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## Inhibiting Intrastate Inequalities: A Congressional Approach to Ensuring Equal Opportunity to Finance Public Education

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## NOTE

### INHIBITING INTRASTATE INEQUALITIES: A CONGRESSIONAL APPROACH TO ENSURING EQUAL OPPORTUNITY TO FINANCE PUBLIC EDUCATION

Joshua Arocho\*

*The United States has exhibited a strong commitment to public education throughout its history. The local control of education long associated with the United States' federal system, however, has led to extreme inequalities in education finance within states. This reality, held constitutionally permissible by the Supreme Court in San Antonio Independent School District v. Rodriguez, is a product of heavy reliance on local property taxation as a means to fund schools. Although levying property taxes is a permissible state action to promote local control of education, its unaltered use is archaic and ultimately detrimental due to the United States' growing income gap and corresponding wealth segregation in the housing markets. Because federal and state court litigation has produced an intractable and inequitable split in education policy that remains unsolved by current federal- and state-led initiatives, this Note argues that a conditional congressional grant of funds would serve as a new, more politically feasible solution to this problem. By making federal funding under the next reauthorization of the No Child Left Behind Act contingent on states' adoption of new school finance systems, particularly the Guaranteed Tax Base, Congress can encourage states to give all communities an equal opportunity to finance a high-quality education for their students, regardless of the value of their taxable property.*

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### INTRODUCTION

“Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, *schools and the means of education shall forever be encouraged.*”<sup>1</sup>

While this passage, unlike much of the Northwest Ordinance of 1787, did not end up in the Bill of Rights,<sup>2</sup> the United States nonetheless ascribes no small value to education: after all, there are more colleges and universities per capita in the United States than in any other developed nation.<sup>3</sup> Yet our commitment to education is not reflected in the structure of our public school financing. Unlike many developed nations, the United States has a decentralized primary and secondary education system that has led to fragmentation and inequality within and among states.<sup>4</sup> Unfortunately, the structure of the U.S. government does little to help the situation, as it defers to the states to create school finance policies.

The clash between federal and state education initiatives finds its roots in our federal system of government. The U.S. Constitution, via the Tenth Amendment, delegates the duty to regulate public education to the states.<sup>5</sup> In fact, every state in the union guarantees the right to an education in its constitution, though the education clauses vary greatly in length and clarity.<sup>6</sup>

1. Northwest Ordinance of 1787, art. III, *reprinted in* 1 U.S.C., at lvii, lix (2012) (emphasis added). This passage, key to the spread of higher education in the United States, is engraved on the facade of the University of Michigan’s Angell Hall.

2. David G. Chardavoyne, *The Northwest Ordinance and Michigan’s Territorial Heritage*, in *THE HISTORY OF MICHIGAN LAW* 13, 13 (Paul Finkelman & Martin J. Hershock eds., 2006) (“Its provisions established a structure of government that encouraged settlement of that vast region and provided those settlers a startling set of civil rights that presaged the U.S. Constitution’s Bill of Rights.”).

3. JOHN U. BACON, *THREE AND OUT: RICH RODRIGUEZ AND THE MICHIGAN WOLVERINES IN THE CRUCIBLE OF COLLEGE FOOTBALL* 13 (2011).

4. David K. Cohen & James P. Spillane, *Policy and Practice: The Relations Between Governance and Instruction*, 18 *REV. RES. EDUC.* 3, 6 (1992).

5. *Id.* at 5.

6. Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 *BYU EDUC. & L.J.* 1, 3–4. For a discussion of the four categories of education

Although states differ in their approaches to school finance, one source of funding has proved ubiquitous: local property taxation.<sup>7</sup> This system purportedly maintains local control over education, but as the income gap continues to grow,<sup>8</sup> funding schools with local property taxes has created severe disparities in per-pupil funding between high-property-value school districts and low-property-value school districts.<sup>9</sup> On its face, local property taxation seems to allow communities to fund their schools at whatever level they deem appropriate; even if a low-property-value district greatly values education and therefore imposes high taxes, however, the revenues of its higher property tax rate cannot match the revenues that many high-property-value districts can raise with lower tax rates.<sup>10</sup>

States have taken conflicting approaches in attempting to solve the issue of disparate funding between school districts. Some state legislatures, like New Jersey's, have sought to enact laws aimed at creating parity between district funding—a true attempt at equal education for all of their students.<sup>11</sup> Other states, however, have declared that education is not a fundamental right and continue to use the local property tax schemes that cause such great inequalities.<sup>12</sup> For example, in Lake County, Illinois, there remains an enormous disparity in per-pupil funding: in 2010, Rondout Elementary spent \$24,244 per pupil, whereas Taft Elementary spent a mere \$7,023.<sup>13</sup>

The assumption that schools that spend more money per pupil have parents who care more about education is invalid. The local control ideals behind property tax funding can give rise to the erroneous conclusion that the parents in Rondout's school district, for example, value education much more than the parents in Taft's school district. Proportionally, however, Rondout parents pay less in property taxes than do Taft parents.<sup>14</sup> Given the increasing income gap in the United States,<sup>15</sup> revenues raised via property taxation are no longer an accurate metric of a community's commitment to

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clauses in state constitutions, see JAMES W. GUTHRIE ET AL., *MODERN EDUCATION FINANCE AND POLICY* 86–87 (2007).

7. See, e.g., DAPHNE A. KENYON, *THE PROPERTY TAX-SCHOOL FUNDING DILEMMA* 4 (2007), available at [https://www.lincolnst.edu/pubs/dl/1308\\_Kenyon%20PFR%20Final.pdf](https://www.lincolnst.edu/pubs/dl/1308_Kenyon%20PFR%20Final.pdf).

8. Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor*, in *WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES* 91, 100–01 (Greg J. Duncan & Richard J. Murnane eds., 2011).

9. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 11–13 (1973).

10. *Id.* at 64–65 (White, J., dissenting) (“In [low-property-value districts], no matter how desirous parents are of supporting their schools with greater revenues, it is impossible to do so through the use of the real estate property tax.”).

11. See discussion *infra* Section I.B.

12. See *infra* note 58.

13. Lisa Black, *Spending Gap Between State's Rich, Poor Schools Is Vast*, CHI. TRIB., Nov. 7, 2011, at 1, available at [http://articles.chicagotribune.com/2011-11-07/news/ct-met-school-funding-gaps-20111107\\_1\\_spending-gap-taft-s-district-poorest-schools](http://articles.chicagotribune.com/2011-11-07/news/ct-met-school-funding-gaps-20111107_1_spending-gap-taft-s-district-poorest-schools).

14. See *id.*

15. Reardon, *supra* note 8, at 100–01.

education. Perhaps this scheme accomplished its goal in the days where single-room schoolhouses were funded completely by homogenous communities of farmers, blacksmiths, and carpenters. But today vast discrepancies in personal wealth allow richer communities to shower their schools with resources unimaginable to schools serving low-income students—and they can do it at a much lower property tax rate. Parents in low-property-value school districts simply do not have the resources to match those of their high-property-value counterparts.<sup>16</sup> This antiquated funding scheme is no longer promoting local control over education; rather, it statutorily reinforces poverty by providing children in low-income families with fewer educational resources. As Cohen and Moffitt note, “[m]oney alone cannot cure [the] weak schools, but a chief source of academic weakness in these schools is the badly educated teachers and poor working conditions that inadequate revenues . . . underwrite.”<sup>17</sup>

Several reform efforts have attempted—and failed—to address these disparities. The struggle to eliminate such funding inequities faced its biggest legal setback in 1973, when the Supreme Court handed down its opinion in *San Antonio Independent School District v. Rodriguez*.<sup>18</sup> The Court held that funding education through local property taxes, despite the resultant disparities in per-pupil funding between neighboring school districts, did not violate the Equal Protection Clause of the Fourteenth Amendment because such funding was rationally related to the legitimate government interest of encouraging local control over education.<sup>19</sup> *Rodriguez*, though upholding the Texas law, left open the question of whether “some identifiable quantum of education is . . . constitutionally protected.”<sup>20</sup>

Nine years later, in *Plyler v. Doe*, the Court answered this question in the affirmative by invalidating a statute that completely denied public education to children of undocumented immigrants.<sup>21</sup> Writing for the majority, Justice Brennan (who wrote a bitter dissent in *Rodriguez*<sup>22</sup>) referred to these children as “victims” and argued that to deny them a basic education “imposes a lifetime hardship” and deprives them of the opportunity to “contribute in even the smallest way to the progress of our Nation.”<sup>23</sup> While this case was a

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16. Oftentimes, they are even legally prohibited from raising such revenues due to uniform property tax caps. See, e.g., MICH. CONST. art. IX, § 3 (setting a cap on increases in local property taxation). This bars property-poor districts from raising taxes to a level at which they could collect the same amount of revenues for schools as their property-rich counterparts do.

