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Disrupting Education Federalism

Kimberly Jenkins Robinson

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DISRUPTING EDUCATION FEDERALISM

KIMBERLY JENKINS ROBINSON*

ABSTRACT

The ongoing expansion of federal influence over education in the United States provides a particularly salient time to consider how education federalism should be structured to achieve the nation's education goals. One of the nation's unfulfilled and yet essential education goals is to ensure that all students receive equal access to an excellent education. A variety of scholars and, most recently, the federal Equity and Excellence Commission have offered proposals for advancing this goal. By building on this growing momentum for reform, I argue that disrupting the nation's longstanding approach to education federalism—which I define as the balance of power between federal, state, and local governments that emphasizes substantial state autonomy over education—is necessary for a successful national effort to achieve this goal. I then provide a foundational theory for strengthening the federal role in education by analyzing the essential elements of a successful reform effort based upon research regarding the strengths of federal education policymaking and upon identification of the missing elements of current reforms. Finally, I respond to many of the potential arguments against disrupting education federalism. For instance, I argue that National Federation of Independent Business v. Sebelius continues to provide ample room for Congress to expand the federal role in education in ways that are needed to build a more equitable education system. I also explain that although strengthening the federal role in education will reduce some forms of state and local control over education, it also will provide states and localities new forms of control.

* Professor of Law, University of Richmond School of Law. I am thankful for the insightful comments from Margaret Bacigal, Tara Casey, Jessica Erickson, Jim Gibson, Meredith Harbach, Joyce Janto, William Koski, Corinna Lain, Martha Minow, Daniel Murphy, Eloise Pasachoff, Wendy Perdue, James Ryan, and Kevin Walsh. I also received excellent research assistance from Nick Dantonio, Adam Pratt, Jon Phenix, and Kathleen Travis. Many thanks also to Dean Wendy Perdue for her support of research assistance for this project.

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INTRODUCTION

The United States continues to tolerate a longstanding educational opportunity gap. Today, it relegates at least ten million students in low-income neighborhoods and millions more minority students to poorly performing teachers, substandard facilities, and other inferior educational opportunities.¹ This occurs in part because the United States invests more money in high-income districts than in low-income districts, a sharp contrast to other developed nations.² Scholars and court decisions also have documented the sizeable intrastate disparities in educational opportunity.³ In addition, interstate inequalities in educational opportunity represent the largest component of disparities in educational opportunity.⁴ The harmful nature of interstate disparities falls hardest on disadvantaged schoolchildren who have the most educational needs,⁵ and states do not

1. EQUITY & EXCELLENCE COMM'N, FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 14 (2013).

2. COUNCIL ON FOREIGN RELATIONS, REMEDIAL EDUCATION: FEDERAL EDUCATION POLICY 4 (2013).

3. See Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 667 (N.Y. 1995); Tenn. Small Sch. Sys. v. McWherter, 91 S.W.3d 232, 234–35 (Tenn. 2002); WAYNE AU, UNEQUAL BY DESIGN: HIGH-STAKES TESTING AND THE STANDARDIZATION OF INEQUALITY 140 (Michael W. Apple ed., 2009); JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICAN 127 (2010); Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2068 (2006).

4. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 332 (2006); see also BRUCE D. BAKER ET AL., EDUC. LAW CTR., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 11–12 tbl. 2 (3d ed. 2014) (showing per pupil state expenditures on elementary and secondary education).

5. Liu, *supra* note 4, at 333–34.

possess the resources and capacity to address the full scope of these disparities.⁶ Furthermore, research confirms that as the gap in wealth has grown between low-income and high-income families, the achievement gap between children in low-income and high-income families also has widened.⁷

Although equal educational opportunity remains a central goal of the U.S. education system, it has never been realized.⁸ Indeed, the United States relies heavily on schools to overcome the influence of a child's circumstances, such as family income and structure, on life opportunities despite evidence that schools are not effectively serving this function.⁹ Fulfilling the goal of equal educational opportunity will become increasingly important to the nation's interests given research that reveals that the United States will need more highly skilled workers to fill jobs that meet the economy's demands. This research also indicates that the achievement gap must be closed to ensure that students from rapidly growing minority communities possess the educational skills necessary to contribute to the economy.¹⁰

The nation's approach to education federalism—which I define as a balance of power between the federal, state and local governments that emphasizes substantial state autonomy over education—has played a significant and influential role in undermining federal reforms that have attempted to address disparities in educational opportunity.¹¹ In a recent article, I examined how the nation's approach to education federalism served as one of the principal obstacles to three of the most comprehensive federal attempts to advance equal educational opportunity: school desegregation, federal school finance litigation, and the No Child Left

6. Richard Rothstein, *New Federal Roles in Education*, in *THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY & SECONDARY EDUCATION* 37, 39 (2001); Liu, *supra* note 4, at 333–34; Liu, *supra* note 3, at 2082–85, 2089.

7. GREG J. DUNCAN & RICHARD J. MURNANE, *RESTORING OPPORTUNITY: THE CRISIS OF INEQUALITY AND THE CHALLENGE FOR AMERICAN EDUCATION* 1–2 (2014); Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES* 91, 91 (Greg J. Duncan & Richard J. Murnane eds., 2011) [hereinafter *WHITHER OPPORTUNITY?*].

8. MICHAEL A. REBELL & JESSICA R. WOLFF, *MOVING EVERY CHILD AHEAD: FROM NCLB HYPE TO MEANINGFUL EDUCATIONAL OPPORTUNITY* 13 (2008).

9. See DUNCAN & MURNANE, *supra* note 7, at 2.

10. Thomas Bailey, *Implications of Educational Inequality in a Global Economy*, in *THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION* 74, 78–79, 92 (Clive R. Belfield & Henry M. Levin eds., 2007) [hereinafter *THE PRICE WE PAY*].

11. Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 *WAKE FOREST L. REV.* 287, 290 (2013).

Behind Act.¹² Although some contend that these decisions and results are driven more by a lack of political will rather than education federalism,¹³ the consistency with which federalism has arisen as a real or imagined obstacle to reforms aimed at ensuring equal educational opportunity suggests that it is a significant contributing factor even if other factors also adversely influenced these reforms.

Given this compelling history and the nation's deeply entrenched educational opportunity gap, I propose a theory for strategically restructuring and strengthening the federal role in education in the United States to establish the necessary foundation for a national effort to ensure equal access to an excellent education. This restructuring and strengthening of the federal role in education will disrupt the nation's longstanding approach to education federalism because it would require shifting the balance of power in education away from the state and local governments and toward the federal government. The United States would then need to adopt a new understanding of education federalism that embraces the federal government as the guarantor of equal opportunity because it is the only government with the capacity and sufficient incentive to lead a national effort to achieve this widely supported—yet persistently elusive—goal. Although this would not require federalizing the nation's education system as at least one scholar has recommended,¹⁴ it would require acceptance of a larger federal role in education to hold the states accountable for ensuring that all students receive equal access to an excellent education.

Throughout this Article, I define equal access to an excellent education as the opportunity for all students to attend a high-quality school that enables them to effectively pursue their life goals, to become engaged citizens, and to develop their abilities to their full potential.¹⁵ Equal access to an excellent education includes enabling all students to receive “a real and meaningful opportunity to achieve rigorous college- and career-ready standards.”¹⁶ If the United States pursues equal access to an excellent education as the primary goal for its education system, it will break the traditional link between low-income and minority status and inferior

12. *Id.* at 297–307, 309–14, 323–30. The Equity and Excellence Commission also noted that local control of education has hindered efforts to promote educational equity. See EQUITY & EXCELLENCE COMM'N, *supra* note 1, at 34.

13. Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 111 (2004).

14. See Thomas Kleven, *Federalizing Public Education*, 55 VILL. L. REV. 369, 407 (2010).

15. See Robinson, *infra* note 37, at 1712.

16. EQUITY & EXCELLENCE COMM'N, *supra* note 1, at 12.

educational opportunities.¹⁷ This goal recognizes that educational opportunities should be tailored to meet the individual needs of students that may vary dramatically depending on a variety of factors, including family structure and stability, students' health and nutrition, and neighborhood climate.¹⁸ This goal also embraces closing opportunity gaps as an essential prerequisite for closing achievement gaps.¹⁹ Incentivizing and embracing racially and economically diverse schools is essential for achieving this goal because of compelling research regarding the harms of racial and class isolation, the benefits of diversity, and evidence that diverse schools provide important educational benefits that cannot be duplicated by alternative reforms.²⁰ An excellent education for all schoolchildren should be the nation's ultimate education goal because all families ultimately want a first-rate education for their children and the United States would benefit economically, socially, and politically from providing such an education.

I contend that both the executive branch and Congress can significantly restructure and expand their authority over education under the Spending Clause even though the United States Supreme Court, for the first time, has placed limitations on Spending Clause legislation in *National Federation of Independent Business v. Sebelius*.²¹ As Part III explains, the broad parameters established by the Court for Spending Clause legislation in the decision would provide Congress and the executive branch ample room to take action that would strengthen federal authority over education in ways that would not run afoul of the Constitution. In reaching this conclusion, I agree with other scholars who contend that for the Court to find a statute unconstitutional in the future, a statute would need to include

17. Janice Petrovich, *The Shifting Terrain of Educational Policy: Why We Must Bring Equity Back*, in BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 3, 12 (Janice Petrovich & Amy Stuart Wells eds., 2005) [hereinafter BRINGING EQUITY BACK].

18. See Greg J. Duncan & Richard J. Murnane, *Introduction: The American Dream, Then and Now*, in WHITHER OPPORTUNITY?, *supra* note 7, at 3, 15; REBELL & WOLFF, *supra* note 8, at 30–33.

19. See LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA'S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 73–74 (2010).

20. See Richard D. Kahlenberg, *Socioeconomic School Integration*, in THE FUTURE OF SCHOOL INTEGRATION: SOCIOECONOMIC DIVERSITY AS AN EDUCATION REFORM STRATEGY 1, 3 (Richard D. Kahlenberg ed., 2012); Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 327–36 (2009); GARY ORFIELD & CHUNGMEI LEE, *WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY* 7 (2005); RYAN, *supra* note 3, at 278–80.

21. 132 S. Ct. 2566, 2606–07 (2012) (plurality opinion) (the Medicaid expansion that required states to insure anyone under age 65 with an income of less than 133 percent of the federal poverty line was unconstitutionally coercive in violation of the Spending Clause); *see id.* at 2664–67 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

each of the factors that the plurality found troubling in *National Federation of Independent Business* rather than any one of those factors in isolation.²²

My theory for disrupting education federalism is particularly timely for two reasons. First, the United States is undergoing an unprecedented expansion of the federal role in education and an accompanying shift in its approach to education federalism. The American Recovery and Reinvestment Act of 2009,²³ also known as the stimulus bill, authorized an unprecedented \$100 billion to invest in education funding, tuition tax credits, and college grants which President Obama trumpeted as “the largest investment in education in our nation’s history.”²⁴ The stimulus bill included \$4.35 billion for the Race to the Top (RTTT) program, which represented far more discretionary funding than all of Secretary of Education Arne Duncan’s predecessors.²⁵ Although RTTT has its shortcomings,²⁶ it has sparked significant education reform, including greater state support for the common core standards, charter schools, and revisions to state laws regarding the use of student testing data to evaluate teachers.²⁷ In a number of states and districts, the two years following the

22. Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 871 (2013); Eloise Pasachoff, *Conditional Spending after NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 594 (2013).

23. Pub. L. No. 111-5; 123 Stat. 115.

24. Press Release, White House Office of the Press Secretary, Remarks by the President and the Vice President at a Meeting with Nation’s Mayors (Feb. 19, 2009) (http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-and-Vice-President-at-Meeting-with-Nations-Mayors/); see Sam Dillon, *For Education Chief, Stimulus Means Power, Money and Risk*, N.Y. TIMES, Feb. 17, 2009, at A1; Press Release, U.S. Dep’t of Educ., Duncan Hails Passage of President’s Stimulus Package, Cites “Historic Opportunity to Create Jobs and Advance Reform” (Feb. 18, 2009) (<http://www.ed.gov/news/press-releases/duncan-hails-passage-presidents-stimulus-package-cites-historic-opportunity-crea>, archived at <http://perma.cc/3JCZ-86NS>).

25. See Race to the Top Fund: Notice of Final Priorities, 74 Fed. Reg. 59,688 (Nov. 18, 2009); Grover Whitehurst, Panel Remarks, A Discussion with Secretary of Education Arne Duncan (May 11, 2009), http://www.brookings.edu/~media/events/2009/5/11educationduncan/20090511_education_transcript_corrected.pdf, archived at <http://perma.cc/6PKF-D47S>.

26. See, e.g., Jamie Gullen, Note, *Colorblind Education Reform: How Race-Neutral Policies Perpetuate Segregation and Why Voluntary Integration Should Be Put Back on the Reform Agenda*, 15 U. PA. J. L. & SOC. CHANGE 251, 264–65 (2012) (arguing that RTTT does not benefit many children who need education reform and funding and that children in losing states will be omitted from the reforms that it incentivizes); Patrick McGuinn, *Stimulating Reform: Race to the Top, Competitive Grants and the Obama Education Agenda*, 26 EDUC. POL’Y 136, 143–47 (2012) (noting some of the implementation challenges for RTTT, including the absence of new enforcement tools for the U.S. Department of Education and political opposition to the reforms).

27. See Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 146 (2013); McGuinn, *supra* note 26, at 143–47.

creation of RTTT sparked more reform than those locations had seen in the preceding twenty years.²⁸

The stimulus bill built on the substantial expansion of the federal role in education created by the No Child Left Behind Act of 2001 (NCLB).²⁹ NCLB represents the most expansive education reform law in the history of the United States.³⁰ For example, the law's far-reaching provisions required annual testing in math and reading in third through eighth grade and once in grades ten through twelve and periodically in science.³¹ The law also instituted public reporting of results of student assessments on the content of state standards, launched disaggregation of this data for a variety of student characteristics including race and ethnicity, created accountability interventions for Title I schools, and set minimum requirements for highly qualified teachers.³² Although NCLB also established a new federal role in education, it did not provide an accompanying new understanding of education federalism that could help to guide this role.³³ Given congressional failure to reauthorize the law in a timely manner, the U.S. Department of Education continues to wield this expansive federal authority through waivers of NCLB requirements if states will agree to new conditions on the receipt of federal aid.³⁴

Second, my theory is particularly timely given the current national focus on improving educational performance of poor schoolchildren and reducing achievement and opportunity gaps.³⁵ For instance, a 2013 report from the Equity and Excellence Commission, a panel of education policy experts convened by President Barack Obama, proposed a variety of far reaching reforms that would greatly expand federal responsibility for ensuring equal educational opportunity.³⁶ Scholars similarly have offered a variety of thoughtful proposals for how to reduce the opportunity gap that

28. Mike Johnston, *From Regulation to Results: Shifting American Education from Inputs to Outcomes*, 30 YALE L. & POL'Y REV. 195, 206 (2011).

29. Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

30. PATRICK J. MCGUINN, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965-2005, at 1, 195 (2006).

31. 20 U.S.C. § 6311 (2012).

32. 20 U.S.C. §§ 6311, 6319 (2012).

33. See Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J.L. & EDUC. 1, 26-27 (2010).

34. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 279-81 (2013).

35. See DAVID K. COHEN & SUSAN L. MOFFITT, THE ORDEAL OF EQUALITY: DID FEDERAL REGULATION FIX THE SCHOOLS? 10 (2009); RYAN, *supra* note 3, at 277; EQUITY & EXCELLENCE COMM'N, *supra* note 1, at 14.

