased under the federal stimulus package. *See* Dennison, *Legislature 2009 Comes to a Close*, *supra* n. 45 (noting that value of federal stimulus package to Montana was \$1 billion of an \$8 billion, two-year budget). Human services expenditures accounted for 24.6% of the total general fund biennial budget for 2009–2011, an increase of \$51.7 million (an increase of almost 7%) to \$796.5 million. *HB 2 Summary*, figs. 1, 2 http://leg.mt.gov/content/Publications/fiscal/ba_2011/HB_2/Overview%20SF.pdf (accessed May 25, 2009). Increases were attributable mostly to changes in the state matching rate for Medicaid, caseload and services increases (mostly Medicaid), and funding the increase in CHIP eligibility. *Id.* at 2. The total 2009–2011 budget included more than \$3.02 billion for health and human services, which represents a 2.72% increase. *Id.* at figs. 3, 4. The difference between the state general fund figure for health and human services and the total budget figure for health and human services suggests that federal funds account for about 70% of all expenditures on health and human services in Montana.

247. *See* figs. 5–7. The average amount received by a Montana TANF recipient in 2006 was \$377/month. Haynes & Haralson, *supra* n. 32, at 4. A total of about 4,000 TANF “cases” in Montana received \$17.8 million in 2006, representing a drop from the amount paid in 2003. *Id.* As for SNAP, 8.9% of Montana residents received this benefit in 2008, with the average benefit to a Montana client being \$214/month. *Id.* at 3. Montana’s Poverty Report Card details receipt, by county of residence, of various other state and federal benefits such as the Free and Reduced Price Lunch Program. Haynes & Haralson, *supra* n. 32, at 5–8.

248. *See* Jason DeParle, *For Victims of Recession, Patchwork State Aid*, N.Y. Times A1 (May 10, 2009) (reporting that among Montana residents eligible for each type of assistance, only a small percent-

ple, only 11% of Montana residents who are eligible for TANF receive it.²⁴⁹ This low rate is likely attributable in part to the conditions imposed for receipt of benefits under so-called welfare reform in 1996, some of which have proven impracticable in rural settings.²⁵⁰ Further, USDA data suggest that many families receiving SNAP are still experiencing food insecurity, and the rate of food insecurity is higher still for those who have recently stopped receiving SNAP.²⁵¹

Finally, through a range of grant programs, the federal government funds various local government and non-government initiatives.²⁵² These include Maternal Child Health Grants,²⁵³ Community Development Block Grants,²⁵⁴ Community Facilities Loans and Grants,²⁵⁵ and a wide range of USDA and Small Business Administration programs.²⁵⁶ Federal funds also flow into Montana, as they do into other states with American Indian populations, under the auspices of the Bureau of Indian Affairs and, among associated agencies, Indian Health Services.²⁵⁷

age were receiving it: 11% cash welfare; 52% unemployment benefits; 32% housing assistance; 62% food stamps; 43% health care assistance for poor adults; 70% health care assistance for low-income children).

249. *Id.*

250. Pruitt, *Missing the Mark*, *supra* n. 54, at 473–474 (noting challenges such as lack of jobs and the death of child care in rural areas); *see also* Haynes & Haraldson, *supra* n. 32, at 4.

251. Mark Nord, *Some Households Leaving SNAP Still Face Food Shortfalls*, *Amber Waves* 5, <http://www.ers.usda.gov/AmberWaves/June09/Findings/Households.htm> (June 2009).

252. Wagner, *supra* n. 179, at 592–613 (listing federal grants available to tribes, as well as those available to rural communities).

253. Dept. Pub. Health & Human Servs., *Maternal & Child Health Needs Assessment*, <http://www.dphhs.mt.gov/PHSD/family-health/mch/phsd-mch-index.shtml> (2005); U.S. Dept. Health and Human Servs., *Maternal & Child Health Bureau*, <http://mchb.hrsa.gov/> (accessed Jan. 21, 2010) (noting that goal of grants is to “ensure that the Nation’s women, infants, children, adolescents, and their families, including fathers and children with special health care needs, have access to quality health care” and that more than 900 grants are awarded); *see also infra* n. 388, 450 and accompanying text (noting Gallatin and Big Horn counties’ use of MCH grant funds).

254. Wagner, *supra* n. 179, at 595–596 (listing also a number of other HUD programs); *see also* Weaver, *Grassroots*, *supra* n. 218, at 164.

255. Wagner, *supra* n. 179, at 597.

256. *Id.* at 599–500, 602–611.

257. The Bureau of Indian Affairs provides services directly or through various grants and contracts to the 562 federally recognized tribes. Although tribal self-governance has recently been emphasized, the Bureau still provides an array of services on which Tribes rely. These include training, social services, Indian education, and economic development. The Bureau provides funds directly to tribes to operate schools, empower Indian school boards, and permit local hiring of teachers and staff. In regards to economic development, the Bureau provides funds to assist tribes in accessing energy and mineral resources, help tribes stimulate job creation, increase tribal business knowledge, increase business, increase capital investment, and economic development. Bureau of Indian Affairs, www.bia.gov; *select* What We Do (last accessed Jan. 4, 2010). Indian Health Services serves 1.9 million American Indians and provides for 73 compacts, totaling \$1 billion in funding. U.S. Dept. Health & Human Servs., *Indian Health Services*, http://www.ihs.gov; *select* About us, *select* fact sheet, *select* 2009 IHS Profile (accessed Mar. 1, 2009); *see also* Laura Sullivan, *Lawmakers Move to Curb Rape on Native Lands*, <http://www.npr.org/templates/story/story.php?storyId=103717296> (May 3, 2009) (reporting that the February 2009

C. Montana's Public Schools

As with provision of other services, Montana's public school system faces spatial challenges arising from Montana's physical vastness.²⁵⁸ The State's public schools are among "the most rural in the nation,"²⁵⁹ with nearly 40% of the State's students educated in rural schools²⁶⁰ and 68% of all Montana public schools located in rural areas.²⁶¹ Small, rural districts account for more than 80% of Montana districts.²⁶² Statewide, only 29 of Montana's 336 administrative districts have more than 1000 students.²⁶³ Additionally, Montana has the highest number of one-room schools in America,²⁶⁴ with more than 60 single-room schools serving isolated communities in 2007.²⁶⁵

Montana schools nevertheless boast several positive indicators. The State's high school graduation rate is 81.5%, well above the national average of 74.7%.²⁶⁶ Montana students score higher than the national average on the Scholastic Aptitude Test (SAT),²⁶⁷ and 84% of Montana students

federal stimulus bill injected \$500 million into the Indian Health Services while a March, 2009 appropriations bill increased the BIA budget by \$85 million).

258. See *supra* n. 8 and accompanying text.

259. Jerry Johnson & Marty Strange, *Why Rural Matters 2007: The Realities of Rural Education Growth* 66, http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/36/26/08.pdf (Oct. 2007).

260. *Id.* at 66. Comparatively, 21.4% of students are educated in rural schools nationwide. *Id.* at 4. The authors define "rural" using the NCES locale code system (2006). The new locale codes are based on proximity to an urbanized area (a densely settled core with densely settled surrounding areas). The locale code system includes four major types of areas: city, suburban, town, and rural. Each type has three subcategories. For city and suburb, these are gradations of size—large, midsize, and small. Towns and rural areas are further distinguished by their linear distance from an urbanized area. They can be characterized as fringe, distant, or remote. Rural schools used in our report are those designated as locale codes 41 (rural fringe), 42 (rural distant), or 43 (rural remote). We defined rural districts as those with at least 50% of their total students enrolled in rural schools. *Id.* at 3.

261. *Id.* at 66. In comparison, 28.6% of schools in the United States are rural. *Id.* at 4.

262. *Id.* at 66. A small rural district is defined as a rural district that is below the median district enrollment for all rural public school districts in the nation. The U.S. median is 502 students. *Id.* at 5. Comparatively, 40% of districts in the United States are small rural districts. *Id.* at 4.

263. U.S. Dept. Educ., Natl. Ctr. for Educ. Evaluation & Regl. Assistance, *How Northwest Region States Are Supporting Schools in Need of Improvement* 8, http://ies.ed.gov/ncee/edlabs/regions/northwest/pdf/REL_2007009.pdf (Aug. 2007).

264. Neenah Ellis, *One Room Schools Holding on in Rural America*, <http://www.npr.org/templates/story/story.php?storyId=5064420> (Dec. 22, 2005).

265. Claudette Morton, *The Vanishing Breed? The 2006–2007 Montana Rural Teacher Salary and Benefit Survey* 9, <http://www.mtsmallschools.org/pdf/VanishingBreedComplete.pdf> (2007).

266. Natl. Ctr. Educ. Statistics, *Dropout and Completion Rates in the United States: 2006*, http://nces.ed.gov/pubs2008/dropout06/figures/figure_04.asp (accessed Mar. 1, 2009).

267. College Bd., *2008 College-Bound Seniors: State Profile Report: Montana*, http://professionals.collegeboard.com/profdownload/Montana_CBS_08.pdf (2008).

who took the SAT in 2006 were enrolled in a college in 2007.²⁶⁸ Rural students in Montana score above average on the National Assessment of Educational Progress (NAEP) in both math and reading.²⁶⁹ Nearly 90% of Montana's schools are making Adequate Yearly Progress (AYP) under the No Child Left Behind Act, a rate significantly higher than the national average of 70%.²⁷⁰

Despite these successes, challenges remain.²⁷¹ Many of Montana's school buildings are structurally deteriorating,²⁷² while low salaries and rural locales make teacher recruitment and retention problematic.²⁷³ Furthermore, performance disparities exist between Montana's minority students and their white peers.²⁷⁴ Minorities—almost entirely American Indian²⁷⁵—

268. College Bd., *College Attendance Patterns of Montana 2006 Public School College Bound Seniors Who Took the SAT 1*, http://www.collegeboard.com/prod_downloads/about/news_info/cbsenior/yr2007/attendance/MT.pdf (2007).

269. Johnson & Strange, *supra* n. 259, at 111–112; *but see* Children's Def. Fund, *Children in Montana* (Children's Def. Fund May 2006) (reporting that 64% of Montana fourth graders read below grade level and 61% of them are below grade level in math). While Montana students are less likely to participate in Advanced Placement (AP) exams than their peers nationwide, those who do take the exams have a slightly higher mean score than the national mean. U.S. Dept. Educ., *Mapping Montana's Educational Progress 2008 1*, <http://www.ed.gov/nclb/accountability/results/progress/montana.pdf> (2008) (reporting that 15.8% of Montana students took Advanced Placement Exams in 2007, compared with 24.9% of students nationally). The mean grade for Montana students was 2.94/5, while the national mean score was 2.83/5. College Bd., *Inspiring minds, Summary Reports*, http://www.collegeboard.com/student/testing/ap/exgrd_sum/2008.html; *select* National Report, *select Montana* (2008).

270. U.S. Dept. Educ., *Mapping Montana's Educational Progress 1*, <http://www.ed.gov/nclb/accountability/results/progress/montana.pdf> (2008). AYP is a measure of progress toward a minimum level of proficiency that the state, its school districts, and schools must achieve each year on annual tests and other academic indicators. *Id.*

271. Prior to the *Columbia Falls II* litigation, discussed *infra* note 282 and accompanying text, one public education advocacy group, The Rural Trust, ranked Montana 5th in terms of greatest need for education reform. Am. Fedn. Teachers, *Survey and Analysis of Teacher Salary Trends 2007 17*, <http://www.aft.org/salary/2007/download/AFT2007SalarySurvey.pdf> (accessed Mar. 11, 2009).

272. Am. Socy. Civ. Engrs., *Infrastructure Report Card 2005*, <http://www.asce.org/reportcard/2005/page.cfm?id=66> (accessed Mar. 11, 2009) (reporting that 45% of Montana's schools have at least one inadequate building feature and 69% of Montana's schools have at least one unsatisfactory environmental condition).

273. *See* Dori Burns Nielson, Mont. Bd. Pub. Educ., *Who Will Teach Montana's Children?* 6, <http://www.opi.state.mt.us/pdf/cert/teachchildren.pdf> (Feb. 2001); *see also* St. of Mont. Off. of Pub. Instr., *Montana K–12 Schools Staff Recruitment and Retention Report 1*, <http://www.opi.state.mt.us:8010/PDF/Measurement/oldmeasurement/Measurement/StaffRetent.pdf> (Jan. 2000).

274. *See e.g.* Christopher D. Lohse & Susan Ockert, *American Indian Student Achievement in Montana Public Schools: Features of the Achievement Gap and Policy Prescription 1*, http://leg.mt.gov/content/committees/interim/2005_2006/qual_schools/staff_reports/AMERICAN_INDIAN_STUDENT_ACHIEVEMENT_IN_MONTANA_PUBLIC_SCHOOLS.pdf (Sept. 1, 2005) (noting that “the performance of American Indian students lags significantly behind the performance of white students—both at the national level, and in Montana”).

275. The State recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity. Mont. Const. art. X, § 1(2). Montana is the only state whose constitution requires public schools to preserve American Indian cultural heritage. The Montana Supreme Court ruled in 2004 that the State had “failed to recognize

comprise approximately 19% of students enrolled in rural schools.²⁷⁶ Indeed, about one-tenth of all Montana students are American Indian,²⁷⁷ and they comprise more than 90% of students in thirteen school districts.²⁷⁸ Nearly 8% of students enrolled in Montana's rural districts—almost all American Indian—are English Language Learners (ELL),²⁷⁹ ranking Montana eighth in the nation for rural ELL students.²⁸⁰

A round of school-funding litigation in Montana from 2004–2008 culminated most recently in a December 2008 district court ruling that upheld the current school funding scheme.²⁸¹ A recap of the litigation illustrates how the Montana Supreme Court and the Montana legislature have responded to a constitutional challenge regarding provisions of services, as well as how these institutions have viewed spatial challenges to service delivery. In 2005, the Montana Supreme Court in *Columbia Falls Elementary School District No. 6 v. Montana (Columbia Falls II)* found the State's funding system for public schools to be constitutionally inadequate.²⁸² In particular, the Court in *Columbia Falls II* determined that Montana's school funding violated Article X, § 1(3) of the Montana Constitution.²⁸³ That

the distinct and unique cultural heritage of American Indians and [had] shown no commitment in its educational goals to the preservation of their identity." See *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2004 Mont. LEXIS 684 (Mont. Nov. 9, 2004) [hereinafter *Columbia Falls I*]; see also Mary Ann Zehr, *Judge Says Montana Falls Short on Indian Education*, <http://www.edweek.org/ew/Articles/2004/04/28/33montana.h23.html> (Apr. 28, 2004); see also *infra* nn. 282–290 (discussing the constitutionality of Montana's school funding formula).

276. Johnson & Strange, *supra* n. 259, at 101. This is slightly lower than the national average (22.9%). *Id.*

277. U.S. Dept. Educ., Natl. Ctr. Educ. Evaluation & Regl. Assistance, *How Northwest Region States Are Supporting Schools in Need of Improvement* 8–9, http://ies.ed.gov/ncee/edlabs/regions/northwest/pdf/REL_2007009.pdf (2007).

278. *Id.*

279. Johnson & Strange, *supra* n. 259, at 104.

280. *Id.* at 66. The most commonly spoken languages among Limited English Proficient students in Montana are American Indian languages: Blackfoot (24%), Crow (16%), Dakota (11%), Salish (8%), and Assiniboine (8%). U.S. Dept. Educ., *Montana: Most Commonly Spoken Languages* 3, <http://www.ncela.gwu.edu/policy/states/reports/statedata/2001/pdffiles/Montana-Comp.pdf> (Oct. 2002).

281. See *infra* n. 295.

282. *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 259 (Mont. 2005) [hereinafter *Columbia Falls II*]. The 1993 legislation responded to a court challenge of the prior system. *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989); see also Hillary A. Wandler, *Will Montana Breathe Life into Its Positive Constitutional Right to Equal Educational Opportunity?*, 65 Mont. L. Rev. 343, 344 (2004) (discussing *Helena Elementary Sch. Dist. No. 1 v. State*); Gregory J. Petesch, *The State of the Montana Constitution (Turkey Feathers on the Constitutional Eagle)*, 64 Mont. L. Rev. 23, 29–30 (2003).

283. *Columbia Falls II*, 109 P.3d at 262–263. More specifically, the Montana Supreme Court found that the “major problems” with the funding system, identified by the district court, were credible. *Id.* at 262. These major problems were the lack of a “mechanism to deal with inflation;” failure to “base its numbers on costs such as teacher pay, meeting accreditation standards, fixed costs, or costs of special education;” the fact that “increases in allowable spending were not tied to costs of increased accreditation standards or content and performance standards;” that relevant data was outdated by two years

provision requires the legislature to “provide a basic system of free quality elementary and secondary schools . . . [and] fund and distribute in an equitable manner to the school districts the state share of cost” of these schools.²⁸⁴ The Montana Supreme Court determined that the Legislature had failed to define what constitutes a “quality” system of education.²⁸⁵ The Court thus ordered the Legislature to create an education funding formula grounded in principles of quality.²⁸⁶ The *Columbia Falls II* litigation focused more on the “quality” phrase of Article X, § 1(3) than on its “equitable” language. Indeed, the Court declined to reach the issue of whether Montana’s school funding scheme also violated the Montana Constitution’s equality guarantees.²⁸⁷

The Montana Legislature was in session when the Montana Supreme Court handed down the *Columbia Falls II* decision in March 2005. The legislature’s response had been in progress even earlier, following the district court’s decision.²⁸⁸ The legislature promptly amended the Montana Code to define a “basic system of free quality public elementary and secondary schools” as one which meets specified accreditation standards and provides for students with special needs, including so-called “At-Risk,” disabled, gifted, and limited English proficient students.²⁸⁹ The Code further recognizes the rural context in which many schools operate by requiring funding mechanisms that take account of the needs of “isolated schools with low population density” and the “ability of school districts to attract and retain qualified educators and other personnel.”²⁹⁰

Also responding to *Columbia Falls II* during its 2005 regular session, the Montana Legislature increased state funding for public schools for the 2005–2006 and 2006–2007 fiscal years.²⁹¹ In addition, the legislature appropriated funds during the 2005 special session,²⁹² including a \$5 million

when the bill passed; and no study justified the disparity in per-pupil (ANB) funds that went to high schools as compared to elementary schools. *Id.* at 262.

284. Mont. Const. art. X, § 1(3).

285. *Columbia Falls II*, 109 P.3d at 261–262.

286. *Id.* at 262 (holding that quality schools would be funded in relation to relevant educational needs such as academic standards, teacher pay, fixed costs, costs of special education, and performance standards).

287. *Id.* at 264. The equality issue had been considered in a 1989 case, *Helena Elementary Sch. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989), discussed *infra* n.543–548.

288. See Mont. Sen. 152, 59th Leg., 2005 Reg. Sess. (Dec. 30, 2004).

289. Mont. Code Ann. § 20–9–309(2)(b).

290. Mont. Code Ann. § 20–9–309(3)(b) and (f).

291. *Columbia Falls Elementary Sch. Dist. No. 6 v. State (Columbia Falls III)*, 2008 Mont. Dist. LEXIS 483 at **5–7 (Mont. 2008) [hereinafter *Columbia Falls III*]. This included increases in per-student entitlements, special education block grants, and general tax base aid. *Id.*

292. *Id.* at **8–10.

“At-Risk” payment²⁹³ and a \$3.28 million “American Indian Achievement Gap” payment²⁹⁴ for Fiscal Year 2006–2007. As the district court in the December 2008 *Columbia Falls III* decision explained, these payments “address the dual achievement gaps” that separate poor students from other students and that separate American Indian students from other poor students.²⁹⁵ Districts serving poor American Indian students thus receive both types of funds, “recognizing the educationally relevant needs of these students.”²⁹⁶ In 2007, the Montana Legislature maintained the previous level of At-Risk and American Indian Achievement Gap funding.²⁹⁷ In the 2009 legislative session, the Legislature increased spending for public schools by just one-third of one percent (0.36% or \$4.7 million).²⁹⁸ Federal stimulus funds replaced almost \$10 million in At-Risk payments for the 2009–2011 budget cycle.²⁹⁹

Montana public schools are currently funded approximately 46% from state sources, 40% from local sources, and 14% from federal sources.³⁰⁰ However, the proportion of each school district’s budget that is derived

293. *Id.* at *9; *see also* Mont. Code Ann. § 20–9–328. At-Risk students are the same as those identified for federal Title I funding, which is linked to the poverty. *Columbia Falls III*, 2008 Mont. Dist. LEXIS 483 at *38.

294. *Columbia Falls III*, 2008 Mont. Dist. LEXIS 483 at *9; *see also* Mont. Code Ann. § 20–9–330. Additional appropriations were made for Indian education, facilities improvements, and energy cost relief. *Columbia Falls III*, 2008 Mont. Dist. LEXIS 483 at *10.

295. *Columbia Falls III*, 2008 Mont. Dist. LEXIS 483 at *41–*42.

296. *Id.* at 42.

297. *Id.* at *11. The legislature also provided funding for full-time kindergarten and increased per-educator payments. *Id.* at *11–12.

298. St. of Mont., *Montana State Budget Summary: HB 2 Summary 2–3*, http://leg.mt.gov/content/Publications/fiscal/ba_2011/HB_2/Overview%20SF.pdf (2009). This represents an increase of \$4.7 million. *Id.* Of the general fund, just 40.6% went to K-12 education. *Id.* The increase in funds was in the form of a one percent per year increase in basic and per ANB entitlements. *Id.* However, the Montana House of Representatives removed \$9.9 million for K-12 At-Risk payments, replacing them with federal stimulus funds. *Id.* at 11. Some complained that eliminating state funding for At-Risk students and replacing it with federal stimulus money will be problematic because the federal funds will not be available in future budget cycles. Peter Johnson, *Schmidt Fills in Chamber with Legislative Rundown*, [http://docs.newsbank.com/s/InfoWeb/aggdocs/AWNB/127EB81C1DA635C0/0D0CB57AEDE52A75](http://docs.newsbank.com/s/InfoWeb/aggddocs/AWNB/127EB81C1DA635C0/0D0CB57AEDE52A75) (April 30, 2009).

299. St. of Mont., *Montana State Budget Summary: HB 2 Summary 11*, http://leg.mt.gov/content/Publications/fiscal/ba_2011/HB_2/Overview%20SF.pdf (2009).

300. U.S. Census Bureau, *Public Education Finances: 2006* tbl. 1, <http://ftp2.census.gov/govs/school/06f33pub.pdf> (Apr. 2008). Approximately \$1.365 billion in federal, state, and local funds went into elementary and secondary education in Montana in 2006. This includes \$190 million (14%) from federal sources; \$627 million (46%) from state sources; and \$548 million (40%) raised locally. *Id.* The U.S. Census Bureau reports total per pupil spending in Montana at \$8,581, below the national average of \$9,138. *Id.* at fig. 4. The finance figures are further broken down by the Montana Office of Public Instruction. Off. Pub. Instr., *Understanding Montana School Finance and School District Budgets 4* (Jan. 2008). As for the core general fund budget (which excludes the transportation, adult education, technology and flexibility funds), 62% (\$532 million) is funded by the State, while local property taxes finance 30% (\$256 million). *Id.*

from each of these sources varies dramatically. Enhanced federal monies typically target the neediest schools and students,³⁰¹ as does a very limited amount of state funding.

Indeed, the flow of federal monies into particular schools makes Montana's school funding scheme appear highly inequitable at first glance.³⁰² One education non-profit, the Education Trust, ranked Montana last in the nation for equitable revenues and expenditures among districts in 2005–2006,³⁰³ the first year's budget to reflect the legislative changes following *Columbia Falls II*. Median revenues per pupil were \$10,414 that year.³⁰⁴ In the districts in the bottom 5% in terms of funding level, the total revenue per pupil was \$6,797 or less, while the total revenue per pupil for districts in the top 5% in terms of funding level was \$27,381 or more.³⁰⁵ The districts receiving the highest level of funding thus got three times more than those receiving the least funding.

These statistics are misleading, however, unless considered in relation to which districts receive the greatest funding. Apparent inequalities are created primarily by the presence of federal monies which, in fact, essentially serve to level the playing field for school districts that educate the neediest students. This is because state and local funding of public education in Montana is topped up by significant federal funding for American Indian students and poor students (Title I).³⁰⁶ This money flows to districts where the need is greatest. While this creates a situation that appears inequitable, the effect of the federal funds is actually to equalize.³⁰⁷ Indeed, state law limits the extent to which local wealth can enhance the funds available to some schools, while leaving poor districts with much less fund-

301. See figs. 19–20.

302. Natl. Ctr. Educ. Statistics, *Revenues and Expenditures for Public Elementary and Secondary School Districts: School Year 2005–2006 (fiscal year 2006)* 4, <http://nces.ed.gov/pubs2008/2008345.pdf> (accessed Mar. 11, 2009) [hereinafter *Revenues and Expenditures 2005–2006*].

303. The Educ. Trust, *Funding Gaps 2006* 7, <http://www.edtrust.org/sites/edtrust.org/files/publications/files/FundingGap2006.pdf> (2006); see also *Revenues and Expenditures 2005–2006*, *supra* n. 302, at 1. Montana also ranked last in the nation in 2005–2006 for equitable revenues and expenditures per district. *Id.* at 4; see also Hamill, *supra* n. 116, at 142 n. 95 (criticizing Montana as among the states with the lowest funding for K–12 education and noting that its per pupil expenditure in the highest poverty districts is only \$8,329, compared to \$8,581 for all districts).

304. Lei Zhou & Frank Johnson, *Revenues and Expenditures for Public Elementary and Secondary School Districts: School Year 2005–2006 (Fiscal Year 2006)* 4, <http://nces.ed.gov/pubs2008/2008345.pdf> (July 2008).

305. *Id.*

306. Title 1 funds are targeted to schools with the highest percentage of low-income children. See U.S. Dept. Educ., *Title 1—Improving the Academic Achievement of the Disadvantaged*, <http://www.ed.gov/policy/elsec/leg/esea02/pg1.html#sec1001> (accessed Jan. 21, 2010). In addition, federal funding also flows into Montana to compensate for loss of tax dollars and other revenue related to the presence of federal land such as PILT, Secure Rural Schools Act. See *supra* nn. 234–235 and accompanying text.

307. See *infra* Part VI (discussing how enhanced federal funding—and to a limited extent higher state funding—promotes substantive equality).

ing. The law does so by “encourag[ing]” school districts to fall within a budget range that limits the role local property taxes can play in school funding.³⁰⁸

This more redistributive approach—based on need as linked to ethnicity, poverty, and spatiality—is, however, largely attributable to federal funding priorities, rather than to state or local priorities. State At-Risk and Indian Achievement Gap funds are relatively small amounts—about \$200 per student—in relation to other per-pupil revenues.³⁰⁹ Further, they are not necessarily an ongoing feature of the funding scheme, but rather must be re-funded during each legislative session.³¹⁰ Funding levels for At-Risk students were maintained during the 2009 Legislative Session,³¹¹ albeit entirely with federal stimulus monies.³¹² The total amount granted for the programs is \$34.2 million over the two-year budget cycle.³¹³ The Indian Education for All and Close Achievement Gap allocations are still supported, though not as fully as in the prior budget cycle.³¹⁴

I return in Part VI for further discussion of Montana’s school funding scheme, contrasting its distributive character to the more localized way in which county governments are funded. The latter funding scheme is well illustrated in the Part IV(D), which focuses on the economies, demographics and county government finances of five Montana counties.

308. In order to achieve relative equity among districts, each is required to adopt a BASE budget, the minimum legal general fund budget. *Understanding Montana School Finance and School District Budgets*, *supra* n. 300, at 16. The state also sets a formula for calculating a maximum general fund budget. *Id.* at 17. State law “encourages” districts to adopt budgets within the range between the BASE and the maximum. *Id.* Current budgets that fall within this range are considered equalized. *Id.*

309. *Understanding Montana School Finance*, *supra* n. 300, at 15. For fiscal year 2008, the legislature appropriated \$5 million for “At-Risk” students, which was distributed according to the same formula as federal Title 1 funds. *Id.*

310. *Understanding Montana School Finance*, *supra* n. 300, at 15.

311. Mont. Legis. Fiscal Div., *Legislative Budget Analysis 2011 Biennium 2*, http://leg.mt.gov/content/publications/fiscal/HB_645/federal_stimulus_narrative_E_sfc.pdf (2009).

312. This reduced the need to make “At-Risk” expenditures from the state general fund. Off. Pub. Instr., *2011 Biennium Summary E-2*, http://leg.mt.gov/content/publications/fiscal/ba_2011/HB_2/HB2%20E.pdf (2009).