17. DAVID K. COHEN & SUSAN L. MOFFITT, *THE ORDEAL OF EQUALITY: DID FEDERAL REGULATION FIX THE SCHOOLS?* 191 (2009).

18. 411 U.S. 1 (1973).

19. *Id.* at 54–55.

20. See *id.* at 36.

21. 457 U.S. 202 (1982).

22. *Rodriguez*, 411 U.S. at 62–63 (Brennan, J., dissenting).

23. *Plyler*, 457 U.S. at 223–24.

much-needed victory in federal court for proponents of educational opportunity, it set the standard for the right to education so low that it has proven unable to overcome the trend set by *Rodriguez*.

By largely foreclosing federal litigation as a means to secure greater educational equity, *Rodriguez* and *Plyler* have forced some reformers to seek redress in state court litigation on the one hand and in federal and state legislative reforms on the other. After these federal equal protection claims (known as the “first wave” of school finance lawsuits),<sup>24</sup> two new waves of litigation—equality challenges and adequacy challenges—surfaced in state courts.<sup>25</sup> These challenges are referred to as the second and third waves of school finance litigation, respectively.<sup>26</sup> Modern trends have shifted toward adequacy challenges, which argue that every student is entitled to a basic level of education. These challenges have generally been more successful than equality challenges, which aimed to secure equal funding for all schools.<sup>27</sup> Such second and third wave cases have taken place in forty-five of fifty states, and their mixed results have left poor students in certain states at a severe competitive disadvantage.<sup>28</sup> Looking to the future, some have proposed a “fourth wave” of education litigation comprising federal quality-of-education (adequacy) claims,<sup>29</sup> but this is unlikely to produce meaningful results due to the amorphous character of educational quality. Put simply, courts lack the requisite expertise to prescribe standards for education.<sup>30</sup> Without such knowledge, they can give only *carte blanche* authority to states to determine the meaning of “adequate education,” which is the system under which we already operate.<sup>31</sup>

Perhaps noting the mixed results in seeking equity in inputs (i.e., school funding), the federal government has attempted to address educational inequities in outputs (i.e., student performance) through initiatives like the No Child Left Behind Act (“NCLB”). Although NCLB continued to partially offset funding differences in high- versus low-income schools—as did its predecessor, the Elementary and Secondary Education Act of 1965 (“ESEA”)—poor schools already counted on these dollars to educate low-income students.<sup>32</sup> And although the states have engaged in collective action

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24. GUTHRIE ET AL., *supra* note 6, at 91–93.

25. *Id.* at 87.

26. *Id.*

27. *See id.*

28. *See* MICHAEL A. REBELL, COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 2–3 (2009).

29. Lauren Nicole Gillespie, Note, *The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education*, 95 CORNELL L. REV. 989 (2010).

30. *See, e.g.*, Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996) (“What constitutes a ‘high quality’ education, and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards.”).

31. Even if courts had the requisite knowledge to do so, they would face significant separation-of-powers problems. *Butt v. California*, 842 P.2d 1240, 1258 (Cal. 1992).

32. NCLB did significantly increase Title I funding, *No Child Left Behind Is FUNDED*, HOUSE EDUCATION AND THE WORKFORCE COMMITTEE (Jan. 2005), available at <http://>

to form the Common Core State Standards Initiative, which exerts more control over curricula than the federal government does with NCLB, the Common Core is minimally funded and thus has not and cannot address school finance issues.<sup>33</sup>

In light of these failed attempts at meaningful reform, this Note proposes a new federal legislative solution to cure the ailment of school finance inequity. History has made clear that Congress is the only remaining body with the authority and ability to correct the inequities in education funding caused by local-property-tax-based school finance schemes. By conditioning a percentage of federal education funding under the next reauthorization of NCLB on states' adopting more equitable school finance systems, Congress can encourage states to provide all communities an equal opportunity to finance a high-quality education for their students, regardless of the communities' respective taxable property values. Part I argues that appeals to the judiciary are counterproductive—federal litigation cannot be a vehicle for change given the existing jurisprudence, and state court litigation has led to an inequitable split in education policy. Part II contends that legislative reform efforts have been largely ineffective: states have struggled to address school finance inequities through a patchwork of individual reform efforts, current federal reforms are ineffective, and state-led collaborative programs will fail because such initiatives lack the additional funding necessary to cure financial inequalities. Finally, Part III argues that congressional action is the only avenue available to address systemically school finance inequity, and this Part therefore offers a legislative proposal wherein Congress would use its spending powers to persuade states to create school finance schemes that offer equal opportunity for all school districts to collect funds to finance public education.

#### I. RODRIGUEZ AND THE STATES' DIFFERING CONCEPTIONS OF EDUCATIONAL EQUALITY

This Part discusses the *Rodriguez* decision and its ultimate effect: perpetuating a detrimental rift in state school finance policy that not only disadvantages poor students within states but also disadvantages students in states with less progressive school finance systems. Section I.A outlines *Rodriguez* and *Plyler*, concluding that Supreme Court jurisprudence has foreclosed federal litigation as a viable means to secure school finance equality. Section I.B discusses the different positions state supreme courts have taken on state

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archives.republicans.edlabor.house.gov/archive/issues/109th/education/nclb/nclbfunded.htm, but these increases failed to give low-property-value school districts the ability to tax themselves at a higher rate in order to escape the strings attached to Title I funding.

33. See CTR. ON EDUC. POLICY, YEAR 3 OF IMPLEMENTING THE COMMON CORE STATE STANDARDS: AN OVERVIEW OF STATES' PROGRESS AND CHALLENGES 14 (Aug. 2013) ("34 states reported that finding adequate resources to support all of the necessary CCSS implementation activities is a major (22 states) or minor (12) challenge."), available at <http://www.cep-dc.org/displayDocument.cfm?DocumentID=421>.

constitutional rights to education, and it also examines many state legislatures' failure to address school finance inequality even in the face of court orders. Section I.B ultimately suggests that *even states that recognize the importance of education* cannot find equitable funding solutions.

#### A. *Rodriguez and Its Aftermath*

States control education by virtue of their police power. The Constitution vests in the states all authority not expressly vested in the federal government,<sup>34</sup> and the power to control education is not expressly vested in the federal government.<sup>35</sup> States, in turn, have transferred much of their power over education to counties, school districts, and individual schools.<sup>36</sup> This structure has helped perpetuate the educational inequalities that plague the states. The *Rodriguez* decision—an immense blow for proponents of equal educational opportunity—is instructive.

In *Rodriguez*, Texas's school finance system used property taxes to promote local control over public schools. The Texas Minimum Foundation School Program guaranteed that every school would get a minimum level of funding from the state.<sup>37</sup> If districts decided that they wanted to spend more than the funding program allowed, they could do so by levying more property taxes.<sup>38</sup> This policy led to vast inequalities in per-pupil expenditures, which prompted the *Rodriguez* plaintiffs to file suit under the Fourteenth Amendment's Equal Protection Clause. The Edgewood Independent School District—a community composed of 90 percent Mexican Americans and 6 percent African Americans—took exception to this system because it did not allow them to raise revenues comparable to those raised by more affluent communities. The property tax rate in Edgewood was \$1.05 for every \$100 of property value as compared with the nearby Alamo Heights Independent School District's \$0.85.<sup>39</sup> But because per-pupil property values in Alamo Heights were more than 10 times higher than those in Edgewood, Alamo Heights was able to raise \$333 per pupil compared to Edgewood's scant \$26.<sup>40</sup> Despite Edgewood's demonstrated commitment to education—as evidenced by its higher property tax rate as compared with that of neighboring Alamo Heights—it was not able to raise even one-tenth of the revenue that Alamo Heights raised.

The Supreme Court, in a 5–4 decision, dismissed the plaintiffs' equal protection claim. The Court held that the Texas school finance system was

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34. U.S. CONST. amend. X.

35. *See id.* art I.

36. Cohen & Spillane, *supra* note 4, at 5–6.

37. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 9–10 (1973). Eighty percent of funds for this program came from the state's general treasury, and the remaining 20 percent came from statewide property taxes, in an attempt to ensure that districts with the greater ability to pay would do so. *Id.*

38. *Id.* at 9–11.