36. See EQUITY & EXCELLENCE COMM'N, *supra* note 1, at 34-35.

would require greatly expanding federal authority over education and thereby restructuring education federalism.³⁷

This Article strengthens these calls for reform in three critical ways. First, it explains why disrupting education federalism is necessary for a successful national effort to ensure equal access to an excellent education. Second, it identifies the essential elements for a successful comprehensive effort to achieve this goal. Finally, it responds to many of the common arguments against expanding the federal role in education and highlights the benefits that could be obtained through a restructuring of education federalism. In so doing, I provide a theory of education federalism for reforms that seek to reduce achievement and opportunity gaps by strengthening the federal role in education.³⁸

In offering a theory for how education federalism should be restructured to strengthen the federal role over education, and thus reduce reliance on states to ensure equal access to an excellent education, I build upon Yale Law Professor Heather Gerken's argument that federalism theory should eschew advancing a single theory for all occasions because "[b]oth in theory and practice . . . there are many federalisms, not one."³⁹ She astutely contends that scholars developing and critiquing federalism theory should consider the appropriate balance of institutional arrangements for a specific context.⁴⁰ Therefore, my theory for how

37. For instance, in a prior work, I developed a collaborative enforcement model for congressional legislation that would guarantee a federal right to education and that would require consistent federal oversight and support of state efforts to provide this right. Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1715–22 (2007). Education law scholar and now California Supreme Court Justice Goodwin Liu has argued that Congress should ensure "educational adequacy for equal citizenship." Liu, *supra* note 3, at 2049 (italics omitted). Michael Rebell and Jessica Wolff have proposed greater federal involvement in education that would require a joint federal-state effort to ensure that all children receive a meaningful educational opportunity and adequate funds for the education of all at-risk children. See REBELL & WOLFF, *supra* note 8, at 152. Education scholar Richard Rothstein recently proposed that "[i]t could . . . be a unique and necessary federal role to equalize per pupil spending between states, with the federal government subsidizing elementary and secondary education in low-spending states" and that this should represent "a federal role on which everyone can agree." Rothstein, *supra* note 6, at 38.

38. "Through its spending power, the federal government is boldly raising its voice in education. The states have all accepted this federal role, incorporating federal goals into their own education plans. . . . The field is thus ripe for new theories of federalism." Benton Martin, *An Increased Role for the Department of Education in Addressing Federalism Concerns*, 2012 BYU EDUC. & L.J. 79, 80 (footnotes omitted).

39. Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1561 (2012).

40. Heather Gerken insightfully argues that

Federalism debates are best understood not as disagreements over which model to choose but as disputes over how to strike the right balance between different types of institutional arrangements. Such debates, however, can only be hashed out in context—domain by domain,

education federalism should be restructured does not attempt to propose a federalism theory for other policymaking arenas such as environmental law or healthcare policy. Instead, it solely proposes a shift in the balance of federal, state, and local authority in order to strengthen the federal role in ensuring equal access to an excellent education while preserving the aspects of state and local autonomy over education that do not undermine equal access to an excellent education.

This Article proceeds in three parts. Part I analyzes the current structure of education federalism and notes the major trends that have shaped it. It contends that although some praise education federalism for its numerous benefits, oftentimes these benefits have not been realized. Part I offers five reasons that the United States should consider reexamining its longstanding approach to education federalism. Part II provides my theory for restructuring education federalism that embraces strengthening federal responsibility and support for ensuring equal access to an excellent education. Part III responds to some of the possible critiques of my theory, including an explanation of why I do not recommend a change in education doctrine and instead look to the legislative and executive branches to strengthen the federal role in education.

I. THE CASE FOR REEXAMINING EDUCATION FEDERALISM

This Part describes the trends that have shaped the structure of education federalism. It also notes some of the benefits that the current approach to education federalism is supposed to provide. This Part then offers compelling reasons why the nation should reexamine education federalism as a means to pursue a national reform agenda to ensure equal access to an excellent education.

A. *The Benefits of the Current Structure of Education Federalism*

Historically, the hallmarks of education federalism within the United States have been decentralized state and local control over public schools

policymaking arena by policymaking arena. Generic calls for one approach or another simply cannot do the trick. Shifting the debate along these lines would lead us to focus our attention on a more productive set of questions. We would spend more of our time analyzing which flavor of federalism best fits a given context and less time pushing a single theory.
Id. at 1552.

and a limited federal role.⁴¹ The constitutional foundations for this approach lie in the omission of education from the purview of federal authority and the Tenth Amendment's reservation of state authority in all areas that the Constitution does not assign to Congress.⁴² However, education federalism has undergone three substantial transformations in recent decades.

First, the federal role in education has grown exponentially from its original narrow role. After *Brown v. Board of Education*,⁴³ Congress passed several statutes that fostered federal responsibility for equal educational opportunity, including the Elementary and Secondary Education Act of 1965.⁴⁴ In the last two decades, Congress has expanded the federal role to encourage higher standards and greater accountability for the education of all children, most recently through NCLB and its waivers and the RTTT program.⁴⁵ Indeed, the current reach of federal influence in education extends from the classroom to the state capitol.

Second, state control over education has risen substantially over the last half century or more of school reform. School finance litigation and reform encouraged centralization of education authority with state officials who eventually became the primary funders of public schools.⁴⁶ States currently contribute 45.2% of school funding and local government

41. See Carl F. Kaestle, *Federal Education Policy and the Changing National Polity for Education, 1957–2007*, in *TO EDUCATE A NATION: FEDERAL AND NATIONAL STRATEGIES OF SCHOOL REFORM* 17, 17 (Carl F. Kaestle & Alyssa E. Lodewick eds., 2007).

42. U.S. CONST. amend. X; REBELL & WOLFF, *supra* note 8, at 43.

43. 347 U.S. 483 (1954).

44. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.); see also Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–09 (2012)); Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, 88 Stat. 514 (codified at 20 U.S.C. §§ 1701–58 (2012)); Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 241, 252 (codified at 42 U.S.C. § 2000 (2012)); Michael W. Kirst, *Turning Points: A History of American School Governance, in WHO'S IN CHARGE HERE? THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY* 14, 22–23 (Noel Epstein ed., 2004) [hereinafter WHO'S IN CHARGE]; CTR. ON EDUC. POLICY, A BRIEF HISTORY OF THE FEDERAL ROLE IN EDUCATION: WHY IT BEGAN & WHY IT'S STILL NEEDED 8–9 (1999).

45. See 20 U.S.C. § 7861(a) (2012); No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.); Race to the Top Fund: Notice of Final Priorities, 74 Fed. Reg. 59,668, 59,688 (Nov. 18, 2009); MCGUINN, *supra* note 30, at 1, 180–81, 193–95; Barron & Rakoff, *supra* note 34, at 279–81.

46. See Paul T. Hill, *Recovering from an Accident: Repairing Governance with Comparative Advantage, in WHO'S IN CHARGE, supra* note 44, at 75, 77; Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1402–03 (2010); Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 HOW. L.J. 705, 730–31 (2004); Kirst, *supra* note 44, at 27.

provides 44.6%.⁴⁷ The federal government provides 10.2% of funds for education⁴⁸ and this represents an increase in federal education funding over the last decade, although not a steady increase.⁴⁹ The increase in the state proportion of funding led to an increase in state authority over schools.⁵⁰ State-created standards and tests also have expanded state influence over the curriculum.⁵¹

Finally, the third trend necessarily follows from the first two trends. The rise in federal and state authority over education has led to a substantial decrease in local control of schools for the last half century.⁵² Local authority over education is primarily focused on the daily administrative responsibilities for running schools.⁵³ Most local school boards also may raise funds for public schools through property taxes.⁵⁴

The nation's current approach to education federalism has been praised for its ability to reap several benefits. For instance, some find this approach superior based upon Justice Brandeis's view that state and local governments may serve as experimental "laboratories" that can help to solve the nation's economic and social challenges.⁵⁵ States and localities have adopted a diverse array of governance structures for education that are designed to respond to state and local interests and preferences.⁵⁶ This

47. NAT'L CTR. FOR EDUC. STATISTICS, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2011–12 (FISCAL YEAR 2012), at 2, 4 tbl. 1 (Jan., 2015), <http://nces.ed.gov/pubs2014/2014301.pdf>.

48. *Id.*

49. Regina R. Umpstead, *The No Child Left Behind Act: Is it an Unfunded Mandate or a Promotion of Federal Educational Ideals?*, 37 J.L. & EDUC. 193, 201–02 (2008); NAT'L CTR. FOR EDUC. STATISTICS, *Digest of Education Statistics: 2011*, tbl. D (May, 2012), http://nces.ed.gov/programs/digest/d11/ch_4.asp, archived at <http://perma.cc/BGN3-C2M5>.

50. See Hill, *supra* note 46, at 77.

51. See Kirst, *supra* note 44, at 36–37. For instance, the 1980s and 1990s witnessed an increase in state standards for student test performance, curricular and program mandates, and behavioral requirements, such as attendance, homework and discipline. See *id.* at 37.

52. See James E. Ryan, *The Tenth Amendment and Other Paper Tigers: The Legal Boundaries of Education Governance*, in WHO'S IN CHARGE, *supra* note 44, at 42, 60; Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 131–32 (2006); Kirst, *supra* note 44, at 32.

53. See Hill, *supra* note 46, at 78; Ryan, *supra* note 52, at 57. In addition, school boards are responsible for such areas as hiring and supervising staff; constructing, acquiring and maintaining school buildings; acquiring and managing funding; enforcing attendance laws; implementing federal and state categorical programs and court orders; obtaining and managing vendor contracts; and transporting students. See Hill, *supra* note 46, at 78.

54. See Ryan, *supra* note 52, at 57; Heise, *supra* note 52, at 130.

55. Heise, *supra* note 52, at 131 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); Pinder, *supra* note 33, at 36.

56. PAUL MANNA, COLLISION COURSE: FEDERAL EDUCATION POLICY MEETS STATE AND LOCAL REALITIES 12–14 (2011) [hereinafter COLLISION COURSE]; Heise, *supra* note 52, at 131.

decentralization also allows state and local governments to adopt a variety of curricula, teaching, and learning approaches.⁵⁷

Some also praise the current structure of education federalism for its ability to produce the most effective outcomes. For example, proponents of localism, such as legal theory and local government scholar Gerald Frug, contend that local decision making can produce more effective policy reforms because those most affected by the decision shape the reform.⁵⁸ Others contend that a decentralized approach to education is more effective at identifying the most successful educational methods given the existing uncertainties regarding how best to educate children.⁵⁹

Localism also can create an efficient allocation of goods and services.⁶⁰ Efficiency results from the ability of local governments to compete for citizens by offering an attractive array of public services.⁶¹ Within education, when localities offer diverse learning options, some citizens can shop for the best schools or relocate so that their children can attend schools that most effectively serves their educational needs.⁶²

Additionally, state and local control over education is commended for its ability to foster greater accountability to citizens.⁶³ Individuals exert greater influence over local government policy than federal or state government.⁶⁴ Local control can enable parents to become involved in and influence their child's education and school.⁶⁵ Parents regularly interact with and monitor their child's school and this involvement can improve student performance.⁶⁶ This involvement also can foster a stronger community as parents interact with other parents and their children.⁶⁷

57. See COLLISION COURSE, *supra* note 56, at 13.

58. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1068–69 (1980).

59. See Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 518–19 (2010).

60. Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 632 (2011) (citing Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417 (1956)).

61. See Tiebout, *supra* note 60, at 418.

62. *Id.*

63. Heise, *supra* note 52, at 131.

64. See Kirst, *supra* note 44, at 38.

65. See Saiger, *supra* note 59, at 519–20; Wilson, *supra* note 60, at 632–33.

66. Saiger, *supra* note 59, at 519–20.

67. *Id.* at 520.

Finally, the tradition of local control of education remains an important value for many within the American public.⁶⁸ Many view state and local control over public elementary and secondary education as a central component of state and local government.⁶⁹ While public opinion polls reveal an increasing comfort with federal involvement in education, the polls continue to indicate that Americans generally prefer state and local control over education.⁷⁰ This preference influences the avenues for reconstructing education federalism that I explore. In addition, state and local authority over education has resulted in diversity in education governance that influences how the federal government can impact education.⁷¹

B. Five Reasons for Reexamining Education Federalism

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

1. Education Federalism Does Not Consistently Reap Some of the Benefits It Is Designed to Achieve

Although education federalism undoubtedly reaps some of the benefits that it is designed to accomplish,⁷² the current approach does not consistently yield the benefits that it is supposed to secure. For instance, education federalism has been praised for its ability to allow the state and local governments to serve as “laboratories” of reform. However, research reveals that in the area of school finance reform, most of the changes have been fairly limited in scope, and that the reliance on property taxes to fund

68. Kaestle, *supra* note 41, at 20; Kirst, *supra* note 44, at 16; COLLISION COURSE, *supra* note 56, at 11.

69. Heise, *supra* note 52, at 131.

70. See Rebecca Jacobsen & Andrew Saultz, *The Polls, Trends: Who Should Control Education?*, 76 PUB. OPINION Q. 379, 388 (2012).

71. Cf. COLLISION COURSE, *supra* note 56, at 13 (noting that “the diverse institutional terrain on which federal policy operates” influenced NCLB’s impact).

72. See Shannon K. McGovern, Note, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1529–33 (2011); Hill, *supra* note 46, at 86 tbl.4-1 (highlighting the comparative advantage of various levels of educational governance); Kirst, *supra* note 44, at 38–39 (noting that citizens have greater opportunity to influence policy in their local school districts).

schools remains the prevailing method for local funding of schools.⁷³ This method has continued despite the Supreme Court's 1973 call for school finance reform in *San Antonio Independent School District v. Rodriguez*:

The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity.⁷⁴

Even when plaintiffs have prevailed in litigation that sought to reform school finance systems, most states typically have maintained the same fundamental and unequal structure for school finance.⁷⁵ Additionally, in a substantial majority of the states, funding inequities between wealthy and poor districts and schools persist.⁷⁶ Only fourteen states provide more funding to districts with high concentrations of poverty than those with low concentrations of poverty,⁷⁷ despite consistent research that low-income students require more resources for a successful education than their more affluent peers.⁷⁸ The 2013 Equity and Excellence Commission report confirms this lack of additional funding to students who live in high poverty concentrations and notes that substantial reform is needed because, apart from a few exceptions, states fail to link their school finance systems to the costs that they would need to invest to educate all children in compliance with state standards.⁷⁹ Given decades of reforms that have not made consistent and substantial inroads on these challenges, the states are not serving as effective “laboratories” for school finance reform.

Education federalism also is supposed to yield an efficient and effective education system. However, the education system regularly falls

73. See BENJAMIN MICHAEL SUPERFINE, *THE COURTS AND STANDARDS-BASED EDUCATION REFORM* 123 (2008); Deborah A. Verstegen & Teresa S. Jordan, *A Fifty-State Survey of School Finance Policies and Programs: An Overview*, 34 J. EDUC. FIN. 213, 215 (2009); RYAN, *supra* note 3, at 153, 171–72.

74. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973).

75. See Marilyn Gittell, *The Politics of Equity in Urban School Reform*, in BRINGING EQUITY BACK, *supra* note 17, at 16, 38; Kimberly Jenkins Robinson, *The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism*, 79 U. CHI. L. REV. 427, 437–38 (2012) (reviewing RYAN, *supra* note 3); Black, *supra* note 46, at 1371; Robinson, *supra* note 11, at 318–22.