313. Mont. Legis. Fiscal Div., *supra* n. 311 (reporting that approximately \$17.1 million was to be released by the U.S. Department of Education in March 2009, with another \$17.1 million available following the state’s submission of an approval application). The budget allocates specific funding for homeless children, support for special education maintenance, and funds for the incorporation of technology in the classroom. *Id.* at 2–5. Off. Pub. Instr., *2011 Biennium Summary*, *supra* n. 312 (reporting a total of \$89.1 million in both Title I and stimulus funding that will go to Montana’s “At-Risk” students).

314. Off. Pub. Instr., *2011 Biennium Summary*, *supra* n. 312, at E-3, E-11 (noting that the decrease of \$1.7 million in state general funds was attributable to diminished participation by students and educators).

D. Uneven Development as Spatial Inequality: A Comparison of Private Wealth and Public Services in Five Montana Counties

As suggested by the discussion of local government finance in Part IV(B), property tax revenues are the primary source of funds with which local governments operate. This, in turn, means that a county's property tax base (taxable valuation or mill value), as well as its willingness to levy taxes, has a profound effect on its capacity to provide services. That some counties have much greater property tax bases than others creates spatial inequalities across counties. These inequalities are aggravated when the counties are so sparsely populated that they are unable to achieve economies of scale for purposes of service provision. They may also be aggravated in counties that cover more territory because of the challenge of serving spatially far-flung residents.

A closer look at five Montana counties illustrates the extent to which uneven development across the State results in spatial inequality in the delivery of government services. In this part, I consider government services other than public education, and my focus is on health and human services. In the following sections, I look in detail at a broad cross-section of counties to show how spatial inequalities are manifest in Montana. I discuss one metropolitan county (Yellowstone); one micropolitan county (Gallatin); one affluent nonmetropolitan county (Stillwater); and two highly impoverished rural counties. One of the highly impoverished counties is a majority American Indian county (Big Horn), and the other has an overwhelmingly white population (Wheatland).

With the exception of Big Horn County, all of the counties considered are populated primarily by whites.³¹⁵ Other than in Big Horn County, where American Indians are almost 60% of the population,³¹⁶ the highest percentage of American Indians among the other four counties is in Yellowstone County, with just over 4%.³¹⁷ All five have small but growing Hispanic/Latino populations.³¹⁸

315. *American FactFinder*, *supra* n. 6; search "Yellowstone County, Montana," refer to 2005–2007 data, refer to ACS Demographic Estimates (reporting 91% White population); *id.* at search "Wheatland County, Montana," refer to 2000 data, refer to General Characteristics (reporting 97% White population); *id.* at search "Gallatin County, Montana" refer to 2005–2007 data, refer to ACS Demographic Estimates (reporting 94.7 % population); *id.* at search "Stillwater County, Montana," refer to 2000 data, refer to General Characteristics (reporting 96.8% White population).

316. *Id.* at search "Big Horn County, Montana," refer to 2000 data, refer to General Characteristics.

317. *Id.* at search "Yellowstone County, Montana," refer to 2005–2007 data, refer to ACS Demographic Estimates.

318. *Id.* at search "Gallatin County, Montana," refer to 2005–2007 data, refer to ACS Demographic Estimates (reporting a Hispanic/Latino population of 2.4%); *id.* at search "Yellowstone County, Montana," refer to 2005–2007 data, refer to ACS Demographic Estimates (reporting a Hispanic/Latino population of 4.7%); *id.* at search "Big Horn County, Montana," refer to 2000 data, refer to General Char-

Various graphs depicting the economic, demographic, and social circumstances of the five counties and their residents follow.³¹⁹ Figures 1–10 depict data that reflect the well-being of the counties' residents, with some focus on children and families. Figures 11–18 provide information about the counties' revenue sources, with an emphasis on local property tax revenue. Table 1 provides detailed information about the taxable value of each Class or type of property, e.g., agriculture, land and improvements, in each county. This information, in turn, sheds light on each county's economic base. To the extent such information is available, the following parts also discuss the health and human services that are available in each county, as well as information regarding how those services are financed.

1. *Metropolitan Development and Diversification: Yellowstone County*

Yellowstone County, one of only four metropolitan counties in Montana,³²⁰ lies in the south central part of the State. The county seat is Billings, which is also Montana's largest city with an estimated 2006 population of just over 100,000.³²¹ The City's population has increased more than ten percent since the 2000 Census.³²² Indeed, while Billings is the largest city in a 500-mile radius,³²³ with a 2006 population of only 135,687,³²⁴ Yellowstone County falls at just three on the rural-urban continuum.³²⁵ Yellowstone County's relatively small land area and relatively large population make it one of Montana's most densely-populated coun-

acteristics (reporting 3.7% Hispanic/Latino population); *id.* at search "Stillwater County, Montana," refer to 2000 data, refer to General Characteristics (reporting 2% Hispanic/Latino population).

319. Obtaining information about Wheatland, Stillwater and Big Horn counties was generally more difficult because these counties post less information on websites. As a related matter, Weaver and Mathre observe that many county governments lack email access and/or home pages. Weaver & Mathre, *Review*, *supra* n. 48, at 10. In addition, officials in these counties, particularly Wheatland County, often did not return telephone calls. Finally, on some state websites, information about Wheatland County is not available because the County does not report it to the State. See Mont. Research & Analysis Bureau, Mont. Dept. Lab. & Industry, *State and County Economic Fliers*, <http://www.ourfactsyourfuture.org/?PAGEID=67&SUBID=273> (accessed May 24, 2009).

320. See *supra* n. 25 and accompanying text.

321. U.S. Census Bureau, *State & County Quick Facts: Billings, Montana*, <http://quickfacts.census.gov/qfd/states/30/3006550.html> (accessed Sept. 14, 2009).

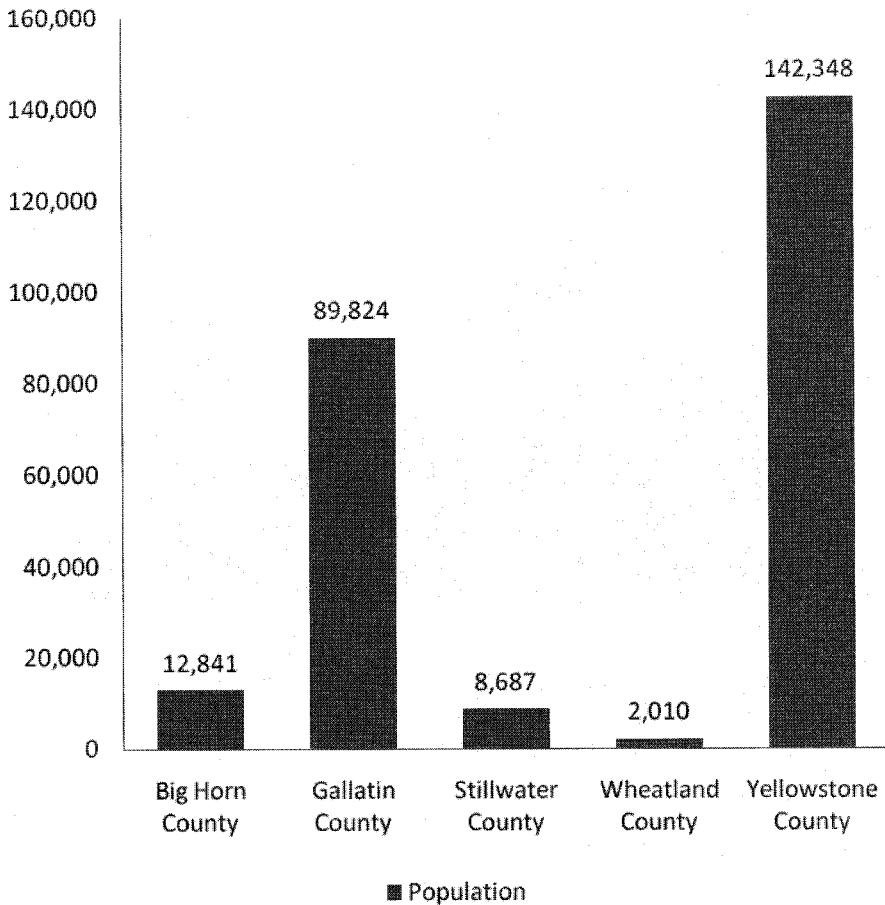
322. *American FactFinder*, *supra* n. 6; search "Billings, Montana," refer to 2000 data (accessed Sept. 14, 2009) (reporting a 2000 population of 89,847).

323. Mont. Dept. Com., *Demographic & Economic Information for Yellowstone County 2*, http://www.ourfactsyourfuture.org/admin/uploadedPublications/3326_Yellowstone_CF09_web.pdf. (Feb. 2009).

324. *American FactFinder*, *supra* n. 6.

325. *2007 County-Level Poverty Rates for Montana*, *supra* n. 140; select Montana (accessed Sept. 14, 2009).

FIGURE 1
COUNTY POPULATION (2008)



Source: U.S. Census Bureau 2008 Estimates

ties.³²⁶ Part of the Crow Indian reservation lies in the southeast part of the County.³²⁷

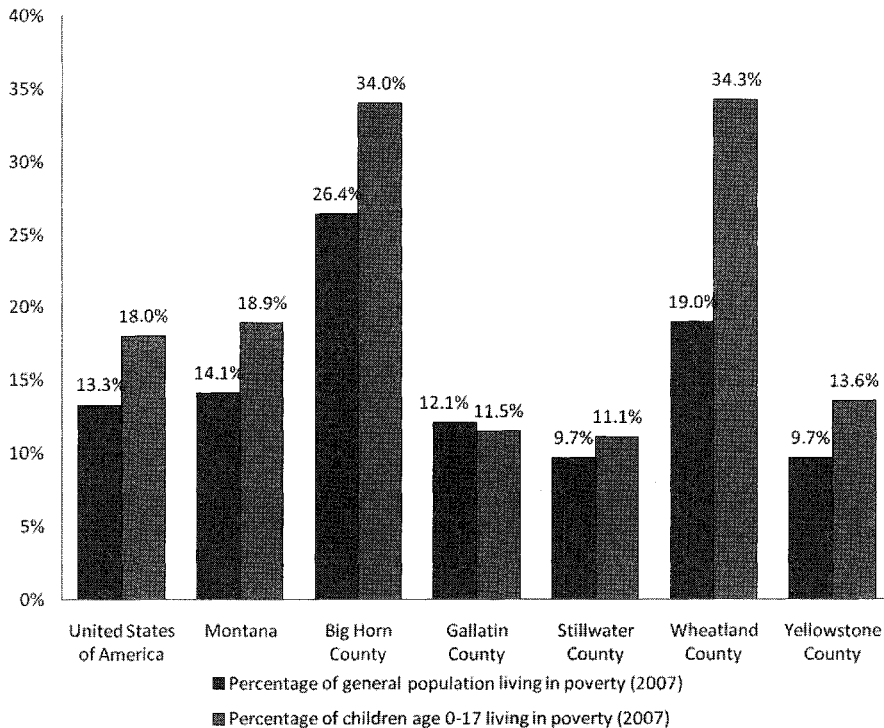
Yellowstone County enjoys the diverse economy characteristic of a metropolitan area, with “oil and gas, health care, livestock, and banking playing significant roles.”³²⁸ Billings boasts three colleges and an interna-

326. U.S. Census Bureau, *State & County Quick Facts: Yellowstone County, Montana*, <http://quickfacts.census.gov/qfd/states/30/30111.html> (accessed Sept. 14, 2009) [hereinafter *Yellowstone County Quick Facts*] (reporting a population density of 49.1 persons per square mile and a total land area of 2,635 square miles).

327. Mont. Geographic Info. Clearinghouse, *Montana Maps*, <http://nris.state.mt.us/gis/gisdata/lib/mtmaps.aspx>; *select* American Indian Reservations (accessed Sept. 14, 2009).

328. *Demographic & Economic Information for Yellowstone County*, *supra* n. 323, at 2. The largest employers in the county are Billings Clinic, Wal-Mart, Avitus Group, and St. Vincent Healthcare. Also

FIGURE 2
POVERTY: GENERAL AND CHILDREN (2007)



Source: USDA Economic Research Service

tional airport.³²⁹ The greatest number of the County's employees work in health and social assistance, followed by retail, accommodation and food services, and construction.³³⁰

The 2007 median household income in Yellowstone County was \$47,947, the fifth highest among the State's counties.³³¹ The percentage of residents living in poverty is below both state and national averages, as is the rate of child poverty.³³² Other metrics³³³ similarly suggest that Yellowstone County residents are better off than the state average.³³⁴

significant are Wells Fargo, Albertson's Food and Drug, First Interstate Bank, and St. John's Lutheran Home. *Id.* at 4.

329. *Id.* at 2.

330. *Id.* at 6-7.

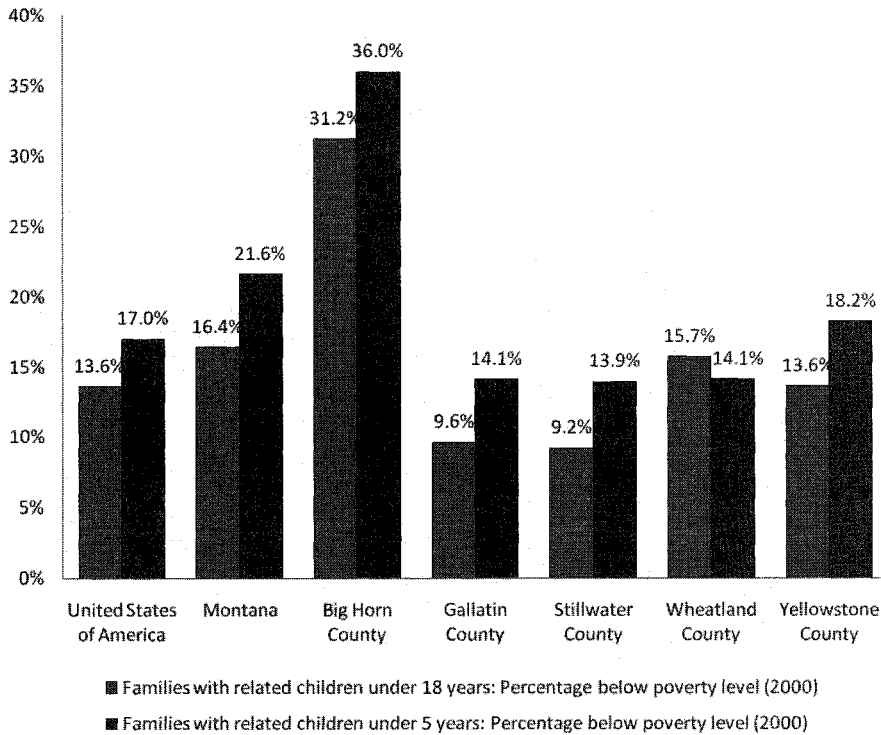
331. U.S. Dept. Agric, Econ. Research Serv., *County-Level Unemployment and Median Household Income for Montana*, <http://www.ers.usda.gov/data/unemployment/RDList2.asp?ST=MT> (accessed Sept. 14, 2009). [hereinafter *Unemployment and Median Income*]

332. See Fig. 2.

333. See Figs. 2-5, 7.

334. *Id.* Neighboring Carbon County, with a population under 10,000, is also designated metropolitan because it is part of the Billings Metropolitan Statistical Area. *American FactFinder*, *supra* n. 6;

FIGURE 3
POVERTY: FAMILIES WITH CHILDREN (2000)
(UNDER AGE 18 AND UNDER AGE 5)



Source: U.S. Census Bureau, 2000 Census

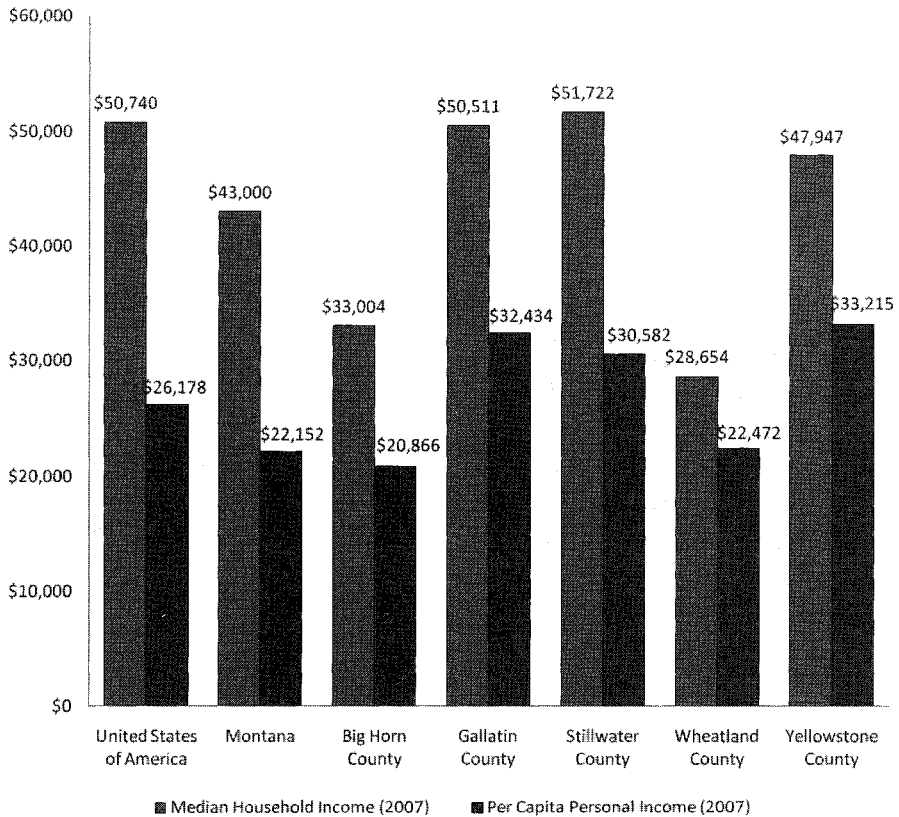
Further, Yellowstone County's property tax base is substantial, and it reflects the diversification one would expect from a metropolitan area. The total taxable property value for 2008 was more than \$264 million, which is about \$1,782 per capita.³³⁵ Two-thirds of Yellowstone County's Fiscal Year 2008 total taxable property value was Class 4 Land and Improvements.³³⁶ While Class 3 Agricultural Land constitutes more than \$3.6 million in taxable property (second only to Big Horn County among the five examined here), that amount is only 1.4% of Yellowstone County's total

search Carbon County, Montana, refer to 2000 data (accessed Sept. 14, 2009). The mean commute time each way for a Carbon County worker is 28 minutes. *Id.* at *select* Economic Characteristics. This suggests that many commute to Yellowstone County, making Carbon County exurban. The data points for Carbon County reflect greater affluence than that for Yellowstone County, which is consistent with an exurban character. *Id.*

335. See figs. 11–12.

336. See fig. 14. This Class 4 Land and Improvements total included \$111.6 million (63%) residential and \$56.5 million (32%) commercial.

FIGURE 4
PER CAPITA AND MEDIAN HOUSEHOLD INCOME (2007)



Sources: USDA Economic Research Service (Median Household Income); Montana State University, Local Government Wall Chart (county data) and U.S. Census Bureau (Montana and USA data).

taxable property value.³³⁷ The total funds appropriated in the County in Fiscal Year 2007 were \$49.8 million,³³⁸ or about \$350 per capita.³³⁹ Yellowstone County received more than \$170,000 in PILT funds in 2008,³⁴⁰ an insignificant amount in light of the County's overall budget.

Among the services provided by Yellowstone County are Public Health and Human Services Programs that cost the County \$1.87 million in

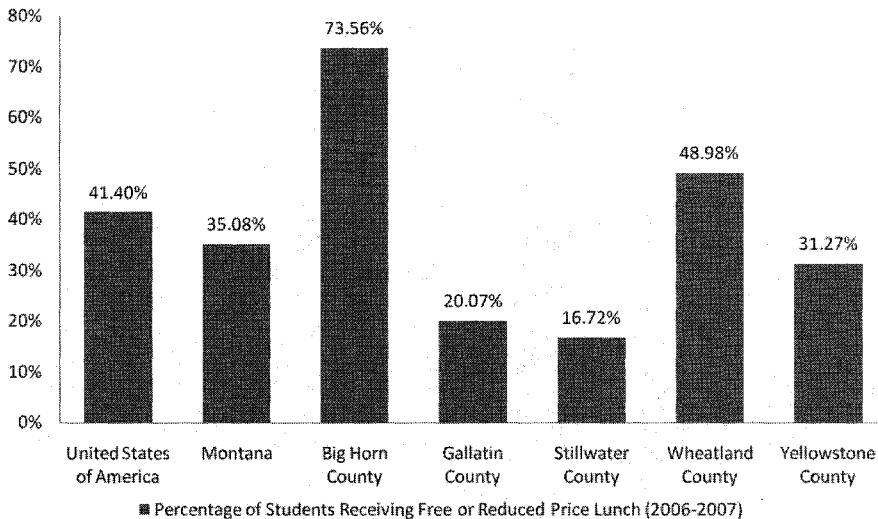
337. See tbl. 1. Yellowstone County has far more substantial Class 5 property than the other five counties, but it nevertheless constitutes less than 2% of the county's entire taxable property value. This category includes rural electric and telephone co-operative property, as well as property related to pollution control. *Id.*

338. See fig. 17.

339. See fig. 18.

340. See fig. 16.

FIGURE 5
STUDENTS RECEIVING FREE OR REDUCED PRICE LUNCH (2006-2007)



Source: National Center for Education Statistics, Common Core Data (CCD) (2006-2007)

Fiscal Year 2009.³⁴¹ These services include rent assistance, youth shelter programs, and low-income medical assistance.³⁴² Property taxes earmarked for health and human services programs include library and health department levies.³⁴³

Yellowstone County is unique in that the County runs a multijurisdictional Service District under the name RiverStone Health (formerly known as Yellowstone City-County Health Department).³⁴⁴ The only one of its type in Montana,³⁴⁵ this service district was until 2007 permitted under Title 7 of the Montana Code.³⁴⁶ Just 6% of RiverStone Health's budget

341. Email from Scott Turner, Yellowstone County Budget Director, to Janet Wallace, Research Assistant, University of California–Davis, School of Law, Yellowstone County Budget Question (April 8, 2009, 7:58 a.m. PST).

342. *Id.* This budget also includes an allocation for involuntary commitments. *Id.*

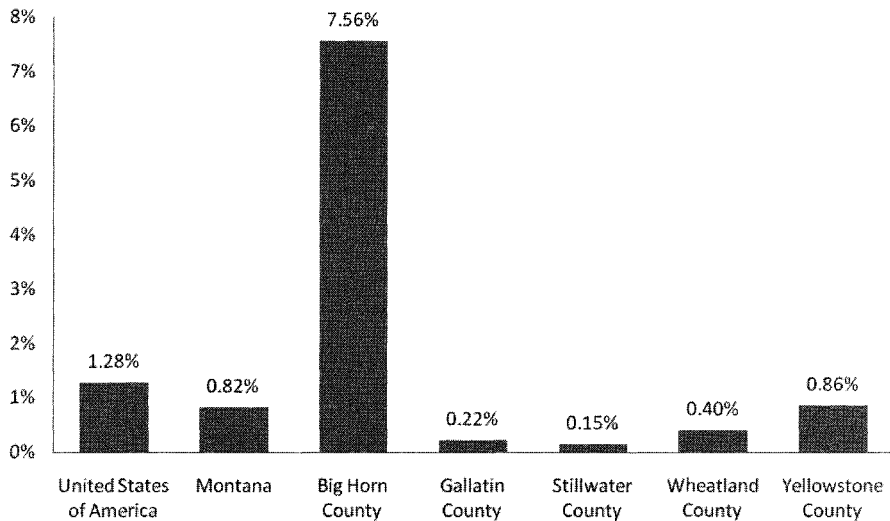
343. Yellowstone Co., Mont., *Final Budget Summary, Fiscal Year 2008–2009* at 1, <http://www.co.yellowstone.mt.gov/Finance/Budget09/BudgetSummary09.pdf> (accessed Sept. 18, 2009); Yellowstone Co., Mont., *Fiscal Year 2008–2009 Final Revenue and 5 Year Revenue History* 23–24, <http://www.co.yellowstone.mt.gov/Finance/Budget09/SpecialRevenue09.pdf> (accessed Sept. 18, 2009).

344. RiverStone Health, *About RiverStone*, <http://www.riverstonehealth.org/AboutRiverStone/tabid/36/Default.aspx> (accessed Sept. 14, 2009).

345. Telephone Interview with John Felton, Executive Vice President, Operations/Assistant Health Officer, RiverStone Health (May 22, 2009).

346. Mont. Code Ann. § 7–11–1101 (2007) (Repealed in 2009). The relevant provision states that municipalities and counties may form multijurisdictional service districts to provide: (1) a higher level of service than is available through the local governments forming such a district; or (2) services that are not available through the governments forming such a district. *Id.* As a multijurisdictional organization, RiverStone Health is authorized to levy property taxes in an amount not to exceed that authorized in the

FIGURE 6
RESIDENTS RECEIVING TANF (DECEMBER 2008)



■ Percentage of residents receiving Temporary Assistance for Needy Families (December 2008)

Sources: Montana Department of Health and Human Services and U.S. Department of Health and Human Services, Administration for Children and Families

comes from a mill levy approved by the voters,³⁴⁷ while the remainder derives largely from fees and grants, which increased from \$17.5 million in 2005 to about \$30 million in 2008.³⁴⁸ RiverStone Health administers approximately 30 programs.³⁴⁹ These include immunization, breast and cervical health services, home-health nursing, and hospice services. Additionally, it offers such programs as Healthcare for the Homeless, Environmental Health Services, and Deering Community Health Services.³⁵⁰ Health services are also provided by the Billings Clinic, a non-profit, health organization based in Billings. While the Billings Clinic has no special clinics for

district and to appropriate funds derived from other general tax revenues for the operation of the district. Mont. Code Ann. § 7-11-1112.

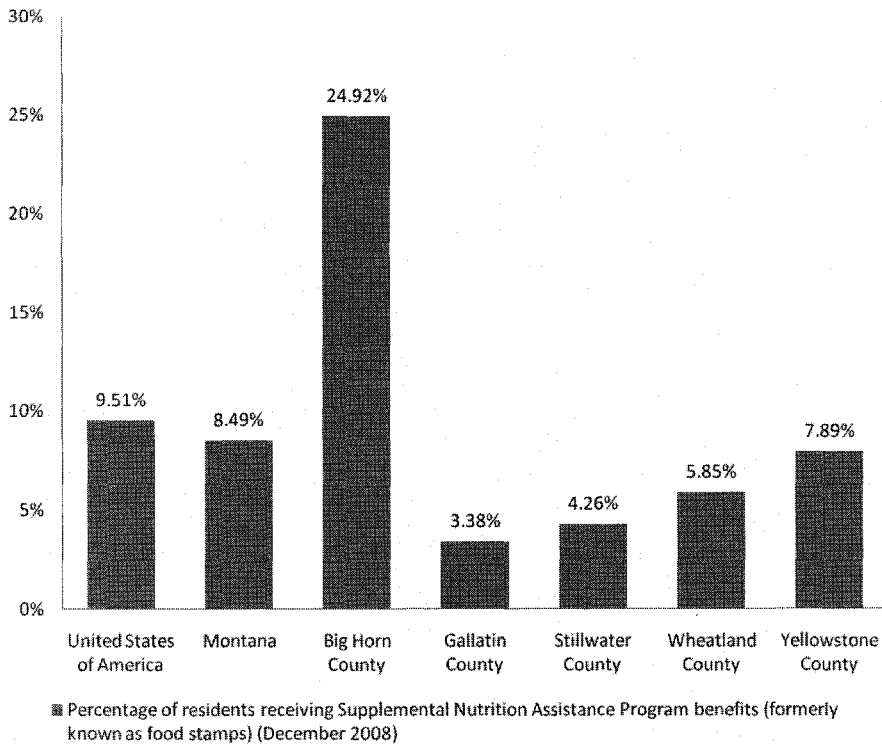
347. *Fiscal Year 2008-2009 Final Revenue Budget and 5 Year Round Revenue History*, *supra* n. 343, at 34. The county levies millage for the RiverStone operation. Voters approved the additional 4.75 mill levy for this purpose in November 2002.

348. Diane Cochran, *YCCH to Change Name to RiverStone Health*, *Billings Gaz.* (June 17, 2008) (available at http://billingsgazette.com/news/local/Article_76270b9c-40a8-531d-93c5-4990ebf7ed1e.html); RiverStone Health, *Press Release: New Name for Health Department*, <http://www.riverstonehealth.org/AboutRiverStone/NewsMedia/LatestNews/NewNameforHealthDepartment/tabid/158/Default.aspx> (accessed Sept. 14, 2009).