39. *Id.* at 12–13.

40. *Id.*

constitutional because it was rationally related to the government objective of promoting local control of public education.<sup>41</sup> Furthermore, the Court noted that the residents of property-poor districts were not members of a suspect class because of the “large, diverse, and amorphous” nature of the group<sup>42</sup> and that education is not a fundamental right.<sup>43</sup> This explains the Court’s application of the rational basis test.

*Rodriguez* did leave the door open for subsequent educational equality litigation by noting that there may be a constitutional right to “some identifiable quantum of education.”<sup>44</sup> The implication was a glimmer of hope for equal education proponents and prompted another lawsuit, *Plyler v. Doe*.<sup>45</sup> There, the Supreme Court held unconstitutional a Texas statute that completely barred children of undocumented immigrants from participating in public education.<sup>46</sup> The Court noted that denying these children access to education would impose a “lifetime hardship on a discrete class of children not accountable for their disabling status.”<sup>47</sup>

*Plyler*, however, has not set a trend counter to *Rodriguez*. Although a federally guaranteed right to a “quantum” of education exists, only a *complete denial* of education violates that right.<sup>48</sup> Thus, school finance systems based on the use of local property taxation, despite their archaic and unbalanced approach to granting localities control over education, remain constitutionally permissible. Because the Supreme Court has given no indication that it will reverse course on the issue,<sup>49</sup> reformers have turned to state courts and legislatures.

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41. *Id.* at 50–51. The Court specifically noted that “[i]t has simply never been within the constitutional prerogative of this Court to nullify statewide measures . . . merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.” *Id.* at 54.

42. *Id.* at 28.

43. *Id.* at 37.

44. *See id.* at 36–37 (“Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [the rights to speak or vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.”).

45. 457 U.S. 202 (1982).

46. *Plyler*, 457 U.S. at 230.

47. *Id.* at 223.

48. *See id.* at 230.

49. *See, e.g.,* *McCleskey v. Kemp*, 481 U.S. 279, 297–98 (1987) (holding that despite statistical evidence that the death penalty was disproportionately administered to African Americans in Georgia, the petitioner failed to show that the legislature acted with a discriminatory purpose or that it maintained the legislation *because of* the statistics showing a disproportionate impact); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985) (noting the Court’s reluctance to create new suspect classes); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (In order to run afoul of the Fourteenth Amendment, the law must be made “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that unconstitutionality is not presumed merely because the law may affect a greater proportion of one demographic than another). Furthermore, it will be nearly impossible for future litigants to prove that any state legislature enacted school finance legislation purposely to disadvantage the poor because

B. *The Failures of State Court Litigation and State-Based Legislation*

Although state courts have occasionally been sympathetic to concerns about school finance equity, they have been very inconsistent in recognizing the need for such equity. After the limited success of *Plyler*, litigants turned to state courts to seek greater equity under state constitutional provisions on either public education or equal protection.<sup>50</sup> States are about equally split: some have accorded education the status of a fundamental right and have consequently mandated more equal funding schemes, others have chosen not to do so, and still others have declared that the state is required to give every child an *adequate* level of education—the definition of which is rarely specified.<sup>51</sup>

The line of *Abbott* decisions from New Jersey arguably represents the most extreme example of a state supreme court enforcing school finance equality. These cases, brought by the Education Law Center beginning in 1981, challenged New Jersey's Public School Education Act of 1975, arguing that its reliance on property taxes caused substantial inequalities in funding between New Jersey school districts.<sup>52</sup> Almost a decade later, the New Jersey Supreme Court held that the Act violated New Jersey's constitution, that it must be revised to “assure funding of education in poorer urban districts at the level of property-rich districts,” and that this funding could not depend on a district's ability to levy property taxes.<sup>53</sup> This led to further litigation over the New Jersey legislature's failed attempts to ensure parity between district funding.<sup>54</sup> Although this was probably the single most sweeping state court order regarding school finance, several other lawsuits have also achieved some level of success in state court.<sup>55</sup>

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of the prevalence of local property taxation in school funding nationwide. See, e.g., KENYON, *supra* note 7, at 4 (noting that in the 2004–2005 school year, 28.7% of all school funding nationwide came from local property taxes).

50. See GUTHRIE ET AL., *supra* note 6, at 93–99.

51. See 3 JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION § 6:19 (2012–13 ed. 2012).

52. *Abbott v. Burke*, 495 A.2d 376, 381 (N.J. 1985) (“The framework for plaintiffs' contention is that under the 1975 Act, for the past decade, the State has contributed no more than about 40% of all school operating costs, and that the majority of all public school expenditures is derived from local property taxes. Referring to the considerable evidence marshalled and adduced in the course of discovery, plaintiffs contend that substantial property wealth disparities exist among school districts, that this has resulted in substantial disparities in per pupil expenditures among districts, and that both of these disparities have widened since the 1975 Act went into effect.”).

53. *Abbott v. Burke*, 575 A.2d 359, 363 (N.J. 1990).

54. See *Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011). For a discussion of state legislatures' failure to follow court orders, see *infra* notes 60–65 and accompanying text.

55. E.g., *Hull v. Albrecht*, 960 P.2d 634 (Ariz. 1998) (en banc) (holding that substantial funding disparities between school districts is unconstitutional); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002) (holding that education is a fundamental right); *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206 (Conn. 2010) (en banc) (holding that state constitution requires substantially equal educational opportunities); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206 (Ky. 1989); *Columbia Falls Elementary Sch. Dist.*

Conversely, several state constitutional challenges have failed. In Maine, for example, students and school districts challenged the state's School Finance Act because its cuts in state aid disproportionately harmed low-property-value school districts. The Supreme Judicial Court of Maine declined to decide whether education is a fundamental right because the plaintiffs did not present any evidence that the Act affected the quality of their education.<sup>56</sup> The court ultimately held the Act to be rationally related to the legitimate government interest of subsidizing education while staying within the limits of the state budget.<sup>57</sup>

Several other state supreme courts have arrived at similar conclusions,<sup>58</sup> thus creating an interstate rift in educational equality jurisprudence. This rift is especially problematic given recent research that stresses the importance of improving our educational systems *across the board* to be able to compete in a global economy.<sup>59</sup> The disagreement over education's status as a fundamental right significantly disadvantages students in states that do not recognize it as such a right. This is especially true for students in poor, urban school districts who are denied equal educational opportunities due to a lack of funding available to their schools. The proposal outlined in Part III would address this problem, both in states that do not recognize education as a fundamental right and in states that *do* but have failed to implement truly equitable systems.

State legislatures have also failed to address these issues, even in the face of court-ordered relief. In Ohio, for example, the state supreme court ordered the legislature to reconfigure its school finance scheme because it did not provide a "thorough and efficient system of common schools *throughout the state*."<sup>60</sup> The state legislature failed to respond adequately, which prompted additional court opinions—also unheeded—holding that the school finance scheme was unconstitutional.<sup>61</sup> The plaintiffs ultimately petitioned the Supreme Court for a writ of certiorari, which was summarily denied.<sup>62</sup> Education advocates encountered a similar situation in New York.

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No. 6 v. State, 109 P.3d 257 (Mont. 2005) (holding that the funding scheme did not allow for all schools to meet quality standard in state constitution).

56. Sch. Admin. Dist. No. 1 v. Comm'r, Dep't. of Educ., 659 A.2d 854, 857 (Me. 1995).

57. *Id.* at 858.

58. See, e.g., Idaho Schs. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho 1993) (education is not a fundamental right); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996) (education is not a fundamental right); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170 (Kan. 1994) (education is not a fundamental right).

59. See NAT'L GOVERNORS ASS'N ET AL., BENCHMARKING FOR SUCCESS: ENSURING U.S. STUDENTS RECEIVE A WORLD-CLASS EDUCATION 9–19 (2008), available at <http://www.achieve.org/files/BenchmarkingforSuccess.pdf>.

60. DeRolph v. State, 677 N.E.2d 733, 747 (Ohio 1997) (emphasis added).

61. DeRolph v. State, 780 N.E.2d 529, 532 (Ohio 2002); DeRolph v. State, 728 N.E.2d 993, 1020 (Ohio 2000).

62. DeRolph v. Ohio, 540 U.S. 966 (2003).

There, a state court ordered more funding for state schools,<sup>63</sup> and the legislature complied with the order by drafting a plan to phase in more appropriations for education.<sup>64</sup> During the 2008 recession, however, New York defaulted on that promise.<sup>65</sup>

In short, states have largely failed to ensure educational equality for their students. Even where states' highest courts have declared the school finance systems unconstitutional, such as in Ohio and New York, students were ultimately *still* subjected to inequitable treatment. Given the federal structure of the U.S. government, state action is necessary in promoting educational equality, but such action alone has proved insufficient.