76. Gittell, *supra* note 75, at 26; RYAN, *supra* note 3, at 127.

77. BRUCE D. BAKER ET AL., *supra* note 4, at 17 fig.3 (examining 2011 school expenditure data).

78. RYAN, *supra* note 3, at 158.

79. EQUITY & EXCELLENCE COMM'N, *supra* note 1, at 17–18.

short of achieving these goals.⁸⁰ The substantial percentage of poorly educated students inflicts substantial costs upon the United States, resulting in numerous inefficiencies.⁸¹ For example, as I have noted in prior scholarship,⁸² increasing the high school graduation rate could save the nation between \$7.9 and \$10.8 billion annually in food stamps, housing assistance and welfare assistance.⁸³ The nation forfeits \$156 billion in income and tax revenues during the life span of each annual cohort of students who do not graduate from high school.⁸⁴ This cohort also costs the public \$23 billion in health care costs and \$110 billion in diminished health quality and longevity.⁸⁵ By increasing the high school graduation rate by one percent for men aged twenty to sixty, the nation could save \$1.4 billion each year from reduced criminal behavior.⁸⁶ Given this research, ineffective schools inflict high costs upon the nation—costs that it cannot afford as it wrestles with predicted long-term growth in the deficit and significant, yet declining, unemployment.⁸⁷

Local participation in the governance of school districts also is quite low. The growing federal and state influence over education has led some scholars to contend that “local control” no longer exists within American education and, in fact, it has not existed for quite some time.⁸⁸ Education federalism also has led to varying levels of local control for different communities, with low-income and minority communities oftentimes experiencing the least local control. In low-income communities, community participation regularly can yield little influence due to the lack

80. See DARLING-HAMMOND, *supra* note 19, at 23–26.

81. *See id.*

82. Robinson, *supra* note 75, at 429–31 (reviewing RYAN, *supra* note 3).

83. Jane Waldfogel et al., *Welfare and the Costs of Public Assistance*, in THE PRICE WE PAY, *supra* note 10, at 160, 173. This estimate is based upon ensuring that all students graduate with a high school degree and one third of dropouts obtain some education beyond high school. *See id.*

84. Cecilia Elena Rouse, *Consequences for the Labor Market*, in THE PRICE WE PAY, *supra* note 10, at 99, 101.

85. Peter Muennig, *Consequences in Health Status and Costs*, in THE PRICE WE PAY, *supra* note 10, at 125, 137.

86. Enrico Moretti, *Crime and the Costs of Criminal Justice*, in THE PRICE WE PAY, *supra* note 10, at 142, 157. Along with early behavioral problems, low educational attainment also can help to predict later involvement in criminal activity. Greg J. Duncan & Katherine Magnuson, *The Nature and Impact of Early Achievement Skills, Attention Skills, and Behavior Problems*, in WHITHER OPPORTUNITY?, *supra* note 7, at 47, 63.

87. See CONG. BUDGET OFFICE, THE 2013 LONG-TERM BUDGET OUTLOOK 2–3, 13 (2013); Press Release, Bureau of Labor Statistics, The Employment Situation—March 2015 (Apr. 3, 2015) (<http://www.bls.gov/news.release/pdf/empisit.pdf>), archived at <http://perma.cc/LAK5-Y9A5>; Dionne Searcey, *Job Growth Fails to Help Paychecks of Workers*, N.Y. TIMES, Jan. 10, 2015, at B1.

88. Ryan, *supra* note 52, at 60; Heise, *supra* note 52, at 131.

of political power and financial means of residents.⁸⁹ Low-income citizens also cannot influence local or state governments to enact favorable policies and reforms when these governments lack the funds for implementation.⁹⁰ Parents also do not enjoy an unfettered ability to choose their child's school.⁹¹ Although the quality of schools certainly influences where many families purchase homes, low-income families typically lack the financial ability to choose the best schools because such schools are zoned for more expensive housing options.⁹²

Local participation in the governance of school districts also fails to yield the accountability that it is supposed to secure. Research reveals that local participation in school board elections and governance can be quite limited.⁹³ Typically, no more than ten to fifteen percent of voters participate in school board elections.⁹⁴ School board meetings also oftentimes experience low citizen attendance.⁹⁵ Even the structure of many school board meetings limits public discussion and often public discussion does not influence board decisions.⁹⁶ Research also has found that many who support the concept of locally controlled school boards do not understand the functions of school boards or support the school boards in their communities.⁹⁷

In noting that education federalism does not consistently yield the benefits that it is designed to secure, I am not suggesting that it does not yield some important benefits. Certainly, the decentralized nature of the American education system fosters some state and local experimentation and innovation, such as curricular reform, teaching innovations, and other state and local reforms.⁹⁸ One need look no further than the effectiveness

89. Wilson, *supra* note 60, at 633.

90. *Id.*

91. *Id.* at 634.

92. *Id.*

93. *Id.* at 633.

94. See Kirst, *supra* note 44, at 38.

95. Wilson, *supra* note 60, at 633.

96. *Id.*

97. See Kirst, *supra* note 44, at 38.

98. See Henry M. Levin, *Multiple "Choice" Questions: The Road Ahead*, in WHO'S IN CHARGE, *supra* note 44, at 228, 231 (describing the expansion in school choice models from the 1970s through the 1990s); COUNCIL OF CHIEF STATE SCH. OFFICERS, SCHOOL CHOICE IN THE STATES: A POLICY LANDSCAPE 9–13 (2013) (analyzing state opportunities to participate in the eleven most common types of school choice); INST. FOR YOUTH, EDUC. & FAMILIES, NAT'L LEAGUE OF CITIES, EDUCATIONAL ALIGNMENT FOR YOUNG CHILDREN: PROFILES OF LOCAL INNOVATION 1 (2012) (examining successful efforts by individual cities to improve educational success by aligning early childhood education with K–12 education programs); Gerard Toussaint Robinson, *Can the Spirit of Brown Survive in the Era of School Choice?: A Legal and Policy Perspective*, 45 HOW. L.J. 281, 295–307 (2002) (describing the growth of charter schools and voucher programs and some of the lawsuits challenging voucher

of some charter schools against great odds, or community-based reforms that coordinate and connect the educational, health, and social service needs of children to find examples of success that have arisen from local reforms.⁹⁹ The current structure of education federalism undeniably fosters more state and local control and accountability for state and local decisions than a completely federalized system of education.¹⁰⁰ These important benefits are worth preserving. However, the inconsistency in reaping these benefits suggests that it is worth reexamining how education federalism could be restructured to more reliably secure such benefits.

2. *Education Federalism Has Served as One of Several Important Roadblocks to Reforms Aimed at Ensuring Equal Educational Opportunity*

As explained in the Introduction, in a 2013 article I analyzed how a preference for local control and a limited federal role in education have functioned as one of several critical roadblocks to three of the primary reforms that promote equal educational opportunity: school desegregation, school finance litigation in federal court, and NCLB.¹⁰¹ For instance, key Supreme Court decisions, from the 1974 decision in *Milliken v. Bradley* to the 1995 decision in *Missouri v. Jenkins*, relied on the structure of federalism and the American tradition of local control of education as one of the reasons for severely curtailing the authority of courts to ensure effective school desegregation.¹⁰² In so doing, these opinions clung to a form of dual federalism that required separate spheres for certain government functions, and thus insisted that education was solely a state

programs); REBELL & WOLFF, *supra* note 8, at 141–43 (describing the effectiveness of Kentucky’s school improvement approach that includes deploying “highly skilled educators” to low-performing schools).

99. See, e.g., CHRISTINA CLARK TUTTLE ET AL., MATHEMATICA POLICY RESEARCH, KIPP MIDDLE SCHOOLS: IMPACTS ON ACHIEVEMENT AND OTHER OUTCOMES 32 (2013) (finding in a study of performance in KIPP (Knowledge Is Power Program) middle schools on reading, math, science and social studies that “the average impacts of KIPP middle schools on student performance on state assessments are positive, statistically significant, and educationally meaningful in all academic subjects we analyzed”); Diana Hall, *Schools Uniting Neighborhoods: Community Schools Anchoring Local Change*, COMMUNITY INVESTMENTS, Summer 2012, at 14, 17 (describing outcomes of efforts to bring together schools and community partnerships in Multnomah County, Oregon, and finding that “74 percent of students met state benchmarks or growth target in Reading”).

100. See Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 607, 613 (2007).

101. Robinson, *supra* note 11, at 287, 297–307, 309–14, 323–30. The Equity and Excellence Commission also noted that local control of education has been a hindrance to efforts to advance educational equity. See EQUITY & EXCELLENCE COMM’N, *supra* note 1, at 34.

102. See Robinson, *supra* note 11, at 297–304.

and local function.¹⁰³ However, dual federalism had already been eschewed in prior Court decisions that prohibited segregated educational systems, and in federal legislation and enforcement that provided additional federal funding for low-income students and that required equal educational opportunity for girls, women, disabled students, and English language students.¹⁰⁴

Similarly, the Supreme Court relied upon education federalism as one of several justifications for rejecting a federal right to education in *San Antonio Independent School District v. Rodriguez*.¹⁰⁵ The Court noted that it lacked the expertise to interfere with state and local education judgments (an objection that did not stop the Court from deciding *Brown*) regarding the most effective education reforms and the connection between funding and educational quality.¹⁰⁶ The Court's rationale also highlighted the importance of local control of schools and the values it brings, such as tailoring programs to students' needs and experimentation.¹⁰⁷ The Court insisted that it did not want to disturb the existing balance of power between the federal and state governments by reaching a decision that essentially would result in striking down school finance systems throughout the United States.¹⁰⁸ Thus, the Court's decision privileged federalism interests over the nation's interest in equal educational opportunity and insulated school finance disparities from federal judicial review.¹⁰⁹

Even when Congress was adopting NCLB, which represents the most comprehensive education statute aimed at closing achievement and opportunity gaps, the nation's longstanding approach to education federalism insisted that states decide the standards for students and teachers.¹¹⁰ This "congressional genuflect to education federalism" resulted in many states failing to adopt rigorous standards for either students or teachers.¹¹¹

103. *Id.* at 303–04.

104. *Id.* at 287, 303–04.

105. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43–44, 49–50 (1973); *see also* Robinson, *supra* note 11, at 309–11.

106. *Rodriguez*, 411 U.S. at 42–43.

107. *See id.* at 49–50.

108. *See id.* at 47–48, 54–55.

109. *See* Robinson, *supra* note 11, at 310–11.

110. *See* COLLISION COURSE, *supra* note 56, at 41 (“Long-standing political concerns and views of American federalism, such as the tradition of state and local control of curriculum and teaching, kept some options such as federally developed standards and tests off the negotiating table from the start.”); Robinson, *supra* note 11, at 325, 327–28.

111. Robinson, *supra* note 11, at 326, 328–29; *cf.* COLLISION COURSE, *supra* note 56, at 30.

Certainly, education federalism does not stand alone as an obstacle to these reforms. Numerous other obstacles, including state and local backlash against court-ordered desegregation,¹¹² the challenges of court-mandated school reform,¹¹³ and inadequate funding for NCLB¹¹⁴ also undermined the effectiveness of these reforms. Nevertheless, education federalism was one of the central obstacles to the effectiveness of these reforms.

3. *Education Federalism Should Be Reexamined Because States Have Refused to Take the Necessary Comprehensive and Sustained Action That Is Needed to Ensure Equal Access to an Excellent Education*

Throughout this nation's history—even acknowledging state reforms of education and school finance—the states have not taken sustained and comprehensive action to ensure that all students receive equal access to an excellent education.¹¹⁵ Redistributive goals and equity concerns are simply not consistent state priorities for education.¹¹⁶ Indeed, the 2013 report from the Equity and Excellence Commission found that:

[A]ny honest assessment must acknowledge that our efforts to date to confront the vast gaps in educational outcomes separating different groups of young Americans have yet to include a serious and sustained commitment to ending the appalling inequities—in school funding, in early education, in teacher quality, in resources for teachers and students and in governance—that contribute so mightily to these gaps.¹¹⁷

112. See MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* 149–74 (2007) (discussing state and local resistance and violence in response to school desegregation orders from federal courts).

113. See, e.g., BENJAMIN MICHAEL SUPERFINE, *EQUALITY IN EDUCATION LAW AND POLICY, 1954–2010*, at 78–80, 125–26 (2013) (noting the challenge confronting school finance litigation, including equity litigation that struggled with “definitional problems of the concept of equality, vague legal requirements, the limited institutional expertise of courts in education, the continuing interplay between the courts and the political branch of state legislatures, and the sheer lack of knowledge about how to transform educational funding into educational opportunities consistently”).

114. See REBELL & WOLFF, *supra* note 8, at 99–102.

115. See EQUITY & EXCELLENCE COMM'N, *supra* note 1, at 14–15, 17–18.

116. See Susan H. Fuhrman, *Less than Meets the Eye: Standards, Testing and Fear of Federal Control*, in WHO'S IN CHARGE, *supra* note 44, at 131, 150; RYAN, *supra* note 3, at 153, 178.

117. See EQUITY & EXCELLENCE COMM'N, *supra* note 1, at 14.

Furthermore, intrastate reforms cannot address significant and harmful interstate disparities in funding.¹¹⁸

The limited scope of many reforms also reveals that the United States has lacked the political will and investments in enforcement to adopt and implement the type of reforms that would make equal access to an excellent education a reality.¹¹⁹ Given this generally consistent failure to undertake comprehensive and sustained reform, the United States should not expect different results from a system that has failed to ensure equal educational opportunity for many generations of schoolchildren.¹²⁰ Instead, an assessment of how education federalism could be restructured to support a comprehensive national effort to achieve this goal is long overdue. Part II.F will explain why further expansion of the role of the federal government as the guarantor of equal opportunity represents a more fruitful avenue for reform than state level reform.

4. *Education Federalism's Insistence on State and Local Control of School Finance Systems Invites Inequality*

Primary state and local control over education essentially invite inequality in educational opportunity because of pervasive state insistence that local governments raise education funds and state funding formulas that do not effectively equalize the resulting disparities in revenue.¹²¹ Although some influential victories have occurred,¹²² school finance litigation has mostly failed to change the basic organizational structure of school finance systems and their reliance on property taxes to fund schools.¹²³ Instead, this litigation at best has obtained limited increases in funding for property-poor districts while allowing property-rich districts to

118. Liu, *supra* note 4, at 332–33.

119. EQUITY & EXCELLENCE COMM'N, *supra* note 1, at 34–35.

120. RYAN, *supra* note 3, at 1.

121. See Ryan, *supra* note 52, at 127–29; Osamudia R. James, *Breaking Free of Chevron's Constraints: Zuni Public School District No. 89 v. U.S. Department of Education*, 56 U. KAN. L. REV. 147, 149 (2007).

122. See, e.g., *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 408 (N.J. 1990) (“We find that in order to provide a thorough and efficient education in these poorer urban districts, the State must assure that their educational expenditures per pupil are substantially equivalent to those of the more affluent suburban districts, and that, in addition, their special disadvantages must be addressed.”); *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661, 666 (N.Y. 1995) (“Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.”).

123. RYAN, *supra* note 3, at 178.

maintain the same funding level or to raise their funding rate at a slower pace.¹²⁴

Recent evidence of the persistent inequalities in school funding can be found in two distinct 2013 reports. A report from the Council on Foreign Relations found that in the United States more is spent per pupil in high-income districts than in low-income districts.¹²⁵ This stands in sharp contrast to most other developed nations where the reverse is true.¹²⁶ The Equity and Excellence Commission report also found that “[n]o other developed nation has inequities nearly as deep or systemic; no other developed nation has, despite some efforts to the contrary, so thoroughly stacked the odds against so many of its children.”¹²⁷ These disparities are due in substantial part to the continued state reliance on property taxes to fund schools.¹²⁸ As a result, state school finance systems in the United States typically create many predominantly low-income and minority schools that predictably produce poor outcomes because these schools typically lack both the resources to ensure that their students obtain an effective education and the capacity to undertake effective reforms even when these reforms are well conceived.¹²⁹

The harms from persistent and pervasive disparities in educational opportunity are not limited to schoolchildren, their families, and their communities. These disparities also harm nationwide interests in a strong economy and a just society. The United States needs to maintain international academic competitiveness to attract businesses and prevent the loss of jobs to other more educated nations.¹³⁰ Yet, international assessments reveal that the performance of U.S. students is often average or below average when compared to other countries,¹³¹ which will make it difficult for U.S. students to compete successfully against students from many other nations. The Program for International Student Assessment (PISA), an international assessment of performance in math, reading and

124. See *id.* at 153, 178; Black, *supra* note 46, at 1371; Robinson, *supra* note 11, at 318–21.

125. See COUNCIL ON FOREIGN RELATIONS, *supra* note 2, at 4.

126. *Id.*

127. EQUITY & EXCELLENCE COMM’N, *supra* note 1, at 15.

128. COUNCIL ON FOREIGN RELATIONS, *supra* note 2, at 4.

129. See ACHIEVE, INC., CLOSING THE EXPECTATIONS GAP: SIXTH ANNUAL 50-STATE PROGRESS REPORT ON THE ALIGNMENT OF HIGH SCHOOL POLICIES WITH THE DEMANDS OF COLLEGE AND CAREERS 22 (2011); REBELL & WOLFF, *supra* note 8, at 163.