349. Telephone Interview with John Felton, Executive Vice President, Operations/Assistant Health Officer, RiverStone Health (May 22, 2009).

350. RiverStone Health, <http://riverstonehealth.org>; *select* Clinical Services, also *select* Public Health, *scroll through* Community Health Services and Family Health Services (accessed Sept. 14, 2009).

FIGURE 7
RESIDENTS RECEIVING SNAP (DECEMBER 2008)



Source: Montana Department of Health and Human Services and USDA.

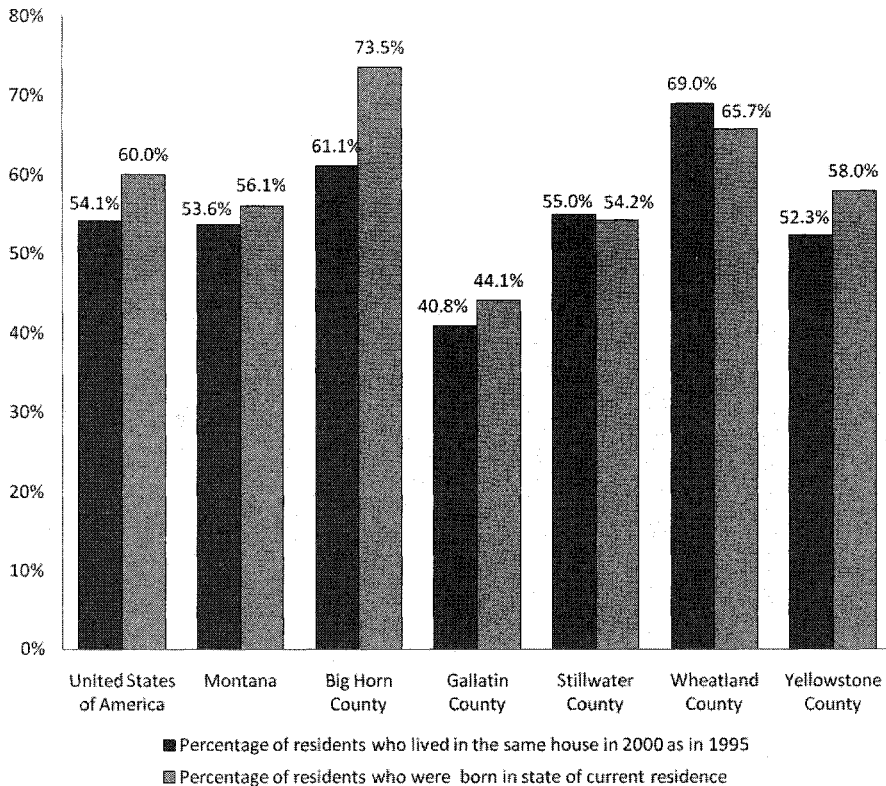
low-income patients, it does handle initial applications for Medicaid, Medicare, SCHIP, and disability. It also assists with Veteran's Administration healthcare and provides services for victims of domestic violence through Violence Against Women Act (VAWA) funding.³⁵¹ In addition, Billings Clinic assists qualifying low-income families with lowered fees through its Financial Assistance Program.³⁵² Billings Clinic also has clinics in the Stillwater Community Hospital in Columbus (Stillwater County) and in Bozeman (Gallatin County).³⁵³

351. The Violence Against Women Act (VAWA) established funding and programs to improve criminal justice and community-based responses to domestic violence, dating violence, sexual assault and stalking in the United States. See Off. Violence Against Women Home Page, U.S. Dept. Just., <http://www.ovw.usdoj.gov/regulations.htm> (accessed Sept. 14, 2009); see also Pruitt, *Place Matters*, *supra* n. 54, at 356–357, 414.

352. Billings Clinic, Billings/Insurance/Financial Options, <http://www.billingsclinic.com/body.cfm?id=463#arrangements> (accessed Jan. 4, 2009); *select* Financial Assistance Program and Financial Assistance Brochure.

353. Billings Clinic, *Branch Physician Clinics, Regional Specialty Outreach Clinics and Affiliate Hospitals*, <http://www.billingsclinic.com/body.cfm?id=177> (accessed Sept. 14, 2009).

FIGURE 8
RESIDENTIAL STABILITY (2000)



Source: U.S. Census Bureau, 2000 Census

2. *Micropolitan Affluence of Rural Gentrification: Gallatin County*

Gallatin County, located in the Rocky Mountains in the southwest part of Montana, covers more than 2,500 square miles,³⁵⁴ including a sliver of Yellowstone National Park.³⁵⁵ Its county seat, Bozeman,³⁵⁶ is home to Montana State University,³⁵⁷ which is the County's largest employer.³⁵⁸ Rural resorts such as the Big Sky Resort³⁵⁹ and the Yellowstone Club³⁶⁰ are

354. Gallatin Co., *Official Gallatin County Website*, <http://www.gallatin.mt.gov>; *select* About Gallatin County (accessed Sept. 14, 2009).

355. Mont. Maps, *supra* n. 327, *select* National Park Service Land (accessed Sept. 14, 2009).

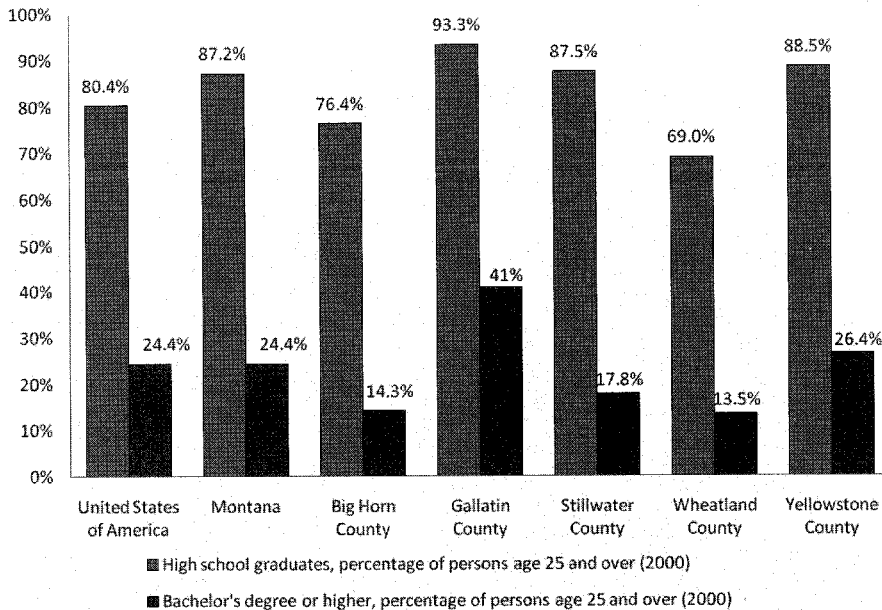
356. *Id.* at *select* County Seats (accessed Sept. 14, 2009).

357. Mont. St. Univ., *About MSU*, <http://www.montana.edu>; *select* About MSU (accessed Sept. 14, 2009).

358. Mont. Dept. Com., *Demographic & Economic Information for Gallatin County 2*, http://www.ourfactsofyourfuture.org/admin/uploadedPublications?3370_CF09_Gallatin.pdf (Feb. 2009).

359. *Big Sky Resort*, <http://www.bigskyresort.com> (accessed Sept. 14, 2009).

FIGURE 9
EDUCATION LEVEL (2000)



Source: U.S. Census Bureau, 2000 Census.

located in Gallatin County, as are a range of other enterprises. The Montana Department of Commerce lists construction, manufacturing, technology, and agriculture as playing significant economic roles, in addition to tourism, retail, and service industries.³⁶¹ More Gallatin County workers are employed in construction (6,168) than are employed in that industry in Yellowstone County (5,780),³⁶² although Gallatin County's population is only about 60% of Yellowstone County's. Indeed, the construction industry in Gallatin County is second only to retail trade among private employers, with accommodation and food services ranking third.³⁶³

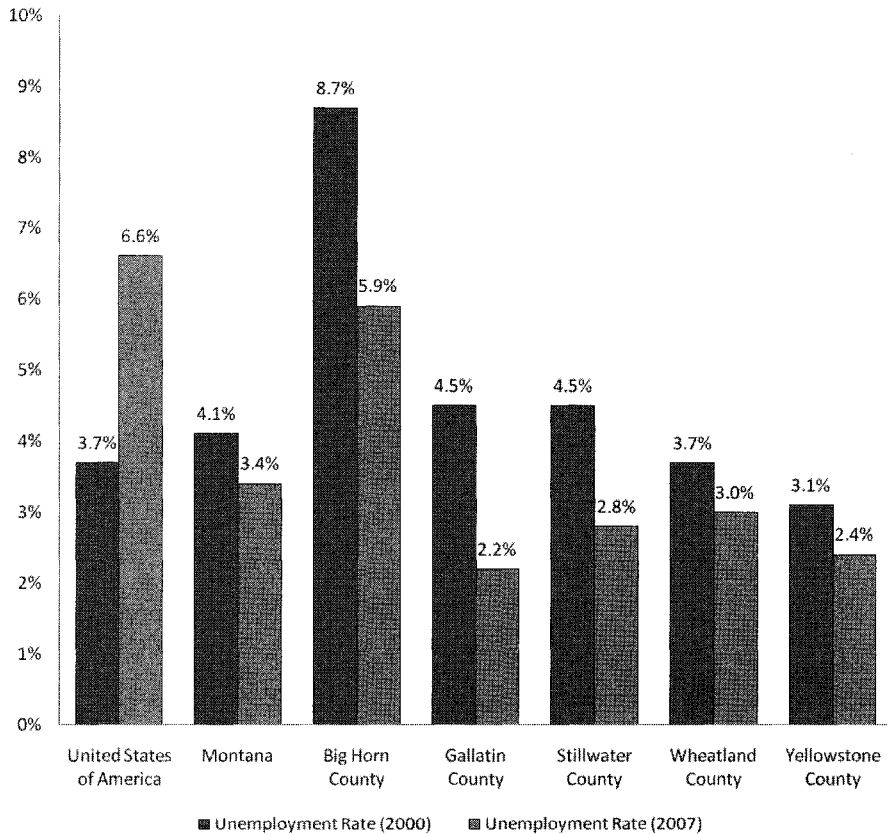
360. *The Yellowstone Club*, <http://www.theyellowstoneclub.com> (accessed Sept. 14, 2009) (advertising the club as "the world's only private ski and golf community"); see also Johnson, *supra* n. 3.

361. Mont. Dept. Com., *Demographic & Economic Information for Gallatin County 2*, http://www.ourfactsfuture.org/admin/uploadedPublications?3370_CF09_Gallatin.pdf (Feb. 2009). The County's largest private employers include Bozeman Deaconess Hospital, Zoot Enterprises, Wal-Mart, RightNow Technologies, and Albertson's. *Id.* at 4.

362. *Demographic & Economic Information for Yellowstone County*, *supra* n. 323, at 6-7 (showing that 5,780 of 68,455, or 8.4% of persons working for private employers, work in the construction industry); *Demographic & Economic Information for Gallatin County*, *supra* n. 358, at 6-7 (showing that 6,168 of 38,547 workers, or 16% of those working for private employers, work in the construction industry).

363. *Id.* at 6-7 (showing that 6,168 of 38,547, or 16% of persons working for private employers work in the construction industry).

FIGURE 10
UNEMPLOYMENT RATE 2000 & 2007



Sources: U.S. Census Bureau, 2000 Census; USDA Economic Research Service

The proliferation of construction jobs in Gallatin County is not surprising given that it was the fastest growing county in the State during the 2000 to 2007 period, with a growth rate of almost 30%.³⁶⁴ The 2000 Census put Gallatin County's population at 67,831,³⁶⁵ of whom 27,509 lived in Bozeman,³⁶⁶ while 2007 estimates from the U.S. Census Bureau report a county population of 80,203.³⁶⁷ These figures cause the County to be designated micropolitan, a type of nonmetropolitan county that falls closest to the met-

364. *Id.* at 2.

365. *American FactFinder*, *supra* n. 6; search "Gallatin County, Montana," refer to 2000 data (accessed Sept. 14, 2009).

366. *Id.* at search "Bozeman, Montana," refer to 2000 data (accessed Sept. 14, 2009).

367. *American FactFinder*, *supra* n. 6, at search "Gallatin County, Montana" and search "Bozeman, Montana," refer to 2005–2007 data (estimating Bozeman's 2007 population at 30,840) (accessed Sept. 14, 2009). These 2007 estimates are available only for more populous locations and therefore are not available for Wheatland, Big Horn, and Stillwater Counties.

ropolitan threshold.³⁶⁸ Gallatin County is at the mid-point (five) on the rural-urban continuum,³⁶⁹ and its population density is 26 per square mile.³⁷⁰

Gallatin County's rapid growth is consistent with rural gentrification and the rural resort phenomenon, and the 1,411 building permits issued in 2007 are further evidence of the County's growth.³⁷¹ The population churn also associated with rural gentrification is evident in statistics showing that almost 30% of the County's residents moved into their current home in 2005 or later.³⁷² An additional one-third moved into their current home between 2000 and 2004.³⁷³ More than half of the County's residents were born in a state other than Montana.³⁷⁴

All indicators for Gallatin County suggest affluence. Its median household income was the third highest in the State in 2007,³⁷⁵ and 41% of County residents hold at least a bachelor's degree, a figure well above both the Montana and national averages.³⁷⁶ Poverty rates for the general population, children, and families with children under the age of five are all below state averages.³⁷⁷ A relatively low percentage of students in Gallatin County schools qualify for Free or Reduced Price lunches.³⁷⁸

Not surprisingly, Gallatin County's property tax base is strong, totaling almost \$181.1 million, or \$2,238 per capita.³⁷⁹ Gallatin County's taxable property is not as diversified as Yellowstone County's, however, with Class

368. See *supra* n. 26 and accompanying text.

369. 2007 County-Level Poverty Rates for Montana, *supra* n. 140.

370. U.S. Census Bureau, *State & County Quick Facts: Gallatin County, Montana*, <http://quickfacts.census.gov/qfd/states/30/30031.html> (accessed Sept. 14, 2009) [hereinafter *Gallatin County Quick Facts*].

371. *Id.* This compares to just 631 building permits in more populous Yellowstone County in the same year. *Yellowstone County Quick Facts*, *supra* n. 326. Recent research indicates that amenity-related growth improves economic well-being. The impact varies depending on the type of development brought to the area such as ski resort, casino, or costal resorts. Cynthia M. Duncan, Priscilla Salant & Chris Colocousis, *Challenges and Opportunities in Rural America: Looking at the Data and Listening to Practitioners, A Report to the Ford Foundation's Asset and Community Development Program* 13, http://www.sbpac.com/bins/site/content/documents/reports%20docs/Challenges%20and%20Opportunities%20in%20Rural%20America.pdf?_resolutionfile=ftppath%7Cdocuments/reports%20docs/Challenges%20and%20Opportunities%20in%20Rural%20America.pdf (March 1, 2006).

372. *American FactFinder*, *supra* n. 6, at search "Gallatin County, Montana," refer to 2005–2007 ACS data, select Housing Characteristics (accessed Apr. 11, 2009).

373. *Id.*

374. *Id.* at refer to 2000 data, select Social Characteristics (52%).

375. *Unemployment and Median Income*, *supra* n. 331.

376. See fig. 9.

377. See figs. 2–3. Only one Gallatin County poverty statistic shows a situation worse than the national average. In 2000, the county's rate for the general population was 12.8%, while the national average was slightly lower, at 12.4%. *Id.*

378. See fig. 5.

379. See figs. 11–12. Two Gallatin County communities, West Yellowstone and Big Sky, levy a resort tax. Weaver & Mathre, *Review*, *supra* n. 48, at 37 n. 32. In West Yellowstone, the 3% sales tax

4 Land and Improvements constituting 84% of all taxable property.³⁸⁰ Of that \$176 million sum, two-thirds is residential.³⁸¹ Gallatin County's total funds appropriated in Fiscal Year 2007 were \$47.2 million,³⁸² while its per capita appropriation that year was \$567.³⁸³ With significant public lands in its territory, Gallatin County received more than \$1.5 million in PILT funding in 2008,³⁸⁴ in addition to more than \$500,000 in Secure Rural Schools funds.³⁸⁵

Given its strong capacity to raise local revenue, Gallatin County is able to provide significant services to its residents. The County partners with the City of Bozeman to provide some health services.³⁸⁶ Among the county-wide services provided are public health nurses who are assigned to particular geographic areas in the County and who liaise with community or school advisory groups or councils.³⁸⁷ The Montana Department of Public Health and Human Services division provides immunization and testing programs, inspects daycare facilities, and administers a variety of federally funded programs such as the WIC nutrition program, a Breast and Cervical Health Program, and various initiatives financed by a federal Maternal and Child Health (MCH) Block Grant.³⁸⁸ The Gallatin County Health Department also operates clinics and programs aimed at preventing child abuse and neglect, including car-seat clinics.³⁸⁹ The total budget for these pro-

on luxury goods and services generates more than a \$1 million annually. Weaver, *Grassroots*, *supra* n. 218, at 164.

380. *See* tbl. 1.

381. *Id.*

382. *See* fig. 17.

383. *See* fig. 18.

384. *See* fig. 16.

385. *Id.*

386. Gallatin County, *Official Gallatin County Website*, <http://www.gallatin.mt.gov/>; *select* County Budget, *select* Public Health, *select* City/County Health (accessed Apr. 27, 2009). A levy of 5.01 mills is earmarked for "City/County Health." *Id.*

387. *Id.* at F-12; *select* County Budget, *select* Public Health, *select* Health Human Services.

388. *Id.* This report notes that the MCH block grant "supports school nursing services . . . home visitation programs that target high-risk pregnant women and children up to the age of 5 years, breastfeeding support, and prenatal and parenting classes." *Id.* It further notes that "[a]nother factor that drives MCH programs . . . is the availability of funding sources. The programs are supported, in whole or in part, by grants and contracts. Without the infusion of these dollars into the budget, the Health department would not be able to provide the present level of services." *Id.* The Gallatin County Public Health office also oversees water quality, alcohol rehabilitation, and cancer prevention initiatives, among others. *Id.*

Gallatin County's receipt of such grants points out another characteristic of places in the midst of rural gentrification: well-educated newcomers typically bring skills, including knowledge of grant programs, that more static rural communities do not enjoy. *See* Lisa R. Pruitt, *Using Oldtimer-Newcomer Synergy to Solve Rural Problems*, *Legal Ruralism Blog*, <http://legalruralism.blogspot.com/2008/09/oldtimer-newcomer-synergy-to-solve.html> (Sep. 10, 2008); Nina Glasgow & David L. Brown, *Grey Gold: Do Older In-Migrants Benefit Rural Communities?*, <http://www.carseyinstitute.unh.edu/publications/PB-Glasgow-Brown-GreyGold.pdf> (Fall 2008).

389. *Official Gallatin County Website*, *supra* n. 386, at F-12–F-13.

grams is \$1.5 million, supported by an earmarked tax levy of 5.01 mills.³⁹⁰ Resources dedicated to mental health initiatives are just over \$200,000 and are supported by a 0.99 mill levy.³⁹¹

3. *Nonmetropolitan Affluence from Natural Resources: Stillwater County*

Stillwater County is a nonmetropolitan county west of metropolitan Carbon and Yellowstone counties, placing it near the Billings metropolitan area.³⁹² Stillwater County's population in 2000 was 8,195,³⁹³ and the population of Columbus, the largest town and county seat, was 1,748.³⁹⁴ The County's small, sparse population (4.6 per square mile),³⁹⁵ and distance from a metropolitan county, along with the small population of Columbus, place it at eight on the rural-urban continuum.³⁹⁶

Stillwater County defies many of the stereotypes associated with rural counties. Unlike many Great Plains counties, Stillwater County is not suffering population loss; its 2008 population estimate shows a modest 7% growth rate since 2000.³⁹⁷ The County's 2007 median household income was the second highest in the State,³⁹⁸ and other metrics also suggest affluence.³⁹⁹ At 9.7%, the County's general poverty rate is one of the lowest in the State.⁴⁰⁰ The child poverty rate is similarly low,⁴⁰¹ as are rates of TANF and SNAP receipt.⁴⁰² The percentage of students countywide who are eligible for Free or Reduced Price lunches is exceptionally low,⁴⁰³ while the high school graduation rate is particularly high.⁴⁰⁴

Stillwater County's relative wealth—particularly for a sparsely populated county—appears to be largely attributable to mineral deposits and the resulting mining and manufacturing enterprises that dominate the local

390. *Id.* at F-3–F-4 (also reporting that the largest portion of the budget, \$6.5 million, goes to the county rest home).

391. *Id.*

392. *Montana Maps*, *supra* n. 327; *select Largest City on Each County* (accessed Mar. 30, 2009).

393. *American FactFinder*, *supra* n. 6; *search "Stillwater County, Montana," refer to 2000 data* (accessed Mar. 30, 2009).

394. *Id.*; *search "Columbus, Montana," refer to 2000 data* (accessed Mar. 30, 2009).

395. U.S. Census Bureau, *State & County Quick Facts: Stillwater County, Montana*, <http://quickfacts.census.gov/qfd/states/30/30095.html> (accessed May 12, 2009).

396. *2007 County-Level Poverty Rates for Montana*, *supra* n. 140.

397. *Stillwater County Quick Facts*, *supra* n. 395 (last visited Jan. 10, 2010) (showing a 7.2% growth rate).

398. Fig. 4.

399. *See* figs. 2–7.

400. Fig. 2.

401. *Id.*

402. Figs. 6–7.

403. Figs. 5.

404. Fig. 9.

economy.⁴⁰⁵ Stillwater Mining Company, a leading producer of platinum group metals, has its headquarters in Columbus and is by far the County's largest private employer, with more than a thousand employees.⁴⁰⁶ Overall, the greatest number of workers in the County are engaged in manufacturing (335), with accommodation and food services running second (272).⁴⁰⁷ Agriculture is also a significant component of the County's economic base, with some 552 farms covering almost 900,000 acres.⁴⁰⁸

The property tax base of Stillwater County, which totals \$ 30.5 million (\$3,523 per capita)⁴⁰⁹ also reflects the economic dominance of mining. More than \$6 million (18%) of the County's total taxable property value is attributable to mining, categorized as Class 2 Gross Proceeds (Metal Mining).⁴¹⁰ The highest portion of the County's property tax base, however, is Class 4 Land and Improvements, at 57%.⁴¹¹ Of the total \$12.1 million in this category, two-thirds is residential, and one-quarter is commercial.⁴¹² Class 9 Utilities and Class 8 Business Equipment are also significant components of the total property tax base,⁴¹³ the latter presumably because the County's mining and manufacturing activities require expensive and specialized equipment. The total funds appropriated in Stillwater County for

405. According to the 2000 Census, more than 27% of the Stillwater County workforce is engaged in agriculture, forestry, fishing and hunting, or mining. *American FactFinder*, *supra* n. 6; search "Stillwater County, Montana," refer to 2000 data, select Economic Characteristics (accessed Mar. 30, 2009). Neighboring Sweet Grass County, with a population of just 3,609, is slightly less affluent than Stillwater County. *American FactFinder*, *supra* n. 6; search "Sweet Grass County, Montana," select 2000 data, refer to Economic Characteristics (accessed Apr. 22, 2009). Less than 10% of the general population and only 11.9% of children were living in poverty in 2007. *County-Level Poverty Rates for Montana*, *supra* n. 140. Nevertheless, 83.3% of families with children under age five led by a female householder, with no husband present, are poor. *American FactFinder*, *supra* n. 6; search "Sweet Grass County, Montana," refer to 2000 data, select Economic Characteristics (accessed Mar. 30, 2009). This indicates that single mothers struggle financially, even in the midst of relative affluence. The mean travel time to work for county residents is 28.5 minutes, which suggests that some may commute to neighboring Yellowstone and Carbon counties.

406. Mont. Dept. of Com., *Demographic & Economic Information for Stillwater County 1, 4*, <http://www.ourfactsyourfuture.org/?PAGEID=67&SUBID=273> (Jan. 2008) [hereinafter *Demographic & Economic Information for Stillwater County*] (citing Mont. Dept. of Lab. and Indus., *Quarterly Census of Employment and Wages Program 2d Quarter 2007*). A related business, Montana Silversmiths, is the county's second largest employer. *Id.* at 4.

407. *Demographic & Economic Information for Stillwater County*, *supra* n. 406, at 6-7.

408. *Id.* at 5.

409. Figs. 11-12.

410. *Id.* *Understanding Montana School Finance and School District Budget*, *supra* n. 300, at 30 (noting that Class 2 is "Gross proceeds of metal mines"). Montana, *Biennial Report*, *supra* n. 225, at 189.

411. Tbl. 1 (showing that the County's Class 4 valuations comprise \$12.2 million of the county's \$21.3 million property tax base, equivalent to 57% of the total county taxable valuation).

412. *Id.*

413. Tbl. 1. These comprise 18.5% and 15%, respectively, of Class 9 (Utilities) and Class 8 (Business Equipment) property.

Fiscal Year 2007 were just \$5.3 million,⁴¹⁴ but that constituted a \$610 per capita appropriation.⁴¹⁵ Relatively little in federal funds associated with public lands flows into Stillwater County.⁴¹⁶

Public information regarding Stillwater County's locally funded health and human services program is scarce, although tax documents indicate that the County levied taxes earmarked for library, group insurance, permissive medical, and mental health.⁴¹⁷ The County occasionally helps to finance a particular program, e.g., an educational program for senior citizens, in collaboration with a non-profit or private agency.⁴¹⁸

As in most counties, the Montana Department of Public Health and Human Services, which houses an office in Stillwater County, provides some services.⁴¹⁹ Further, Stillwater County's public health officer, a registered public health nurse, works out of the Stillwater Community Hospital every second and fourth Tuesday of the month, providing immunization and Well Child clinics.⁴²⁰ This nurse also works closely with the federally-funded WIC nurse in Stillwater County, who provides referral services to local health and nutrition programs. The WIC nurse also provides basic nutrition education to pregnant and breastfeeding women, or those families with children under the age of five.⁴²¹

4. Nonmetropolitan Persistent Poverty in Indian Country: Big Horn County

Big Horn County is a nonmetropolitan, persistent poverty county⁴²² in the southeast part of Montana,⁴²³ where it borders Wyoming.⁴²⁴ Like Stillwater, Big Horn County is contiguous to metropolitan Yellowstone and

414. Fig. 17.

415. Fig. 18.

416. Fig. 16.

417. Mont. Dept. of Admin., Local Govt. Services Bureau, *Montana City/Town/County Final Budget Document: Stillwater County Budget* <http://www.co.stillwater.mt.us/Finance%20&%20Human%20Resources/Benefits/FY09%20Budget%20Report%20Part%201.pdf> (Sept. 16, 2008) [hereinafter *Stillwater County Budget*].

418. Telephone Interview with Joe Morse, Finance & Human Resource Specialist, Stillwater County, Mont. (May 22, 2009). According to the 2009 Stillwater County budget, the County did fund library services with money from the state. *Stillwater County Budget*, *supra* n. 417.

419. E-mail from Nancy Ambrose, County Director, Stillwater County, Mont. (May 22, 2009). Confirmed in Telephone Interview with Joe Morse, Finance & Human Resource Specialist, Stillwater Co., Mont. (May 22, 2009).

420. Telephone Interview with Pam Prideaux-Leak, Registered Nurse, Stillwater Community Hospital (Aug. 5, 2009).

421. Jule Bruursema, *Proper Nutrition Pays Off*, Stillwater County News, <http://www.stillwatercountynews.com/archive/032003.html> (Mar. 20, 2003).

422. *Supra* Part III(A)(4) (defining persistent poverty).

423. *Montana Maps*, *supra* n. 327; *select* Counties (accessed Mar. 30, 2009).

424. *Id.*

Carbon counties, which partly explains its position at six on the rural-urban continuum.⁴²⁵ The County's population is 12,671,⁴²⁶ of whom just over a quarter live in Hardin, the county seat.⁴²⁷ The County's population density is just 2.5 persons per square mile,⁴²⁸ and the majority of the County's land area is Crow or Northern Cheyenne Reservation.⁴²⁹ The 2007 median household income for Big Horn County was just \$33,304, about three-fourths of the state median.⁴³⁰ Coal mining and agriculture are the major pillars of the County's economy.⁴³¹ Like many other nonmetropolitan counties in recent years,⁴³² Big Horn County competed to host a state prison, which was constructed in 2007. As of 2009, however, the prison was largely empty and the County was in default on its construction bonds.⁴³³

All of the indicators for child well-being in Big Horn County are poor.⁴³⁴ Over 30% of children there live in poverty,⁴³⁵ and 74% of students—the highest rate among all Montana counties—receive Free or Reduced Price lunches.⁴³⁶ Big Horn County has by far the highest rate of

425. 2007 County-Level Poverty Rates for Montana, *supra* n. 140.