## II. NATIONWIDE ATTEMPTS TO ADDRESS EDUCATIONAL INEQUALITY

Individual states have not been the only actors attempting to increase educational equity. This Part outlines attempts by the federal government, as well as attempts by the state governments acting collectively, to exert control over education policy. These reforms, because they either had only a small impact on schools' budgets or have lacked any meaningful funding mechanisms, have been largely ineffective. Section II.A contrasts the federal government's hands-off approach through the first half of the twentieth century with its increased involvement in education beginning in the 1960s, and this Section concludes that even the increased federal control has not significantly reduced inequalities in intrastate school finance. Section II.B contends that the states' Common Core State Standards Initiative, while a valiant effort to standardize educational goals nationwide, lacks the funding and institutional capacity to address school finance inequities within states.

### A. *From Local Control to Federal Reform*

Public education in the United States has undergone drastic changes since its inception. The early paradigm of local control has given way to greater federal control over national education policy. While localities still have substantial control over education, the federal government's expanded role in setting education policy necessitates congressional action on the issue of school finance.

In the early days of public education, schools were controlled almost exclusively by localities. This phenomenon is particular to the United States, as other nations have adopted more centralized control of education.<sup>66</sup> Many American schools had one room and one teacher for all students and were

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63. Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50 (N.Y. 2006).

64. Sharon Otterman, *Last Days, Perhaps, for Group That Sued for Poor School Districts*, N.Y. TIMES (June 8, 2011, 5:03 PM), [http://cityroom.blogs.nytimes.com/2011/06/08/last-days-perhaps-for-group-that-sued-for-poor-school-districts/?\\_r=0](http://cityroom.blogs.nytimes.com/2011/06/08/last-days-perhaps-for-group-that-sued-for-poor-school-districts/?_r=0).

65. *Id.*

66. Cohen & Spillane, *supra* note 4, at 7.

funded entirely by local communities.<sup>67</sup> Local control over public education prompted the colonists to fund schools through local property taxation.<sup>68</sup> By the beginning of the twentieth century, however, states began to assert control over certain facets of education.<sup>69</sup> Localities lost even more control over their teachers in the 1950s and 1960s, when teachers' unions became prevalent.<sup>70</sup> Despite these changes at the state level, the federal government still did not play a major role in setting education policy, and small, locally controlled schools remained the norm.<sup>71</sup>

By the 1960s, this had changed. On the heels of *Brown v. Board of Education*,<sup>72</sup> liberals pushed for federal aid to schools that served disadvantaged students but were blocked in Congress by Southern conservatives.<sup>73</sup> Early in his presidency, however, President Kennedy created a task force on education, which recommended unprecedented federal aid to public schools.<sup>74</sup> These recommendations resonated with President Johnson, whose attempt to raise educational standards for low-income students broke the impasse with the Elementary and Secondary Education Act of 1965 (now known as the No Child Left Behind Act).<sup>75</sup> Title I of this Act provided direct funding to the states for public education based on a complex formula that takes into account the number of students from low-income families.<sup>76</sup>

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67. CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860*, at 13–15 (1983). Until the late nineteenth century, local communities were charged with setting qualifications for their teachers, resulting in low standards. DAN C. LORTIE, *SCHOOLTEACHER: A SOCIOLOGICAL STUDY* 17 (2002). Since resources were scarce, parents had substantial control over what their children learned in school because they were responsible for choosing the books from which their children learned to read during the school day. KAESTLE, *supra*, at 17. This practice was described as a “jealously defended tradition.” *Id.*

68. LORTIE, *supra* note 67, at 6–7. This form of taxation, they argued, was “highly visible” and “relatively painful,” so locals would think hard about how educational expenditures would affect the resources available for the community’s other needs. *Id.* at 7.

69. One major loss of local control was power over teacher certification. Schools could no longer hire as they pleased but rather were subjected to state certification standards, which often involved the “completion of prescribed courses of study in colleges and universities.” *Id.* at 18.

70. *Id.* at 21.

71. As late as 1956, there were almost 35,000 one-teacher schools in the United States. *Id.* at 4.

72. 347 U.S. 483 (1954).

73. For a discussion of conservative opposition to federal education funding, see generally Steven Teles, *The Eternal Return of Compassionate Conservatism*, NAT’L AFF., Fall 2009, at 107, 121–22.

74. MICHAEL O’BRIEN, *JOHN F. KENNEDY: A BIOGRAPHY* 565 (2005).

75. Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. § 6301 (2012)).

76. *Id.* Even though Democrats tried to minimize federalism issues by giving this money directly to the states to distribute to local schools, this unprecedented federal intrusion into education policy sparked strong opposition from Republicans in Congress. Sarah G. Boyce, Note, *The Obsolescence of San Antonio v. Rodriguez in the Wake of the Federal Government’s*

This Act fundamentally altered the political landscape surrounding federal education policy. In one year, the government nearly tripled its expenditures on public education,<sup>77</sup> and the continued support of the Act throughout both the Nixon and Ford Administrations “embedded [federal funding of education] in the fabric of American politics.”<sup>78</sup> This sweeping change prompted President Reagan to commission a group of researchers and educators to put together a report on the status of education in the United States. The commission presented its results in “A Nation at Risk,” which found that U.S. schools had fallen far behind their international counterparts—a potential explanation for the country’s then-waning economy.<sup>79</sup>

“A Nation at Risk” started an ongoing conversation about strategies for a national solution to the problems facing education. Many problems emerged as roadblocks to education reform—the need for instant results led to conflicting reform efforts, curricula were not rigorous enough to challenge students, teachers were not highly trained in their subject areas, and accountability was generally lacking.<sup>80</sup> Despite the increased inputs, schools were not seeing gains of the anticipated magnitude,<sup>81</sup> which ushered in a wave of accountability-centered initiatives focusing on student test scores known as Standards Based Reform.<sup>82</sup>

Throughout all of these reforms, the federal government continued to give considerable discretion to the states, leading to increased incoherence in curricula, assessments, and benchmarks. NCLB, for example, requires that 100 percent of students in all schools reach “proficiency” in math and reading by 2014<sup>83</sup> but leaves the meaning of “proficiency” to the states.<sup>84</sup> This

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*Quest to Leave No Child Behind*, 61 DUKE L.J. 1025, 1031–33 (2012). By the time the Act came up for reauthorization in 1974, however, this opposition had mostly waned. *Id.* at 1033.

77. Boyce, *supra* note 76, at 1033–34.

78. GARETH DAVIES, *SEE GOVERNMENT GROW: EDUCATION POLITICS FROM JOHNSON TO REAGAN 2* (2007).

79. NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK* 3–6 (1983), *available at* [http://datacenter.spps.org/uploads/SOTW\\_A\\_Nation\\_at\\_Risk\\_1983.pdf](http://datacenter.spps.org/uploads/SOTW_A_Nation_at_Risk_1983.pdf).

80. *See generally* Marshall S. Smith & Jennifer O’Day, *Systemic School Reform*, in *THE POLITICS OF CURRICULUM AND TESTING* 233, 236–45 (Susan H. Fuhrman & Betty Malen eds., 1991) (discussing barriers to school improvement).

81. *See* COHEN & MOFFITT, *supra* note 17, at 182.

82. *Id.* at 185–86. For examples of standards based reform initiatives, see Goals 2000: Educate America Act, 20 U.S.C. § 5801 (2012); the No Child Left Behind Act, 20 U.S.C. § 6301 (2012); the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (2009) (establishing the funding provision for Race to the Top); the Augustus F. Hawkins–Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297 (1988), *amended by* 20 U.S.C. § 6301 (2012); the School-to-Work Opportunities Act of 1994, 20 U.S.C. § 6101 (2000) (expired Oct. 1, 2001, as provided by 20 U.S.C. § 6251 (2000)); 1996 NAT’L EDUC. SUMMIT, *A REVIEW OF THE 1996 NATIONAL EDUCATION SUMMIT* (1996), *available at* <http://www.achieve.org/files/1996NationalEducationSummit.pdf>.

83. 20 U.S.C. § 6311(b)(2)(F) (2006).