130. See Jonathan B. Cleveland, *School Choice: American Elementary and Secondary Education Enter the “Adapt or Die” Environment of a Competitive Marketplace*, 29 J. MARSHALL L. REV. 75, 84 (1995); COUNCIL ON FOREIGN RELATIONS, *supra* note 2, at 1.

131. NAT’L CTR. FOR EDUC. STATISTICS, PERFORMANCE OF U.S. 15-YEAR-OLD STUDENTS IN MATHEMATICS, SCIENCE, AND READING LITERACY IN AN INTERNATIONAL CONTEXT: FIRST LOOK AT PISA 2012, at 9–10 (2013).

science, was administered in 2012 to students in sixty-five education systems.¹³² The results showed that the average U.S. student who participated scored average in reading and science literacy and below average in math literacy when compared to other countries in the Organisation for Economic Co-operation and Development.¹³³ Doctors Eric A. Hanushek, Paul E. Peterson and Ludger Woessman, professors of education at Stanford University, Harvard University and the University of Munich respectively, summarized the lackluster performance of U.S. students on international assessments in a 2013 book by noting that:

The evidence of international comparison is now clear. American students lag badly and pervasively. Our students lag behind students not just in Asia, but in Europe and other parts of the Americas. It is not just disadvantaged students or a group of weak students who lag, but also American students from advantaged backgrounds. Americans are badly underrepresented among the world's highest achievers.¹³⁴

Although some challenge such conclusions from international assessments as overblown and simplistic,¹³⁵ others conclude that these less than stellar outcomes indicate that the U.S. education system is failing to prepare many of its students to compete successfully for jobs with other students from around the world.¹³⁶

Research reveals that the long-term vigor of the U.S. economy will depend on the advanced skills that are typically provided in higher education and that are needed for upper-level technical occupations.¹³⁷ Although the U.S. higher education system historically has been considered world-class, the United States is facing substantial competition from other countries with their fast-growing higher education systems.¹³⁸

132. *See id.* at 1.

133. *See id.* at 9–10.

134. ERIC A. HANUSHEK, PAUL E. PETERSON & LUDGER WOESSMANN, *ENDANGERING PROSPERITY: A GLOBAL VIEW OF THE AMERICAN SCHOOL* vii (2013). The authors further comment, “While there are issues of measurement that warrant further examination and there are some apparent differences across subject area, the overwhelming fact of weak academic achievement among American youth can no longer be in dispute.” *Id.*

135. *See* MARTIN CARNOY & RICHARD ROTHSTEIN, ECONOMIC POLICY INSTITUTE, *WHAT DO INTERNATIONAL TESTS REALLY SHOW ABOUT U.S. STUDENT PERFORMANCE?* 2 (2013).

136. *See* Richard A. Epstein & Jacob E. Gersen, *Understanding Education in the United States: Its Legal and Social Implications*, 79 U. CHI. L. REV. 467, 467 (2012); EQUITY & EXCELLENCE COMM’N, *supra* note 1, at 14–15.

137. Bailey, *supra* note 10, at 74, 78–79.

138. *See id.*

As Thomas Bailey, Teachers College professor of economics and education, has summarized in his research:

Occupational forecasts, analyses of job content, trends in wages, and changes in international competition all point to an increasing need in the United States for workers with high-level skills. Achieving increases in skill levels will be difficult as long as current gaps in educational attainment based on income, race, and ethnicity remain.¹³⁹

In this environment, the U.S. economy and its competitiveness will be increasingly hindered by low college enrollment and completion rates for Hispanic and African American students who increasingly will make up a larger share of the workforce.¹⁴⁰ Many U.S. students cannot compete successfully with students from other developed countries, and the lower achievement of U.S. students could cause comparatively slow growth for the U.S. economy in the years to come.¹⁴¹

The nation also has a strong interest in ensuring that entire segments of the American public are not foreclosed from the American dream due to their family income and racial and ethnic background. The principle of equal opportunity remains an enduring value within American society¹⁴² even though that value has never been fully realized. Rather than abandon the interest in equal opportunity, the nation must explore how this value can become a reality for the nation's schoolchildren. In Part II I propose some innovative ideas on how to accomplish this goal by restructuring education federalism.

5. Education Federalism Should Be Guided by Research Rather than Primarily by Education Politics

A reexamination of education federalism is needed because the expansion of the federal role in education has largely been guided by politics.¹⁴³ Politics, indisputably, will continue to play an influential role in education reform. Nevertheless, I propose a theory for how the expanding federal role in education should be guided by rigorous research regarding

139. *Id.* at 92.

140. *See id.* at 92–93.

141. *See* EQUITY & EXCELLENCE COMM'N, *supra* note 1, at 12–13.

142. *See, e.g.*, PEW RESEARCH CTR., TRENDS IN POLITICAL VALUES AND CORE ATTITUDES: 1987–2009, at 56 (2009) (“Nearly nine-in-ten (87%) agree that: ‘Our society should do what is necessary to make sure that everyone has an equal opportunity to succeed.’”).

143. *See* Kaestle, *supra* note 41, at 17; RYAN, *supra* note 3, at 14.

the strengths of federal policymaking, just as research about the importance of educational opportunities for disabled students informed Congress's passage of the Education for All Handicapped Children Act of 1975.¹⁴⁴ Although federal education law and policy is also influenced by politics, the federal government has demonstrated a willingness to leverage politics and research to address the needs of the disadvantaged within American society when politics has prevented effective reform at the state and local levels.¹⁴⁵

II. A THEORY FOR DISRUPTING EDUCATION FEDERALISM

Education federalism should be restructured to embrace greater federal leadership and responsibility for a national effort to provide equal access to an excellent education. This Part recommends the key elements for strengthening the federal role in education to accomplish this goal. It identifies new federal responsibilities that should be undertaken and recommends reforms of existing federal education policy that would facilitate this goal. Any substantial strengthening and reform of the federal role in education will transform the nature of education federalism because substantive changes to federal authority over education directly affect the scope of state and local authority over education. These shifts in education federalism have occurred throughout U.S. history, including federally mandated school desegregation,¹⁴⁶ NCLB,¹⁴⁷ and, most recently, waivers to NCLB.¹⁴⁸

In proposing the essential elements for a national effort to ensure equal access to an excellent education, I offer a broad theory to guide future reform by Congress, the executive branch, or both. The theory could be used to guide development of federal legislation, new initiatives by the

144. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-09 (2012)); see MARGRET A. WINZER, *THE HISTORY OF SPECIAL EDUCATION: FROM ISOLATION TO INTEGRATION* 381 (1993).

145. Charles Barone & Elizabeth DeBray, *Education Policy in Congress: Perspectives from Inside and Out*, in *CARROTS, STICKS, AND THE BULLY PULPIT: LESSONS FROM A HALF-CENTURY OF FEDERAL EFFORTS TO IMPROVE AMERICA'S SCHOOLS* 61, 63 (Frederick M. Hess & Andrew P. Kelly eds., 2011) [hereinafter *CARROTS, STICKS*].

146. See *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954); see also Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 796-837 (2010) (analyzing how some of the Supreme Court's leading desegregation decisions both prohibited and implicitly tolerated school segregation).

147. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.)

148. See Barron & Rakoff, *supra* note 34, at 279-80.

Department of Education, or—most likely—a combination of the two. This theory is intentionally broad and does not propose a specific statute or federal initiative because a wide variety of federal statutes and initiatives could incorporate the elements identified here. Instead, this theory provides research and ideas that could inform a variety of federal reforms for many years to come. As Part III.B explains, I focus on future action by Congress and the executive branch, rather than doctrinal reform through the courts, because the legislative and executive branch enjoy numerous policymaking strengths over courts.¹⁴⁹

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

- (1) Prioritizing a national goal of ensuring all children have equal access to an excellent education and acknowledging that achieving this goal will require disrupting education federalism;¹⁵⁰
- (2) Incentivizing development of common opportunity-to-learn standards that identify the education resources that states must provide;¹⁵¹
- (3) Focusing rigorous research and technical assistance on the most effective approaches to ensuring equal access to an excellent education;¹⁵²
- (4) Distributing financial assistance with the goal of closing the opportunity and achievement gaps;¹⁵³

149. See *infra* Part III.B.

150. In arguing for a restructuring of education federalism, I join the call of other scholars who have recommended expanding the federal role in education and redefining the federal-state relationship to advance equal educational opportunity. See, e.g., REBELL & WOLFF, *supra* note 8, at 69–76 (arguing that Congress should require that all states provide a “meaningful educational opportunity” when it reauthorizes the Elementary and Secondary Education Act); Liu, *supra* note 3, at 2049–50 (arguing that Congress should ensure “educational adequacy for equal citizenship” that, *inter alia*, reduces interstate inequalities in education).

151. Cf. REBELL & WOLFF, *supra* note 8, at 157–58 (arguing that NCLB should be revised to require that all children receive a “meaningful educational opportunity” and noting the “educational essentials” that students should receive); Liu, *supra* note 3, at 2103 (arguing that Congress should ensure “a common baseline of educational opportunity for equal citizenship”).

152. See COLLISION COURSE, *supra* note 56, at 160.

153. See James E. Ryan, *The Perverse Incentives of The No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 989 (2004); Paul T. Hill, *The Federal Role in Education*, BROOKINGS PAPERS ON EDUC. POLICY, no. 3, 2000, at 11, 34; COLLISION COURSE, *supra* note 56, at 160.

(5) Demanding continuous improvement from states to ensure equal access to an excellent education through federal oversight that utilizes a collaborative enforcement model;¹⁵⁴ and

(6) Establishing the federal government as the final guarantor of equal access to an excellent education¹⁵⁵ by strengthening the relationship between federal influence and responsibility.

As the analysis below will show, each of these elements either suggests how to leverage existing strengths of federal policymaking more effectively or fills in important gaps of federal policymaking and enforcement.¹⁵⁶

Federal education law and policy that encompasses these elements would greatly increase federal responsibility as part of a national effort to ensure equal access to an excellent education while setting the foundation for a shoulder-to-shoulder working relationship with the states to achieve this goal. In contrast to existing federal education policy that too often demands much from the states but gives them relatively little,¹⁵⁷ my proposed theory would strengthen the relationship between increasing federal demands for reform and greater federal responsibility for accomplishing those reforms. If federal education law and policymaking embraced each of these elements, *collectively* these reforms would place primary responsibility on the federal government for establishing a national framework for ensuring equal access to an excellent education.

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

The federal government must identify a national goal of ensuring that all children are provided equal access to an excellent education. Some national leaders already have noted the importance of this goal.¹⁵⁸

154. See Robinson, *supra* note 37, at 1715–22.

155. Cf. Liu, *supra* note 3, at 2049 (“Congress is duty-bound to secure equal national citizenship by serving as the ultimate guarantor of educational opportunity.”).

156. See, e.g., COLLISION COURSE, *supra* note 56, at 159–61 (identifying several strengths of federal policymaking in education).

157. NCLB has been criticized because, among other things, “through NCLB the federal government can achieve its policy goals on the proverbial financial backs of states and local school districts.” Heise, *supra* note 52, at 141.

158. See, e.g., President Barack Obama, Speech to the U.S. Hispanic Chamber of Commerce (Mar. 10, 2009), http://www.washingtonpost.com/wp-srv/politics/documents/Obama_Hispanic_Chamber_Commerce.html (“The relative decline of American education is untenable for our economy, it’s unsustainable for our democracy, it’s unacceptable for our children—and we can’t afford to let it continue.”).

However, some key points are missing from this rhetoric that must be emphasized to support the type of comprehensive reforms envisioned in this Article. For instance, the nation's top education leaders, including the President, the Secretary of Education, and members of Congress, would need to initiate a national conversation on why the United States should no longer tolerate longstanding disparities in educational opportunity and why federal action is needed to address them.¹⁵⁹

Federal and national education leaders also must make the case that the entire nation would benefit from ending inequitable disparities in education because research reveals that reforms to help those who are disadvantaged typically do not succeed unless they benefit more privileged Americans.¹⁶⁰ Therefore, the federal government must convince the more affluent segments of American society that a more equitable distribution of educational opportunity would inure to their benefit. This could be accomplished in part by publicizing existing research that quantifies the myriad of high costs that the United States pays for offering many schoolchildren a substandard education and that acknowledges that even many advantaged children are not competing effectively with their international peers.¹⁶¹ Initiating such a conversation also requires the federal government to prioritize equal access to an excellent education among its national policymaking agenda.

One way that federal leaders are beginning to identify concrete ways to close the opportunity gap is through President Obama's call to Congress, elected leaders, and business executives to make high-quality preschool education available for all children.¹⁶² This call to close one element of the opportunity gap builds upon robust research that reveals that investing in preschool education yields substantial educational, societal, and financial

159. See *supra* text accompanying notes 73–87, 125–42.

160. See COHEN & MOFFITT, *supra* note 35, at 9 (“Though this state of affairs rankles advocates, government seems unable to devise programs to help the poor unless they also offer something to more advantaged Americans. Absent a large and well-organized poor peoples’ movement, coalitions that spread benefits and unite sentiment behind programs for poor people are essential.”) (footnote omitted).

161. Cf. *supra* text accompanying notes 81–87, 131–36 HANUSHEK, PETERSON & WOESSMANN, *supra* note 134, at vii.

162. President Barack Obama, State of the Union Address (Jan. 28, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address>, archived at <http://perma.cc/48AU-4QGE> (“Research shows that one of the best investments we can make in a child’s life is high-quality early education. Last year, I asked this Congress to help states make high-quality pre-K available to every four year-old. As a parent as well as a President, I repeat that request tonight.”).

benefits for the United States.¹⁶³ Although closing the prekindergarten gap represents an important component of closing the opportunity gap, it remains only one small element of this gap in the United States. A broad call and initiative for closing the full spectrum of the opportunity gap from early childhood education through high school is essential and overdue.

Establishing equal access to an excellent education as a national priority would require federal leadership to explain that a reexamination of the nation's approach to education federalism is warranted. Leaders would explain how education federalism has served as a barrier to past reforms¹⁶⁴ and the reasons that restructuring education federalism must occur if the United States is ever going to ensure equal access to an excellent education.¹⁶⁵ This discussion should highlight federal willingness to shoulder greater responsibility for leading the national effort to achieve this goal while emphasizing that effective comprehensive reform must involve a shoulder-to-shoulder partnership among the federal, state, and local governments.