426. American FactFinder, *supra* n. 6; search "Big Horn County, Montana," refer to 2000 data (accessed Mar. 30, 2009).

427. *Id.*; search "Hardin, Montana," refer to 2000 data (accessed Mar. 30, 2009). Hardin's 2000 population was 3,314.

428. U.S. Census Bureau, *State & County Quick Facts: Big Horn County, Montana*, <http://quickfacts.census.gov/qfd/states/30/30003.html> (accessed Apr. 27, 2009).

429. Mont. Dept. of Com., *Demographic & Economic Information for Big Horn County*, 2 http://www.ourfactyourfuture.org/admin/uploadedPublications/2213_Big_Horn_CF07_web.pdf (Jan. 2008).

430. Fig. 4; *Unemployment and Median Income*, *supra* n. 331.

431. *Demographic & Economic Information for Big Horn County*, *supra* n. 429, at 2. The county's three largest private employers are Decker Coal Company, Kennecott Energy Company Spring Creek Mine, and Westmoreland Resources, Inc. *Id.* at 4 (citing Mont. Dept. of Lab. & Indus., *Quarterly Census of Employment and Wages Program*). Almost 500 residents are employed in mining, and they earn an average of almost \$67,000/year. *Id.* at 6.

432. See *Prison Town USA* (Lock Pictures 2006) (TV Broad.); see also *Legal Ruralism Blog*, <http://legallruralism.blogspot.com>; select prisons label (accessed July 13, 2009); Lobao, *Continuity*, *supra* n. 33, 69 *Rural Sociology* 1, 21–25 (2004) (noting that rural areas are taking on functions discarded by cities, including prisons).

433. See Pat Dawson, *The Montana Town that Wanted to be Gitmo*, *Time* (May 3, 2009) (available at <http://www.time.com/time/nation/Article/0,8599,1894373,00.html>); see also Jeanne Meserve & Carol Cratty, *Hard-luck Montana Town Pushes to House Gitmo Detainees*, *CNN* (May 26, 2009) (available at <http://www.cnn.com/2009/US/05/26/montana.gitmo.west>).

434. See figs. 2–7; see also American FactFinder, *supra* n. 6; search "Big Horn County, Montana," refer to 2000 data, select Economic Characteristics (accessed Mar. 30, 2009). Among families headed by a female, with children under the age of five, 71.8% live in poverty. *Id.*

435. Fig. 2.

436. Fig. 5.

recipients of TANF and SNAP among the five counties considered.⁴³⁷ As depicted in Figure 9, educational data are similarly alarming.⁴³⁸

Given the high level of poverty and the attendant lack of human capital in Big Horn County, it is not surprising that the property tax base is weak, with just about \$20.3 million in total taxable value, or \$1,543 per capita.⁴³⁹ About 15% of that total taxable value is Class 3 Agricultural, and almost 25% is Class 4 Land and Improvements.⁴⁴⁰ The largest single component of the property tax base, however, is Class 9 Utilities, at 29%.⁴⁴¹ Indian reservations and improvements are not subject to state and local tax, which further limits Big Horn County's tax base.⁴⁴² The total funds appropriated in Big Horn County in Fiscal Year 2007 were just \$10.4 million, which represented the second highest amount of funds among the five counties on a per capita basis, at \$971.⁴⁴³ While Big Horn County's total appropriation is twice that of the more affluent Stillwater County,⁴⁴⁴ Big Horn's per capita expenditure is only about 50% greater.⁴⁴⁵ Federal PILT monies—just over \$13,000 in 2008—are largely irrelevant to the Big Horn County budget.⁴⁴⁶ However, the County received more than \$15 million in Federal Mineral Royalties in 2008, more than any other Montana county.⁴⁴⁷ These mineral royalties from public lands help explain the low taxable valuation in the County, where considerable public lands would generate significant tax revenue if they were privately held, as is the case in Stillwater County.

In spite of the low level of locally generated revenue, some of the service-provision strain in Big Horn County is relieved because of the federal government's role in funding services for the American Indian population, including Indian Health Services.⁴⁴⁸ Apart from largely federally

437. Figs. 6, 7.

438. Slightly more than 76% of the county's residents over the age of 25 have a high school diploma or better, and only 14.3% have a Bachelor's degree or better. *American FactFinder*, *supra* n. 6; search "Big Horn County, Montana," refer to 2000 data (accessed Mar. 30, 2009); see also *infra* n. 448 and accompanying text (discussing funding of some Big Horn County schools).

439. Figs. 11, 12.

440. Tbl. 1.

441. *Id.*

442. Mont. Code. Ann. § 2-1-304.

443. Fig. 17, 18.

444. Fig. 17.

445. Fig. 18 (comparing \$971 to \$611).

446. Fig. 16.

447. E-mail from Claire M. Schaeffer, Program Analyst, Mineral Management Service, U.S. Department of Interior, to Yooli Choi, Research Assistant, University of California–Davis, School of Law (July 9, 2009 12:34 p.m. PST) (copy on file with Author). According to Big Horn County's Fiscal Year 2009 budget, Mineral Royalties for that year were lower, at just over \$10 million. *Montana City/Town/County Final Budget Document: Big Horn Budget 55* (approved Sept. 11, 2008) (on file with Author) [hereinafter *Big Horn Budget*].

448. See IHS Fact Sheets, *Indian Health Service Fiscal Year 2008 Budget*, <http://info.ihs.gov/Budget08.asp> (June 2008). Like other locales with significant American Indian populations, Big Horn

funded services that target the American Indian community, Big Horn County provides relatively few services to its residents. Most of the programs it does provide are educational, including pregnancy and childbirth classes, as well as teen health, nutrition, and smoking cessation programs.⁴⁴⁹ Big Horn County provides immunization and other public health services with funding from a federal Maternal and Child Health (MCH) Block Grant.⁴⁵⁰ The County also administers car-seat loans, bicycle safety, and environmental health initiatives.⁴⁵¹ Additionally, the County provides tuberculosis testing.⁴⁵² The sources of funding for these programs are not clear, though the Fiscal Year 2008 total budget for public health exceeded \$206,000.⁴⁵³ Unlike some more populous counties, Big Horn County does not report any levies for programs such as child daycare, health department, and library.⁴⁵⁴ It does, however, have a library budget, which includes funds from the private Gates Foundation and from the State.⁴⁵⁵

5. *Nonmetropolitan Poverty among Whites: Wheatland County*

Wheatland County, in central Montana, had a population of 2,259 at the 2000 Census,⁴⁵⁶ although estimates for 2008 show a drop of 11% since

County is also eligible for a number of federal grant programs. See Wagner, *supra* n. 179 at 571, 574 (listing federal grants available to tribes, as well as those available to rural communities).

449. Telephone Interview with Deb Salvoson, Dept. of Public Health and Human Serv, Big Horn County, Mont. (Apr. 6, 2009).

450. *Big Horn Budget*, *supra* n. 447, at 20 (reporting MCH funds in excess of \$37,000, including one for immunization, one for fetal infant child mortality, and a block grant). According to the Big Horn County budget, the county received an MCH grant in the amount of \$21,845. *Id.* at 33. For additional information on the MCH grants, see Mont. Dept. of Public Health & Human Services, *Maternal and Child Health Needs Assessment*, <http://www.dphhs.mt.gov/PHSD/family-health/pdf/MT-2005-MCH-Needs-Assessment.pdf> (July 2005) (noting that reports are filed only once every five years); U.S. Dept. of Health & Human Services, *Maternal and Child Health Bureau*, <http://mchb.hrsa.gov> (accessed Sept. 14, 2009).

451. Telephone Interview with Deb Salvoson, Dept. of Public Health and Human Servs., Big Horn County, Mont. (Apr. 6, 2009).

452. *Id.*

453. *Big Horn Budget*, *supra* n. 447, at 18. For expenditures for “social and economic services,” the budget shows line items only for veterans’ services, aging services, and extension services. Items such as direct assistance, general assistance, aid-to-dependent children, medical relief, family services and foster care are listed on the budget, but no money is allocated to any of these. *Id.* at 19.

454. *Id.* at 34.

455. *Id.* at 20. The County received \$11,821 from “State: Aid/Libraries;” \$8,857.38 from “Library Federation Grant;” and \$10,212 from “Library Gates Foundation.” *Id.*

456. *American FactFinder*, *supra* n. 6; search “Wheatland County, Montana,” refer to 2000 data (accessed Mar. 30, 2009). In fact, Wheatland County is one of a number of Montana counties with fewer than 3,000 residents. These are Carter (1,321), Daniels (1,774), Fallon (2,717), Garfield (1,244), Golden Valley (1,150), Granite (2,894), Judith Basin (2,192), Liberty (2,055), McCone (1,818), Meagher (1,968), Petroleum (491), Powder River (1,834), Prairie (1,154), Treasure (735), and Wibaux (977). *Local Govt. Profiles*, *supra* n. 226 (listing each county’s 2006 population).

then, to 2,010.⁴⁵⁷ With a much smaller land area than that of Big Horn County, Wheatland County's population density is just 1.6 persons per square mile.⁴⁵⁸ The county seat is tiny Harlowton, where almost half of the County's residents live.⁴⁵⁹ Wheatland County falls into the most rural category of counties, ranking nine on the rural-urban continuum.⁴⁶⁰

With a 2000 poverty rate just over 20%, Wheatland is a high-poverty county.⁴⁶¹ While the child poverty rate indicated by the 2000 U.S. Census was only 16%,⁴⁶² the 2007 Census Bureau estimate puts it at 34.3%.⁴⁶³ Other metrics indicative of child well-being in Wheatland County also signal alarm, as illustrated in Figures 5–7 and 9. Nearly 49% of students receive Free or Reduced Price lunches,⁴⁶⁴ and the County has the lowest rate of high school diploma holders in the State, at just 69%.⁴⁶⁵ Nevertheless, all students in the County's two high schools—a total of 38—graduated in 2005.⁴⁶⁶

Those living in Wheatland County tend to be long-time residents, suggesting very little population churn.⁴⁶⁷ Indeed, as noted above, the County is experiencing population loss.⁴⁶⁸ This is presumably due in part to natural decrease, given the high percentage of the County's population who are elderly.⁴⁶⁹

457. U.S. Census Bureau, *State & County Quick Facts: Wheatland County, Montana*, <http://quickfacts.census.gov/qfd/states/30/30107.html> (accessed Apr. 27, 2009).

458. *Id.*

459. *American FactFinder*, *supra* n. 6; search "Harlowton, Montana," refer to 2000 data (accessed Mar. 30, 2009).

460. *2007 County-Level Poverty Rates for Montana*, *supra* n. 140.

461. *American FactFinder*, *supra* n. 6; search "Wheatland County, Montana," refer to 2000 data (accessed Mar. 30, 2009). The 2007 estimate shows a slight drop in the general poverty rate to 19%. *2007 County-Level Poverty Rates for Montana*, *supra* n. 140.

462. *American FactFinder*, *supra* n. 6; search "Wheatland County, Montana," refer to 2000 data, select Economic Characteristics (accessed Mar. 30, 2009). According to Haynes & Haraldson's *Poverty Report Card*, however, the 2007 poverty rate for those under age 18 was 34.3%. Haynes & Haraldson, *supra* n. 32, at 2.

463. *2007 County-Level Poverty Rates for Montana*, *supra* n. 140. See also *supra* fig. 2.

464. Fig. 5.

465. *American FactFinder*, *supra* n. 6; search "Wheatland County, Montana," refer to 2000 data (accessed May 19, 2009). Further, only 13.5% of those aged 25 or older has a Bachelor's Degree or higher. *Id.*; see also fig. 9.

466. Montana Office of Public Instruction, *Montana High School Completion and Graduation Rates for the Graduating Class of 2005*, <http://www.opi.mt.gov/PDF/Measurement/rptHsCompleteGradRate05.pdf> (Mar. 2006).

467. Fig. 8; see also *American FactFinder*, *supra* n. 6; search "Wheatland County, Montana," refer to 2000 data, select Housing Characteristics (accessed Mar. 30, 2009) (reporting that, in 2000, 69% of residents were living in the same house in which they had been living in 1995).

468. See *supra* n. 457 and accompanying text; see also *Montana Local Government Profiles*, *supra* n. 226 (showing that Wheatland County lost 6.8% of its population between 2002 and 2007).

469. *American FactFinder*, *supra* n. 6; search "Wheatland County, Montana," refer to 2000 data (accessed Mar. 30, 2009). More than 19% of Wheatland County residents are over the age of 65, while the national average is 12.4%. *Id.*

Economic indicators for Wheatland County are bleak. The 2007 median household income was the second lowest in the State.⁴⁷⁰ At only \$28,654, it was just two-thirds of the state median.⁴⁷¹ According to the 2000 Census, 41% of the County's work force are engaged in agriculture, forestry, fishing and hunting, or mining, while a surprising 37% report working in a managerial or professional capacity.⁴⁷² This latter figure may reflect a high rate of sole proprietorships and farmers.⁴⁷³ Unlike most other counties, Wheatland County does not report additional detail about its economic base to the State.⁴⁷⁴

Some clues to the Wheatland County economy may nevertheless be found by considering the types of property that generate most of its revenue. While the total 2008 taxable value for property in Wheatland County was relatively low, at just over \$11.8 million, its per capita figure is high, at \$5,621.⁴⁷⁵ Agricultural land is a significant portion of Wheatland's property tax base. Indeed, Class 3 Agricultural Land and Class 4 Land and Improvements provide roughly equal portions of its total taxable value, at 11.8% and 11.3% respectively.⁴⁷⁶ As with Big Horn County, the largest portion of the County's total taxable value is Class 9 Utilities, which comprises 47%.⁴⁷⁷ While the County's total funds appropriated for Fiscal Year 2007 were only \$2.1 million,⁴⁷⁸ Wheatland County had the highest per capita total funds appropriated among the five counties, at just over \$1,000.⁴⁷⁹ In light of its meager tax revenues, the PILT funds and Secure Rural Schools payments that the County receives—totaling more than \$260,000⁴⁸⁰—constitute a significant part of its overall budget.

470. *Unemployment and Median Income*, *supra* n. 331 (reporting an unemployment rate of just 3.4%). The 2000 per capita income was \$11,954. *American FactFinder*, *supra* n. 6; search "Wheatland County, Montana," refer to 2000 data, select Economic Characteristics (accessed Mar. 30, 2009).

471. Fig. 4.

472. *American FactFinder*, *supra* n. 6; search "Wheatland County, Montana," refer to 2000 data, select Economic Characteristics (accessed Mar. 30, 2009).

473. More than 22% of Wheatland County workers are engaged in self-employment in unincorporated enterprises. *Id.* This is in contrast with Gallatin County, where 11.2% of workers are self-employed in their own unincorporated enterprises. *American FactFinder*, *supra* n. 6; search "Gallatin County, Montana," refer to 2005-2007 ACS data, select Economic Characteristics.

474. See State of Montana, *Research & Analysis Bureau: Montana Department of Labor & Industry*, <http://www.ourfactsyourfuture.org>; select Labor Market Info, select Explore Local Area, select Local Area Profile, scroll down to Wheatland County, select view Local Area Profile (accessed May 25, 2009) (showing no detailed data for Wheatland County).

475. Figs. 11, 12.

476. Fig. 14.

477. *Id.* This suggests that these counties primarily tax enterprises based outside the counties, such as utilities with transmission lines and other equipment within the county.

478. Fig. 17.

479. Fig. 18.

480. Fig. 16.

No detailed information is available regarding Wheatland County's general operating budget. Wheatland County relies primarily on funding from the State of Montana to administer its public health and human services.⁴⁸¹ The State Department of Public Health and Human Services sends a representative to Wheatland County every Monday to provide assistance with public benefit programs such as TANF, Medicaid, and SNAP. She drives approximately 60 miles to reach Harlowton and is also the primary service provider for five other counties, traveling elsewhere on other days.⁴⁸²

Wheatland County is a member of the Central Montana Health District, which is comprised of Wheatland and five other rural counties.⁴⁸³ As a member, Wheatland County has access to a public health nurse the District employs.⁴⁸⁴ Her position is not paid from the Wheatland County budget, however; rather it is funded by a federal Public Health Emergency Preparedness Grant.⁴⁸⁵ As the public health officer for six counties, this public health nurse only comes to Wheatland County for scheduled classes or immunization clinics.⁴⁸⁶ She does not hold regular hours in the county.⁴⁸⁷ For basic medical care, then, residents visit either Wheatland Memorial Hospital in Harlowton, or they can travel 60 miles to Lewiston to see the Fergus County public health nurse who holds regular office hours there.⁴⁸⁸

E. Summary

This five-county comparison reveals a story of uneven development and its consequences in an age of devolution. To some extent, this is a story that is unfolding in amenity-rich rural places around the country, particularly in the inter-mountain West. But it is also one that reflects differences in wealth attributable to natural resources such as oil, gas, and minerals. As in more urban states—that is, states more dominated by cities and

481. Telephone Interview with Gwen Brown, Wheatland County Deputy Clerk & Recorder (May 22, 2009).

482. Email from Gwen Brown, Wheatland County Deputy Clerk & Recorder, to Lisa Pruitt, Law Professor, University of California–Davis, School of Law (May 22, 2009).

483. County Health Profile Data, *Department of Public Health & Human Services Home Page*, <http://www.dphhs.mt.gov/PHSD/health-profiles/health-profiles-pronotes.shtml>; *select* Public Health & Safety Division, *under* Health Resource Assessment (accessed Aug. 20, 2009).

484. Telephone interview with Sue Woods, Public Health Nurse, Central Montana Health District (Aug. 3, 2009).

485. *Id.*

486. *Id.*

487. *Id.*

488. *Id.*

TABLE 1: TAXABLE VALUES, PROPERTY (FY 2008)

County	Big Horn	Gallatin	Stillwater	Wheatland	Yellowstone
CLASS 1 Net Proceeds (Mining)	\$0	\$267,435	\$0	\$0	\$0
CLASS 2 Gross Proceeds (Mining)	\$0	\$0	\$6,028,165	\$0	\$0
CLASS 3 Agriculture Land:					
Tillable Irrigated (3.07, 3.01%)	\$682,184	\$815,777	\$249,228	\$138,062	\$960,152
Tillable Non-Irrigated (3.07, 3.01%)	\$858,659	\$659,805	\$890,526	\$461,130	\$1,125,148
Grazing (3.07, 3.01%)	\$1,898,075	\$609,950	\$798,674	\$714,148	\$992,947
Wild Hay (3.07, 3.01%)	\$213,550	\$158,058	\$222,804	\$127,023	\$38,945
Non-Qualified Ag Land (21.49%, 21.07%)	\$84,998	\$807,048	\$281,325	\$60,292	\$578,589
Eligible Mining Claims (3.07, 3.01%)	\$0	\$0	\$0	\$0	\$0
Class 3 Subtotal	\$3,737,466	\$3,050,638	\$2,442,557	\$1,500,655	\$3,695,781
CLASS 4 Land and Improvements:					
Residential (3.07, 3.01%)	\$1,924,264	\$119,468,877	\$8,040,491	\$694,498	\$111,698,562
Residential Low Income (varies)	\$21,787	\$184,472	\$68,004	\$6,770	\$648,071
Mobile Homes (3.07, 3.01%)	\$218,947	\$1,332,140	\$215,364	\$16,623	\$2,382,328
Mobile Homes Low Income (varies)	\$388	\$12,841	\$3,389	\$1,395	\$43,329
Commercial (3.07, 3.01%)	\$1,633,428	\$54,094,828	\$2,982,464	\$697,087	\$56,445,527
Industrial (3.07, 3.01%)	\$87,357	\$154,758	\$72,470	\$3,966	\$1,017,479
New Manufacturing (varies)	\$2,136,954	\$742,637	\$782,357	\$10,361	\$4,361,404
Qualified Golf Courses (1.54, 1.51%)	\$7,119	\$353,091	\$0	\$0	\$306,252
Remodeled Commercial (varies)	\$0	\$0	\$0	\$0	\$123,327
Extended Prop Tax Relief Program (Res Only)	\$0	\$483,027	\$12,758	\$814	\$100,018
Class 4 Subtotal	\$6,030,244	\$176,826,671	\$12,177,296	\$1,431,514	\$177,126,297
CLASS 5					
Rural Electric and Telephone Co-Op (3%)	\$718,810	\$417,396	\$399,078	\$40,180	\$1,327,269
Qualified New Industrial (3%)	\$0	\$0	\$0	\$0	\$0
Pollution Control (3%)	\$103,774	\$54,479	\$103,563	\$0	\$2,524,464
Gasohol Related (3%)	\$0	\$0	\$0	\$0	\$0
Research and Development (0%-3%)	\$0	\$0	\$0	\$0	\$0
Aluminum Electrolytic Equipment (3%)	\$0	\$0	\$0	\$0	\$0
Class 5 Subtotal	\$822,584	\$471,875	\$502,641	\$40,180	\$3,851,733

TABLE 1 (CONTINUED)

County	Big Horn	Gallatin	Stillwater	Wheatland	Yellowstone
CLASS 7 Non-Centrally Assessed Public Util. (8%, 3%)	\$0	\$0	\$0	\$0	\$0
CLASS 8					
Machinery (3%)	\$4,117,964	\$4,288,134	\$3,998,968	\$55,598	\$27,852,772
Farm Implements (3%)	\$608,877	\$695,228	\$318,193	\$216,773	\$663,833
Furniture and Fixtures (3%)	\$161,915	\$3,139,037	\$94,979	\$25,477	\$5,560,393
Other Business Equipment	\$500,333	\$1,192,099	\$587,783	\$33,992	\$2,403,563
Class 8 Subtotal	\$5,389,089	\$9,314,498	\$4,999,923	\$331,840	\$36,480,561
CLASS 9 Utilities	\$7,218,497	\$14,372,949	\$6,219,371	\$5,981,464	\$27,105,728
CLASS 10 Timber Land (0.35%, 0.35%)	\$54,027	\$264,678	\$44,801	\$9,848	\$22,612
CLASS 12					
Railroads (3.53%, 3.31%)	\$866,209	\$924,476	\$407,310	\$240,436	\$3,119,630
Airlines (3.53%, 3.31%)	\$0	\$1,166,324	\$93	\$0	\$1,985,223
Class 12 Subtotal	\$866,209	\$2,090,800	\$407,403	\$240,436	\$5,104,853
CLASS 13					
Electrical Generation Property (6%)	\$0	\$212,125	\$319,434	\$0	\$3,487,421
Telecommunication Property (6%)	\$352,120	\$3,613,824	\$370,021	\$373,751	\$7,990,485
Elect Gen/Tele Real Prop New & Exp	\$0	\$0	\$0	\$0	\$0
Class 13 Subtotal	\$352,120	\$3,825,949	\$689,455	\$373,751	\$11,477,906
CLASS 14					
Wind Generation (3%)	\$0	\$0	\$0	\$0	\$0
Wind Generation New & Exp (varies)	\$0	\$0	\$0	\$2,734,052	\$0
Class 14 Subtotal	\$0	\$0	\$0	\$2,734,052	\$0
TOTAL	\$24,470,236	\$210,485,493	\$21,334,316	\$12,643,740	\$264,865,471

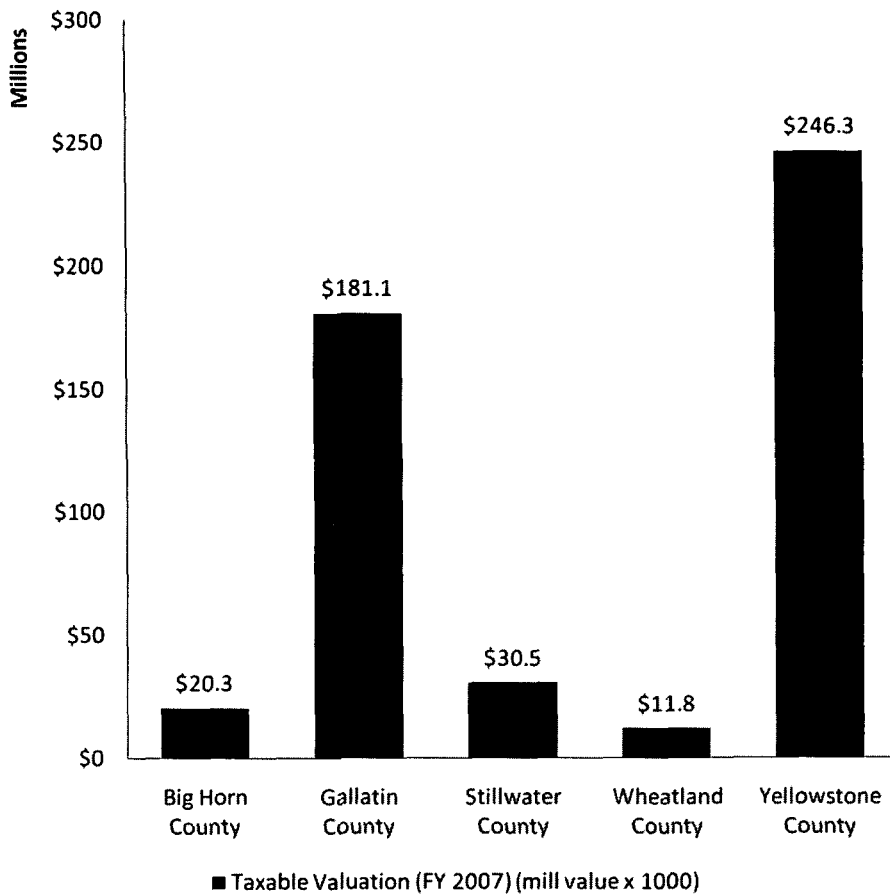
Source: Montana Department of Revenue, Biennial Report, July 1, 2006 to June 30, 2008

where cities are more important players in the provision of services⁴⁸⁹—Montana’s story is a story of “haves” and “have-nots.” In states with more robust urban populations, the story is more likely to be about urban and suburban haves and rural and center-city have-nots. In Montana, however, the story is also very much one of *rural* haves and *rural* have-nots.

Montana counties have grossly disparate abilities to meet the needs of their residents because they are so heavily dependent on local property tax revenue. Counties such as urban Yellowstone and rural gentrified Galla-

489. See Anderson, *supra* n. 48 (assuming the significance of municipalities in the delivery of services).

FIGURE 11
TAXABLE VALUATION (FY 2007) (IN MILLIONS)



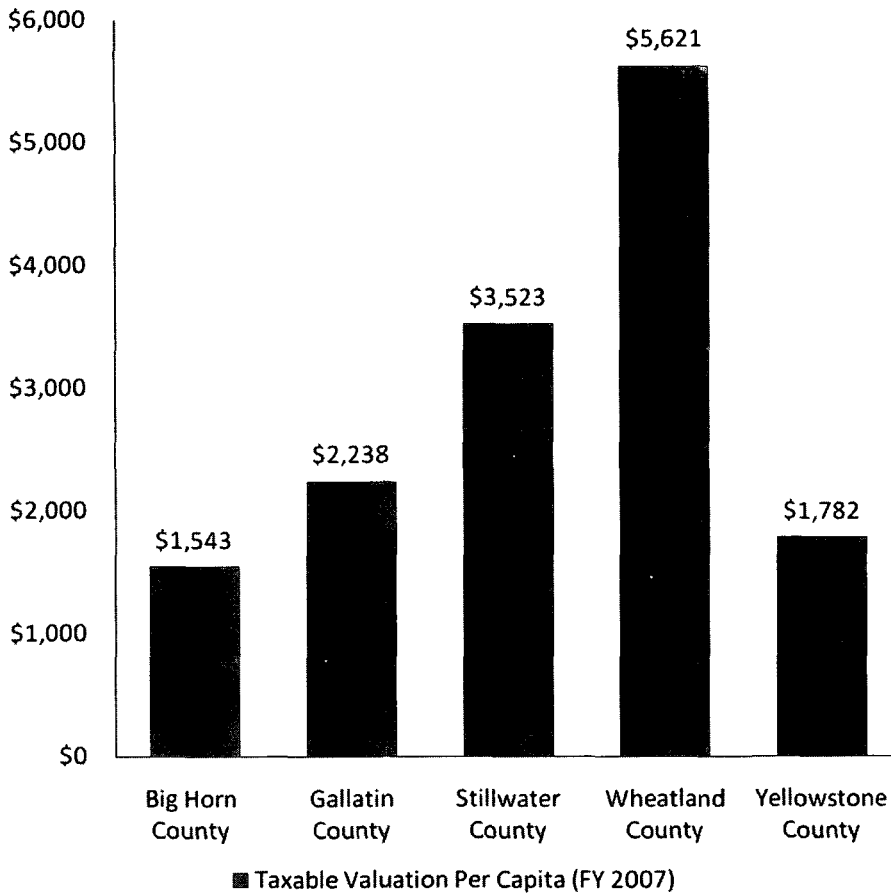
Source: Montana State University, Local Government Wall Chart

tin⁴⁹⁰ have significant and growing property tax bases which endow them with much greater capacities to provide services for their residents. Counties like Stillwater, with an economy based heavily on extraction of natural resources, are similarly affluent and enjoy relatively robust public coffers.⁴⁹¹

490. The same is presumably also true of other rural gentrification counties such as Flathead. Flathead's taxable valuation rose to 34.4% between 2002 and 2007, which suggests hasty development. *Montana Local Govt. Profiles, Fiscal Year 2007*, *supra* n. 226. The County's population grew 18.8% between 2000 and 2008, and 431 building permits were issued in 2007. U.S. Census Bureau, *State & County Quick Facts: Flathead County, Montana*, <http://quickfacts.census.gov/qfd/states/30/30029.html> (accessed May 14, 2009).