84. *Id.* § 6311(b)(2)(B).

attempt to overcome the fragmented nature of U.S. public education misguidedly aimed to create “fifty coherent systems in which teaching and learning followed standards and tests.”<sup>85</sup> But this presented a problem: the same fifty states that caused the incoherence in the first place were responsible for repairing it. Fearing the harsh penalties associated with NCLB,<sup>86</sup> many states adopted low academic standards to make it appear that they were in compliance without actually improving instruction.<sup>87</sup> This delegation of power even produced an ironic twist—because the states most behind in educational outputs feared NCLB’s penalties the most, they set the lowest standards,<sup>88</sup> which enabled them to become the most academically “proficient” states.

Despite federal reforms in other aspects of education, Congress has continued to defer to states in the context of school finance schemes. In light of the popularity of local property tax funding schemes among the states,<sup>89</sup> continued use of these schemes has served to reinforce the substantial inequalities in education spending within states.<sup>90</sup> The federal government requires equal outputs from all schools, but it does so where educational resources are inherently unequal, making it incredibly difficult for under-resourced schools to keep up. Notwithstanding the federal government’s efforts to increase educational equality, students in low-property-value school districts are still subject to unequal inputs, with little meaningful improvement in outputs.

B. *The Common Core State Standards Initiative Lacks the Resources Necessary to Address School Finance Inequities*

State-led initiatives have also failed to grapple with the inequities in school finance caused by the legacy of local control and local property taxes. The Common Core State Standards Initiative aims to create a national curricular framework but makes no mention of school finance. Without adequate funds, however, schools will not be able to implement the Common Core evenly.

Because localities have a record of jealously guarding their control over education, they have viewed federal mandates on education policy as intrusive. In many nations, the national government has ultimate authority over

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85. COHEN & MOFFITT, *supra* note 17, at 188.

86. 20 U.S.C. § 6311(g).

87. COHEN & MOFFITT, *supra* note 17, at 34.

88. *See id.* at 192; Tamar Lewin, *States Found to Vary Widely on Education*, N.Y. TIMES, June 8, 2007, at A21, available at <http://www.nytimes.com/2007/06/08/education/08scores.html>.

89. Local property taxes make up almost half of all school funding nationwide. Bruce J. Biddle & David C. Berliner, *What Research Says About Unequal Funding for Schools in America*, POLICY PERSPECTIVES (WestEd, San Francisco, Cal.) 2003, at 23.

90. *Id.* at 2.

education policy.<sup>91</sup> Conversely, states retain power over most educational decisions in the United States.<sup>92</sup> This partly explains why many believe that the Common Core State Standards Initiative could be more successful than the federally mandated NCLB.<sup>93</sup>

As of September 2013, forty-five states and the District of Columbia have adopted the Common Core Standards for English Language Arts and Mathematics.<sup>94</sup> These standards outline the skills that students are supposed to attain by the end of each grade, giving states and teachers common guidelines for what they should be teaching.<sup>95</sup> Proponents of the Common Core believe that because the initiative is state-led and not federally mandated, state governors may be more inclined to ensure the success of its implementation than they are to ensure that of NCLB, as the governors lack political cover in the event that the Common Core fails.<sup>96</sup>

While the Common Core addresses the need for uniform education standards, it does not address gross inequities in education finance. The Common Core provides that the standards “ensur[e] all students, no matter where they live, are well prepared with the skills and knowledge necessary to collaborate and compete with their peers in the United States and abroad.”<sup>97</sup> But without drastic reform of states’ school finance schemes, the Common Core will not be able to achieve its goal.<sup>98</sup> The National Governors Association and the Council of Chief State School Officers could include a provision requiring states that adopt the Common Core to agree to revamp their school finance laws such that schools have equal opportunity to implement the Common Core standards. This way, schools and districts that typically operate on lower per-pupil expenditures will have a better chance at administering the standards at the same level as those that typically operate with more funds. As noted above, money alone is not a cure-all, but it can

91. Cohen & Spillane, *supra* note 4, at 6.

92. *See id.*

93. Willona Sloan, *Coming to Terms With Common Core Standards*, 16 POL’Y PRIORITIES 4 (2010), available at <http://www.ascd.org/publications/newsletters/policy-priorities/vol16/issue4/full/Coming-to-Terms-with-Common-Core-Standards.aspx>.

94. *In the States*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/in-the-states> (last visited Feb. 19, 2014).

95. *See, e.g., Mathematics*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/Math> (last visited Feb. 19, 2014).

96. In the case of NCLB, governors could simply shirk their responsibility to successfully implement the program and instead blame the federal government for its failure. The Common Core, by contrast, is led by the National Governors Association and the Council of Chief State School Officers, which brings accountability to the state level. *See* NAT’L GOVERNORS ASS’N ET AL., *supra* note 59, at 24–25.

97. *Frequently Asked Questions*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/resources/frequently-asked-questions> (last visited Feb. 19, 2014).

98. Education reformer Diane Ravitch has similarly commented on the Common Core’s shortcomings, noting that “we have a problem of poverty, and the Common Core does nothing to address that particular problem.” *Exclusive—Diane Ravitch Extended Interview Pt. 1*, THE DAILY SHOW WITH JON STEWART (Oct. 30, 2013), [http://www.thedailyshow.com/extended-interviews/430100/playlist\\_tds\\_extended\\_diane\\_ravitch/430085](http://www.thedailyshow.com/extended-interviews/430100/playlist_tds_extended_diane_ravitch/430085).

counteract some of the detrimental conditions that plague weak schools.<sup>99</sup> For example, with more money, low-income school districts could pay higher teacher salaries and thus attract more experienced teachers to their classrooms. These teachers will have a better chance of effectively implementing the Common Core than their less experienced counterparts. By tying a school finance rider to the Common Core, the National Governors Association and Council of Chief State School Officers may be able to help ensure that a child receives equal access to quality education no matter where he lives in any given state.

Because the Common Core is still struggling to implement its education standards and develop standardized tests,<sup>100</sup> however, it may be reluctant to address the additional, and much more arduous, task of reassembling the majority of state school finance systems. Furthermore, the Common Core has no funding mechanism to persuade state legislatures to create more equitable school finance schemes. Like NCLB, the Common Core aims for equal outputs where resources are inherently unequal, thus disadvantaging underresourced schools. For these reasons, Congress must take action for the Common Core State Standards Initiative to experience success at scale.

### III. CONDITIONAL FEDERAL APPROPRIATIONS CAN HELP TO ERADICATE EDUCATIONAL INEQUALITY

With federal constitutional challenges nigh impossible, state constitutional rulings inconsistent, and current state-led education initiatives insufficient, congressional action represents the only means of obtaining educational funding equity. State-led initiatives may be more politically feasible given today's heated political climate, but they lack the funding and the scope of a congressional remedy. Therefore, this Part proposes that Congress should incentivize states to change their school finance schemes by tying federal grant money to the states' use of a more equitable school finance formula—the Guaranteed Tax Base—that subsidizes low-property-value school districts that choose to tax themselves at high rates. Section III.A details such a congressional solution and concludes that it is the most feasible avenue because of the politically divisive nature of state legislatures. Section III.B outlines Congress's constitutional authority to take such action and finds that while there are weak federalism arguments against such action, it should prove permissible under the current test for such claims, despite recent scholarship attacking the constitutionality of similar spending provisions in NCLB.

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99. COHEN & MOFFITT, *supra* note 17, at 191.

100. Leila Meyer, *States Struggling to Secure Staffing and Resources for Common Core*, THE J. (Aug. 8, 2013), <http://thejournal.com/articles/2013/08/08/states-struggling-to-secure-staffing-and-resources-for-common-core.aspx>.

A. *A Congressional Solution: Manipulating Local Property Taxation to Provide Equal Educational Opportunity*

While the federal government has significantly increased its role in national education policy,<sup>101</sup> it has remained relatively deferential in the realm of state operational budget appropriations.<sup>102</sup> By making funding under the next reauthorization of NCLB contingent on the use of more equitable school finance schemes, however, Congress can have a significant impact on school finance equity nationwide. This Section proposes a solution that, despite its federal nature, respects the United States' legacy of local control over education. It does so by leaving a significant amount of discretion with the states, thereby reducing the likelihood of a backlash against what some may view as an overly intrusive federal initiative.