Fortunately, the federal government has proven its ability to herald the importance of new educational goals and approaches in the national interest.¹⁶⁶ Research and history confirm that agenda setting serves as one of the strengths of the federal government in education policymaking.¹⁶⁷ For instance, President Johnson successfully convinced Congress to advance equal educational opportunity for low-income schoolchildren through the Elementary and Secondary Education Act,¹⁶⁸ which includes Title I, and the Economic Opportunity Act,¹⁶⁹ which includes programs like Head Start and Upward Bound.¹⁷⁰ President Bush championed NCLB and its insistence on proficiency for all children in math and reading,

163. See W.S. Barnett & Leonard N. Masse, *Comparative Benefit-Cost Analysis of the Abecedarian Program and Its Policy Implications*, 26 ECON. OF EDUC. REV. 113, 122 (2007); Timothy J. Bartik et al., *Earnings Benefits of Tulsa's Pre-K Program for Different Income Groups*, 31 ECON. OF EDUC. REV. 1143, 1156 (2012).

164. See generally Robinson, *supra* note 11, at 287, 297–307, 309–14, 322–30.

165. See *infra* Part I.B.

166. See Paul T. Hill, *Getting it Right the Eighth Time: Reinventing the Federal Role*, in *NEW DIRECTIONS: FEDERAL EDUCATION POLICY IN THE TWENTY-FIRST CENTURY* 147, 163 (Marc Kanstoroom & Chester E. Finn, Jr. eds., 1999); COLLISION COURSE, *supra* note 56, at 159–60;

167. See Chester E. Finn, Jr., *Agenda-Setters and Duds: A Bully Pulpit, Indeed*, in *CARROTS, STICKS*, *supra* note 145, at 217, 217; Michael Mintrom & Sandra Vergari, *Education Reform and Accountability Issues in an Intergovernmental Context*, 27 *PUBLIUS* 143, 152 (1997); COLLISION COURSE, *supra* note 56, at 159–60.

168. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

169. Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (repealed 1981).

170. Finn, Jr., *supra* note 167, at 226.

public reporting of testing data disaggregated by subgroups, and a range of accountability interventions for failing schools.¹⁷¹ Therefore, a federal call to implement a comprehensive plan to ensure equal access to an excellent education should build upon the lessons learned from these and other federal reforms.

B. Incentivizing Development of Common Opportunity-to-Learn Standards

A federal effort to ensure equal access to an excellent education should incentivize the states to develop common opportunity-to-learn standards. Opportunity-to-learn (OTL) represent one of the critical missing elements of the current education reform agenda. OTL standards would identify the in-school and out-of-school resources that students should receive in order to meet rigorous achievement standards.¹⁷² The standards in most states are the common core standards, which were developed by a group of assessment specialists and academics in response to a request from the Council of Chief State School Officers and the National Governors Association.¹⁷³ The standards are intended to provide a clear set of math and English language and literacy standards for kindergarten through twelfth grade that would prepare all public schoolchildren to complete their high school education and to be ready to enroll in college or participate in the workforce.¹⁷⁴ OTL standards are essential for ensuring equal access to an excellent education because, as leading education scholar Linda Darling-Hammond has noted, two decades of high standards and testing implementation has revealed that “there is plentiful evidence that—although standards and assessments have been useful in clarifying goals and focusing attention on achievement—tests alone have not improved schools or created educational opportunities without investments in curriculum, teaching, and school supports.”¹⁷⁵ I recommend the

171. *See id.* at 227.

172. *See* REBELL & WOLFF, *supra* note 8, at 69–74.

173. Elaine McArdle, *What Happened to the Common Core?*, HARVARD ED. MAG., Sept. 3, 2014, at 23.

174. *See* Common Core State Standards Initiative, *Frequently Asked Questions*, <http://www.corestandards.org/about-the-standards/frequently-asked-questions/>, archived at <http://perma.cc/Y5Y9-DQUK> (last visited Feb. 20, 2015); *Standards in Your State*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/standards-in-your-state/>, archived at <http://perma.cc/7G6A-MFAQ?type=live> (last visited Feb. 20, 2015) (identifying the forty-three states that have adopted and are implementing the common core standards along with the District of Columbia and four territories) [hereinafter *Standards in Your State*].

175. DARLING-HAMMOND, *supra* note 19, at 74.

adoption of common OTL standards to provide a mechanism for ensuring that educational opportunities are distributed fairly so that state adoption of high academic standards can have the intended effect of improving educational outcomes.

1. Understanding Common OTL Standards

Common OTL standards would aim to guide state efforts to reduce substantial and impactful disparities in educational opportunity and set a floor for equal educational opportunity, while states would retain the flexibility to ensure greater equality of opportunity than the OTL standards demand. The states would serve as the primary architects of the standards because this approach fosters greater cooperation in implementing the standards and reduces criticism that the standards represent a federal takeover of education. As the standards are being developed, the federal government could publicize research regarding the essential resources that states must provide for students to achieve the learning benchmarks contained in the common core standards.

Common OTL standards would need to be broad enough to preserve the ability of states to adopt a variety of educational governance, funding, and policymaking structures. Federal support for common OTL standards should encourage state-level innovation and experimentation regarding how each state implements the standards, thus preserving the states as laboratories for education reform.¹⁷⁶ The standards should eschew any suggestion that a one-size-fits-all approach should be adopted for education.¹⁷⁷ Moreover, decisions about how and what to teach, such as how best to teach English language learners and whether to teach creationism within a science curriculum, should remain within the purview of state and local control.

Others also have called for OTL standards and some of these proposals provide recommendations for the content of such standards. For instance, the Equity and Excellence Commission recently made a somewhat similar proposal by calling for each state to identify and publicize “the teaching staff, programs and services needed to provide a meaningful educational opportunity to all students of every race and income level . . . based on

176. See JOSEPH F. ZIMMERMAN, *CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER* 5 (2d ed. 2008); Heise, *supra* note 52, at 131; Pinder, *supra* note 33, at 2–3.

177. See Jonathan H. Adler, *Cooperation, Commandeering, or Crowding Out?: Federal Intervention and State Choices in Health Care Policy*, 20 KAN. J.L. & PUB. POL’Y 199, 203–04 (2011).

evidence of effective education practices.”¹⁷⁸ Similarly, some scholars, such as Michael Rebell and Jessica Wolff, have argued that the federal government should adopt federal OTL standards when the Elementary and Secondary Education Act is reauthorized.¹⁷⁹ The Scott Foundation has initiated a National Opportunity to Learn Campaign and has produced reports that describe the potential content of OTL standards and recommend the adoption of such standards.¹⁸⁰

I agree with the proposal of the National Opportunity to Learn Campaign for common OTL standards that would support the provision of equitable resources as states implement the common core standards.¹⁸¹ However, in contrast to that proposal for mandatory federal OTL standards, I recommend that the federal government provide incentives for states to develop these common OTL standards. As a result, these standards would neither be federally defined, as the National Opportunity to Learn Campaign and Rebell and Wolff recommend, nor designed individually by each state, as the Equity and Excellence Commission advocates. Instead, the federal government could incentivize creation of OTL standards by building upon its success in incentivizing the development of the common core standards through RTTT.¹⁸²

In addition, a federal effort to support adoption of national OTL standards would move beyond the Commission’s recommendation in two important ways. First, if the states agree to identify the resources that are needed to offer a meaningful educational opportunity, they run the risk of being sued under state constitutions for failing to provide these resources.¹⁸³ Given this likelihood, federal support for development of common OTL standards must act as a check against state incentives to set a low floor for educational opportunity.¹⁸⁴ Federal support for these standards would emphasize the importance of excellence in education and

178. EQUITY & EXCELLENCE COMM’N, *supra* note 1, at 18. The report also recommends that states assess and publish the costs of these resources based upon “the efficient and cost-effective use of resources.” *Id.*

179. REBELL & WOLFF, *supra* note 8, at 157. For a thorough analysis of the potential content of such standards, *see id.* at 157–64.

180. *See generally* LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW ET AL., FRAMEWORK FOR PROVIDING ALL STUDENTS AN OPPORTUNITY TO LEARN THROUGH REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 3 (2010); NAT’L OPPORTUNITY TO LEARN CAMPAIGN, FEDERAL RECOMMENDATIONS 8–10 (2009).

181. *See* LAWYER’S COMMITTEE, *supra* note 180, at 2.

182. *See* McGuinn, *supra* note 26, at 143–45.

183. *See, e.g.,* Abbott v. Burke (Abbott IV), 693 A.2d 417, 429, 442–43 (N.J. 1997) (holding the New Jersey funding formula unconstitutional because it failed to link school funding to what students must receive to learn the content in state standards).

184. *See* COLLISION COURSE, *supra* note 56, at 160.

the need to empower U.S. students to compete successfully with their counterparts around the world. In contrast, states sometimes maintain a statewide or regional aim for education and lose sight of the reality that students now compete in an international job market. Second, my theory would draw upon the insights of states in defining essential educational resources, but would not make each state the sole judge of its own standards, as the Commission report would permit. Instead, the states would have to reach agreement on common standards, which inevitably would involve a compromise on what should be included.

Common OTL standards would identify not only what educational resources should be offered but also establish some standards for the quality of the resources needed to effectively implement rigorous standards. For instance, common OTL standards could identify the essential elements of high-quality prekindergarten education, especially given President Obama's recent focus on this issue.¹⁸⁵ The meaning of the phrase "high-quality" can differ greatly among the states and prekindergarten providers; thus some common baseline for an understanding of "high-quality" should be established in common OTL standards.

Common OTL standards also might establish the necessary access to effective teachers, educational materials, and support services. The analysis by Michael Rebell and Jessica Wolff provides helpful examples of some of the elements that the standards should include. For instance, they recommend that students should receive "effective teachers, principals, and other personnel," "adequate school facilities," and "instrumentalities of learning, including, but not limited to, up-to-date textbooks, libraries, laboratories, and computers" among other essential resources.¹⁸⁶ Given the wide range of resources that could be included in a common OTL standard, a thorough discussion of their essential content is beyond the scope of this Article.

Ultimately, federal incentives for states to develop common OTL standards would build upon past federal successes in addressing denials of equal educational opportunity.¹⁸⁷ Once these standards are developed, states must undertake efforts to ensure that students are delivered an

185. Press Release, Fact Sheet: White House Office of Press Sec'y, President Obama's Plan for Early Education for All Americans (Feb. 13, 2013) (<http://www.whitehouse.gov/the-press-office/2013/02/13/fact-sheet-president-obama-s-plan-early-education-all-americans>), *archived at* <http://perma.cc/RH8D-V6YW> (identifying how the White House defines a "high-quality" preschool program).

186. REBELL & WOLFF, *supra* note 8, at 157.

187. See Barone & DeBray, *supra* note 145, at 63.

education consistent with the standards. Certainly, the standards initially will be aspirational. Yet, reaching this reality first requires identifying the standards as clear goals and then developing a step-by-step plan to implement them. Such a plan would include examining the gap between existing resources and the standards, determining the cost of bridging the gap, and raising funds for closing the gap. As discussed below in Part II.C, federal research, technical expertise, and financial assistance should be offered to expand the capacity of states to bridge the gap between existing resources and the common national OTL standards.

2. *Shepherding a Successful Effort for Developing Common OTL Standards*

In its inception, the standards and accountability movement recognized that the success of academic standards depended upon ensuring that students receive an equal opportunity to acquire the knowledge within high standards.¹⁸⁸ OTL standards were tested, but proved politically unsustainable, in the mid-1990s.¹⁸⁹ In 1994, Congress passed Goals 2000: Educate America Act and this law provided for two options for the creation of OTL standards that established the conditions and resources needed throughout the education system to provide students the opportunity to learn the content set forth in voluntary national or state content standards.¹⁹⁰ First, the National Education Standards and Improvement Council was created to develop voluntary OTL standards.¹⁹¹ Second, states were permitted to develop their own OTL standards.¹⁹² The Improving America's Schools Act of 1994 (IASA) also conditioned Title I funds on state development of rigorous content and performance standards.¹⁹³ IASA included a requirement that state plans must describe how states will help districts and schools "develop the capacity" to achieve high standards and that this plan could include OTL standards.¹⁹⁴

188. *See id.* at 73–74.

189. *See* MCGUINN, *supra* note 30, at 109.

190. Goals 2000: Educate America Act, Pub. L. No. 103-227, § 3(a)(7), 108 Stat. 125 (1994) (codified as amended in scattered sections of 20 U.S.C.); *see* REBELL & WOLFF, *supra* note 8, at 52–53.

191. Goals 2000: Educate America Act §§ 212, 213(c); REBELL & WOLFF, *supra* note 8, at 52–53.

192. Goals 2000: Educate America Act § 213(d); REBELL & WOLFF, *supra* note 8, at 52–53.

193. Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 1111(b)(8), 108 Stat. 3518, 3523 (codified as amended in scattered sections of 20 U.S.C.); MCGUINN, *supra* note 30, at 96 tbl. 5.1.

194. *See id.*

These provisions were enacted because of the recognition that students could not be expected to achieve high standards without an equal opportunity to learn the content within the standards.¹⁹⁵ However, shortly after the passage of these laws, a Republican-controlled Congress repealed the federal power to establish OTL standards and the mandate that states should establish such standards.¹⁹⁶

In contrast to the past effort, my recommendation of common OTL standards comes at a time in U.S. history that is ripe for federal support for such standards. When OTL standards were first considered, vigorous debates were ongoing about the content and implementation of academic standards and the appropriate federal role regarding those standards.¹⁹⁷ Today, although some opposition to the common core standards has arisen regarding concerns such as the pace of implementation and federal involvement in these standards,¹⁹⁸ all states have adopted academic standards and the states are far closer to adopting common academic standards than ever before.¹⁹⁹ These common academic standards will provide a consistent aim for education across states. This process will lay a foundation for the states to identify what they need to provide to students to meet these standards. This common endeavor, along with growing federal support and influence in education, should provide a more fertile ground for federal incentives to create common OTL standards.

In addition, state leadership could draw upon the lessons from school finance litigation that attempts to define the educational opportunities that students must receive to meet state constitutional obligations for education.²⁰⁰ This rich source of research was not available when OTL standards were first introduced through federal legislation.²⁰¹ Although obtaining federal support for these standards will likely involve a tough political battle, the battle today would begin with greater ammunition and more favorable conditions.

195. See DARLING-HAMMOND, *supra* note 19, at 73–74.

196. MCGUINN, *supra* note 30, at 109; REBELL & WOLFF, *supra* note 8, at 68.

197. See MCGUINN, *supra* note 30, at 86.

198. See Javier C. Hernández, *Responding to Critics, New York State Plans to Scale Back Standardized Tests*, N.Y. TIMES, Oct. 26, 2013, at A16; Valerie Strauss, *Slow Down Reforms, Say School Chiefs in Maryland*, WASH. POST, Jan. 31, 2014, at B1; Emma Brown, *Gov. Jindal Attacks Common Core*, WASH. POST, FEB. 6, 2015, at A3.

199. RYAN, *supra* note 3, at 244 (noting that all states have implemented standards and tests linked to these standards); *Standards in Your State*, *supra* note 174 (identifying the forty-three states that have adopted and are implementing the common core standards).

200. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (identifying seven capacities that the state must provide each child to secure the child's fundamental right to an adequate education).

201. See REBELL & WOLFF, *supra* note 8, at 68.

Finally, and perhaps most importantly, I do not recommend federally defined standards, as Goals 2000 envisioned and as some scholars have recommended.²⁰² Instead, I recommend federal support for a state effort to develop national common OTL standards. Through state leadership and consensus building, my recommendations could avoid some of the opposition encountered by the prior attempt at OTL standards.