491. Fallon County is another example. See *supra* n. 148 and accompanying text.

FIGURE 12
TAXABLE VALUATION PER CAPITA (FY 2007)



Source: Montana State University, Local Government Wall Chart

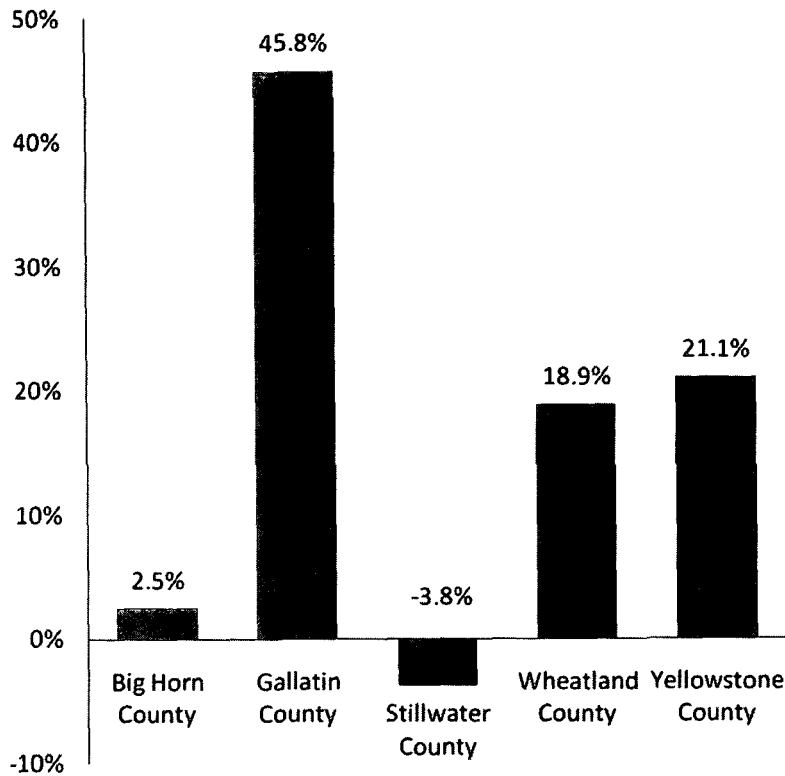
The affluence of rural “haves,” such as Gallatin County and its residents, is particularly striking when compared with impoverished counties like Wheatland and Big Horn. Both of the latter lack development, job growth, services, and amenities. Wheatland County is also losing population, while Big Horn County is confronting the distinct challenges associated with persistent poverty and a majority American Indian population.⁴⁹² While the federal government plays a role in addressing some of these challenges,⁴⁹³ particularly in Indian Country,⁴⁹⁴ the problems endure. Greater

492. See *supra* n. 429 and accompanying text.

493. See *supra* n. 434 and accompanying text.

494. See *supra* n. 448 and accompanying text.

FIGURE 13
CHANGE IN TAXABLE VALUATION (2002-2007)



Percentage change in taxable valuation (2002-2007)

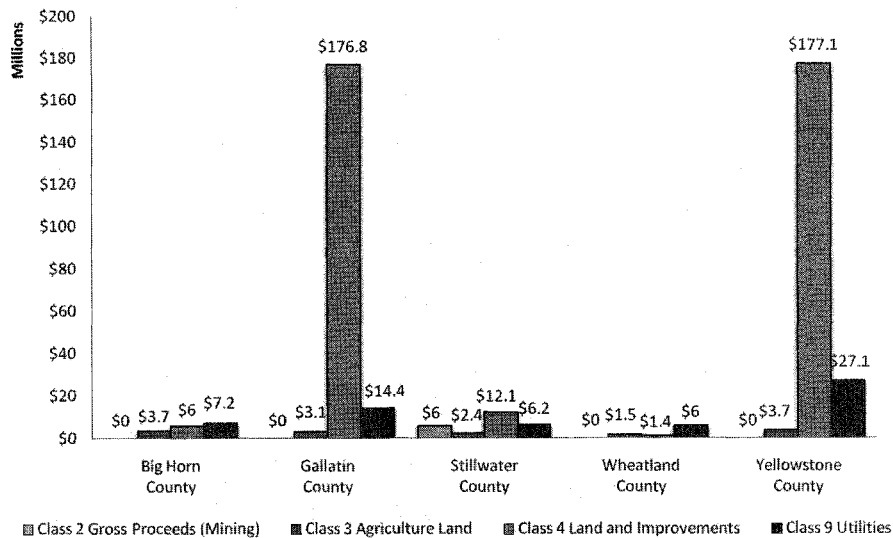
Source: Montana State University, Local Government Wall Chart

centralization of funding by the State would help level the playing field among counties and among all of Montana's children.

Because of the relatively low degree of centralization in the funding of Montana's county governments, Wheatland and Big Horn counties are among those with less ability to deliver necessary services to a population who are in even greater need of them. This lack of services is particularly ironic given that the per capita appropriations in these counties are the highest among the five counties studied, at about \$1,000 each.⁴⁹⁵ This means that Wheatland and Big Horn County residents pay more per person in property taxes, while enjoying fewer services. This is in part because these

495. See fig. 18. The per capita assessed value for Wheatland County is the highest among the counties considered at \$5,621. Fig. 12. The next highest is Stillwater County at \$3,523. *Id.* Oddly, Big Horn County's per capita assessed value is the lowest among the five at \$1,543, but this may be largely a function of its significant public lands which generate considerable revenues from mineral leases.

FIGURE 14
TAXABLE VALUATION BY CLASS OF PROPERTY (IN MILLIONS)



Source: Montana Department of Revenue, Biennial Report, July 1, 2006 to June 30, 2008

counties must compensate for the lack of property wealth by paying a higher tax rate.⁴⁹⁶ It is also due to their inability to achieve economies of scale in the provision of services to their spatially dispersed populations.

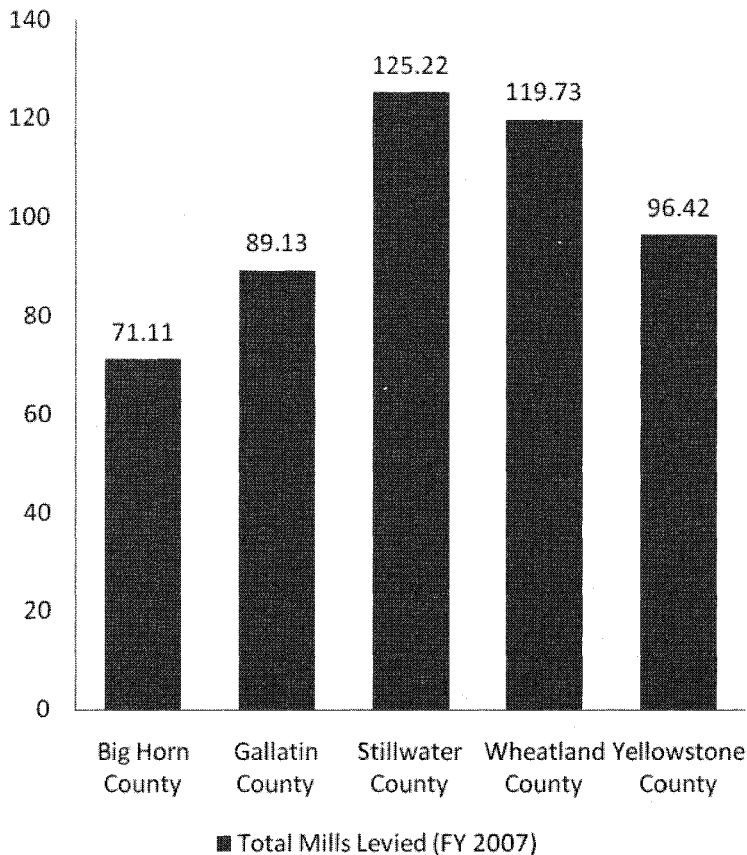
Under the current funding regime, a county's relative lack of private wealth and income generating activity leads to still greater deprivation and poverty. Meanwhile another county's private wealth and economic development—be it in the nonmetro form of rural resorts or of the more typical metropolitan variety—enhances that county's affluence. Stillwater County is, in a sense, the anomaly amidst the five. It is a very rural county (eight on the continuum) with significant private wealth that is largely attributable to natural resources. Yet in spite of its relative affluence, its county government does not deliver significant health and human services to its small and dispersed population. This failure may be, at least in part, a function of lack of political will to do so, but it may also reflect the economy-of-scale problem.

In short, because of the arbitrary nature of county boundaries, which are a remnant of history,⁴⁹⁷ the scheme by which county government is funded results in this uneven service delivery. State action as manifest in this heavy reliance on local funding of services translates uneven develop-

496. See *supra* n. 230 and accompanying text; fig. 15.

497. Weaver & Mathre, *Review, supra* n. 48, at 2 (noting that Montana's 56 counties "can trace their roots back further than the 16 original counties . . . carved out of the Montana Territory in 1889" at statehood).

FIGURE 15
TOTAL MILLS LEVIED (FY 2007)



Source: Montana State University, Local Government Wall Chart

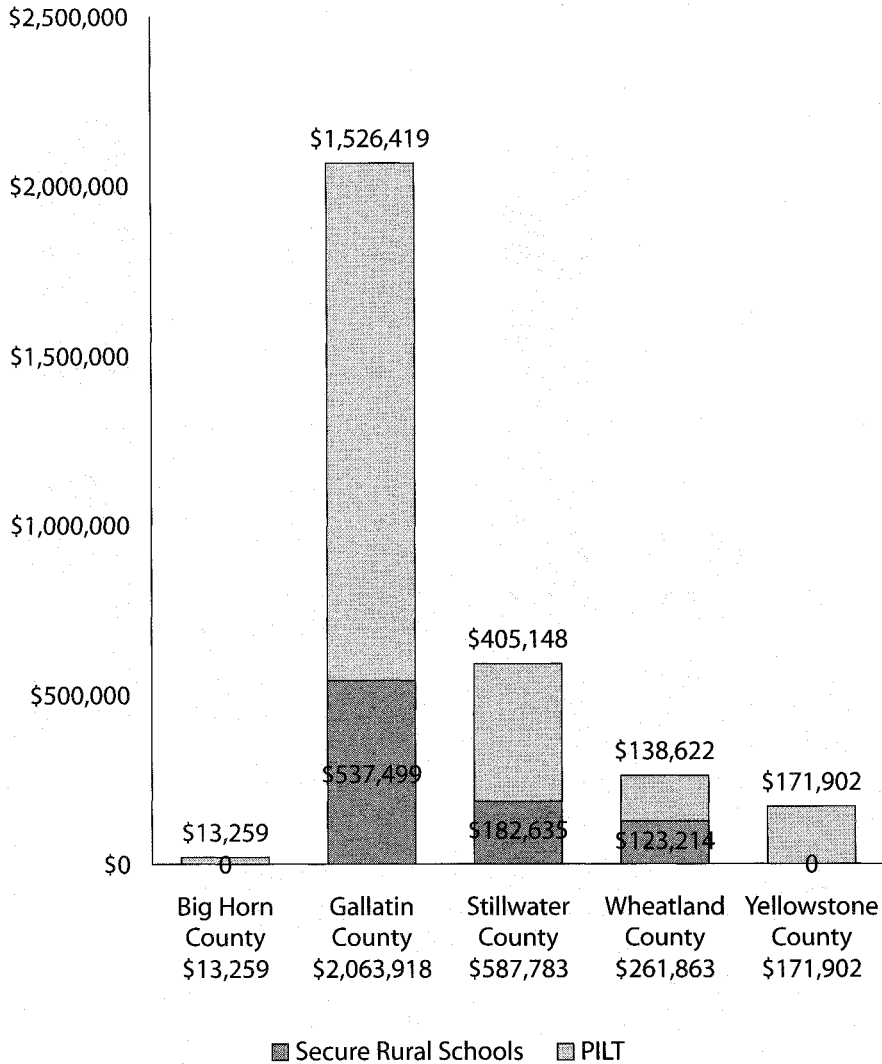
ment into spatial inequality in the delivery of significant government services.⁴⁹⁸ The lack of state centralization in the funding of county government leaves clusters of poor people unserved, or at least grossly underserved, in comparison to their neighbors in more affluent, more developed

498. This is similar to how the California Supreme Court described the school funding scheme—skewed based on local tax revenue—that it struck as unconstitutional in 1971. *Serrano v. Priest*, 5 Cal.3d 584 (Cal. 1971). The court wrote:

We think that discrimination on the basis of district wealth is equally invalid. The commercial and industrial property which augments a district's tax base is distributed unevenly throughout the state. To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of such property is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments. Surely, this is to rely on the most irrelevant of factors as the basis for educational financing.

Id. at 601.

FIGURE 16
FEDERAL PAYMENTS ASSOCIATED WITH PUBLIC LANDS (FY 2008)



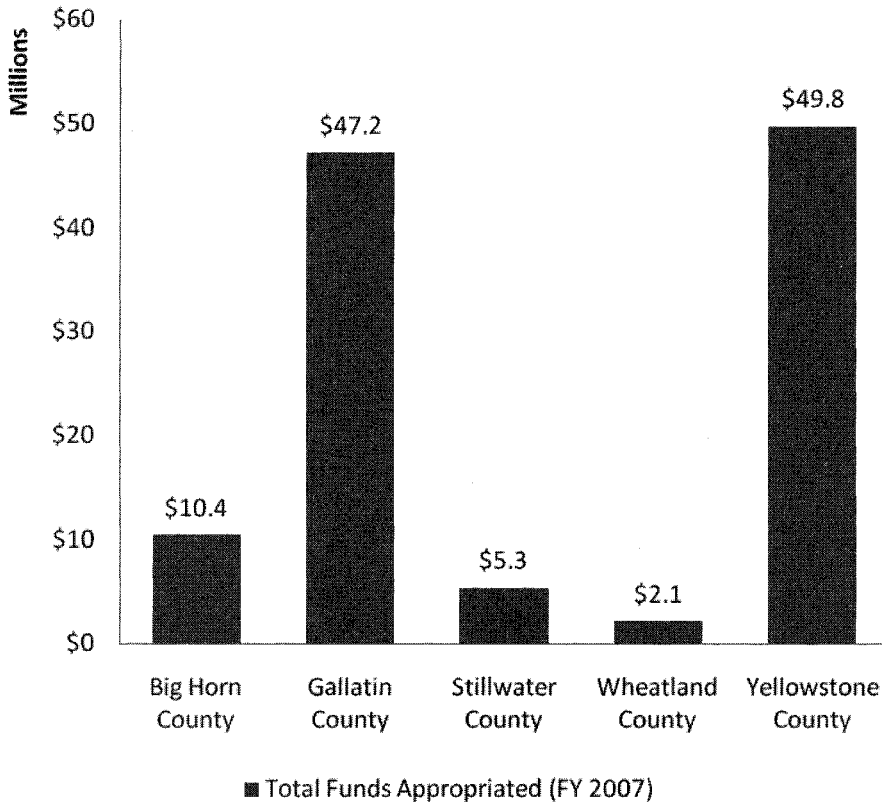
Source: Secure Rural Schools, U.S. Forest Service; PILT, U.S. Department of the Interior

counties. They are also under-served by having to drive longer distances to reach state-run Offices of Public Assistance located in other counties.⁴⁹⁹

Children are among those who are short-changed by government. Many are denied robust health and human services based simply on where they live. In relation to the State of Montana, of which the counties are merely agencies or administrative arms, county boundaries thus delineate

499. See *supra* nn. 197–198 and accompanying text.

FIGURE 17
TOTAL FUNDS APPROPRIATED (FY 2007) (IN MILLIONS)



Source: Montana State University, Local Government Wall Chart

the “where” that determines who gets what. The next part discusses how law might be enlisted to redress these spatial inequalities and create greater opportunity for all of Montana’s children.

V. LEGAL REMEDIES FOR SPATIAL INEQUALITY AMONG CHILDREN

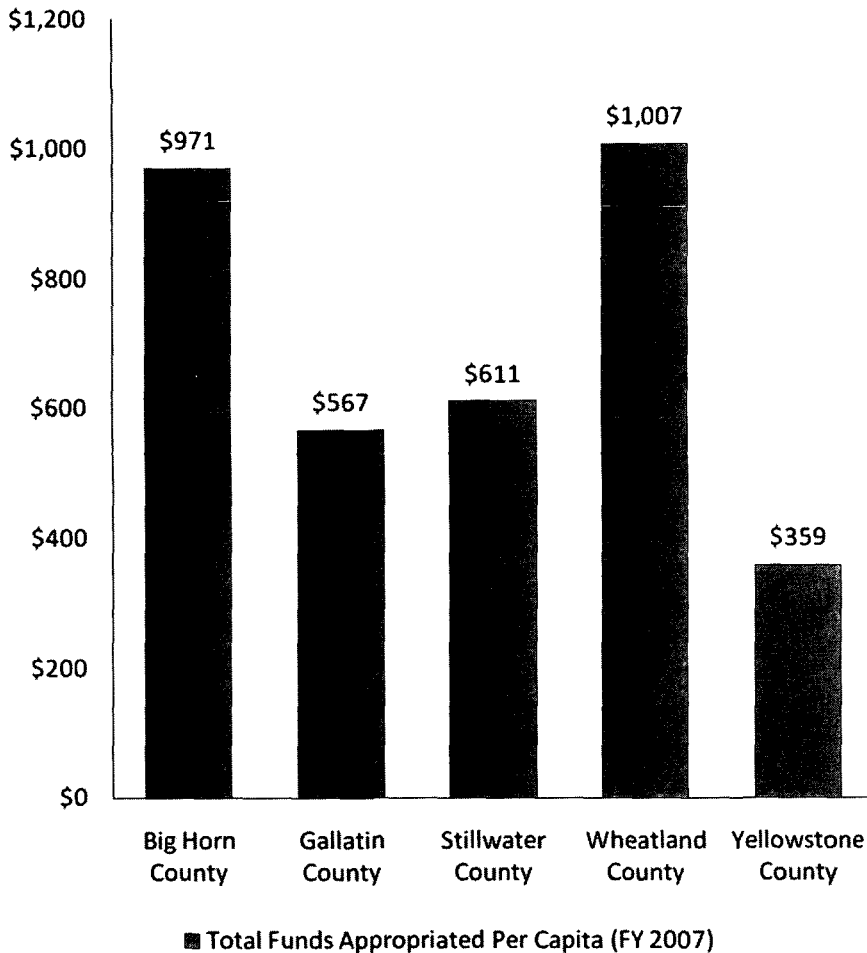
A. *The Promise of the 1972 Montana Constitution for the State’s Children*

As noted in the introduction to this article, Montana’s 1972 Constitution is a very progressive one,⁵⁰⁰ and many scholars have already considered the innovative ways in which it might be interpreted and the good uses to which it might be put.⁵⁰¹ I will now turn to an analysis of how the

500. See *supra* nn. 16–22 and accompanying text.

501. See *supra* nn. 20–22 and accompanying text.

FIGURE 18
PER CAPITA APPROPRIATION (FY 2007)



Source: Montana State University, Local Government Wall Chart

Montana Constitution might be used to level the playing field for Montana's children,⁵⁰² thereby mitigating the sometimes gross inequalities that currently exist across counties in terms of government service provision.

502. The Montana Constitution addresses the rights of children in Article II, § 15 titled "Rights of Persons Not Adults." This section provides that the rights of those under the age of 18 "shall include, but not be limited to, the fundamental rights of this Article unless specifically precluded by laws," which provide minors even greater protection. Mont. Const. art II, § 15. Article II is called the Declaration of Rights, and it incorporates the substance of the U.S. Bill of Rights including the first nine, with the exception of the third amendment. Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide* 57 (Greenwood Press 2001). The only two cases to interpret § 15, however, relate to trying juveniles as adults. *Id.* at 57–58.

While the Montana Constitution does not unequivocally provide a basis for finding the State must provide a minimal level of services to children, it nevertheless makes greater commitments to children than does the U.S. Constitution.⁵⁰³ Further, the State's equal protection guarantee provides a sound basis for evening out provision of services from county-to-county. Finally, the Dignity Clause of the Montana Constitution provides a rare opportunity to consider what a right to "dignity" means, particularly in relation to children and in light of the doctrine of *parens patriae*.

It is entirely possible that the inequalities I describe run afoul not only of the Montana Constitution, but also of the U.S. Constitution. Yet there are political and practical reasons for addressing these inequalities as a matter of Montana constitutional law rather than as a violation of the U.S. Constitution. State courts are necessarily more agile and responsive to changing circumstances—including changing economic conditions—than are the federal judiciary and the U.S. Constitution. Over the course of well more than two centuries, the U.S. Constitution has been amended only 27 times, including the ten amendments reflected in the Bill of Rights.⁵⁰⁴ In contrast, Montana's Constitution has proved to be a living document. Adopted in 1972, this Constitution has since been amended 44 times in less than four decades.⁵⁰⁵ Indeed, under the very terms of the Montana Constitution, the need for its revision is considered every 20 years.⁵⁰⁶

One of the 44 amendments to the Montana Constitution came in the wake of the Montana Supreme Court's decisions in *Butte Community Union I* and *II*,⁵⁰⁷ which held that the State could not discriminate against adults under the age of 50 in the provision of welfare benefits.⁵⁰⁸ Those decisions were followed by an amendment to the Montana Constitution that made the provision of public benefits discretionary.⁵⁰⁹ That sequence of events, discussed further below in relation to socioeconomic rights, reflects just the sort of give and take that makes state jurisprudence and judicial fora more

503. See Daan Braveman, *Children, Poverty and State Constitutions*, 38 Emory L.J. 577, 594 (1989) (arguing that this is generally characteristic of state constitutions). The Montana Constitution explicitly references maintenance and improvement of a "clean and healthful environment . . . for present and future generations." Mont. Const. art. IX, § 1, cl. 1. The Montana Supreme Court has construed this right in relation to art. II, § 3, which provides the inalienable right to "a clean and healthful environment." *Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality & Seven-Up Pete Joint Venture*, 988 P.2d 1236, 1246 (Mont. 1999) (calling the two provisions so interdependent that they must be considered together and applied in tandem).

504. The United States Constitution has been amended 27 times.

505. The current version of the Montana State Constitution, dated November 2, 2004, lists 41 constitutional amendments, as well as three amendments by ballot initiative.

506. Mont. Const. art. XIV, § 3.

507. See William C. Rava, *State Constitutional Protections for the Poor*, 71 Temp. L. Rev. 543, 566 (1998) (discussing Mont. Const. art. XII, § 3(3) (1988)).

508. See *infra* n. 523 and accompanying text.

509. Rava, *supra* n. 507, at 566.

appropriate for confronting issues such as the one I raise, which has significant cost implications for the State.

Other scholars advance related arguments. Professor Mary Helen McNeal suggests the “trend to interpret state constitutions more broadly” than their federal counterparts, the so-called “new judicial federalism,”⁵¹⁰ is a logical complement to devolution, which not only makes states more responsible to their citizenry, but also confers upon them greater powers.⁵¹¹ Helen Hershkoff offers reasons why state constitutions are better suited to address socioeconomic rights.⁵¹² She points out the opportunity state courts have to “work collaboratively with the other branches of government to elaborate social and economic rights.”⁵¹³ Hershkoff observes that judicial review of state constitutional rights “creates important incentives for state public officials to face up to constitutional goals.”⁵¹⁴ While Hershkoff advances these arguments with respect to the New York Constitution’s welfare provision in particular, they apply also to the appropriateness of the Montana judiciary looking after the needs of constituents with diminished political access. She writes: “Judicial review leverages the political strength of groups that lack strong alliances or electoral power, moving their concerns onto a legislative agenda and creating political resources for future use.”⁵¹⁵ Thus, politically powerless citizens, such as poor children in Montana, gain “opportunities . . . to participate in political life.”⁵¹⁶

1. *Equal Protection Law and Socioeconomic Rights*

Some provisions of the Montana Constitution mirror those of its federal counterpart. Article II, § 4 of the Montana Constitution, for example, provides that “[n]o person shall be denied equal protection of the laws.”⁵¹⁷ It specifically forbids the State, along with private actors, from discriminating “against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”⁵¹⁸ The Montana Supreme Court has held that Article II,

510. Mary Helen McNeal, *Toward a “Civil Gideon” Under the Montana Constitution: Parental Rights as the Starting Point*, 66 Mont. L. Rev. 81, 84 (2005).

511. *Id.*

512. Hershkoff, *supra* n. 44.

513. *Id.*

514. *Id.* This is reflected in what has been called the remedy of “engagement,” which has been applied in socio-economic rights contexts and structural reform litigation. See Brian Ray, *Extending the Shadow of Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases*, 2009 Utah L. Rev. 797.

515. Hershkoff, *supra* n. 44, at 1432.

516. *Id.*

517. Mont. Const. art II, § 4.

518. *Id.*

§ 4 “provides for even more individual protection” than the U.S. Constitution’s Equal Protection Clause,⁵¹⁹ and the Court similarly declared in other contexts that it is not “constrained by interpretations of the Federal Constitution.”⁵²⁰

Other provisions of the Montana Constitution go beyond the U.S. Constitution. While the U.S. Constitution “addresses economic inequality weakly and indirectly,”⁵²¹ the 1972 Montana Constitution initially featured a very strong provision in Article XII, § 3(3), regarding socioeconomic rights: “The legislature *shall* provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for aid of society.”⁵²² The germinal Montana case on socioeconomic rights, *Butte Community Union v. Lewis (Butte Community Union I)*,⁵²³ considered not only this so-called welfare provision, but also the State Constitution’s Equal Protection Clause in relation to it.

In determining who could receive welfare benefits, the *Butte Community Union I* Court prohibited the State from distinguishing between those over the age of 50 and those under the age of 50.⁵²⁴ The Montana Supreme Court held that, while welfare benefits were not a fundamental right,⁵²⁵ they were important enough to be subjected to a heightened scrutiny analysis because “welfare” was at least mentioned in the Montana Constitution.⁵²⁶ The Court thus applied a new “middle tier” test, which involved two

519. *Cottrill v. Cottrill Sodding Serv.*, 744 P.2d 895, 897 (Mont. 1987).

520. See McNeal, *supra* n. 510, at 83 n. 9 (citing *Armstrong v. Mont.*, 989 P.2d 364 (Mont. 1999); *Dorwart v. Caraway* 58 P.3d 128 (Mont. 2002)); see also *Elison & Snyder*, *supra* n. 502 (observing that the state Supreme Court has “modified and to some extent enlarged traditional federal concepts of equal protection”); Hershkoff, *supra* n. 44, at 1405–1406 (noting that differences among state constitutions “reflect the preferences of specific communities” which differ from each other and the U.S. Constitution in their “approaches to social and economic issues”) (citations omitted).

521. Laura T. Kessler, *Getting Class*, 56 Buff. L. Rev. 915, 915 (2008).

522. Mont. Const. art. XII, § 3(3) (1972) (superseded 1988 by Mont. Const. amend. 18) (emphasis added).

523. *Butte Community Union v. Lewis*, 712 P.2d 1309 (Mont. 1986) [hereinafter *Butte Community I*] (superseded by Mont. Const. amend. 18).