The vast majority of states employ local property taxation to provide school districts with a minimal level of funding through Foundation Formulas.<sup>103</sup> In such formulas, the state sets a "foundation level," which is the minimum per-pupil funding that the state believes is required to provide an adequate education.<sup>104</sup> Next, the state mandates that each district pay a minimum property tax rate, which is known as the "required local effort."<sup>105</sup> Many states, such as Michigan, also set a maximum property tax rate.<sup>106</sup> Finally, if a district fails to raise the foundation level of per-pupil funding—calculated by multiplying the district's required local effort by its assessed property valuation—the state makes up the difference.<sup>107</sup> School districts that raise more than the foundation level do not receive a state subsidy but are generally permitted to keep any money they raise that exceeds the foundation level.<sup>108</sup>

Although these programs guarantee low-property-value school districts a minimum level of funding, the combination of property tax rate maximums and low property values prevents many low-property-value school districts from funding their schools at a level higher than the minimum. This is a significant problem because oftentimes parents in low-property-value school districts are willing to tax themselves at higher rates to secure

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101. See *supra* Section II.A.

102. Federal education spending has typically come in the form of block grants to states, which the states distribute as they see fit. See, e.g., N.Y. STATE ARCHIVES, FEDERAL EDUCATION POLICY AND THE STATES: 1945–2009, at 46–47 (rev. 2009), available at [http://www.archives.nysed.gov/edpolicy/altformats/ed\\_background\\_overview\\_essay.pdf](http://www.archives.nysed.gov/edpolicy/altformats/ed_background_overview_essay.pdf).

103. See, e.g., Jennifer Imazeki, *School Finance 101: State Funding Formulas*, POLICY ANALYSIS FOR CALIFORNIA EDUCATION (Apr. 8, 2013, 8:55 AM), <http://www.edpolicyinca.org/blog/school-finance-101-state-funding-formulas>.

104. GUTHRIE ET AL., *supra* note 6, at 170–72.

105. *Id.* at 171.

106. CITIZENS RESEARCH COUNCIL OF MICH., REPORT 371, DISTRIBUTION OF STATE AID TO MICHIGAN SCHOOLS 14 (2011), <http://www.crcmich.org/PUBLICAT/2010s/2011/rpt371.pdf>.

107. GUTHRIE ET AL., *supra* note 6, at 170–71.

108. *Id.* at 171–72.

more funding for education,<sup>109</sup> a willingness that reflects the American public's preference for more education spending.<sup>110</sup> To foster equal opportunity for low-property-value schools to raise money, it is necessary to depart from Foundation Formulas.

To address this problem, Congress should create a new condition in the next reauthorization of Title I of NCLB to appropriate additional funding that is conditioned on states' implementation of equal access programs, such as the Guaranteed Tax Base, a system that provides state subsidies to inflate artificially the property values in low-property-value school districts.<sup>111</sup> Alternatively, Congress could withhold current Title I funding from states that choose not to implement such programs. This move would be a dramatic shift in school finance policy. As of 2007, only three states used the Guaranteed Tax Base.<sup>112</sup> Congress should use the National Minimum Drinking Age Act, which withheld federal funds from states that chose not to raise the legal drinking age to twenty-one,<sup>113</sup> as a model to structure the new language of Title I. That language would read as follows:

The United States Department of Education shall establish an Equal Educational Opportunity grant to be made available to the states. All states choosing to implement an Equal Access formula for school finance, such as a Guaranteed Tax Base, shall receive grant funding proportionate to the amount of pupils in its education system, which shall amount to a 10% bonus in Title I funding. All states not implementing such an Equal Access formula forfeit the right to any bonus grant funding under this Section.

In the alternative, if Congress is unable to appropriate additional funds under Title I, it could more closely follow the National Minimum Drinking Age Act by withholding 10 percent of current Title I funding from states that choose not to adopt a Guaranteed Tax Base formula. This would obviate the need to seek additional appropriations in a political climate in which raising taxes is difficult, if not impossible.

This plan relies on an established idea from education researchers and state reform efforts—the Guaranteed Tax Base—as a basis for helping states to develop equitable, yet flexible, funding formulas in response to the federal mandate. Under a Guaranteed Tax Base, the state “guarantees” each school district a certain amount of taxable property value per pupil and allows each individual school district to set its own tax rate, subject to a mandatory minimum.

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109. See discussion *supra* Section I.A.

110. REBELL, *supra* note 28, at 90 (“State and national polls have revealed a consistent willingness of large majorities of the American public (59–75 percent) to pay higher taxes for education, especially if there is a reasonable expectation that the money will be spent well.”).

111. Other forms of equal access programs that operate in a similar manner are percent-age equalizing programs and power equalizing programs. GUTHRIE ET AL., *supra* note 6, at 173–74.

112. Deborah A. Verstegen & Teresa S. Jordan, *A Fifty-State Survey of School Finance Policies and Programs: An Overview*, 34 J. EDUC. FIN. 216 (2009).

113. National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158 (2012).

For school districts with assessed property valuation below the state-set guaranteed tax base, the state subsidizes the balance. For example, if the state sets the guaranteed tax base at \$250,000 per pupil and the school district has only \$70,000 of taxable property per pupil, then the state must subsidize the district for the revenue that would be generated under the district's chosen tax rate with the additional \$180,000 of taxable property per pupil. Like the Foundation Formulas, the Guaranteed Tax Base thus has the advantage of guaranteeing each school district a minimum level of per-pupil funding, but it also enables low-property-value school districts to raise more than the foundation level if they choose to tax themselves at a higher rate. Moreover, this plan does not force the equalization of school funding but rather leaves each school district with a question to be addressed at the local level: How much do we value education? By not mandating equalized spending between low-property-value and high-property-value districts, states should not face opposition from more affluent communities that do not want the quality of their children's education to be affected by a leveling down of education spending.<sup>114</sup>

Equal opportunity formulas such as the Guaranteed Tax Base do, however, have a practical problem: allowing school districts to set their own tax rates could force states to subsidize unwieldy budgets.<sup>115</sup> If extremely low-property-value districts were to approve of very high tax rates, states may not have enough money in their education budgets to subsidize all low-property-value school districts. To solve this problem and to make the state education budget more predictable, states could implement control measures, such as sliding scales for state aid. Keeping with the example above, a state could decide that a school district may participate in the guaranteed tax base program if it levies a minimum rate of 20 mills (2%) of property tax, for which the foundation level of per-pupil funding would be \$5,000 (such that any school district taxing at 20 mills would be guaranteed \$5,000 per-pupil in state funds). If school districts decided to tax higher than 20 mills, the state could set the guaranteed tax base at \$250,000 per pupil for up to the first 20 mills of property tax levied, \$230,000 for the next 5 mills, \$210,000 for the next 5 mills, and so on. Under this system, a school district with taxable property of \$70,000 per pupil with a 28-mill property tax would raise \$1,960 per pupil before state subsidies. For the first 20 mills, the state would then subsidize the school district for \$180,000 of taxable property, thus giving the district an additional \$3,600 per pupil. For the next 5 mills, the state would subsidize the school district for \$160,000 of taxable property, thus giving the district another \$800 per pupil. Finally, for the last 3 mills, the state would subsidize the district for \$140,000 of taxable property, thus giving the district another \$420 per pupil, for a grand total of \$6,780 per pupil from state and local sources. For charts of this sliding scale

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114. See William A. Fischel, *How Serrano Caused Proposition 13*, 12 J.L. & Pol. 607, 612–14 (1996) (discussing California Proposition 13 and the *Serrano* decision, which together resulted in an across-the-board drop in education spending in California's public schools).

115. See GUTHRIE ET AL., *supra* note 6, at 175.

and its application to the example's hypothetical district, see Appendices A and B.<sup>116</sup>

As the mill level increases and the corresponding guaranteed tax base shrinks, fewer districts will qualify for subsidies, which will limit the burden on the state coffers. Setting these types of cost-predicting plans will, of course, fall within the discretion of each individual state, as Congress is in no position to judge the financial situation of every state. States would not be limited to sliding scales of aid in their cost-predicting plans—they would have broad discretion to implement other measures, such as setting a timeline on voting for tax rate elections to increase long-term predictability of the state budget and creating accountability measures to ensure that state aid is well spent.