C. Focusing Rigorous Federal Research and Technical Assistance on the Most Effective Approaches for States to Provide Equal Access to an Excellent Education

For the federal government to lead a comprehensive national effort to ensure equal access to an excellent education, the federal government must provide generous support for the rigorous, objective research and effective technical assistance state and local governments will need to reach this goal. Substantial variations exist in the educational, economic, and administrative capabilities of states.²⁰³ One of the principal hindrances to NCLB's success was insufficient capacity at the state and local level to implement the required changes.²⁰⁴ Comprehensive reforms to ensure equal access to an excellent education will demand even more from states than NCLB. Therefore, federally supported research and technical assistance must help state and local governments develop the capacity to implement effective reforms.²⁰⁵

Fortunately, Congress already has begun to recognize the need for rigorous educational research through its passage of the Education Sciences Reform Act (ESRA).²⁰⁶ Congress passed ESRA in 2002 to provide research that would assist the states in complying with NCLB.²⁰⁷ ESRA created the Institute of Education Sciences (IES) and authorized IES to engage only in research based on science.²⁰⁸ This congressional requirement represents a substantial shift in how the federal government is

202. *See id.* at 157.

203. *See* COHEN & MOFFITT, *supra* note 35, at 14.

204. *See* David K. Cohen & Susan L. Moffitt, *The Influence of Practice on Policy*, in SHAPING EDUCATION POLICY: POWER AND PROCESS 63, 77–78 (Douglas E. Mitchell et al. eds., 2011); COLLISION COURSE, *supra* note 56, at 49–52.

205. NANCY KOBER ET AL., CTR. ON EDUC. POLICY, BETTER FEDERAL POLICIES LEADING TO BETTER SCHOOLS 8 (2010); Fuhrman, *supra* note 116, at 151.

206. Education Sciences Reform Act of 2002, Pub. L. No. 107-279, 116 Stat. 1940 (codified as amended in scattered sections of 20 U.S.C.).

207. Benjamin Michael Superfine, *New Directions in School Funding and Governance: Moving from Politics to Evidence*, 98 KY. L.J. 653, 686 (2009–10).

208. 20 U.S.C. § 9511(a) (2012); Superfine, *supra* note 207, at 686–87.

conducting and funding education research.²⁰⁹ This change has been noted as a promising development in congressional support for education research and some believe that IES has helped emphasize evidence-based approaches for education research that could focus attention on reforms that could be replicated.²¹⁰ The passage of ESRA indicates that Congress recognizes the need for federal support for high-quality education research to enable the United States to reach its essential educational goals.

Rigorous, objective research that supports a national effort to ensure equal access to an excellent education should build on this success while also establishing an agenda that identifies the critical research states need as they enact reforms to achieve this goal. This research would examine the most cost-effective and efficient state funding methods that ensure equal access to an excellent education.²¹¹ It also could propose and test funding models that states have not yet adopted. In addition, federal research could assess school governance and funding models from other countries that provide a more equitable distribution of educational resources.

Additionally, federally supported research could help identify and disseminate research regarding the essential characteristics of high-quality educational offerings. For example, scientifically based research on such topics as the essential characteristics of a high-quality prekindergarten program should serve as the foundation for identifying how to close opportunity gaps in prekindergarten education.²¹² Harvard scholar Hirokazu Yoshikawa has found that these characteristics include involving children in planning activities and creating low student-teacher ratios.²¹³ In

209. Superfine, *supra* note 207, at 686.

210. *See id.* at 689. In addition, the U.S. Department of Education's newly developed What Works Clearinghouse has disseminated some research on promising educational practices. *See* Paul Manna, *Strong Federal Policies Benefit Local Districts*, 90 PHI DELTA KAPPAN 568, 570 (2009).

211. *Cf.* Adler, *supra* note 177, at 205 (discussing the benefits of federal health research and commenting that "information about the cost-effectiveness of given types of health interventions or the likely market effects of certain types of policies are likely to apply across jurisdictions").

212. *See* Fact Sheet, *supra* note 185; *see also, e.g.*, Ellen C. Frede, *The Role of Program Quality in Producing Early Childhood Program Benefits*, FUTURE OF CHILDREN, Winter 1995, at 115, 120 ("The longitudinal research supports the view that small class sizes and low child-to-teacher ratios contribute to positive, long-term benefits for children from low-income families."); Nat'l Inst. of Child Health & Human Dev. Early Child Care Research Network & Greg J. Duncan, *Modeling the Impacts of Child Care Quality on Children's Preschool Cognitive Development*, 74 CHILD DEV. 1454, 1456 (2003) ("Findings from the National Child Care Staffing Study, the Cost, Quality, and Outcomes Study, . . . as well as the NICHD Study of Early Child Care show that children attending programs in which caregivers had more education and training, and in which child-staff ratios were smaller, performed better across a range of cognitive and social measures.") (citations omitted).

213. Hirokazu Yoshikawa, *Long-Term Effects of Early Childhood Programs on Social Outcomes and Delinquency*, FUTURE OF CHILDREN, Winter 1995, at 51, 68 (finding that effective early childhood

addition, the federal government should ensure that existing rigorous research on this topic is disseminated to states so that states can avoid costly duplication of research as they develop new programs.

A federal research agenda also should identify the primary impediments to ensuring equal access to an excellent education. For instance, research indicates that challenging work environments in urban schools discourage highly qualified teachers from teaching in such schools.²¹⁴ Once common impediments are identified, research should examine the costs and benefits of potential reforms to address these impediments. The federal government could assist states and localities as they undertake and support research that responds to regional, state, and local conditions that present unique challenges.²¹⁵

Establishing a federal research agenda to ensure equal access to an excellent education would capitalize on the federal government's substantial comparative advantage over states and localities in conducting and supporting research.²¹⁶ It would eliminate the inefficiencies caused by each state conducting its own research. This research also would reduce the cost of state efforts to achieve this goal by offering research that supplies the possible reforms for achieving this goal.²¹⁷ Once this research is disseminated, it would provide state and local governments sufficient models to consider as they develop state- and district-specific plans of action.

In addition to research assistance, the federal government should offer technical assistance that supports state efforts to ensure equal access to an excellent education. This component would strengthen the existing federal-state relationship because the federal government offers technical assistance on a wide variety of issues, including assistance on how to achieve the core goals of RTTT,²¹⁸ early childhood education,²¹⁹ and

programs "emphasized the initiation and planning of activities by the child rather than the teacher" and "staff-child ratios in infant/toddler educational child care were in the range of one adult to three or four children, and 1 to 6 in preschool programs").

214. See RYAN, *supra* note 3, at 173.

215. See McGovern, *supra* note 72, at 1521. The federal government also could encourage state innovation in developing new funding mechanisms through a variety of efforts, including federal research grants and evaluations, funding to outside experts, and intergovernmental partnerships. See Hill, *supra* note 166, at 175; KOBER ET AL., *supra* note 205, at 7; Manna, *supra* note 210, at 570.

216. See DAVID T. CONLEY, WHO GOVERNS OUR SCHOOLS? CHANGING ROLES AND RESPONSIBILITIES 32 (2003); Marshall S. Smith, *Rethinking ESEA: A Zero-Base Reauthorization*, in CARROTS, STICKS, *supra* 145, at 231, 233; Fuhrman, *supra* note 116, at 151; COLLISION COURSE, *supra* note 56, at 160.

217. See Adler, *supra* note 177, at 216, 218.

218. See U.S. Dep't. of Educ., *Race to the Top Resources*, <http://www2.ed.gov/about/inits/ed/implementation-support-unit/tech-assist/index.html> (last visited Feb. 20, 2015).

special education.²²⁰ To achieve this goal, the states may need federal technical assistance on the most effective and efficient funding mechanisms and other reforms and the common barriers to successful reforms. In addition, state and local governments may need federal technical assistance regarding how to develop data collection systems that enable states and localities to document the scope of opportunity gaps and the effectiveness of efforts to reduce those gaps. Although NCLB provided a strong impetus for states to develop new data systems in order to comply with the law's standards for teacher quality, this issue received less attention from states once it became clear that those requirements would not consistently be enforced.²²¹ Federal technical assistance should help preclude any unnecessary diversion of resources and duplication of effort that would occur if each state had to develop such technical expertise on its own.²²²

Additional federal technical assistance is essential to supplement the limited capacity of some state education agencies to implement comprehensive reform.²²³ As education scholar Paul Manna insightfully noted in his comprehensive analysis of NCLB implementation:

[D]espite being charged with implementing education policy in a state, these agencies have tended to possess little expertise in actually working on substantively important education initiatives, such as the development of standards, curriculum, and tests. Instead, their main purpose has been to distribute state and federal money to local communities and then monitor to ensure that those dollars have been spent appropriately.²²⁴

Although the capacity and expertise of state education agencies has grown as they have implemented NCLB, these agencies, along with state legislatures, may still lack the capacity and expertise to implement a comprehensive reform agenda to ensure equal access to an excellent education. The federal government could address this capacity gap by providing essential expertise on effective reforms as its understanding of these issues deepens through the implementation of the research agenda.

219. See U.S. Dep't of Educ., *Federal Technical Assistance for Early Learning*, <http://www.ed.gov/early-learning/federal-technical-assistance> (last visited Feb. 20, 2015).

220. See *Special Education—National Activities—Technical Assistance and Dissemination*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/programs/oseptad/index.html> (last visited Feb. 20, 2015).

221. See COLLISION COURSE, *supra* note 56, at 55–58.

222. See Adler, *supra* note 177, at 205–06.

223. See COLLISION COURSE, *supra* note 56, at 49.

224. *Id.*

D. Distributing Financial Assistance Focused on Closing Opportunity and Achievement Gaps

The federal government will need to provide financial assistance to states to support a national effort to ensure equal access to an excellent education due to the substantial cost of closing opportunity and achievement gaps.²²⁵ This financial support for education would leverage the federal government's superior ability to redistribute resources among the states.²²⁶ This superior ability stems in part from the federal government's capacity to spread the costs of redistribution across a wider national constituency than state governments. In addition, business interests and the wealthy possess a greater ability to thwart redistribution at the state level than at the federal level because they can threaten to leave a state.²²⁷ Past experience reveals that federal resources can be an effective means for influencing state and local education policy.²²⁸

The federal financial contribution should include both *incentives* and *assistance* to address opportunity and achievement gaps. Financial incentives will draw attention to this critical issue and motivate states that have resisted reform, just as incentives motivated reform through RTTT.²²⁹ Financial assistance also will expand the potential reform options beyond what states could implement with their own state resources and will supply political cover for politicians who support reform.²³⁰ The federal investment in efforts to ensure equal access to an excellent education could include funding mechanisms such as competitive grants and formula grants.

Federal financial support for closing opportunity and achievement gaps will be essential for expanding state capacity to achieve this goal. A recent

225. See, e.g., Obama, *supra* note 162 (noting the need for federal aid to support state development of high-quality prekindergarten education).

226. See Kevin G. Welner & Jeannie Oakes, *Mandates Still Matter: Examining a Key Policy Tool for Promoting Successful Equity-Minded Reform*, in BRINGING EQUITY BACK, *supra* note 17, at 77, 89; Gittell, *supra* note 75, at 39; COLLISION COURSE, *supra* note 56, at 160; Ryan, *supra* note 153, at 989.

227. See Kleven, *supra* note 14, at 401.

228. See COLLISION COURSE, *supra* note 56, at 160 (noting the importance of federal grants to incentivize desegregation and to provide flexibility to state and local governments); KOBER ET AL., *supra* note 205, at 5 ("Over the past several decades, the federal government has made important, positive contributions to education by setting broad goals, redistributing resources to redress inequities, mobilizing state and local governments to address pressing needs, and calling attention to urgent national priorities and promising practices.")

229. See Friedman & Solow, *supra* note 27, at 146; McGuinn, *supra* note 26, at 143–47.

230. See Paul Manna & Laura L. Ryan, *Competitive Grants and Educational Federalism: President Obama's Race to the Top Program in Theory and Practice*, 41 PUBLIUS 522, 542 (2011); COHEN & MOFFITT, *supra* note 35, at 111; COLLISION COURSE, *supra* note 56, at 95.

move in this direction can be found in President Obama's proposal to invest \$75 billion in federal funds over ten years to ensure that all four-year-olds receive a high-quality prekindergarten education.²³¹ In addition, President Obama previously created incentives for states to invest in early childhood education through the RTTT Early Learning Challenge by offering states the chance to compete for \$500 million in discretionary grants if they expanded early childhood education to young children of low-income families.²³² Such efforts represent an important first step toward closing the substantial opportunity and achievement gaps. However, a comprehensive effort to ensure equal access to an excellent education would need to invest federal resources across the full spectrum of opportunity and achievement gaps in elementary and secondary education.

Federal support for a national effort to ensure equal access to an excellent education would not require federal funding for all of the necessary state and local reforms. Instead, the federal government should generously increase its contribution to education costs while continuing to share these costs with the state governments. The level of generosity of federal funding should be based upon the disparate capacities of states to close opportunity and achievement gaps.²³³ Generous federal financial assistance would fund a larger percentage of the costs of reforms than had occurred with past education reforms.²³⁴ These past reforms typically failed to deliver the substantial funds that were initially anticipated when the laws were enacted.²³⁵ For example, one of many criticisms of NCLB was that the federal government covered very little of the implementation costs.²³⁶ Since increasing federal funding for ensuring equal access to an excellent education would simultaneously increase federal responsibility for achieving this goal, my theory would create a closer and more effective marriage between federal demands and federal responsibility as discussed below further in Part II.F.²³⁷

231. H. BUDGET COMM. DEMOCRATIC STAFF, H. COMM. ON THE BUDGET, HIGHLIGHTS OF THE PRESIDENT'S FISCAL YEAR 2014 BUDGET 10 (2013).

232. Applications for New Awards; Race to the Top—Early Learning Challenge, 78 Fed. Reg. 53,992, 53,992 (Aug. 30, 2013).

233. Liu, *supra* note 3, at 2114.

234. Given this Article's focus on identifying the essential elements for a national effort to ensure equal access to an excellent opportunity rather than proposing a specific statute or program, it does not offer a specific dollar amount for the appropriate federal financial investment.

235. See JACK JENNINGS, CTR. ON EDUC. POLICY, REFLECTIONS ON A HALF-CENTURY OF SCHOOL REFORM: WHY HAVE WE FALLEN SHORT AND WHERE DO WE GO FROM HERE? 3 (2012).

236. See COLLISION COURSE, *supra* note 56, at 62; REBELL & WOLFF, *supra* note 8, at 100.

237. Although some, such as education scholar Michael Heise, have suggested that federal

Additionally, a blend of federal and state funding will encourage greater efficiency than full federal funding.²³⁸ Shared funding should encourage both the federal and state governments to contain costs. If the federal government paid the full bill for any necessary reforms, the states might inflate the alleged costs of such reforms. Shared financial responsibility helps avoid such perverse incentives.

E. Demanding Continuous Improvement from States on Ensuring Equal Access to an Excellent Education Through Federal Oversight that Utilizes a Collaborative Enforcement Model

A federally-led effort to ensure equal access to an excellent education should include federal monitoring of state progress. Such monitoring would provide federal accountability for state progress, thus helping to foster improvement.²³⁹ Oversight also would enable the federal

involvement in education should be limited to what it funds, this Article's proposed theory disagrees with that contention for three reasons. See Heise, *supra* note 52, at 149–50, 153; see also *South Dakota v. Dole*, 483 U.S. 203, 216 (1987) (O'Connor, J., dissenting) (arguing that the federal government should pay for what it seeks to accomplish through the Spending Clause). First, this approach would greatly curtail federal involvement in education because the federal government does not enjoy a limitless financial capacity to fund education given its competing policymaking priorities. The reduction of the federal government's involvement in education would be a tremendous loss to the nation because its role in education has served as an essential impetus for the nation's efforts to ensure equal educational opportunity. See GENEVIEVE SIEGEL-HAWLEY & ERICA FRANKENBERG, CIVIL RIGHTS PROJECT, SOUTHERN SLIPPAGE: GROWING SCHOOL SEGREGATION IN THE MOST DESEGREGATED REGION OF THE COUNTRY 7–8 (2012); JENNINGS, *supra* note 235, at 2. If the federal government had been limited to what it could pay for when it passed Title IX or the Education for All Handicapped Children Act, this legislation probably would not have been adopted or would have been greatly limited. See Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–88 (2012)); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–09 (2012)). Second, shared federal and state funding for education encourages greater investment in education because the federal government can encourage additional state investment in education by raising the federal funding matching rate. In addition, states can purchase services less expensively because the federal government would cover a portion of the costs. See *Dole*, 483 U.S. at 216 (O'Connor, J., dissenting). David Super offers some criticisms of federal matching programs and offers some suggestions for improvement. See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2587–88, 2649–50 (2005). Finally, requiring that states contribute to the reforms that will be required will encourage state commitment to the success of those reforms. For these reasons, although this Article recommends that the federal government should bear primary responsibility for establishing a theory that will guide a national effort to ensure equal access to an excellent education, this Article supports shared federal and state financial responsibility for achieving this goal.