524. *Id.*

525. *Id.* at 1311. The Court held that then-Article XII, § 3(3) did not provide a fundamental right to general assistance because it was not listed in Montana’s Declaration of Rights and was “not a right upon which constitutionally guaranteed rights depend.” *Id.* at 1312. See also Robert Doughten, *Filling Everyone’s Bowl: A Call to Affirm a Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions to Satisfy International Standards of Human Decency*, 39 Gonz. L. Rev. 421, 444–445 (2004) (discussing *Butte Community I*).

526. *Butte Community Union I*, 712 P.2d at 1313–1314. Burt Neuborne has argued generally for such an outcome in cases like *Butte Community Union I*. He writes: “Where . . . the constitutional text demonstrates an intense substantive interest in the plight of the poor, a judge’s willingness to use the state’s Equal Protection and Due Process Clauses to reinforce the substantive concerns already present in the constitution’s text should be much greater.” Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 Rutgers L. Rev. 881, 895 (1989) (citations omitted).

parts.⁵²⁷ The first was whether the classification was reasonable, and the second was whether the State's interest in the classification outweighed the interests of the people in getting the benefits.⁵²⁸ The Court held that the State had not established that those younger than 50 were more capable of surviving without welfare than those over age 50; the classification was therefore unreasonable.⁵²⁹ In balancing the State's interest in saving money against the interests of those needing the welfare benefit, the Court found the interests of those in need to be greater.⁵³⁰

Six months after the *Butte Community Union I* decision, the Montana Legislature adopted another welfare law, which stated that able-bodied persons without dependent minor children were only eligible for two months of nonmedical general relief assistance within a 12-month period. In 1987, the Montana Supreme Court sustained the district court decision in *Butte Community Union v. Lewis (Butte Community Union II)*,⁵³¹ which held the new statute unconstitutional under the middle-tier test.⁵³² The district court had held that deeming able-bodied persons without dependent minor children as having no need for general relief assistance was "arbitrary and unreasonable"⁵³³ under the first prong of the middle-tier test. It was therefore unnecessary to apply the second prong. In affirming the trial court's decision, the Montana Supreme Court held that the State Legislature could not reduce its spending "by the expedient of eliminating classes of eligible individuals from public assistance without regard to their constitutionally grounded right to society's aid when needed, through misfortune, for the basic necessities of life."⁵³⁴

In the wake of both *Butte Community Union* decisions, Montana voters amended their Constitution to make the provision of public benefits discretionary.⁵³⁵ Article XII, § 3(3) now provides: "The legislature *may* provide such economic assistance and social and rehabilitative services for those who, by reason of age, infirmities, or misfortune, are determined by the legislature to be in need."⁵³⁶ While the provision of benefits is no longer required, Article XII, § 3(3) nevertheless continues expressly to recognize

527. *Butte Community Union I*, 712 P.2d at 1313–1314.

528. *Id.* at 1314.

529. *Id.*

530. *Id.*

531. *Butte Community Union v. Lewis*, 745 P.2d 1128 (1987) [hereinafter *Butte Community II*].

532. *Id.* at 214.

533. *Butte Community Union I*, 712 P.2d at 1132.

534. *Id.* at 1133.

535. Rava, *supra* n. 507, at 565–566 (discussing the two *Butte Community* decisions and legislative and other responses to them).

536. Mont. Const. art. XII, § 3(3) (emphasis added). The Montana Supreme Court held in *Zempel v. Uninsured Employers' Fund* that the 1998 amendment overruled *Butte Community Union I*. 938 P.2d 658, 661–662 (1998).

age as a relevant, though not mandatory, basis for providing economic assistance and social services.⁵³⁷

As illustrated by this public benefits litigation, the principal purpose of Montana's Equal Protection Clause is to avoid subjecting persons to arbitrary and discriminatory governmental action.⁵³⁸ Yet the county government funding scheme does precisely that. It subjects all Montana citizens to disparities in access to services based on the arbitrary happenstance of where county boundaries were drawn as much—or more—than a century ago.⁵³⁹ This disparate impact on the basis of geography or place arguably falls within one of the Constitution's explicitly forbidden bases for discrimination: "social origin or condition."⁵⁴⁰

Furthermore, it is not practical to say that citizens can shop for better services by moving to another county. The immobility of the poor is well-documented,⁵⁴¹ and that of children is self-evident. I have presented here great detail of Montana's county funding scheme and its consequences. More could be gathered in order to establish an equal protection violation under the Montana Constitution. Indeed, this is presumably true regarding all services provided at the county level,⁵⁴² although my focus here is on health and human services.

Indeed, a 1989 school funding case that focused on equality in the provision of public education illustrates the Montana Supreme Court's openness to arguments based on spatial inequality. In *Helena Elementary School District No. 1 v. Montana*, the Court held that the Equality Clause of the Constitution's Article X, § 1 regarding education, was violated by the State's failure to provide sufficient funding for elementary and secondary

537. For an innovative argument that governments must distribute services equitably based on constitutional equality guarantees, even in the absence of constitutional recognition of socioeconomic rights, see Denise Meyerson, *Equality Guarantees and Distributive Inequity*, 19 Public L. Rev. 32 (2008).

538. *McKamey v. Mont.*, 885 P.2d 515, 521 (1994), *overruled on other grounds*, *Trustees of Ind. U. v. Buxbaum*, 69 P.3d 663 (Mont. 2003).

539. See *supra* n. 497 (citing Weaver & Mathre on historical point).

540. Mont. Const. art. II, § 4.

541. See Lichter & Parisi, *supra* n. 36, at 63–65. A U.S. Census Bureau report in the midst of the 2008–2009 recession illustrates the correlation between fiscal uncertainty and mobility. It showed that the "number of people who changed residences declined to 35.2 million from March 2007 to March 2008, the lowest number since 1962, when the nation had 120 million fewer people." See Sam Roberts, *Slump Creates Lack of Mobility for Americans*, N.Y. Times (Apr. 23 2009) (available at <http://www.nytimes.com/2009/04/23/us/23census.html>); see also fig. 8 (showing greater residential stability in impoverished Big Horn and Wheatland Counties).

542. In 2006, Montana overhauled its public defender system by financing it at the state level rather than at the county level. Barbara Mantel, *Do Indigent Defendants Get Adequate Legal Representation?*, 18 CQ Researcher 337, 340 map, 347 (Apr. 18, 2008); The Constitution Project, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* Part II.B. (Apr. 18, 2009) (available at <http://tcpjusticedenied.org/>). Montana made this change after the ACLU sued, asserting the unconstitutionality of the prior county-funding scheme. See Mont. Code Ann. §§ 47–1–102 to 47–1–110.

public schools.⁵⁴³ Section 1(1) mandates “[e]quality of educational opportunity . . . for each person in the state” and § 1(3) further dictates that the Legislature “shall fund and distribute in an equitable manner to the school districts the State’s share of the cost of the basic elementary and secondary school system.”⁵⁴⁴ Because of inadequate state funding, the Court found that the State was “forcing an excessive reliance on permissive and voted levies.”⁵⁴⁵ Noting that taxable valuation of property varied enormously from district to district and contributed to per-pupil spending disparities among schools as great as eight to one,⁵⁴⁶ the Court explicitly affirmed the district court’s holding that “the spending disparities among the State’s school districts translate into a denial of equality of educational opportunity.”⁵⁴⁷ While the trial court had also found that the system violated the State’s Equal Protection Clause, the Montana Supreme Court did not find it necessary to consider that issue because of its holding based on the Education Clause.⁵⁴⁸ Nevertheless, the State’s high court in *Helena Elementary* proved itself responsive to spatial inequalities in government services that were created by heavy reliance on local property tax.

Assuming for a moment that an argument based solely on equal protection would not prevail, the following part explores other provisions of the Montana Constitution that might—independently or in the aggregate—be the basis for a remedy that would ensure more generous benefits and services, including life’s basic necessities, for all of Montana’s children.

2. *The Individual Dignity Clause*

Montana’s Constitution is the only state constitution in the nation that features a dignity clause.⁵⁴⁹ Article II, § 4 provides:

INDIVIDUAL DIGNITY. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.⁵⁵⁰

This section juxtaposes the concepts of individual dignity and equal protection, placing both under the former heading. Professors Larry Elison and Fritz Snyder observe that Article II, § 4 is “unique to the extent it recog-

543. *Helena Elementary School District No. 1 v. Montana*, 769 P.2d 684, 690 (1989).

544. Mont. Const. art. X, § 1.

545. *Helena Elementary*, 769 P.2d at 690.

546. *Id.* at 686.

547. *Id.* at 690.

548. *Id.* at 691.

549. Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Mont. L. Rev. 15, 21 (2004).

550. Mont. Const. art. II, § 4.

nizes human dignity as a dimension of, or corollary to, the concept of equal protection of the law.”⁵⁵¹

Although the Clause and its placement in relation to equal protection are unique, the Dignity Clause has not—standing alone—been subject to much judicial analysis. Elison and Snyder note that the Clause “has not been interpreted to mean anything in particular.”⁵⁵² Scholars nevertheless discuss possible uses and interpretations of the Dignity Clause, as well as the history of its inclusion in the 1972 Montana Constitution.⁵⁵³ Most conclude that the individual dignity right has been primarily used to complement other rights, most notably equal protection.⁵⁵⁴ Yet the court in *Butte Community Union I*, for example, did not mention the Dignity Clause or use the word “dignity” in that germinal equal protection case.⁵⁵⁵

Professors Matthew Clifford and Thomas Huff speculate on alternative possible synergies between the Dignity Clause and other constitutional provisions.⁵⁵⁶ They assert that “the dignity right might supplement” other rights in the Declaration of Rights “by assuring . . . that the core humanity of persons is protected” and by “complementing and elaborating . . . other enumerated rights.”⁵⁵⁷ They also call attention, however, to the “venerable” canon of constitutional interpretation that each clause should be read as “both substantively meaningful and not redundant.”⁵⁵⁸ Clifford and Huff thus assert the possibility that the Dignity Clause may be violated absent “some sort of arbitrary classification.”⁵⁵⁹

Consistent with Clifford and Huff’s assertion, Professor Heinz Klug suggests that the dignity provision might be the basis for “claims to a limited core of socio-economic rights.”⁵⁶⁰ He observes, for example, the “in-

551. Elison & Snyder, *supra* n. 502, at 35.

552. *Id.* at 34; *see also* Fritz Snyder, *The Fundamental Human Rights Compared in Two Progressive Constitutions: Japan and Montana*, 14 *Intl. Leg. Persps.* 30, 47 (2004).

553. *See* Jackson, *supra* n. 549, at 19–20; Klug, *supra* n. 21, at 155; Clifford & Huff, *supra* n. 21, at 303.

554. McNeal, *supra* n. 510, at 101–106 (citing Clifford & Huff, *supra* n. 21); *see also* Jackson, *supra* n. 549, at 28–32.

555. *Butte Community Union I*, 712 P.2d 1309. This seems especially unusual in light of the dignity interests implicated by the need for public benefits. *See supra* n. 525 and accompanying text.

556. Clifford & Huff, *supra* n. 21, at 336.

557. *Id.* at 336.

558. *Id.* at 305. Clifford & Huff note that this position is strengthened by the title of Mont. Const. art. II, § 4: “Individual dignity.” *Id.*

559. *Id.* at 306–307 (arguing that presumably anyone, not just members of protected classes, can experience a violation of dignity) (citations omitted); *see also* Wendy A. Fitzgerald, *Toward Dignity in the Workplace: Miller-Wohl and Beyond*, 49 *Mont. L. Rev.* 147, 147 (1988) (arguing that the “sweeping ‘dignity clause’” should be the starting point for sex discrimination litigation). For a wider-ranging discussion of the possible meanings of dignity, *see* Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *Yale L.J.* 1694, 1736–1745 (2008) (discussing various constructions of dignity in recent U.S. Supreme Court abortion cases).

560. Klug, *supra* n. 21, at 134, 154.

trinsic link between economic security and human dignity.”⁵⁶¹ This is consistent with international conceptions of human dignity,⁵⁶² which also include “positive concepts of human rights to minimally adequate necessities of life.”⁵⁶³ Certainly, it is difficult to envisage a life lived in hunger, or without other basic necessities, that reflects or embodies human dignity.⁵⁶⁴

Another provision of the Montana Constitution supports a link between dignity and economic justice. Article II, § 3 of the Montana Constitution provides:

INALIENABLE RIGHTS. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.⁵⁶⁵

This language does not guarantee the achievement of “safety, health, and happiness;” it provides only the right to “*pursu[e]* life’s basic necessities.”⁵⁶⁶ Elison and Snyder observe that the “gist” of these Article II, § 3 rights “is in the nature of individual autonomy.”⁵⁶⁷ Indeed, this language suggests the very sort of autonomy-related idea that is often associated with dignity;⁵⁶⁸ it arguably reiterates the dignity right. Scholarly interpretations of the Dignity Clause by Klug, Clifford, and Huff (particularly when considered alongside this complementary language from Article II, § 3) support an argument that the system by which Montana finances public services is a violation of the individual dignity of those who are consequently underserved.⁵⁶⁹

561. *Id.* at 141.

562. See Jackson, *supra* n. 549, at 15.

563. *Id.* at 27 (discussing the Universal Declaration of Human Rights, arts. 22–26, GA Res. 217(A) (III), UN GAOR, 3d Sess., Supp. No. 127, at 71, UN Doc. A/810 (1948)).

564. See also Hershkoff, *supra* n. 44, at 1431 (arguing, in relation to the New York Constitution’s welfare provision, that “economic stability [is] a precondition of political life, of social inclusion, and of personal dignity.”).

565. Mont. Const. art. II, § 3.

566. *Id.* (emphasis added).

567. Elison & Snyder, *supra* n. 502, at 31.

568. See Siegel, *supra* n. 559.

569. In the Constitution of the Republic of South Africa, for example, the dignity right is repeatedly linked to freedom and equality. Section One of the South African Constitution provides that South Africa “is one sovereign, democratic state founded on the following values: a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.” S. Afr. Const. ch. 1, § 1.a. The South African Bill of Rights of the Constitution also refers to these values in § 9 (Equality), § 10 (Human Dignity), and § 12 (Freedom and Security of the Person).

These three principles are often invoked in decisions adjudicating rights. See e.g. *Govt. of the Republic of S. Afr. v. Grootboom*, 2000 (11) BCLR 1268 (CC) at 24 (noting that the case “brings home the harsh reality that the Constitution’s promise of dignity and equality for all remains for many a distant dream.”).

a. *What Dignity Means for Children*

While the dignity-as-autonomy interpretation is mainstream and uncontroversial, it does not make sense when mapped onto child subjects. Children are an extremely vulnerable population in a range of ways—emotionally, physically, and economically.⁵⁷⁰ The conceptualization of the dignity right in relation to autonomy is thus wrong-headed in relation to children because their lack of maturity means they have a diminished capacity for autonomy.⁵⁷¹ A better conceptualization with respect to minors links their dignity to another aspect of their humanity: their inherent vulnerability and dependency.⁵⁷² Because children are necessarily dependent, dignity and/or inalienable rights to pursue necessities and to seek safety and health are meaningless if their parents cannot—or simply do not—provide them food, clothing, and shelter. For those children, no prospect exists for the exercise of these supposedly inalienable rights, just as they enjoy no meaningful prospect of living with dignity.

Further, if children are not provided the most basic necessities, they cannot develop into fully functioning adults with the capabilities to pursue these inalienable rights. The Montana Supreme Court should thus interpret the Dignity provision for children in a way that recognizes their fundamental dependency rather than on the basis of a misplaced assumption of autonomy. Doing so would require Montana to more equitably fund services for the State's children, ensuring that all children—including those living in less affluent counties—enjoy life's basic necessities, as well as appropriate health and human services. Acknowledging that dignity and the dependency of children are inextricably linked would surely require focusing on the evenness with which services are distributed, as well as the adequacy of these services to meet the needs of Montana's poorest and, in many ways, most vulnerable citizens.⁵⁷³

570. See Martha L. A. Fineman, *Taking Children's Interests Seriously*, in *Child, Family, and State* 234 (Stephen Macedo & Iris Marion Young eds., N.Y.U. Press 2003).

571. Tamar Ezer, *A Positive Right to Protection for Children*, 7 *Yale Hum. Rights & Dev. L.J.* 1, 39–42 (2004) (noting that John Locke, for example, maintained that children have a right “not only to bare Subsistence but to the conveniences and comforts of Life, as far as the conditions of their Parents can afford it,” John Locke, *Two Treatises of Government* (Thomas L. Cook ed., Hafner Publ. Co. 1947)).

572. Martha Minow, *What Ever Happened to Children's Rights?*, 80 *Minn. L. Rev.* 267, 296 (1995).

573. This is reminiscent of the current trend in school funding litigation to focus on adequacy in lieu of equality. See *Shavers*, *supra* n. 23, at 137–139. It is also consistent with the international human rights concept of minimum core rights. See Marius Pieterse, *Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services*, 22 *S. Afr. J. Hum. Rights* 473, 474 (discussing rejection of a “minimum core” approach to rights by the South African Constitutional Court); David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence*, 19 *S. Afr. J. Hum. Rights* 1 (2003).

b. *Creating an Affirmative Obligation: The State as Parens Patriae*

The doctrine of *parens patriae* may also provide the Montana Supreme Court with a basis for linking the dignity of children to their vulnerability and inherent dependency. In 1944, the U.S. Supreme Court in *Prince v. Massachusetts*⁵⁷⁴ accepted the common law doctrine of *parens patriae*, which recognizes the State's ultimate responsibility to protect children's well-being.⁵⁷⁵ The *Prince* Court acknowledged the special status of children and the State's broader authority over them, as compared to adults.⁵⁷⁶ The Court there held that it is in the interest of society "to protect the welfare of children It is in the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."⁵⁷⁷ The *Prince* Court further emphasized that democratic society depends "upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."⁵⁷⁸

Yet in spite of *Prince*'s lofty, broad, and policy-based language, the State's *parens patriae* role is manifest more often as a sword against parents rather than as a shield that would proactively provide for children.⁵⁷⁹ That is, while the State has the power to regulate children and the family,⁵⁸⁰ that power is mostly "residual"⁵⁸¹ in practice because the State typically defers to the family, which is viewed as a private institution. Thus, the State more often uses the law from an offensive posture to remove children from their families, rather than to assist and defend families by ensuring

574. *Prince v. Mass.*, 321 U.S. 158, 166 (1944) (discussed in Ezer, *supra* n. 571, at 13).

575. Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 Ohio St. L.J. 519, 535 (1996).

576. *Prince*, 321 U.S. at 168. This differentiation between children and adults is also evident—albeit unexpressed as such—in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The Supreme Court held in *Casey* that married women need not have the consent of their husbands in order to obtain an abortion, but minors must typically have the consent of their parents. *Id.* at V-C & V-D. Implicit in this differentiation is the idea that minors need greater protection than adult women.

577. *Prince*, 321 U.S. at 165. Tamar Ezer suggests that this part of the *Prince* opinion "planted the seeds" for positive rights. Ezer, *supra* n. 571, at 14.

578. *Prince*, 321 U.S. at 168.

579. See generally Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. Legis. 239, 241 (2002) (offering a broad ranging discussion of laws regarding termination of parental rights, including an argument that the state is inadequately supportive of families in terms of providing the types of services and benefits that might permit them to stay intact).

580. *Prince*, 321 U.S. at 166 (stating, "Acting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.").

581. Fineman, *supra* n. 570, at 235.

that children have life's basic necessities.⁵⁸² This is so despite the fact that most families where children need protection from their parents are families in which the stresses of poverty contribute to the dysfunction.⁵⁸³ This reflects Martha Fineman's observation that children, "invisible within the private sphere, can conveniently be ignored in fashioning public policy."⁵⁸⁴

Nevertheless, a number of scholars have theorized possible bases for the State's positive obligations to children.⁵⁸⁵ Professor Kay Kindred, for example, maintains that *parens patriae* imposes upon the state an affirmative obligation to assist parents.⁵⁸⁶ She argues that family privacy, to which law gives so much lip service, would be better served not by removing children from their parents, but rather by providing material assistance to families who wish to parent their children.⁵⁸⁷ Professor April Land also advocates an affirmative obligation by the State to provide children with basic necessities.⁵⁸⁸

A somewhat related basis for a state's duty to provide for children is their vulnerability and need, which again is logically linked to their dignity as humans.⁵⁸⁹ Barbara Woodhouse, for example, argues that children's rights "flow not from their autonomy, but from their dependency."⁵⁹⁰ In discussing this basis for the obligation, Tamar Ezer cites John Stuart Mill to support his claim: "Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury."⁵⁹¹ Additionally, Ezer observes, the U.N. Declaration of

582. Braveman, *supra* n. 503, at 607 (listing some of the offensive uses to which the doctrine has been put, including to terminate parental rights, to involuntarily commit a child, to approve a petition for sterilization, and to suppress child pornography).

583. *Id.* at 608. See also Marcia Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 Geo. L.J. 1745, 1827 (1987) (arguing that society's failure to provide families with "sufficient support" will produce "abuse, neglect, and family dysfunction," leading to a "population of damaged children with diminished potential."); Deborah Weissman, *The Personal is Political—and Economic: Rethinking Domestic Violence*, 2007 BYU L. Rev. 387, 415–417 (2007) (positing that economic downturns lead to "reductions in social services and social interactions between neighbors and coworkers" which are related to "family dysfunction" and other types of crime).

584. Fineman, *supra* n. 570, at 235.

585. Ezer, *supra* n. 571, at 32–41.

586. Kindred, *infra* n. 575, at 521.

587. *Id.* at 536.

588. Land, *supra* n. 116, at 781. Land offers this argument in the wake of welfare reform which devolved to the state's authority to administer welfare programs and tended to aggravate child poverty. See also Hershkoff, *supra* n. 44, at 1403; Pruitt, *Missing the Mark*, *supra* n. 54.

589. Barbara Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 Ohio St. L.J. 393 (1996).

590. *Id.* at 420.

591. Ezer, *supra* n. 571, at 39 (quoting John Stuart Mill, *On Liberty* 484 (Legal Classics Library 1992)).

the Rights of the Child⁵⁹² supports this idea that children have certain needs that must be satisfied if they are to grow into healthy, productive adults.⁵⁹³ This is the same aspiration that the Supreme Court in *Prince* linked to the well-being of our democracy⁵⁹⁴ and that the Court has occasionally since recognized in relation to the importance of education.⁵⁹⁵

The State's obligation to provide for the well-being of children in the interest of society under *Prince*, as well as the Court's acknowledgement of the inherent dependency and vulnerability of children, provides a strong justification for a more proactive approach to protecting the dignity of Montana's children. Read in concert with the individual Dignity Clause and Professor Klug's assertion that certain core socio-economic rights are inherent to the concept of dignity, the doctrine of *parens patriae* can and should be used to establish the State's affirmative duty to provide for children's most basic needs.⁵⁹⁶

B. Challenging the Orthodoxy of U.S. Constitutional Jurisprudence

Although I have just argued the Montana Constitution is a more appropriate vehicle for responding to the problems identified, it is worth considering briefly how the U.S. Constitution might be enlisted to redress spatial inequalities across Montana's counties⁵⁹⁷ or, alternatively, to ensure that every child's minimal needs are met. The jurisprudence of the U.S. Supreme Court does not recognize socio-economic rights, but several decisions regarding children, education, and equal protection provide glimmers of hope regarding government's obligations to poor children. In addition, several dissents by Justice Thurgood Marshall provide a useful framework for thinking about the state's role in creating these inequalities, as well as

592. Declaration of the Rights of the Child, Preamble, G.A. Res 1386 (XIV), UN GAOR, 14th Sess. Supp. No. 16, at 19, U.N. Doc A/4354 (1959) at pmb1. It states: "the child, by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection." *Id.*

593. Minow, *supra* n. 572, at 295.

594. *Prince*, 321 U.S. at 165; *see also* Lee E. Teitelbaum, *Foreword: The Meanings of the Rights of Children*, 10 N.M. L. Rev. 236, 253 (1980).

595. *See infra* nn. 613–620 and accompanying text.

596. While the doctrine of *parens patriae* can arguably stand alone as a basis for the state's obligation to provide for the basic needs of children, it is admittedly not a legal argument that has gained much traction as a practical vehicle for protecting children's rights. This is perhaps due to the defensive, rather than offensive, way the state has chosen to defend the rights of children, as discussed above.

597. While federalism issues are implicated by legal challenges to spatial inequalities among states, I do not address those issues here because my focus is on spatial inequalities within a given state, among counties. Like Coons et al in their landmark work on spatial inequality in school finance, I assume that the quality of services should not be a function of wealth other than the wealth of the state as a whole. Coons et al, *Educational Opportunity*, *supra* n. 230, at 338. I assume that the state is the level at which equality should be achieved. *See also* Coons et al., *Private Wealth*, *supra* n. 23, at 14–17 (discussing "subsidiarity" rather than federalism) and Appendix A (referencing the state-nation analogy to the district-state picture).

the state's responsibility for eliminating them. Three issues in equal protection jurisprudence are particularly relevant to my focus on the unevenness with which Montana provides services for children: (1) the significance of the right or benefit at stake; (2) the relative political power, or lack thereof, of the disadvantaged group; and (3) the role of the state in creating these inequalities. I take up each of these in the parts that follow.

1. *The Interest at Stake*

Public assistance has not in recent decades been considered a weighty or significant benefit that compels significant concern based on equal protection or other constitutional doctrines. Similarly, wealth has not been considered a suspect classification.⁵⁹⁸ The most recent germinal Supreme Court decision in which welfare benefits were at stake was *Dandridge v. Williams*.⁵⁹⁹ There, the Court in 1970 upheld a Maryland law that based financial need for state assistance in part on the number of children in the family.⁶⁰⁰ While the benefit increased with each additional person in the household, the aggregate was capped,⁶⁰¹ thereby effectively denying assistance to members of large families. The plaintiffs argued that the “maximum grant” discriminated against some children based on family size and therefore violated the Equal Protection Clause of the Fourteenth Amendment.⁶⁰² While the Court acknowledged the weighty stakes,⁶⁰³ it nevertheless applied a rational basis test in upholding the constitutionality of the Maryland scheme.⁶⁰⁴

Justice Marshall, in dissent, focused on the life-sustaining nature of the benefits at stake as a justification for applying heightened scrutiny to the Maryland program. He distinguished prior cases that applied the rational basis test, observing that *Dandridge* was different because the “most basic economic needs of impoverished human beings” were at stake in that case.⁶⁰⁵ Marshall repeatedly noted that the appellants were individuals, and not merely institutions. He called for greater attention to the “relative importance” of the denied benefits “to individuals in the class discriminated against.”⁶⁰⁶ A few paragraphs later, Marshall again mentioned the “individ-

598. For an excellent argument—albeit a dated one—that wealth is a suspect classification, see *Serrano v. Priest*, 487 P.2d 1241, 1250 (1971) (discussing wealth as a suspect classification and citing U.S. Supreme Court decisions that support treating it as such).

599. *Dandridge v. Williams*, 397 U.S. 471 (1970).

600. *Id.*

601. *Id.* at 473.

602. *Id.* at 487.

603. *Id.* at 485.

604. *Id.* at 486–488.

605. *Dandridge*, 397 U.S. at 508–509 (Marshall & Brennan, JJ., dissenting) (citations omitted).

606. *Id.* at 521.

ual interests here at stake” as “most clearly distinguish[ing] this case from the ‘business regulation’ equal protection cases.”⁶⁰⁷ He wrote that welfare for “needy dependent children provides the stuff that sustains those children’s lives: food, clothing, shelter.”⁶⁰⁸ In a similar vein, Marshall criticized the majority for turning its analysis “on the basis of a closed category of ‘fundamental rights.’”⁶⁰⁹ Again invoking the life-and-death nature of welfare benefits, Marshall observed that one whose “very survival is at stake” would not likely be “comforted by the knowledge that his fundamental rights are preserved intact.”⁶¹⁰

Justice Marshall again asserted the enormous significance of the interest at stake—this time education—in his dissent in *San Antonio Independent School District v. Rodriguez*.⁶¹¹ There he proclaimed the “right of every American to an equal start in life.”⁶¹² Justice Marshall saw that “equal start” as including the “provision of a state service as important as education,” which he labeled “vital.”⁶¹³

Indeed, the U.S. Supreme Court has repeatedly recognized education’s importance; this was one point that eight members of the *Rodriguez* Court expressly endorsed.⁶¹⁴ Writing for the majority in *Rodriguez*, Justice Powell wrote “the abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after [*Brown v. Board of Education*] was decided.”⁶¹⁵ In *Plyler v. Doe*, the Court similarly emphasized the importance of education, calling it “the very foundation of good citizenship”⁶¹⁶ and recognizing that it “provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.”⁶¹⁷ The *Plyler* Court quoted at

607. *Id.* at 522.