To avoid abuse by recalcitrant taxpayers or state legislators who want to circumvent the law, every state's Guaranteed Tax Base must be subject to a mandatory minimum per-pupil funding level in order to receive federal funding. This minimum funding level can be based on a federal study aimed at finding the "amount of money per pupil necessary to guarantee a minimally adequate education."<sup>117</sup> This funding level, of course, must be adjusted for factors such as cost of living. This cost study will guarantee a minimal level of uniformity and will prevent states from setting low foundation levels and thus harming low-property-value or reluctant-to-tax school districts. Furthermore, to safeguard against other potential abuses, such as states setting meaninglessly low guaranteed tax bases, Congress should include an enforcement mechanism—Department of Education oversight or a private right of action, for example—to address states' bad-faith manipulations of the system.<sup>118</sup>

Making federal funding contingent on a state's compliance with federal requirements has proved successful in the past. Congress passed the National Minimum Drinking Age Act in 1984, making 5 percent of federal highway funds contingent on setting the minimum drinking age at twenty-one.<sup>119</sup> Early research showed an immediate drop in alcohol-related deaths.<sup>120</sup> The federal mandate effectively quickened the pace at which states made twenty-one the legal drinking age, which accelerated these life-saving effects.<sup>121</sup> The

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116. In order to show the effects on the state subsidy at tax rates higher than 28 mills, Appendices A and B are extended as though the example district taxed itself at 65 mills, with the guaranteed tax base descending according to the established pattern.

117. Matthew G. Springer et al., *History and Scholarship Regarding United States Education Finance and Policy*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 3, 10 (Helen F. Ladd & Edward B. Fiske eds., 2012). See generally GUTHRIE ET AL., *supra* note 6, at 171, 294–301 (discussing a variety of contemporary cost-modeling strategies).

118. This enforcement mechanism would only apply to bad-faith attempts at implementing the guaranteed tax base program and would not extend to other areas of education policy.

119. National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158 (2012).

120. Jeffrey A. Miron & Elina Tetelbaum, *Did the Federal Drinking Age Law Save Lives?*, REGULATION, Spring 2009, at 10, 10, available at <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2009/2/v32n1-1.pdf>.

121. See *id.* at 12.

federal government could use spending legislation similarly to accelerate the effects of more equitable school finance schemes. If all states adopt equal access programs, a move that Congress's new law will encourage, the effect will be to give *every child* an opportunity to attend a well-funded school, regardless of his socioeconomic status or the wealth of his school district.

This plan offers the political feasibility missing from new financing schemes at the state level. State legislators representing property-rich suburban school districts have no incentive to restructure drastically the state's school finance system in the name of equity—if they lost funding for their schools, their reelection would be at risk. The plan addresses this problem by giving such legislators political cover, for if they decide against restructuring the state's school finance system, the state will lose federal money. In this sense, congressional action will dampen the politically divisive effects of restructuring school finance schemes.

#### B. Congressional Authority to Address School Finance

Congress's power to create stipulations on local property taxation in school finance derives from the Taxing and Spending Clause of the Constitution.<sup>122</sup> In *South Dakota v. Dole*,<sup>123</sup> the Supreme Court endorsed the type of congressional action this Note proposes. The Court noted that “objectives not thought to be within Article I’s ‘enumerated legislative fields’ may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.”<sup>124</sup> A law that conditions the receipt of federal funds in exchange for manipulating the use of local property taxes to fund education would meet the four-factor test espoused in *Dole*. Setting out this test, the Court held (1) that the restriction on receipt of federal funds must help to promote the general welfare; (2) that Congress must unambiguously condition federal funds such that states can knowingly exercise their choice to comply or lose the funding; (3) that conditions on federal grants must impact issues of national concern; and (4) that Congress may not use its taxing and spending powers to coerce states to engage in unconstitutional behavior.<sup>125</sup>

Fostering equality in educational opportunities for all students clearly promotes the general welfare. Allowing for more equal educational inputs across school districts will give students a more equal opportunity for success in whichever of their state's districts they attend school. Furthermore, poor and minority children often have the least access to educational resources.<sup>126</sup> Minorities in the United States typically perform worse than minorities in other countries and will make up the majority of school-aged

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122. U.S. CONST. art. I, § 8, cl. 1.

123. 483 U.S. 203 (1987).

124. *Id.* at 207 (citation omitted) (quoting *United States v. Butler*, 297 U.S. 1, 65 (1936)).

125. *Id.* at 207–08.

126. THE EDUCATION TRUST, FUNDING GAPS 1 (2006), available at <http://www.edtrust.org/sites/edtrust.org/files/publications/files/FundingGap2006.pdf>.

children by 2023.<sup>127</sup> As a result, increasing their educational opportunities is essential to the success of the U.S. economy. In *Dole*, the Court further noted that courts should substantially defer to the judgment of Congress about what promotes the general welfare,<sup>128</sup> which establishes that federal legislation is appropriate in the context of this proposal.

Congress next must explicitly inform states that the receipt of federal funds is contingent on modifying their school finance schemes to provide more equal opportunity for school funding. As outlined above, Congress can easily comply with this requirement. Its alteration of Title I will unambiguously inform states that if they fail to take action, they will miss out on a source of federal funding for education.

It is also clear that K–12 education is an issue of national concern. In today's globalized economy, governments constantly call for international benchmarking in order to compete with the rest of the developed world.<sup>129</sup> Furthermore, the U.S. government has been attempting to solve educational inequalities for decades,<sup>130</sup> which clearly shows that education is a matter of national concern. By conditioning Title I funds on the use of more equitable school finance formulas, Congress furthers Title I's original goal of improving educational opportunities for the poor.

Finally, neither changing school finance schemes generally nor specifically adopting the above plan is unconstitutional coercion. States have traditionally controlled education and its financing, and there is no constitutional issue with a state changing its own school finance scheme. Michigan, for example, has recently considered revising its school finance laws.<sup>131</sup>

Subsequent case law and scholarship addressing the Spending Clause have questioned the constitutionality of federal education spending programs, such as NCLB, under a theory of unconstitutional coercion. Michael Barolsky contends that NCLB is “unconstitutionally coercive and violates state sovereignty by forcing states to adopt [its] broad, controversial education philosophy or lose billions of dollars in federal education funding.”<sup>132</sup> Specifically, he argues that by bundling together several distinct components, including testing and reporting requirements as well as teacher-training requirements, NCLB forces states to either accept all of the many components or risk losing all Title I funding for shirking even one of

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127. NAT'L GOVERNORS ASS'N ET AL., *supra* note 59, at 14–15.

128. 483 U.S. at 207.

129. See NAT'L GOVERNORS ASS'N ET AL., *supra* note 59, at 5.

130. See *supra* Section II.A.

131. Paul Egan & Chastity Pratt Dawsey, *Education Funding Proposal Allows School Choice, More Online Learning*, DETROIT FREE PRESS, Nov. 18, 2012, at 1A, available at <http://www.freep.com/article/20121118/NEWS15/311180296/Education-funding-proposal-allows-school-choice-more-online-learning>.

132. Michael D. Barolsky, Note, *High Schools Are Not Highways: How Dole Frees States from the Unconstitutional Coercion of No Child Left Behind*, 76 GEO. WASH. L. REV. 725, 728 (2008).

them.<sup>133</sup> Barolsky also maintains that NCLB violates state sovereignty by coercing states into adopting specific legislation to comply with its terms.<sup>134</sup> Finally, he notes two recent education cases that gave lower courts pause regarding the unconstitutional coercion test and its application to education.<sup>135</sup> In both cases, the plaintiffs complained that if they were found noncompliant, they stood to lose 100 percent of funding under the title at issue.<sup>136</sup>

The plan proposed here, however, suffers from none of these deficiencies. First, unlike NCLB as a whole, it only addresses school finance and resists mandating changes in other areas of education policy, such as testing or teacher training. Second, the plan leaves a significant amount of discretion to the states by allowing them to adopt sliding scales and accountability measures and by mandating only that they set a bare-minimum foundation level below which schools cannot be funded. Finally, by limiting the scope of the financial benefit or burden to only 10 percent of Title I funding, the plan avoids putting states in the difficult position of choosing between adopting a disagreeable policy and losing all available funding under Title I.<sup>137</sup>

The Supreme Court recently bolstered the unconstitutional coercion test in *National Federation of Independent Business v. Sebelius*.<sup>138</sup> Professor Pasachoff discusses the plurality's three-prong test at length, noting that the *NFIB* Court was the first to strike down a congressional provision—here, the Medicaid expansion of the Affordable Care Act—as unconstitutionally coercive under the Spending Clause.<sup>139</sup> The offending provision, “[i]nstead of simply refusing to grant the new funds to States that will not accept the new conditions . . . threatened to withhold [a significant portion of] those States’ existing Medicaid funds.”<sup>140</sup> First, the plurality declared, courts must determine whether the condition threatens to take away funds from a program that is independent from the program to which the condition is attached.<sup>141</sup> Second, if the court does find that the condition influences an independent program, courts must ask if states had sufficient notice at the time they accepted the original funds that this condition may be imposed in the future.<sup>142</sup> Finally, if the states weren't given sufficient notice, the court

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133. *Id.* at 736–37. The Secretary of Education is given wide discretion to determine what proportion of Title I funding to withhold from noncompliant states. *See id.* at 738–40.