238. See Mun Tsang & Henry M. Levin, *The Impact of Intergovernmental Grants on Educational Expenditure*, 53 REV. OF EDUC. RESEARCH 329, 334–35 (1983).

239. See, e.g., Eric A. Hanushek, *Why the Federal Government Should Be Involved in School Accountability*, 24 J. POL'Y ANALYSIS & MGMT. 167, 171 (2005) (“[W]hile accountability as written into federal law with NCLB can be improved, the existing system offers considerable real improvement over the stagnant schools of the past decades.”).

government to identify states' needs for research, technical and financial assistance when the states fail to seek it. Effective federal monitoring and oversight of a national effort to ensure equal access to an excellent education is also one of the missing components of the current education reform agenda.

This federal monitoring should focus on a collaborative enforcement approach to resolve any disputes between the federal and state governments regarding how states achieve this goal. In a 2007 article, I proposed a collaborative enforcement model for a federal right to education and I envision this Article's theory adopting a similar model.²⁴⁰ Under this collaborative approach, the federal government would establish a periodic, reporting obligation on state efforts to ensure equal access to an excellent education.²⁴¹ State reporting would describe progress on achieving this goal, identify any impediments to progress, and offer potential plans for reform. Input also would be sought from education reform organizations, civil rights groups, and citizens so that the federal government would have a full picture of state efforts.²⁴² A panel or commission of experts would review this information.²⁴³

Upon receiving this information, the panel or commission would assess state reforms and provide feedback on how states could improve their efforts.²⁴⁴ The panel or commission would not have authority to insist upon implementation of these recommendations and instead would encourage states to develop their own approaches.²⁴⁵ Federal recommendations would merely serve as a research-based source of ideas for state reform. The federal government also would assist states in identifying hindrances to effective reforms and provide research and technical assistance based on successful reforms in other states.²⁴⁶ This federal monitoring would draw upon the superior federal capability for enforcement of equity requirements.²⁴⁷

240. Robinson, *supra* note 37, at 1715–22.

241. *Id.* at 1716–18.

242. *Id.* at 1717–18.

243. *Id.* at 1718.

244. *Id.* at 1717–18; see Fuhrman, *supra* note 116, at 151 (“Washington’s ability to fund and draw on research that crosses state boundaries, to invest additional support in capacity-building functions such as professional development, and to hold up a mirror to state efforts through evaluation studies, NAEP, and cross-national assessments can provide important support for state reforms.”).

245. See Robinson, *supra* note 37, at 1718–19.

246. See Manna, *supra* note 210, at 571 (“Their distance from the ground level gives federal leaders a fantastic bird’s-eye view of the system, which can help them find important leverage points to promote reforms.”).

247. See Black, *supra* note 46, at 1350–51. *But see* Barone & DeBray, *supra* note 145, at 71 (“On things that follow along clear, bright lines—like funding formulas, requirements to set goals and

In addition, the collaborative enforcement approach would view penalties as an undesirable last resort, particularly given the additional leverage that *National Federation of Independent Business v. Sebelius* may provide states to challenge implementation of federal programs, which is discussed below.²⁴⁸ Instead, it would embrace flexibility in negotiating compliance with federal funding conditions when warranted by unique state and local conditions.²⁴⁹ A collaborative enforcement model also would require the U.S. Department of Education to develop systems to ensure consistency in federal oversight so that the inconsistent enforcement that undermined NCLB's implementation, and prior authorizations of the Elementary and Secondary Education Act, is not repeated.²⁵⁰

F. Establishing the Federal Government as the Final Guarantor of Equal Access to an Excellent Education by Strengthening the Relationship Between Federal Influence and Responsibility

By enacting federal legislation and initiatives that embrace each of the elements discussed above, the federal government would reestablish itself as the final guarantor of equal access to an excellent education.²⁵¹ Historically, equal educational opportunity served as one of the principle rationales for federal involvement in education.²⁵² The federal government has played a critical role in assisting vulnerable groups when the states have failed to act in the national interest.²⁵³ Yet, an increasing focus on

disaggregate data by subgroups, or targeted investments in pilot programs—Congress is generally able to achieve its aims, or at least monitor its success in doing so. But on more nuanced policies, or ones that require fairly focused monitoring of actions by states and school districts, it falls far short again and again.”).

248. See Gillian E. Metzger, *To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 114 (2012); Bagenstos, *supra* note 22, at 865, 908.

249. See PAUL MANNA, *SCHOOL'S IN: FEDERALISM AND THE NATIONAL EDUCATION AGENDA* 111 (2006) [hereinafter *SCHOOL'S IN*] (“Due to its own weaknesses in license and capacity relative to state policymakers, federal officials often reason that if they did sanction or punish states, it is unlikely these actions would produce the ultimate results they desire. It might also prevent these federal policy entrepreneurs from developing their education agendas in the future.”).

250. See COLLISION COURSE, *supra* note 56, at 66.

251. See CONLEY, *supra* note 216, at 32 (“The federal government remains the level of governance most concerned with equity issues. This is appropriate historically and also provides the strongest legitimacy for a broad federal role.”).

252. See Erik W. Robelen, *The Evolving Federal Role*, in *LESSONS OF A CENTURY: A NATION'S SCHOOLS COME OF AGE* 240, 240 (2000); Kaestle, *supra* note 41, at 27.

253. Frederick M. Hess & Andrew P. Kelly, *Reflections on the Federal Role: A Half-Century of Hard-Won Lessons*, in *CARROTS, STICKS*, *supra* note 145, at 273, 273, 275–76; CTR. ON EDUC. POLICY, *supra* note 44, at 4.

standards and accountability shifted federal attention away from issues of educational equity, while federal reforms unsuccessfully attempted to ensure a quality education for all schoolchildren.²⁵⁴ Although the federal government consistently should aim to maintain excellence, it also needs to reassert itself as the final guarantor of equal educational opportunity because the current failure of the federal government to fulfill this role is one of the critical missing elements of the education reform agenda. In making this recommendation, I join with other scholars, such as Michael Rebell and now-California Supreme Court Justice Goodwin Liu, whose proposals call upon the federal government to guarantee some form of equal educational opportunity.²⁵⁵

History suggests that the federal government is likely to be the only level of government to engage in the leadership and substantial redistribution of resources that equal access to an excellent education will require.²⁵⁶ Local politics oftentimes hinders substantial efforts to redistribute resources.²⁵⁷ Thus, it is unsurprising that it took federal legislation to initiate numerous past reform efforts that addressed disparities in educational opportunity, such as those that assist disadvantaged students,²⁵⁸ girls and women,²⁵⁹ and disabled children.²⁶⁰ The federal government possesses an unparalleled ability to mobilize national, state, and local reform when the United States confronts an educational crisis.²⁶¹ Therefore, my call for a stronger federal role in education would build upon the historical federal role in advancing educational equity and the superior ability of the federal government to accomplish a redistribution of educational opportunity.

By focusing its attention on the policymaking areas identified in Parts II.A through E above, the federal government would shoulder the primary

254. Petrovich, *supra* note 17, at 3–4.

255. See, e.g., REBELL & WOLFF, *supra* note 8, at 9, 69–74 (arguing that all children should be provided a meaningful educational opportunity and identifying its components); Liu, *supra* note 3, at 2049 (arguing that Congress should ensure “educational adequacy for equal citizenship”) (italics omitted).

256. Gittell, *supra* note 75, at 39.

257. See Kirst, *supra* note 44, at 15–16. Kirst argues that both federal and state governments operate more effectively in school finance and civil rights arenas due to the roadblocks to redistribution at the local level. *Id.* at 16.

258. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

259. Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)).

260. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–09 (2012)).

261. See Robinson, *supra* note 75, at 457.

burden for a national effort to ensure equal access to an excellent education. This primary federal burden would be carried through a multifaceted approach in which each policymaking area would support and reinforce the others and draw upon federal strengths in education policymaking. At the same time, federal leadership would incentivize the states to engage in a collaborative partnership with the federal government to achieve this goal. States would retain substantial control over education as they choose among a wide array of reforms while facing compelling incentives to join in this national effort.

Some may argue that the states should bear the primary burden for ensuring equal access to an excellent education because education remains primarily a state function. I reject this dualist understanding of education²⁶² while highlighting our longstanding history that reveals that the states will not rectify opportunity and achievement gaps on their own. The federal role in education has grown significantly in recent decades and has become increasingly influential.²⁶³ My proposed theory builds upon the growing consensus reflected in NCLB and other federal education legislation that the federal government should exercise a substantial role in education law and policy.²⁶⁴

Others may contend that the United States should rein in the growing federal role in education. In some ways, this criticism points to the failures of past federal initiatives as evidence that the federal government's role in education should be curtailed. Most recently, some scholars condemn the shortcomings and implementation of NCLB and RTTT.²⁶⁵ Undeniably, the federal government has undertaken a variety of unsuccessful education reforms.²⁶⁶ Yet, an established track record in education over the last fifty years has given us ample evidence to identify the strengths and weaknesses of federal education policymaking. My theory intentionally builds upon identified federal strengths in innovative and progressive ways. In particular, the theory builds on the foundational premise that in the face of inconsistent and overwhelmingly ineffective state reform, the

262. See Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, 31 *PUBLIUS* 15, 19 (2001).

263. MCGUINN, *supra* note 30, at 1.

264. *Id.*

265. See, e.g., Maurice R. Dyson, *Are We Really Racing to the Top or Leaving Behind the Bottom? Challenging Conventional Wisdom and Dismantling Institutional Repression*, 40 *WASH. U. J.L. & POL'Y* 181, 238–43 (2012); Monica Teixeira de Sousa, *A Race to the Bottom? President Obama's Incomplete and Conservative Strategy for Reforming Education in Struggling Schools or the Perils of Ignoring Poverty*, 39 *STETSON L. REV.* 629, 630–31 (2010); MCGUINN, *supra* note 30, at 183–87; RYAN, *supra* note 3, at 244–45.

266. See Finn, Jr., *supra* note 167, at 219–26.

federal government enjoys a superior and more consistent reform record on issues of educational equity.²⁶⁷ Education scholars Charles Barone and Elizabeth DeBray confirmed this superior track record in stating that:

Over the past half century, Congress has most frequently sought, and in most cases successfully enacted, sweeping changes to federal law when (1) a segment of U.S. Society was judged as having been denied equal educational opportunity and (2) states and municipalities were unable or unwilling to remedy those inequities. In education, as in other areas, like voting rights or retirement security for seniors, this has unquestionably been its most important and powerful role.²⁶⁸

My theory builds upon this superior record in proposing a theory for disrupting education federalism that can guide the United States toward equal access to an excellent education.

In making the federal government the final guarantor of equal access to an excellent education, my proposed theory would strengthen the relationship between growing federal influence in education and greater federal responsibility for accomplishing national objectives. This transformation would greatly improve upon the nation's current cooperative federalism framework for education.²⁶⁹ Today, although the federal government invests in education, this investment is quite limited relative to state and local investments.²⁷⁰ By increasing its demands while limiting its contributions, the federal government has been able to avoid shouldering a substantial portion of the costs and burdens associated with accomplishing the nation's education goals while still enjoying the ability to set the nation's education agenda and demand results.²⁷¹ In contrast, my proposal would establish a much closer and more effective marriage between federal influence and responsibility.

267. See Hess & Kelly, *supra* note 253, at 275–76; JENNINGS, *supra* note 235, at 2–3.

268. Barone & DeBray, *supra* note 145, at 63.

269. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 434 (1998).

270. See SCHOOL'S IN, *supra* note 249, at 111–12; NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 47, at 2, 4 tbl.1.

271. See Heise, *supra* note 52, at 141; Robinson, *supra* note 75, at 462–64 (reviewing RYAN, *supra* note 3).

III. THE BALANCE SHEET FOR DISRUPTING EDUCATION FEDERALISM

In response to my theory for strengthening the federal role in education to establish the foundation for a national effort to ensure equal access to an excellent education, critics may raise a variety of objections. Some may contend that Congress could not pass legislation that builds on my theory because it could violate the Spending Clause requirements that were strengthened in *National Federation of Independent Business v. Sebelius* (*NFIB*),²⁷² the Supreme Court's first opinion striking down a federal law under the Spending Clause. Others may argue that the courts represent the most fruitful avenue for systemic education reform rather than the legislative or executive branch. In addition, some may contend that my proposed theory would reduce some of the benefits of education federalism, such as state and local control over education and accountability. Another likely objection is that the United States lacks the political will to implement this theory. This Part responds to these objections and highlights numerous strengths of my proposed theory.

A. *Understanding Why National Federation of Independent Business v. Sebelius Leaves Ample Constitutional Room for Expanding the Federal Role in Education*

Although the Supreme Court in *NFIB* upheld the mandate requiring individuals to acquire health insurance as a valid exercise of the congressional authority to tax,²⁷³ it also held that the Affordable Care Act's penalty on states that chose not to participate in the expansion of the Medicaid program was unconstitutionally coercive in violation of the Spending Clause.²⁷⁴ Until the Supreme Court's decision in *NFIB*, the Court had placed very few limits on Spending Clause authority.²⁷⁵ Given the shift in the Court's understanding of the scope of authority under the Spending Clause and my reliance on congressional action as one avenue for disrupting education federalism, it is important to understand what impact this decision could have on my theory.

272. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012).

273. *NFIB*, 132 S. Ct. at 2601 (plurality opinion).

274. *NFIB*, 132 S. Ct. at 2606–07 (2012) (plurality opinion); *id.* at 2666–67 (Scalia, Kennedy, Thomas & Alito, J.J., dissenting).

275. For a full and thoughtful analysis of the impact of *NFIB* on federal education law, please see Pasachoff, *supra* note 22, at 584–91.

Although the Court established five conditions for Spending Clause legislation in *South Dakota v. Dole*,²⁷⁶ with the exception of the requirement that conditions must be unambiguous, the Court since *Dole* and prior to *NFIB* had not applied these conditions to establish meaningful substantive limits for Spending Clause legislation.²⁷⁷ Prior to *NFIB*, the Court's minimal enforcement of the requirement that statutory conditions may not be so coercive that they become compulsory was generally understood to be "[t]he virtual judicial abandonment of coercion analysis."²⁷⁸ With little fear of judicial interference, Congress was able to employ its expansive authority under the Spending Clause to enact legislation covering a broad variety of areas that it does not possess direct authority to regulate, including education, the environment, and social welfare issues.²⁷⁹

The Court in *NFIB* found for the first time that a Spending Clause statute had crossed the line from coercion to compulsion.²⁸⁰ The plurality opinion by Chief Justice Roberts, joined by Justices Breyer and Kagan, determined that the Medicaid expansion that required the states to insure anyone under age sixty-five with an income of less than 133% of the federal poverty line was unconstitutionally coercive.²⁸¹ The plurality's analysis focused on several factors to find a constitutional violation, and I agree with scholars Eloise Pasachoff and Samuel Bagenstos that the best reading of the opinion is that each of these factors must exist for the plurality to find a statute unconstitutional.²⁸² The plurality first noted that, rather than establish new conditions for new funds, Congress threatened to

276. 483 U.S. 203 (1987). The Court required that the conditions for federal spending must: (1) benefit the general welfare, (2) be unambiguous, (3) be related to the federal interest in the statute, (4) cannot induce the states to engage in activities that would themselves be unconstitutional and (5) cannot be so coercive as to pass the point at which "pressure turns into compulsion." *Id.* at 207, 208, 210–11 (internal quotations omitted).