608. *Id.* In footnotes 17 and 18 of his dissent, Marshall cited a number of cases in which the Court recognized the life-or-death significance of benefits. *Id.* at 522, nn. 17–18 (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969) (which struck down a residency requirement for welfare eligibility, “noting that the benefits in question are ‘the very means to subsist—food, shelter, and other necessities of life’”); *Snidach v. Fam. Fin. Corp.*, 395 U.S. 337 (1969) (which noted the devastating impact of wage garnishment as a reason to require prior hearing as a matter of due process)).

609. *Id.* at 521 n. 14.

610. *Id.*

611. *San Antonio Independent School District*, 411 U.S. 1 (1973).

612. *Id.* at 71 (Marshall, J., dissenting).

613. *Id.*

614. *Id.* at 30 (majority); *Id.* at 63 (Brennan, J., dissenting); *Id.* at 71 (Marshall, and Douglas, JJ., dissenting). Only Justice White failed to endorse this proposition.

615. *Id.* at 30.

616. *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)); see also Ezer, *supra* n. 571, at 40 (making a similar point that “the thrust of the right to education is to become a useful member of society”).

617. *Plyler*, 457 U.S. at 221. The Court wrote that education is “necessary to prepare citizens to participate effectively and intelligently in our open political system.” *Id.* (quoting *Wis. v. Yoder*, 406 U.S. 205, 221 (1972)). The *Plyler* Court held unconstitutional a Texas statute that denied undocu-

length from *Brown v. Board of Education*⁶¹⁸ in emphasizing the importance of education not only to individual children, but indeed to the well-being and flourishing of our democracy. Supreme Court decisions such as *Plyler*, along with *Brown v. Board of Education*⁶¹⁹ and others,⁶²⁰ are surely correct in terms of their emphasis on the critical role of education. Yet they arguably overstate the potential of education, by itself, to empower disenfranchised groups or to train citizens.

Educational opportunity *alone* does not open doors for children or prepare them for citizenship. Children who live with chronic food insecurity or impermanent housing will struggle to succeed in life, even if they have access to the same educational opportunities as peers from more affluent families.⁶²¹ Deep poverty—especially during the earliest years of childhood—has particularly long-lasting and devastating effects on children’s academic learning and school completion.⁶²² In short, children’s educational opportunities will be of little value if their first-order needs are not met. Justice Marshall recognized this in his *Dandridge* dissent, where he focused on the life-sustaining character of food, clothing, and shelter.⁶²³

The array of services at stake in Montana—from food and shelter to other public health and other human services—are no less crucial to children’s well-being and development. Federal programs such as TANF, SNAP, WIC and Free and Reduced Price Lunches are aimed at preventing and alleviating childhood hunger. Their success in that regard assumes that their parents can meet the requirements for benefits and physically go to the

mented, school-aged children the same free, public education that it provides to others who reside in the state. *Id.* at 219–220, 230.

618. The *Plyler* Court quoted this language from *Brown*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Plyler, 457 U.S. at 222–223 (citing *Brown*, 347 U.S. at 493).

619. *Brown*, 347 U.S. 483.

620. See *Yoder*, 406 U.S. 205, 221 (1972).

621. See *supra* Part III(C).

622. Children’s Def. Fund & Natl. Coalition for the Homeless, *Welfare to What: Early Findings on Family Hardship and Well-Being* 12 (Children’s Def. Fund 1998) (collecting sources) (quoting Land, *supra* n. 116, at 822); see also Hamill, *supra* n. 116, at 121–122 and n. 18 (collecting sources).

623. See *supra* n. 608 and accompanying text.

State Office of Public Assistance to apply for them.⁶²⁴ Those living in counties which are more remote from metropolitan or micropolitan areas, or which are less densely populated, are less likely to have access to an office near them or to one that is open more than a day or two a month.⁶²⁵

The Montana Department of Children and Family Services (CFSD) provides child protective services and assists with child support enforcement⁶²⁶ out of five regional offices,⁶²⁷ as well as 41 county-level offices. As with other health and human services, the schedules for the county-level offices vary greatly, with some open just one day a week and others providing services on several half-days each week.⁶²⁸ Residents of the fifteen counties with no county-level office must get access to CFSD services by traveling to another county.⁶²⁹

Other services, including social services, counseling, and health care are—as demonstrated in Part IV(D)—available on a patchwork basis, largely dependent on county organization and locally levied taxes. All of this means that many impoverished and at-risk children are not well-served by state and local governments. Those in remote rural counties, which typically also have the least affluent tax bases and populations with the poorest economic profiles, suffer the greatest service deficits.

2. *The Efficacy of the Political Process*

Another consideration in equal protection jurisprudence is the status of the aggrieved group, including their relative political power. Those living in persistent and/or concentrated poverty are arguably a “discrete and insular minority” who deserve heightened protection under the Equal Protection Clause. Coined by the Supreme Court in *U.S. v. Carolene Products Co.*,⁶³⁰ the phrase “discrete and insular minority” has been interpreted to include race and national origin.⁶³¹ While neither children nor the poor have been recognized as a discrete and insular minority, poor children meet some of

624. *See supra* nn. 197–198 and accompanying text (discussing the number of offices, opening hours, etc).

625. *Id.*

626. *See supra* n. 200 and accompanying text.

627. *Id.*

628. *Id.*

629. *Id.*

630. *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152–153 n. 4 (1938) (“Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

631. *See* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 148–152 (Harvard U. Press 1980); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 695–696 (3d ed., Aspen Publishers 2006).

the criteria as articulated in *Rodriguez*.⁶³² The Court there stated that strict scrutiny applies only to those in a “position of political powerlessness as to command extraordinary protection from the majoritarian political process.”⁶³³

A majority in *Rodriguez* held that children whose schools received less funding because of a school finance scheme that relied heavily on local property tax revenue—essentially children living in poor neighborhoods—were not in such a position.⁶³⁴ But Justice Marshall’s dissent took issue with this conclusion. He expressed skepticism that the political process would protect children and families living in poor school districts, observing that the political process had “proved singularly unsuited to the task of providing a remedy for this discrimination.”⁶³⁵ Justice Marshall further noted the entrenched and powerful interests of those who would wish to keep things as they were. He wrote:

The disability of the disadvantaged class in this case extends as well into the political processes upon which we ordinarily rely as adequate for the protection and promotion of all interests. Here legislative reallocation of the State’s property wealth must be sought in the face of inevitable opposition from significantly advantaged districts that have a strong vested interest in preservation of the status quo.⁶³⁶

The political process in operation in Montana seems similarly ill-suited to correcting the unevenness of service delivery among that State’s counties. Residents of more affluent counties—typically more populous ones—are unlikely to support a more redistributive mechanism for financing local government or otherwise providing services when the status quo so clearly operates to their immediate benefit. Further, it is self-evident that children themselves are politically powerless in the sense that they cannot vote. While we might assume that children are represented in the political process by their parents, this may not be a fair assumption for children living in poverty, particularly for those in concentrated or persistent poverty. Such children are arguably particularly overlooked by and excluded from the political process because not only their parents but their entire communities

632. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28.

633. *Id.*

634. *Id.*

635. *Id.* at 71 (Marshall, J., dissenting).

636. *Id.* at 123 (analogizing the situation of the children and their families in the case at hand to *Baker v. Carr*, 369 U.S. 186, 191–192 (1962), in that, prior to reapportionment, underrepresented districts faced a similar political challenge).

effectively have no stature in civil society.⁶³⁷ Indeed, some studies indicate that voter participation declines as income decreases.⁶³⁸

The relative political powerlessness of rural people generally and the rural poor, in particular, is generally well-documented, though not the subject of great media or scholarly attention.⁶³⁹ As Professor Donald Voth observes, rural people are largely “unorganized, unmobilized, and . . . unrepresented.”⁶⁴⁰ Rural problems are often literally out of sight, out of mind; when they are contemplated, they may be seen as less pressing than those in urban communities.⁶⁴¹ Even in a state like Montana, which is arguably culturally rural, only half of all residents live in rural places as defined by the U.S. Census Bureau.⁶⁴² While two-thirds live in nonmetropolitan counties,⁶⁴³ a great many of these residents live in more affluent micropolitan counties such as Gallatin and Flathead, and they would not benefit from a more centralized funding scheme.

Further, spatial phenomena such as segregation have been associated with powerlessness and disadvantage in other contexts, including voting and elections. In *Gomillion v. Lightfoot*, the U.S. Supreme Court held that African-Americans were denied equal protection when the city boundaries of Tuskegee, Alabama were redrawn to exclude them.⁶⁴⁴ In *Reynolds v. Sims*, the Court rejected attempts to justify unequal districting on the basis of various geographic factors, declaring that “[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the

637. See Pickering et al., *supra* n. 94, at 30 (writing that persistent poverty locales tend to have “ineffective political leadership”).

638. Joshua Harder & Jon A. Krosnick, *Why Do People Vote? A Psychological Analysis of the Causes of Voter Turnout*, 64 J. of Soc. Issues 525, 531 (2008) (reporting that wealthier people vote at higher rates); Scripps Howard News Service, *Study: Voter turnout varies across U.S.; Arizona consistently near bottom*, Arizona Daily Star (Jan. 19, 2004) (available at <http://azstarnet.com/sn/printDS/6444>) (reporting that voter participation usually “declines in areas [with] high degrees of poverty”). Several dated studies suggest, however, that rural voters are more likely to vote than their urban and suburban counterparts. See Harder & Krosnick, *supra* n. 638, at 533 (citing studies from 1976 and 1980 that showed rural residents more likely to vote). A more recent study found that rural residents vote less frequently, although the difference between them and other voters are not statistically significant. J. Eric Oliver, *Democracy in Suburbia* 50 (Princeton U. Press 2001); cf. J.G. Gimpel & J.E. Schuknecht, *Political Participation and the Accessibility of the Ballot Box*, 22 Political Geography 471 (2003) (finding that distance to polling place is less likely to impede rural voters than it is to deter suburban voters, in part because the former can travel on direct and relatively unimpeded routes).

639. See generally Wagner, *supra* n. 179, at 537–538.

640. Donald E. Voth, *A Brief History and Assessment of Federal Rural Development*, 25 U. Mem. L. Rev. 1265, 1289 (1995).

641. See *supra* n. 60; see also Wagner, *supra* n. 179, at 538.

642. *Rural Definitions: State Level Maps, Montana*, *supra* n. 12, at 8 (reporting that 50.2% of Montanans live in rural places).

643. *Id.*

644. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); see also *White v. Regester*, 412 U.S. 755 (1973) (holding that a multimember district violated equal protection because it “invidiously excluded Mexican-Americans from effective participation in political life”).

Fourteenth amendment just as much as invidious discrimination based upon factors such as race . . . or economic status.”⁶⁴⁵ In the era of the Voting Rights Act, election districts have been re-drawn with the goal of increasing the likelihood that a minority will be elected to represent it.⁶⁴⁶ This has been done by clustering spatial concentrations of African Americans or Latinas/Latinos, for example, in the same district. In doing so, the phenomenon of spatial segregation has been manipulated specifically to empower a disadvantaged group.

Finally, Professor Michelle Wilde Anderson has asserted that county governments have limited political voice.⁶⁴⁷ Yet this is the level of government to which rural populations—especially impoverished rural populations—are mostly likely to have access.⁶⁴⁸ Anderson identifies “robust and proximate political influence” as that which is needed, but not necessarily provided, by county government.⁶⁴⁹ Anderson’s observation about the limited voice of county government is almost certainly less accurate in a state such as Montana, which is largely rural and by some standards has no major city.⁶⁵⁰ However, she offers another important observation about county government that is highly relevant to the Montana context: political participation in this layer of government requires travel to the county seat, which may be distant.⁶⁵¹ In a geographically large county such as Big Horn, for example, a resident of Decker, Montana, near the Wyoming border, would have to travel more than an hour and a half (62 miles) to Hardin to attend a meeting of county commissioners.⁶⁵²

3. *The Role of the State*

Marshall’s dissent in *Rodriguez* made another point that is highly relevant to the inequalities and inadequacies identified in how the State of Montana delivers services. Marshall noted that “the State is responsible for the wealth discrimination” at issue because “[t]he means for financing public education in Texas are selected and specified by the State.”⁶⁵³ “It is the

645. *Reynolds v. Sims*, 377 U.S. 533, 566–567 (1964) (citations omitted).

646. See generally Chemerinsky, *supra* n. 631, at 745.

647. See Anderson, *supra* n. 48, at 1138–1139.

648. Indeed, one study suggests that rural residents are more likely than their suburban and urban counterparts to participate in local government in the sense of attending meetings. Oliver, *Democracy in Suburbia*, *supra* n. 638, at 50 fig. 2.2.

649. See Anderson, *supra* n. 48, at 1138 (referring in particular to minority communities).

650. The largest city, Billings, is in Yellowstone County, which ranks only three on the rural-urban continuum, with one being the most urban designation. 2003 *Rural-Urban Codes for Montana*, *supra* n. 139.

651. Anderson, *supra* n. 48, at 1139.

652. See Google, *Google Maps*, <http://googlemaps.com>; select “get directions,” enter “Decker, Montana” and “Hardin, Montana” (accessed Sept. 15, 2009).

653. *Rodriguez*, 411 U.S. at 123 (Marshall, J., dissenting).

State,” he wrote, “that has created local school districts, and tied educational funding to the local property tax and thereby to local district wealth.”⁶⁵⁴

The same is true regarding the scheme by which Montana funds its county government. It is the State of Montana that created the counties, and it is the State that ties a vast amount of funding for county government to local property taxes—and therefore to local private wealth. The result is a system that grossly underserves some children and families in comparison to others. This, in turn, perpetuates and aggravates inequalities associated with uneven development. The role of the State in perpetuating and aggravating spatial disadvantage is indisputable.⁶⁵⁵

4. Summary

A few threads of Supreme Court jurisprudence can thus be enlisted in support of the argument that Montana’s scheme for funding county government violates the U.S. Constitution. In addition to Justice Marshall’s focus on the humanity of poor children and their dependency on the state for necessities,⁶⁵⁶ the Court has recognized the importance of education.⁶⁵⁷ Finally, the Court has embraced *parens patriae*, albeit for limited purposes.⁶⁵⁸

At least one other Supreme Court decision also supports legal efforts to end the spatial inequality that imperils poor children. Failing to provide life’s basic necessities to children is tantamount to visiting on them the sins (real or perceived) of their parents. Whatever basis may be stated for passing judgment on poor adults and denying them benefits on that basis does not hold up with respect to their children. Just as the Court in *Weber v. Aetna Casualty & Surety Co.* in 1972 determined it unconstitutional to penalize a child who was born to an unmarried mother,⁶⁵⁹ the same principle surely applies to children living in poverty. The Court there wrote:

[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship

654. *Id.* at 123–124 (Marshall, J., dissenting) (citations omitted); see also *Serrano v. Priest*, 487 P.2d 1241.

655. See *supra* n. 543 and accompanying text (discussing *Helena Elementary*, 784 P. 2d 412). A bolder argument could be based on the work of Professor Sandra Fredman. While equality and discrimination are often discussed in relation to race or ethnicity, Fredman points out that substantive equality recognizes that disadvantage, not color or gender or another group characteristic often associated with disadvantage, should be the analytical focus. She argues that this, in turn, supports a positive duty to provide. Fredman, *supra* n. 56, at 163 (2005) (abstract). The disadvantages associated with rurality could similarly be the basis for a duty to provide.

656. See *supra* n. 608.

657. See *supra* nn. 614–620.

658. See *supra* nn. 575–578 and accompanying text.

659. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as an unjust—way of deterring the parent.⁶⁶⁰

Such injustice to the child (along with failed deterrent with respect to the parent) is no less problematic when visited on a child born into poverty, a child who has no more control over the consequences of her birth situation than a child born out of wedlock.

Even if impoverished adults are an unsympathetic population based on an assumption that they are fully autonomous and capable of providing for themselves, this autonomy clearly does not extend to children.⁶⁶¹ As the *Weber* Court recognized, and as Justice Marshall repeatedly observed in his dissent in *Dandridge*, children are not responsible for the circumstances of their birth.⁶⁶² Among these circumstances is place of residence, yet it is a circumstance with profound consequences in the State of Montana.

Montana's scheme of financing county governments runs afoul of the *Weber* principle by denying children benefits on the basis of factors entirely out of their control. The State's failure to provide evenly for all children across all counties effectively penalizes them for their place of residence. In doing so, the State inappropriately imposes on children the consequences of their parents' actions.

VI. MONTANA'S SCHOOL FUNDING SYSTEM AS A MODEL FOR ALLEVIATING SPATIAL INEQUALITY

As noted above, a great deal of school funding litigation has been based on the concept of spatial inequality, though the complaints have not been labeled as such.⁶⁶³ In *Rodriguez*, for example, the plaintiff families complained that some Texas school districts, including those their children attended, were less well-financed than others.⁶⁶⁴ This disparity was due to a heavy reliance on property taxes in the State's system for financing public education, a reliance which meant that students residing in school districts with low property tax bases did not have educational opportunities on par with those residing in wealthier districts that had more substantial property

660. *Id.* at 175–176.

661. Indeed, Professor April Land has advanced a related argument in relation to welfare eligibility. She asserts that “[s]anctioning children whose parents have not complied with work requirements . . . raises equality concerns.” Land, *supra* n. 116, at 823.

662. *Dandridge*, 397 U.S. at 523 (Marshall J., dissenting) (noting that “governmental discrimination between children on the basis of a factor over which they have no control—the number of their brothers and sisters—bears some resemblance” to the distinction between legitimate and illegitimate children, which the Court has condemned under the Equal Protection Clause).

663. See *supra* nn. 281–290 and accompanying text.

664. *Rodriguez*, 411 U.S. 1.

tax bases.⁶⁶⁵ In essence, the parents alleged a spatial inequality that violated the Equal Protection Clause of the U.S. Constitution. A great many other school funding cases have relied on similar arguments.⁶⁶⁶

Although in 2005 the Montana Supreme Court held in *Columbia Falls II* that the State's school funding scheme violated the Montana Constitution, the decision did not turn on Equal Protection or Equality Clause analysis.⁶⁶⁷ Rather, the Court held that the State was not then providing the mandated "quality" education.⁶⁶⁸ In spite of that infirmity, which the legislature has since addressed, the current school funding formula provides a model for a greater degree of redistribution or equalization. Using a funding formula that draws on the same principles—that is, channeling money to places where the need is greatest in order to achieve more substantive equality—would help level the playing field with respect to availability of health and human services, for Montana's children. As with school funding, that redistribution could emanate from both the federal and state levels.

As noted in Part IV(C), some schools in Montana benefit from much higher per student funding than others. Close consideration of the schools that receive the greatest funding, however, reveals that they are often the neediest on one or more of three bases: (1) the poverty of students; (2) the American Indian ethnicity of students; and (3) rural locale. Each of these characteristics makes it more difficult for government to provide equal educational opportunities to these students. This is because the cost of educating poor students is higher than that for others,⁶⁶⁹ and the further disadvantages associated with American Indian status are well-documented.⁶⁷⁰ Finally, schools with relatively few students are much more costly on a per-student basis because of the inability to achieve economies of scale. All of these challenges—socio-economic, ethnic, and spatial—are also relevant to county governments seeking to provide services, including those needed to adequately or more evenly serve disadvantaged children.

In a few instances, the funds that enhance a Montana school district's ability to serve needier students come from state government. In most instances, the funds come primarily from the federal government. Either or

665. *Id.* at 1, 12–13 (providing details of the tax base and funding disparities as reflected in the *San Antonio Independent School District*).

666. See Shavers, *supra* n. 23, at 137–139 (collecting cases).

667. *Columbia Falls II*, 109 P.3d 257 (discussed *supra* at text accompanying notes 282–287).

668. See *supra* nn. 282–287 and accompanying text.

669. The Education Trust, *Funding Gaps 2006*, 6, <http://www2.edtrust.org/NR/rdonlyres/CDEF9403-5A75-437E-93FF-EBF1174181FB/0/FundingGap2006.pdf> (2006); see also Hamill, *supra* n. 116, at 125–126 and n. 19 (collecting sources).

670. See Bethany Berger, *Red: Racism and the American Indian*, 56 UCLA L. Rev. 591, 595 (2009); Wagner, *supra* n. 179, at 533–534; Angela A. Gonzales, *American Indians: Their Contemporary Reality and Future Trajectory*, in *Challenges for Rural America in the 21st Century*, 43 (David Brown & Louis E. Swanson eds., Pa. St. U. Press 2003).

both types of revenues may make some schools appear to be disproportionately well-financed when, in fact, these supplemental funds smooth out and enhance education opportunity for disadvantaged students.

Federal funding appears to play a much greater role in redistribution of resources—and in creating the “apparent” inequities in funding—than do state or local funds.⁶⁷¹ Local sources generally play a relatively small role (40%) in financing Montana’s public schools,⁶⁷² particularly when compared to the dominant role (60–65%) that local property tax revenue plays in financing county government.⁶⁷³ In the school funding context, the role played by local funding sources tends to increase with the affluence of the school district and its pupils, again indicating that the redistributive function occurs at a higher level, such as state or federal. However, Montana’s school funding scheme seeks to maintain relative equality by encouraging schools to fall within a budgetary range, thus preventing local funding from playing so great a role in property-rich districts that they can finance schools much better than the state average.⁶⁷⁴

These funding patterns are illustrated by comparing six high schools in the five counties studied: Lodge Grass High School in Big Horn County, Manhattan and Three Forks high schools in Gallatin County, Columbus High School in Stillwater County, Harlowton High School in Wheatland County, and Shepherd High School in Yellowstone County. Four of the high schools are of somewhat similar size (189 students to 281 students), with Lodge Grass and Harlowton being somewhat smaller (162 and 113 students, respectively).⁶⁷⁵ Lodge Grass and Harlowton also have much higher student poverty rates than do the other schools (29% and 28%, respectively).⁶⁷⁶ All 162 students at Lodge Grass High School are American Indian, making them vulnerable on three bases: ethnicity, poverty, and spatiality. At Harlowton High School, where 88% of students are white, the greater need relates primarily to the latter two bases of disadvantage.

For Fiscal Year 2006, Lodge Grass High School received very high revenues per student: \$22,414, compared to a statewide average of \$9,032.⁶⁷⁷ Of this amount, 54% came from federal sources,⁶⁷⁸ far above

671. *But see infra* n. 683 and accompanying text.

672. *See supra* n. 300 (providing breakdown of funding sources for Montana Public Schools).

673. *See supra* n. 221.

674. *See supra* n. 308.

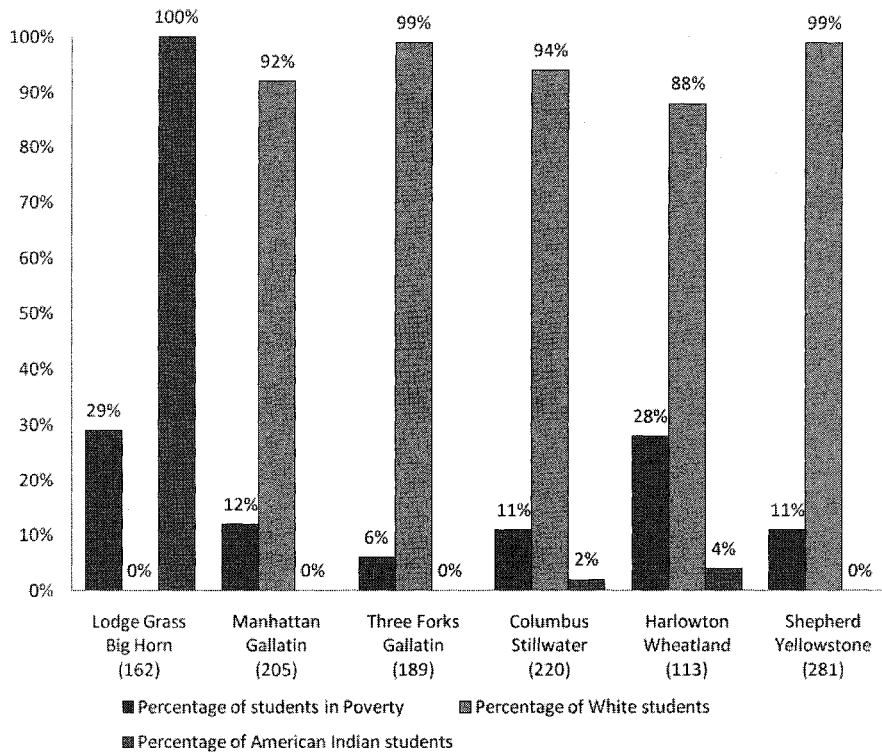
675. Fig. 19.

676. *Id.*

677. Fig. 20.

678. National Center for Education Statistics, Common Core Data (CCD), *School District Finance Survey (Form F-33)*, <http://nces.ed.gov/ccd/bat/>; *select* District, *check* 2005-2006, 2004-2005, and 2003-2004, *select* Next, *select* Finance Per Pupil Ratios [District], *check* Total Revenue per Student (District-Fin.), Total Revenue - Local Sources per Student (District-Fin.), Total Revenue - State Sources per

FIGURE 19
MID-SIZED HIGH SCHOOLS STUDENT DEMOGRAPHICS (FY 2006)



Source: The New America Foundation, Federal Education Budget Project: Montana.

the Montana average of 14% federal funding. This funding is largely attributable to federal monies targeting Lodge Grass' impoverished students⁶⁷⁹ and American Indian students,⁶⁸⁰ because it has many students in both categories. As for the remainder of the school's budget, state funding comprises 28% (including significant amounts on the basis of At-Risk and Indian Achievement Gap funding)⁶⁸¹ and local funding just 17%. This seems

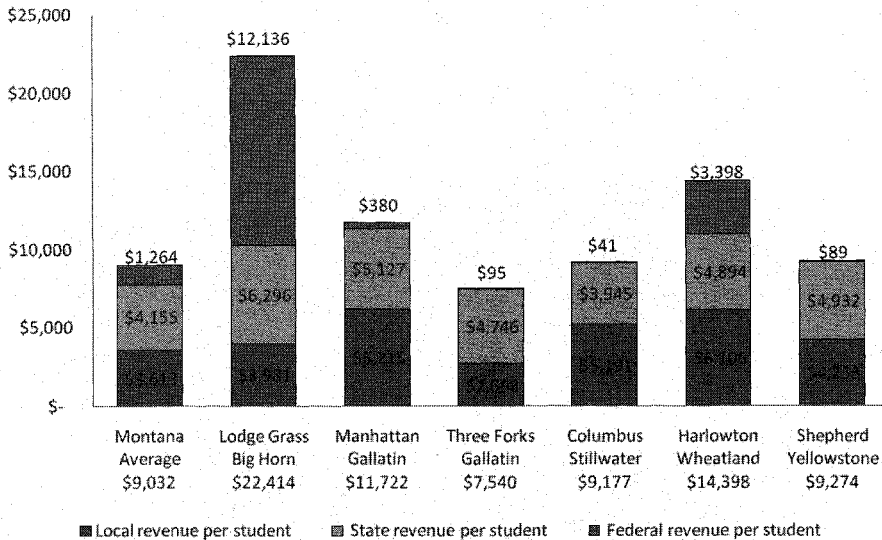
Student (District-Fin.), and Total Revenue - Federal Sources per Student (District-Fin.), *select* Next, *select* MT - Montana, *select* View Table.

679. See *supra* n. 306 (discussing Title I funding).

680. Under Title VII, the federal government provides funding to schools on the basis of their American Indian, Native Hawaiian and Alaska Native students. See Title VII—Indian, Native Hawaiian, and Alaska Native Education, Part A, Subpart 1, Sections 7111–7119. The larger role of federal funding is also evident in other schools with significant American Indian populations. One example is Wolf Point High School in Roosevelt County, where 64% of the students are American Indian and the student poverty rate is 31%. Federal Education Budget Project: Montana, *supra* n. 75; search “Wolf Point High School, Montana.” At Wolf Point, however, per pupil funding is much lower (\$12,280) and just about one-sixth of it (\$2,200) comes from the federal government. *Id.*

681. See *supra* n. 291–299 and accompanying text.

FIGURE 20
MID-SIZED HIGH SCHOOLS FUNDING PER STUDENTS (FY 2006)



Source: National Center for Education Statistics, Common Core Data (CCD)

appropriate since Big Horn County—and presumably the particular part of it served by Lodge Grass High School—has a poor property tax base.⁶⁸²

In contrast to Lodge Grass High, the mid-sized high schools in Gallatin, Stillwater, and Yellowstone counties receive far less federal revenue and rely far more on state and local funding.⁶⁸³ At Manhattan (205 students) and Three Forks high schools (189 students) in Gallatin County, where the student poverty rates are relatively low at 12% and 6%, respectively, the corresponding per-student revenues are considerably lower than for Lodge Grass: \$11,722 and \$7,540.⁶⁸⁴ Federal funds going to these schools are minimal, at \$380 and \$95, respectively.⁶⁸⁵ The situations at Columbus High School in Stillwater County and Shepherd High School in Yellowstone County are similar. The former has 220 students and the latter

682. Figs. 11–12, 14.

683. Fig. 20.

684. Figs. 19–20. Oddly, Manhattan High School, with a higher poverty rate (12%), relies much more heavily than Three Forks on local funding, which comprises 53% of Manhattan's total budget. State funding makes up 43.7%. By contrast, Three Forks derives just 36% of its revenue from local sources but 63% from the state. The raw amounts of funding received from the state do not, however, differ much: \$5,127 to Manhattan and \$4,746 to Three Forks. Local monies account for the real difference between the two schools' funding situations. The Three Forks district raises just \$2,698 per student while the Manhattan district raises more than twice that much, \$6,215. See fig. 20. This runs contrary to my observation about the relative insignificance of local funds in creating inequalities. See *supra* at text accompanying n. 671. It also suggests that the Manhattan district is not equalized. See *supra* n. 308 and accompanying text.