134. *Id.* at 740.

135. *Id.* at 744–45.

136. *See* Va. Dep't of Educ. v. Riley, 106 F.3d 559, 569 (4th Cir. 1997) (discussing the possibility of the government withholding 100% of IDEA funding); Connecticut v. Spellings, 453 F. Supp. 2d 459, 492–93 (D. Conn. 2006) (discussing the possibility of the government withholding 100% of Title I funding).

137. *See supra* Section III.A.

138. 132 S. Ct. 2566 (2012) (plurality opinion in part).

139. Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 579–80 (2013).

140. *Sebelius*, 132 S. Ct. at 2603 (plurality opinion).

141. Pasachoff, *supra* note 139, at 583.

142. *Id.*

must ask if the amount at stake constitutes “economic dragooning.”<sup>143</sup> If the taxing and spending law does not offend *all three* of these prongs, then the law is constitutional.

Even assuming *arguendo* that the plan outlined above fails the first two prongs of the *NFIB* test, it would still withstand the Court’s coercion inquiry because it does not amount to economic dragooning. Under the first prong, one could arguably consider the 10% conditional Title I funds as merely a new facet of the original Title I program. After all, Title I was originally implemented to improve the educational opportunities of disadvantaged students, and the switch to a Guaranteed Tax Base system does exactly that. Conversely, if courts consider this program independent from Title I, they must move to the second prong. Given the sweeping change this plan would impose on school finance, courts would be highly unlikely to rule that states were given sufficient notice that they would be subject to such a condition in 1965 when they agreed to accept a block grant under ESEA. But even if the plan is independent from Title I and even if the states were not given sufficient notice of this potential change when they originally consented to ESEA’s terms, the plan survives *NFIB* scrutiny because it does not amount to economic dragooning. In *NFIB*, the Medicaid expansion qualified as economic dragooning because the penalty for noncompliance amounted to about 10% of the average state budget.<sup>144</sup> For the average state in 2008–2009, however, Title I funding in its entirety amounted to only 0.8% of its budget,<sup>145</sup> meaning that this plan only affects 0.08% of the average state budget. This figure falls far below the 10% deemed unconstitutionally coercive in *NFIB*, and it even falls below the percentage in *Dole*, where the law implicating 0.19% of South Dakota’s budget was deemed “relatively mild encouragement,” not unconstitutional coercion.<sup>146</sup> States may claim that this plan will require them to spend additional money, but as Pasachoff notes, “[i]f the amount at stake in Title I is itself not coercive . . . then *it would not matter for coercion purposes how much the state would have to spend . . . since it could just turn down the . . . funds.*”<sup>147</sup> Under a similar analysis, Pasachoff concludes that threatening to withhold 100% of Title I funds would not amount to unconstitutional coercion,<sup>148</sup> thus bolstering the idea that a 10% condition on Title I would be constitutionally permissible.

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143. *Id.*

144. *Sebelius*, 132 S. Ct. at 2604–05 (plurality opinion).

145. Pasachoff, *supra* note 139, at 622.

146. *Id.* at 624.

147. *Id.* at 627 (emphasis added).

148. *Id.* at 621–29.

Finally, in the wake of *Horne v. Flores*<sup>149</sup> and *United States v. Windsor*,<sup>150</sup> persuading state legislatures to make such a radical change in school finance programs may raise significant federalism concerns. Because of the long-standing tradition of local control of education in the United States, critics will argue that Congress should not interfere in an area of traditional state competence by setting national education policy. Furthermore, “[f]ederalism concerns are heightened when [nonstate decisionmaking] has the effect of dictating state or local budget priorities.”<sup>151</sup> While the *Horne* decision involved spending priorities related to the funding of English Language Learner programs and the Court ultimately remanded the case back to the district court to determine whether Arizona had complied with a previous consent decree,<sup>152</sup> the same principles apply: by tying funding in NCLB to the use of a certain school finance scheme, the federal government would be usurping the states’ role in setting budget priorities and education policy.

The argument that a congressional push to fund schools with a Guaranteed Tax Base dictates spending priorities ignores this plan’s safeguards for local control. As discussed *supra* Section III.A, states will be given broad deference in setting the limits on their Guaranteed Tax Base programs. If a state has financial concerns, it can set up a steeper sliding scale than that discussed above, it can set the original guaranteed tax base lower, or it can make any other changes needed to tailor the program to the state’s individual needs, subject to the mandatory-minimum funding and good-faith requirements. By giving states such wide deference on *how* to implement the program, Congress leaves the states in control of education policy at the macro level while simultaneously putting the onus of setting specific education finance levels on the very institutions on which it originated—local school districts.

#### CONCLUSION

Over the past 200 years, the United States’ federal system and its commitment to education have ceased to coexist peacefully. Although the recent push in Standards Based Reform has shied away from the notion that educational inputs are the root of educational inequalities in the United States, these input inequalities result in varied educational opportunities for students based solely on their zip code. Given the Common Core’s push to

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149. 129 S. Ct. 2579, 2595–96 (2009) (discussing the federalism concerns inherent in the federal government’s involvement in education policy).

150. 133 S. Ct. 2675, 2691 (2013) (noting that because marriage, like education, is traditionally a state-controlled institution, the federal government “has deferred to state-law policy decisions with respect to domestic relations”).

151. *Horne*, 129 S. Ct. at 2593–94.

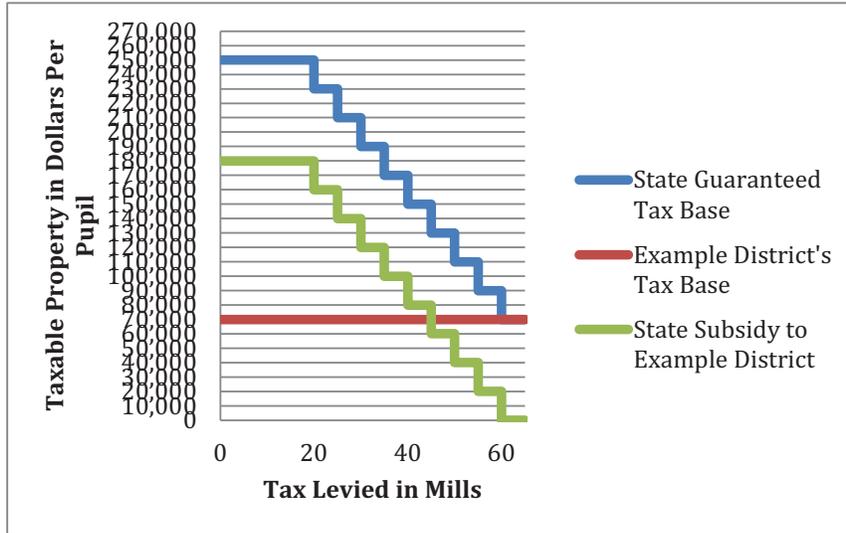
152. *Id.* at 2607. Specifically, the Court noted that increased funding is not the only path to taking “appropriate action” under the Equal Educational Opportunities Act and admonished the appellate court for not considering other factors, such as Arizona’s new English Language Learner instructional methodology, the enactment of NCLB, and the school’s structural and organizational reforms. *Id.* at 2595–606.

abolish such inequalities and adequately prepare all students for “success in college and careers”<sup>153</sup> regardless of where they live, inequalities in inputs must not be allowed to persist. Because closing the gap in per-pupil expenditures within states is an essential step in closing the achievement gap and preparing our students for success in today’s global economy, and because the Common Core lacks resources and is already struggling to effectively implement its standards, Congress must act to persuade states to adopt more equitable school finance schemes. By tying federal funds under the next reauthorization of NCLB to states’ use of a Guaranteed Tax Base system, Congress can incentivize states to provide true equality of educational opportunity to all schools while avoiding the federalism issues associated with a national system of school finance.

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153. Common Core State Standards Initiative, <http://www.corestandards.org/> (last visited Dec. 31, 2013).

APPENDIX A:  
HYPOTHETICAL GUARANTEED TAX BASE SLIDING SCALE



APPENDIX B:  
STATE AND DISTRICT CONTRIBUTIONS UNDER HYPOTHETICAL  
GUARANTEED TAX BASE SLIDING SCALE