685. Fig. 20.

has 281 students; both have a poverty rate of 11%.⁶⁸⁶ They are comparable to the two Gallatin County high schools in terms of the dearth of federal funding received, just \$41 and \$89 per pupil, respectively.⁶⁸⁷

Like similarly impoverished Lodge Grass High School, the total per-pupil revenue at Harlowton High School in Wheatland County is well above the state average,⁶⁸⁸ although at \$14,398, it is considerably closer to the average than Lodge Grass.⁶⁸⁹ With 113 students and a 28% poverty rate, Harlowton High receives almost a quarter of its funding from federal sources. While this means that federal funding plays a much greater role at Harlowton than in the three more affluent counties, it nevertheless plays a significantly smaller role than at Lodge Grass, with its entirely American Indian student body.⁶⁹⁰

The roles of state and local funding at Harlowton High School are more puzzling, and seemingly inequitable. In light of the School's high student poverty rate and corresponding presence of At-Risk students under the State's funding scheme,⁶⁹¹ state funding plays a surprisingly small role in the Harlowton budget. Indeed, state funding of Harlowton plays a lesser part as a percentage of total funding (34%) than it does in the larger and more affluent Gallatin, Stillwater, and Yellowstone County schools.⁶⁹² Consequently, local funding fills a disproportionately greater gap (42%).⁶⁹³ This is especially surprising—and seems highly inequitable—in light of the lack of affluence among Wheatland County's population⁶⁹⁴ and the County's poor property tax base.⁶⁹⁵

Other ways in which Montana's school funding scheme is imperfect could surely be identified. Nevertheless, the underlying principles reflected in the funding formula appear to be a better and more substantively equitable model than the scheme by which local government is currently funded.⁶⁹⁶

686. Fig. 19.

687. Fig. 20. The remainder of Columbus High School's per student revenue of \$9,177 comes 57% from local revenue and 43% from the state. The remainder of Shepherd High School's per student revenue of \$9,274 derives 46% from local sources and 53% from the state. *Id.*

688. *Id.*

689. Figs. 19–20.

690. *Id.* This difference is presumably attributable to the much greater presence of American Indian students at Lodge Grass High.

691. Figs. 19–20. *See also supra* n. 293 and accompanying text (explaining “At-Risk” student funding).

692. Fig. 20.

693. Figs. 19–20.

694. Figs. 2–5.

695. Fig. 11.

696. While federal funds play an important equalizing role in funding schools with significant populations of impoverished and American Indian students, state funds appear to be the more significant equalizing force for smaller, more rural schools. This is illustrated by looking at very small schools,

Development theorist Amartya Sen has explained the “exacting and complex” challenge of achieving substantive equality “when there is a good deal of antecedent inequality to counter.”⁶⁹⁷ “Equal consideration for all,” he writes, “may demand very unequal treatment in favour of the disadvantaged.”⁶⁹⁸ Such “unequal treatment,” reflected in additional funds to benefit disadvantaged students and schools, is the path Montana has taken in funding public education. The State should now consider how such principles might helpfully be borrowed from the public education funding system and applied to its system of financing local government. This approach would suggest channeling more funding to counties with “antecedent inequality” that needs to be countered—counties with higher poverty rates or where the need is greater on some other basis. These funds should be earmarked for health and human services programs. Montana should take these steps even if greater redistribution and responsiveness to the needs of more vulnerable populations requires the distribution of state funds because, more so than in the education context, devolution has so limited federal monies for such services.

VII. CONCLUSION: MAKING MONTANA THE BEST (NOT LAST) PLACE FOR ALL CHILDREN

The test of our progress is not whether we add to the abundance of those who have much; it is whether we provide enough for those who have too little.⁶⁹⁹

Franklin Delano Roosevelt
Second Inaugural Address

[I]n this country, the success of our children cannot depend more on where they live than on their potential.⁷⁰⁰

Barack Obama
State of the Union Address 2010

which tend to receive higher percentages of state funding than mid-sized and large schools. This suggests that the state of Montana is doing the re-distributive work necessary to equalize—at least partially—the situation of rural schools, which are costly to operate because of the inability to achieve economies of scale. Montana Law also reflects this sensitivity to the needs of rural schools. The Montana Code provides that “the needs of isolated schools with low population density” are one factor to be considered when determining school funding. Mont. Code Ann. § 20–9–309(3)(b).

697. Amartya Sen, *Inequality Re-examined* 1 (Oxford U. Press 1992).

698. *Id.*

699. Franklin D. Roosevelt, Speech, *Second Inaugural Address* (Washington D.C., Jan. 20, 1937) (quoted in Kindred, *supra* n. 575, at 541 n. 100). In his so-called “four freedoms” speech in 1941, Roosevelt described the third freedom as “freedom from want, which translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants.” Franklin D. Roosevelt, Message to Congress, *The Four Freedoms* (Washington D.C., Jan. 6, 1941).

700. Barack H. Obama, Speech, State of the Union Address (Washington, D.C., Jan. 27, 2010) (offering comment in the context of a discussion about education) (available at *Text: Obama's State of the Union Address*, N.Y. Times, <http://www.nytimes.com/2010/01/28/us/politics/28obama.text.html?scp=1&sq=obama%20state%20of%20the%20union&st=cse> (accessed Feb. 24, 2010)).

These statements by U.S. Presidents of different eras reflect two ways of thinking about the state's responsibility to ameliorate child poverty: adequacy and equality. First, every child should have enough to flourish. Second, children should have relatively equal opportunities. Spatial inequalities such as those associated with the rural-urban axis should not dictate life prospects. While the U.S. Constitution provides few tools for mandating state responses to the Constitution's Dignity Clause and Equal Protection Clause.

Rural places, almost by definition, are relatively underdeveloped and economically undiversified. Globalization has driven the restructuring of rural economies in recent years, causing and aggravating rural poverty.⁷⁰¹ For a number of rural communities, the result has been greater social and spatial isolation, with many such places facing lower per capita incomes, higher unemployment, a higher proportion of extractive and nondurable manufacturing employment, a greater dependence on income transfers, and fewer government resources.⁷⁰² As devolution places more responsibility on communities that already have poor infrastructure, insufficient resources, and inadequate management, rural poverty and stratification are likely to become even more pronounced.⁷⁰³

While this article holds Montana up as an example of spatial inequality and its consequences for children, the sad story told here is not limited to Montana. It is a story of the consequences of uneven development, coupled with devolution, which is playing out across the country.⁷⁰⁴ As federal funding of public services wanes, state and local funding decisions take on greater significance.⁷⁰⁵ In every state, spatial inequalities—which can be mapped somewhat predictably onto a rural-suburban-urban continuum—are an aspect of our nation's child poverty epidemic. In short, place is a significant marker of economic and social stratification, whether or not it intersects with racial or ethnic disadvantage.

In other ways, the story told here is very much a Montana story and is also representative of recent experiences of other inter-mountain West

701. See e.g. *Communities of Work: Rural Restructuring in Local and Global Contexts* (William W. Falk et al. eds., Ohio U. Press 2003); Pruitt, *Gender, Geography & Rural Justice*, *supra* n. 28, at 349–350, Part III(B)(2).

702. See Warner & Pratt, *supra* n. 50 at 657, 674–675.

703. *Id.*

704. Nationwide, revenue raised at the local level—primarily from property taxes—accounts for 57% of all local government revenue. Cimbaluk & Warner, *supra* n. 44, at 6 (noting that just three percent comes from the federal government and 40% comes from the state). See also Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 *Ariz. L. Rev.* (forthcoming 2010) (discussing the constitutional problems raised from the local funding of indigent defense in Arizona).

705. Cimbaluk & Warner, *supra* n. 44, at 6.

states.⁷⁰⁶ The story of Montana's development in recent decades, unlike that in states where growth has been concentrated in mega cities, is not one of dramatic urbanization. It is also not one—at least not entirely—of rural decline and population loss, as seen in some Midwest and Great Plains locales.⁷⁰⁷ Rather, Montana's story is one of rural gentrification and rural resorts,⁷⁰⁸ as well as localized oil, gas, and mineral wealth. As such, the development is not uniform or state-wide. Rather, it is limited to amenity-rich places in the Rocky Mountains and resource-rich places elsewhere in the State. As a consequence, the tax bases of counties such as Gallatin have burgeoned considerably, while at the same time, residents there expect and demand more services.⁷⁰⁹ Meanwhile, counties like Stillwater are able to maintain a degree of affluence because of the presence of mineral wealth, although the county's small, sparse population limits service provision. Other nonmetropolitan counties that have not seen economic growth suffer population loss and sometimes a corresponding flat or declining property tax base, thus causing them to be taxed more heavily for inferior services.⁷¹⁰ What we see in Montana, then, is an example of what Linda Lobao has called a "new inequality hot spot."⁷¹¹ As some counties have grown rapidly and the demographic profile of their residents has become more affluent, others have changed little or even seen their situations deteriorate due to population loss and rural restructuring.

Under Montana's scheme for financing county government, the fiscal consequences of this uneven development are public as well as private. The spatial inequality evident in Montana is partly a result of counties with poor property tax bases being less able to provide services to their citizens. The consequences of this failure are especially enduring for the particularly vulnerable child population.

To some extent, disparities among Montana counties surely reflect the differing priorities and philosophies among local governments. Gallatin

706. *Id.* at 9 tbl. 3 (charting level of state aid and its degree of centralization in each of 48 states); see also Montana, *Biennial Report*, *supra* n. 225, at 25–31 (comparing Montana's taxation scheme to that of other states).

707. See Hamilton et al., *supra* n. 5, at 7–8, 26; see also Lisa R. Pruitt, *Legal Ruralism Blog*; <http://legalruralism.blogspot.com/>; select Population Loss label (accessed Aug. 29, 2009).

708. See Hamilton et al., *supra* n. 5, at 26.

709. Mark Haggerty, *Fiscal Impacts of Alternative Development Patterns: Broadwater and Gallatin Counties*, Mont. Policy Rev. 19, 23–24, 26 (available at <http://www.montana.edu/wwwlgc/documents/haggerty-1997.pdf>) (accessed Oct. 1997) (arguing that urban development is ultimately more costly to counties than keeping land in agricultural uses because of the high demand for services by urban residents).

710. See *supra* n. 230 (discussing this phenomenon in relation to Weaver & Mathre's work and in relation to that of Coons et al), *supra* Part IV(D)5 and accompanying text (discussing Wheatland County); fig. 15 (showing Wheatland County's total mill levy as higher than urban Yellowstone and micropolitan Gallatin Counties' total mill levies).

711. Lobao, *Continuity*, *supra* n. 33, at 2.

County is clearly pro-growth, and its amenity-rich situation in the Rocky Mountains, near Yellowstone National Park, supports that stance. Stillwater and Wheatland counties are presumably constrained from such a stance by the character of their resources (e.g., human and social capital, ecological assets).

Rural sociologists who consider the character of county government and the challenges facing local governments in rural locales conclude that government at this scale can play a significant role in mitigating inequalities and fostering economic growth.⁷¹² However, county governments tend to view redistributive expenditures as a low priority and economic development as a high one.⁷¹³ But Professors Linda Lobao and David Kraybill found a significant, positive correlation between promotion of economic growth and the provision of social services.⁷¹⁴ Gallatin County's recent experiences surely reflect this phenomenon. The County's growth attracts well-educated and affluent newcomers. These new residents, typically transplants from metropolitan places, have presumably driven demand for services, based in part on the services they enjoyed at their prior place of residence. This provision of services, in turn, enhances Gallatin County's appeal to additional newcomers of the same well-heeled character.

At the same time, a different cycle operates in counties with poor property tax bases. Problems of inadequate infrastructure and schools, coupled with low quality health care and social services, impede these rural counties from enhancing their human capital, which would in turn foster economic growth.⁷¹⁵ Absent redistributive funding of services at the state or federal level, however, counties need local economic growth to remedy the infrastructure, school, and health and human service deficits that hinder that

712. Linda M. Lobao & Gregory Hooks, *Public Employment, Welfare Transfers, and Economic Well-Being across Local Populations: Does a Lean and Mean Government Benefit the Masses?*, 82 Soc. Forces 519, 546 (2003).

713. See Warner & Pratt, *supra* n. 50, at 658; Mildred E. Warner, *Competition, Cooperation and Local Government*, in *Challenges for Rural America in the 21st Century* 252, 255 (David L. Brown & Louis E. Swanson, eds. Pa. St. U. Press 2003) (discussed in Cimbaluk, *Fiscal Devolution and U.S. County Government*, *supra* n. 47, at 15); Paul E. Petersen, *City Limits* 69 (U. Chi. Press 1981) (noting that local government limitations require that they "concentrate on developmental as against redistributive objectives").

714. See Lobao & Kraybill, *supra* n. 49.

715. See Cimbaluk, *Fiscal Devolution and U.S. County Governments*, *supra* n. 47, at 15 (citing Lichter & Johnson, *supra* n. 36, at 333; Sharp & Parisi, *Devolution*, *supra* n. 43, at 357); Anita Brown-Graham & William Lambe, *Measures and Methods: Four Tenets for Rural Economic Development in the New Economy*, Policy Brief No. 9 (Carsey Institute Fall 2008); see also Sarah Dewees et al., *Local Economic Development in an Age of Devolution: The Question of Rural Localities*, 68 Rural Sociology 182 (2003) (finding rural counties in the Ohio River Valley less likely than their urban counterparts to undertake economic development activities).

same economic growth.⁷¹⁶ While some non-profit groups are working to train local leaders and facilitate rural development,⁷¹⁷ and the federal government also offers assistance,⁷¹⁸ growth remains elusive for some counties.

* * *

A great deal is at stake economically for Montana in remedying the spatial inequality that leaves residents of some counties grossly underserved. For starters, the cost of child poverty to the State is \$1.4 billion annually.⁷¹⁹ Other data are similarly compelling. If all students in Montana's high school Class of 2008 had graduated, the State would see an \$830 million boost to its economy.⁷²⁰ Further, educational attainment is positively associated with good health and longer life.⁷²¹

The point, of course, is that poor children are likely to become poor adults.⁷²² This is as true in the bucolic settings of rural America as it is in the urban core. The economic and social characteristics of rural places have profound impacts on the children and youth who grow up there. Not least is a socio-economic landscape that limits their educational and employment

716. See Lobao & Kraybill, *supra* n. 49, at 247; Cimbalk, *Fiscal Devolution and U.S. County Governments*, *supra* n. 47, at 15–16 (observing that, in competing for economic development opportunities, rural areas are constrained by “lower education levels, higher poverty levels, and a depressed economy”).

717. See Northwest Area Foundation, *The Horizons Community Guide* (2008), <http://www.horizonsmt.org/docs/2008%20Community%20Guide%20Lt%20.pdf> (Aug. 2008). The Northwest Area Foundation runs the Horizons program, “a community leadership program aimed at reducing poverty in small rural and reservation communities (populations less than 5,000 with greater than 10% poverty rate) faced with economic decline and demographic change,” in eight states. *Id.* at 4. See also *Montana Horizons Community Blogs*, <http://montana.communityblogs.us/> (accessed Aug. 21, 2009).

718. The U.S. Department of Agriculture administers a variety of grants, loans and programs for rural business and community development. Some examples are the Rural Business Opportunity Grant, Rural Economic Development Loans and Grants, Community Facilities Direct Loans and the Rural Community Development Initiative. Additional information is available at the Department of Agriculture's website. See United States Department of Agriculture, *Rural and Community Development*, http://www.usda.gov/rd/aboutrd/html_select “Programs: Business and Cooperatives” and “Community Development/Empowerment” (accessed Jan. 10, 2010). See also Wagner, *supra* n. 179, at 528.

719. Lori Pflingst, *The Cost of Child Poverty State by State 1–2* (Human Servs. Policy Ctr. 2008) (noting that this \$1.4 billion is but a small fraction of the cost of child poverty to our nation—approximately \$500 billion a year, or 4% of the U.S. gross domestic product); see also Harry J. Holzer, Diane Whitmore Schanzenbach, Greg J. Duncan, & Jens Ludwig, *The Economic Costs of Poverty in the United States: Subsequent Effects of Children Growing Up Poor* 23 (Institute for Research on Poverty 2007) (“summing the costs of foregone earnings and productivity, high crime rates and poor health associated with adults who grew up in poor households”).

720. Alliance for Excellent Educ., *The High Cost of High School Dropouts: What the Nation Pays for Inadequate High Schools* 4 (Alliance for Excellent Educ. June 2008). Montana would have saved an estimated \$30 million in health related costs alone if all the students in the Class of 2006 had graduated high school. Alliance for Excellent Educ., *Healthier and Wealthier: Decreasing Health Care Costs by Increasing Educational Attainment* 5 (Alliance for Excellent Educ. 2006).

721. *Healthier and Wealthier*, *supra* n. 720, at 2 (noting that “a high school graduate lives six to nine years longer than a dropout” and that graduates are more likely to be insured).

722. See Lichter & Johnson, *supra* n. 36, at 336.

prospects.⁷²³ One recent study of rural youth found them “at greater risk for both depression and diminished educational aspirations.”⁷²⁴ It also found that they “suffer greater loneliness and may be less likely to obtain the social support needed to mediate the impact of stressor events.”⁷²⁵ Studies of rural young adults aged 18 to 24 indicate that they are more likely to be idle—that is, unemployed and not enrolled in postsecondary education or the armed forces—than their urban counterparts.⁷²⁶

Yet even in pockets of persistent, high, concentrated, and deep poverty, there is hope. A 2004 study of poverty declines between 1990 and 2000 showed that the poverty rates for the poorest tracts of the poorest counties declined significantly.⁷²⁷ That study found that job growth and the development of social capital significantly reduced poverty and that the greatest reductions were in the tracts with highest poverty.⁷²⁸ The study concluded that policies aimed at particular neighborhoods can be effective at poverty reduction.⁷²⁹ Some Montana counties need just this sort of focused poverty elimination efforts.⁷³⁰

723. *Taking Stock*, *supra* n. 85, at 16; see also Anastasia Snyder, Diane McLaughlin, & Alicia Coleman-Jensen, *The New, Longer Road to Adulthood: Schooling, Work and Idleness Among Rural Youth*, <http://carseyinstitute.unh.edu/publications/Report9-IdleYouth.pdf> (2009).

724. Erik R. Stewart et al., *Parenting Practices of Rural Families and Their Relationship to Adolescent Educational and Emotional Outcomes*, in *The Hidden America: Social Problems in Rural America for the Twenty-First Century* 131, 132–143 (Robert M. Moore III ed., Susquehanna University Press 2001) (noting that “features of rural family life . . . may act to intensify the impact of normative and situational stressor events” for rural youth); see also Lichter et al., *Rural Children and Youth at Risk* *supra* n. 59, at 101–102. This problem is especially acute for American Indian youth. One in six of them has attempted suicide. Gonzales, *supra* n. 670, at 48.

725. Stewart et al., *supra* n. 724, at 132.

726. Anastasia Snyder & Diane McLaughlin, *Rural Youth Are More Likely to be Idle* 1 tbl. 1, http://www.carseyinstitute.unh.edu/publications/FS_RuralYouth_08.pdf (Winter 2008). Minorities aged 18 to 24 have particularly high rates of idleness. *Id.* In 2006, 16.5% of African-Americans, 19.3% of Hispanics, and 22.6% of other racial or ethnic minorities (including American Indians and Alaska Natives) residing in rural areas were idle. *Id.* The rate was 10.5% among rural white youth. *Id.* Rates of idleness were highest in the rural West (18.4%) and the South (14.2%). *Id.*

727. Crandall & Weber, *supra* n. 80 at 1276, 1281.

728. *Id.*

729. *Id.* The study also found that a neighborhood’s poverty “is tied to the fortunes of neighboring areas” so that poverty reduction can have positive “geographic spillovers.” *Id.*

730. Indeed, some communities are benefiting from such efforts, largely driven by non-profit organizations. For instance, the Northwest Area Foundation runs a program called Horizons, an 18-month community leadership program aimed at reducing poverty in small rural and reservation communities (populations of fewer than 5,000 with greater than 10% poverty rate). Seventeen cities in Montana are currently participating in the Horizons program. See *Horizons Montana Home Page, H3 Horizons Communities*, <http://www.horizonsmt.org> (accessed Aug. 21, 2009); in the three years since implementing the program, Harlowton participants in Wheatland County have become advocates and liaisons for their community with regards to issues including education, healthcare, and public parks, among others things. See *Montana Horizons Community Blogs, Horizons 2 Communities, Harlowton*, <http://montana.communityblogs.us/> (accessed Jan. 10, 2010).

Further, the State has a responsibility to all children. Recall the Supreme Court's language in *Prince*, *Brown*, and *Plyler*, as well as Justice Marshall's dissents in *Dandridge* and *Rodriguez*. The *Prince* Court emphasized that democratic society depends "upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."⁷³¹ *Brown* and *Plyler* recognized the importance of education to the capacity of individuals to lead "economically productive lives," as well as to citizenship formation and democracy.⁷³² Justice Marshall's dissent in *Dandridge* amplified the life-and-death nature of certain types of benefits. These decisions, while not always ruling in a way that required states to be more responsive to needy children, nevertheless recognized the importance of children's well being not only to individual children, but also to society. Further, these decisions recognized the role of government in fostering that well-being.

While federal government plays this role in some respects,⁷³³ inequalities and needs remain. For reasons discussed above, the State of Montana is in a position to provide a remedy. The opportunity of the Montana Supreme Court is especially inviting because of the Montana Constitution's Dignity Clause and because the Equal Protection Clause expressly mentions "social origin or condition" as a protected class.⁷³⁴ Just as states (including Montana) have been willing to direct legislative remedies in the context of school funding,⁷³⁵ so they similarly should be willing to direct a remedy for spatial inequality in provision of other government services—a phenomenon that undermines the life prospects of poor children.

Past decisions of the Montana Supreme Court give reason for particular hopefulness. In *Butte Community Union I* and *II*, the Montana Supreme Court was not especially deferential to the legislature, twice rejecting as unconstitutional legislation that curbed welfare benefits.⁷³⁶ In school funding litigation regarding both quality and equality, the State's high court similarly has not hesitated to tell the legislature to "fix it."⁷³⁷

While the Montana Constitution does not expressly or unequivocally make unconstitutional the spatial inequalities that characterize the situation of children (as well as the general population) across the State, the Dignity and Equal Protection Clauses—read together or independently—at least in-

731. *Prince*, 321 U.S. at 168.

732. See *supra* nn. 616–619 and accompanying text.

733. See *supra* n. 80, at 680 and accompanying text (discussing Title I and Title VII funding for education); Part IV(B)(2) (discussing programs such as TANF, SNAP, Medicaid and others).

734. See *supra* n. 517 and accompanying text.

735. See *Shavers*, *supra* n. 23, at 137–139; see also *Braveman*, *supra* n. 503, at 613.

736. See *supra* nn. 523–534 and accompanying text.

737. See *supra* n. 282 (discussing *Helena Elementary School Sch. Dist. I*, 769 P.2d 684; *Columbia Falls I*; *Columbia Falls II*, 109 P.3d 257).

vite reform. They invite change to a local government finance system that aggravates spatial inequalities across counties by dictating service provisions at the county level, while funding county government in a way that leaves some counties grossly unable to respond to the basic needs of residents.

While the focus in this article is the role the State of Montana could play in alleviating child poverty, the federal government has an important role, too. As noted in the initial discussion of devolution, the federal government has enormous potential to level the playing field for Montana's children.⁷³⁸ To some extent the federal government does this with programs such as Title I, which channels funds to low-income school districts,⁷³⁹ and with programs such as SNAP, TANF, WIC, and Free and Reduced Price Lunches.⁷⁴⁰ Indian Health Service and other Bureau of Indian Affairs programs address spatial inequalities as they intersect with American Indian ethnicity.⁷⁴¹

In Montana, however, the potential of the federal government is greater than in most states because of the significant federal funds associated with public lands that also flow into the State.⁷⁴² Yet these funds are typically earmarked for particular counties, and they sometimes go to the most affluent.⁷⁴³ This is particularly ironic in some cases because it is often the public lands—in the form of National Parks and National Forests, for example—that drive the rural resort/gentrification phenomenon, which attracts private wealth and moderates the need for such funds. Gallatin County is an example of this. For other counties, PILT and other transfer payments are critical to rural local governments' capacity to provide services.⁷⁴⁴ This is the case with Big Horn County, which benefits from millions of dollars in mineral lease payments each year.⁷⁴⁵

The 2008 Farm Bill is yet another avenue for garnering federal resources to alleviate child poverty. A provision of the bill establishes a Coordinator for Chronically Underserved Rural Areas.⁷⁴⁶ As of August 2009,

738. Cimbaluk, *Fiscal Devolution and U.S. County Governments 1987–2002*, *supra* n. 47, at 26 tbl. 1, 31 (noting that while federal government spending is, on average \$88 per person, state spending is typically thousands of dollars per capita).

739. U.S. Department of Education, *Improving Basic Programs Operated by Local Educational Agencies (Title I, Part I)*, <http://www.ed.gov/programs/titleiparta/index.html> (accessed May 24, 2009).

740. *See supra* nn. 241–244 and accompanying text.

741. *See supra* n. 257 and accompanying text.

742. *See supra* nn. 234–240 and accompanying text.

743. Fig. 16 (showing that Gallatin County, one of the most affluent in the state, is the recipient of one of the greatest amounts of federal funds associated with public lands).

744. *See supra* nn. 446–447, 480 and accompanying text (discussing federal funds received by Big Horn County and Wheatland County); Fig. 16.

745. *See supra* nn. 439–447 (discussing details of Big Horn County's finances).

746. 7 U.S.C. §§ 6941a(a)–(d) (2006). It provides:

however, no appointment had been made nor any action taken to establish this office.⁷⁴⁷ If and when it is established, the Coordinator will be responsible for directing U.S. Department of Agriculture resources to high-poverty rural areas as well as for “developing rural economic development that leverages the resources of state and local governments and non-profit and community development organizations.”⁷⁴⁸ Montana’s high-poverty rural counties are home to the sort of perennially underserved rural populations that should benefit from this new federal initiative. The State of Montana can play a complementary role with respect to these and other federal monies by providing consultation with local entities and officials regarding available grant funds. Doing so can help ameliorate one consequence of the human and social capital deficits in these most impoverished rural counties.

Eliminating child poverty under the Big Sky calls for action at multiple scales. Success will require a pluralism that enlists federal, state, local, and tribal governments, working collaboratively with non-profit organizations and the private sector, too. All of these entities must seek synergies that respond effectively to the needs of Montana’s youngest and most vulnerable citizens. Doing so will ensure a better future for all Montanans.

(a) Establishment. The Secretary of Agriculture shall establish a Coordinator for Chronically Underserved Rural Areas (in this section referred to as the “Coordinator”), to be located in the Rural Development Mission Area.

(b) Mission. The mission of the Coordinator shall be to direct Department of Agriculture resources to high need, high poverty rural areas.

(c) Duties. The Coordinator shall consult with other offices in directing technical assistance, strategic regional planning, at the State and local level, for developing rural economic development that leverages the resources of State and local governments and non-profit and community development organizations.

(d) Authorization of appropriations. There are authorized to be appropriated to the Secretary such sums as necessary to carry out this section for fiscal years 2008 through 2012.

747. E-mail from Aleta Botts, Staff Director Subcommittee on Rural Development, Biotechnology, Specialty Crops and Foreign Agriculture, House Agriculture Committee (June 23, 2009 5:35 am PST).

748. 7 U.S.C. §§ 6941a(c).