277. Pasachoff, *supra* note 22, at 588–89. On the unambiguous requirement, the Court has insisted that states have "clear notice" regarding the conditions for accepting federal funds. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 300 (2006); Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 393–409 (2008); Pasachoff, *supra* note 22, at 588–89. Even this limitation did not stop Congress from enacting Spending Clause legislation, as it merely established an interpretive rule that requires Spending Clause legislation to be enacted with great clarity such that the states fully understand the conditions for receiving federal funds. Pasachoff, *supra* note 22, at 589.

278. Heise, *supra* note 52, at 137.

279. Pasachoff, *supra* note 22, at 589–90.

280. *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2608 (2012) (plurality opinion); *id.* at 2630 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

281. *Id.* at 2606–07 (plurality opinion).

282. *See* Bagenstos, *supra* note 22, at 864–65; Pasachoff, *supra* note 22, at 594.

withhold both new and existing Medicaid funds if a state did not agree to the expansion.²⁸³ The plurality found that this threat effectively forced states to acquiesce to the Medicaid expansion because when the “conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the states to accept policy changes.”²⁸⁴ This threat triggered an analysis by the plurality of whether the threat had crossed the line from coercion to compulsion.²⁸⁵

The plurality then determined that the terms were unconstitutionally coercive because it considered the threatened loss of all Medicaid funding, which accounts for more than ten percent of a State’s total budget, to be “economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion”²⁸⁶ and essentially “a gun to the head” of the states.²⁸⁷ Finally, the plurality concluded by noting that although the states agreed that Congress could amend or alter Medicaid when they accepted Medicaid funds, the requirement that Congress must attach unambiguous conditions to federal grants means that Congress cannot create “a new health care program” under the guise of merely amending the original program.²⁸⁸ Given that the Medicaid expansion transformed the program from one that serves some of the neediest individuals in society to one that provides healthcare for anyone with an income below 133% of the poverty line, the states did not agree to this dramatic expansion when they agreed that Congress could amend Medicaid.²⁸⁹

In contrast to the plurality opinion, the joint dissent, which was one vote shy of a majority, focused on one factor—“economic dragooning.”²⁹⁰ The joint dissent agreed that the statute was unconstitutionally coercive because of both the percentage of the total state budgets that would be affected as well as the amounts that would be withheld from the states.²⁹¹ The joint dissent noted that the program at stake in *Dole* would have involved “[w]ithholding \$614.7 million, equaling only 0.19% of all state

283. *NFIB*, 132 S. Ct. at 2603–04 (plurality opinion).

284. *Id.* at 2604.

285. Pasachoff, *supra* note 22, at 598.

286. *NFIB*, 132 S. Ct. at 2605 (plurality opinion).

287. *Id.* at 2604.

288. *Id.* at 2606.

289. *Id.*

290. Pasachoff, *supra* note 22, at 605–12.

291. *NFIB*, 132 S. Ct. at 2661–62, 2666 (Scalia, Kennedy, Thomas & Alito, J.J., dissenting); see Pasachoff, *supra* note 22, at 605–08 (noting both factors as relevant to the joint dissent’s analysis).

expenditures combined” and that this amount is appropriately described as a “relatively mild encouragement.”²⁹² In contrast, the Affordable Care Act’s Medicaid expansion would “threaten[] to withhold \$233 billion, equaling 21.86% of all state expenditures combined” and thus is unambiguously coercive.²⁹³ The emphasis on the percentage of the state budget common to both the plurality and joint dissent suggests that this analysis may be the more critical one for future opinions.

Scholars offer some tentative possibilities about the decision’s potential impact on future Spending Clause legislation and how such legislation will be administered by federal agencies.²⁹⁴ Several scholars contend that the decision could potentially invite challenges to an assortment of Spending Clause legislation that will seek to establish how much the Court is willing to limit this previously broad congressional authority.²⁹⁵ Scholars express mixed views about the potential success of such challenges²⁹⁶ and note the decision’s lack of clarity regarding the definition of coercion.²⁹⁷ In addition, several scholars posit that the decision will grant states additional

292. *NFIB*, 132 S. Ct. at 2664 (Scalia, Kennedy, Thomas & Alito, J.J., dissenting) (internal quotation marks omitted).

293. *Id.*

294. See, e.g., Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 *TULSA L. REV.* 427, 442 (2013) (“If the first of these variables—the sheer amount of money involved—turns out to be critical, then *NFIB*’s Spending Clause holding may turn out to be a ticket for this day and train only. But if the old money/new money distinction has legs, then this may allow the states to effect partial opt-outs from federal spending programs.”); Metzger, *supra* note 248, at 111–12 (“If these limits on Congress’s tax and spending powers turn out to have legs, they could undermine the viability of the indirect regulatory options that Chief Justice Roberts defends. Placing significant restrictions on funding conditions, or on what can count as a tax, risks rendering these financial inducements ineffectual as mechanisms for achieving regulatory aims. . . . But if these new tax and spending limits prove largely nominal, Congress will be able to regulate as it wants through money.”). Scholars also note the potential impact on the judiciary, including the difficulty of identifying unconstitutional coercion after the decision. See, e.g., Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 *B.U. L. REV.* 1, 6 (2013) (noting how little guidance *NFIB* provides lower courts for Spending Clause challenges).

295. See, e.g., James F. Freeley III, Essay, *National Federation of Independent Business v. Sebelius: The Constitutionality of Health Care Reform and the Spending Clause*, 45 *CONN. L. REV. CONTEMPLATIONS* 19, 27 n.59 (2013); Mark A. Hall, *A Healthcare Case for the Ages*, 6 *J. HEALTH & LIFE SCI. L.* 1, 11 (2012); Huberfeld et al., *supra* note 294, at 6.

296. Compare Huberfeld et al., *supra* note 294, at 50 (“Proponents of broad federal power will no doubt claim that the decision is *sui generis* and limited to its particular facts. But both the result and the rhetoric in *NFIB* suggest that it is a launch, not a landing.”), with Metzger, *supra* note 248, at 114 (“State claims of coercion seem likely to surface, whether or not they succeed. At a minimum, *NFIB* appears to give states greater leverage in resisting the imposition of new conditions attached to extant federal funds. States’ ability to exercise this leverage in court, however, is likely to remain constrained.”).

297. See Michelle Biddulph & Dwight G. Newman, *Comparativist-Structural Approaches to Interpretation of the Post-Obamacare Spending Power*, 21 *CARDOZO J. INT’L & COMP. L.* 1, 14–15 (2012); Huberfeld et al., *supra* note 294, at 70, 88.

leverage to negotiate with federal agencies regarding how Spending Clause programs are administered and may lead to additional waivers from federal agencies that fear a successful judicial challenge to their program under *NFIB*.²⁹⁸

In considering what *NFIB* will mean for education federalism, I agree with those who contend that education programs within NCLB, as well as other major education laws, are likely to be upheld even after *NFIB*.²⁹⁹ As states are permitted to select which NCLB programs they want to participate in, it is important to analyze the constitutionality of NCLB based upon the separate programs that are packaged within the law.³⁰⁰ Title I represents the largest program under NCLB and cost approximately \$17.114 billion for fiscal year 2011.³⁰¹ For fiscal year 2011, states spent a total of \$1.672 trillion and thus Title I represents 1.02% of states' budgets.³⁰² As education law scholar Eloise Pasachoff previously noted when she conducted this analysis, this potential loss is far closer to the potential loss to South Dakota that the Court upheld as constitutional in *Dole* than to the threatened loss in *NFIB*.³⁰³ In addition, NCLB also avoids the *NFIB* concerns by eliminating the pre-NCLB Elementary and Secondary Education Act; thus, new funds are not conditioned on an old program.³⁰⁴ Given that NCLB represents the most intrusive and extensive federal education law in U.S. history, the strong likelihood that the largest program within this law is constitutional under *NFIB* suggests that Congress is likely to retain extensive authority to pass additional education legislation under the Spending Clause.³⁰⁵

Even after *NFIB*, Congress enjoys ample constitutional room to leverage federal funds to institute this Article's theory for ensuring equal access to an excellent education for several reasons. It is important to note that the plurality found the Affordable Care Act's Medicaid expansion to

298. See Bagenstos, *supra* note 22, at 907–08; Metzger, *supra* note 248, at 114–15; Young, *supra* note 294, at 442–43.

299. See Bagenstos, *supra* note 22, at 892; Pasachoff, *supra* note 22, at 582.

300. Cf. Pasachoff, *supra* note 22, at 614.

301. STEPHEN Q. CORNMAN ET AL., NAT'L CTR. FOR EDUC. STATISTICS, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS: SCHOOL YEAR 2010–11, at 18 tbl.8 (2013).

302. See NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: EXAMINING FISCAL 2011–13 STATE SPENDING 7 tbl.1 (2013); see also Pasachoff, *supra* note 22, at 629 (conducting the same analysis for 2008–09 using the same data sources).

303. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604–05 (2012) (plurality opinion); Pasachoff, *supra* note 22, at 622.

304. See Pasachoff, *supra* note 22, at 619.

305. For a thoughtful analysis of why the Individuals with Disabilities Education Act would remain constitutional under *NFIB*, please see *id.* at 633–42.

be coercive because of the combined effect of several factors rather than any single factor.³⁰⁶ Thus, a fair reading of the plurality opinion suggests that to run afoul of *NFIB*, a federal education program would have to take a pre-existing, large, well-entrenched program, add new and unforeseen conditions that are so substantial as to constitute an independent program, and present the possibility of losing all funds for both the old and new as conditions for any state not wanting to follow the new conditions.³⁰⁷ The need to run afoul of multiple concerns simultaneously will leave Congress with ample room to enact far-reaching education legislation.

In addition, both the plurality and the joint dissent reaffirmed the ability to attach conditions to the grant of new funds.³⁰⁸ Together these opinions make clear that a new federal education program that offered new funding in exchange for state compliance with conditions for spending those funds should easily pass constitutional muster under *NFIB*. Furthermore, such a law would remain constitutional even if the new funds and conditions build upon a preexisting federal conditional spending program. This is permissible because the plurality and joint dissent both indicated approval for attaching new conditions that built upon the prior Medicaid program as long as those conditions did not jeopardize the previously authorized and accepted Medicaid funds.³⁰⁹

Finally, broad constitutional authority still exists for Congress to ensure equal access to an excellent education under the Spending Clause because, as the joint dissent noted, even though education spending is the second largest federally funded item, the total amount of *all* federal education programs currently represents a relatively small percentage of all state expenditures—“only 6.6% of all state expenditures combined.”³¹⁰ This total amount includes a wide variety of federal education programs, including Title I and the Individuals with Disabilities Education Act. This percentage pales in comparison to the approximately 22% of total state budgets that were allocated to pre-expansion Medicaid.³¹¹ Even if the federal government adopted a generous and robust plan to ensure that all

306. See Bagenstos, *supra* note 22, at 864–65; Pasachoff, *supra* note 22, at 594.

307. See Bagenstos, *supra* note 22, at 864–65; Pasachoff, *supra* note 22, at 593–94. The joint dissent focused on both the size of the federal grant and the impact on the states’ budgets. *NFIB*, 132 S. Ct. at 2661–62, 2666 (Scalia, Kennedy, Thomas & Alito, J.J., dissenting).

308. *NFIB*, 132 S. Ct. at 2607 (plurality opinion); *id.* at 2666 (Scalia, Kennedy, Thomas & Alito, J.J., dissenting).

309. *NFIB*, 132 S. Ct. at 2607 (plurality opinion); *id.* at 2666 (Scalia, Kennedy, Thomas & Alito, J.J., dissenting); see Pasachoff, *supra* note 22, at 657–58.

310. *NFIB*, 132 S. Ct. at 2663 (Scalia, Kennedy, Thomas & Alito, J.J., dissenting) (emphasis added).

311. *Id.*

children receive equal access to an excellent education, it seems very unlikely that its funding of *one* education program would surpass the *total amount* that it spent on a wide variety of elementary and secondary education programs.³¹² Therefore, *NFIB* leaves Congress ample constitutional authority to ensure equal access to an excellent education.

B. Legislative and Executive Authority Provides a More Fruitful Avenue for Reform than Judicial Authority

My theory proposes a framework for how the federal legislative and executive branches could lead the United States in a comprehensive effort to ensure equal access to an excellent education. I do not recommend that the courts should serve as the primary focus for reform for numerous reasons. As previously noted, federal courts frequently have relied on federalism and the interest in local control of education as a reason for curtailing efforts that sought to advance equal educational opportunity.³¹³ Also, as I analyzed in detail in prior scholarship, courts provide an inferior forum for education policy reform.³¹⁴ Courts have found a limited ability to institute effective school finance reform when their decisions did not garner significant political support.³¹⁵ Litigation is oftentimes slow and piecemeal and relies on a court order before a state will initiate reform. Yet, even in the face of such an order, legislatures can remain resistant to change.³¹⁶ Once reform is initiated, court-driven reform also can be difficult and laborious if all or even most revisions to the initial plans require court approval.³¹⁷ Federal judges often lack substantive knowledge of the complex and nuanced education issues.³¹⁸ Furthermore, litigation solutions are typically driven by the evidence before the court and thus fail to recognize the competing interests of absent affected constituencies.³¹⁹

312. For instance, Goodwin Liu estimated that a federal education program that, among other things, would reduce interstate inequality in education spending would cost \$30 billion annually in additional education spending. See Liu, *supra* note 3, at 2119–24. Even such a comprehensive and substantial federal effort aimed at addressing inequality in education through one program would still represent a relatively small percentage of states' overall budget when compared to the substantial percentage that states could have lost in *NFIB*. See *NFIB*, 132 S. Ct. at 2663 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

313. See *supra* text accompanying notes 101–09.

314. See Robinson, *supra* note 37, at 1715, 1728–35.

315. See *id.* at 1728.

316. See *id.* at 1734.

317. See *id.* at 1730.

318. See *id.* at 1731.

319. See *id.* at 1734.

In contrast, federal support, research, and funding for reform can provide a counterbalance to state and local insistence on maintaining the status quo.³²⁰ A federal legislative and executive approach can offer comprehensive solutions that incentivize actions by all of the states, a feat that a litigation effort is unlikely to accomplish.³²¹ In contrast to litigation that regularly requires court approval for any changes to a remedial order, legislative or executive action can offer much-needed flexibility to revisit and refine the legislation, regulations, or initiatives that are implemented.³²² Legislative and executive action also would benefit from the expertise of federal policymakers who have knowledge of and experience in education and its many complexities. Federal policymakers can seek input from states, scholars, and policymakers when additional expertise and research is needed.³²³ Additionally, the legislative and executive process can provide a more comprehensive assessment of the problem, the affected constituencies, and possible avenues for reform.³²⁴

Perhaps most importantly, a court-centered reform effort would undermine the collaborative enforcement approach that is critical for sustained and continuous improvement by the states. Litigation would introduce an adversarial nature to reform and pit the federal government against states and localities.³²⁵ In contrast, I propose a collaborative approach in which the federal, state, and local governments enter a shoulder-to-shoulder partnership to ensure consistent improvement through federal assistance for state and local reforms.³²⁶ For these and other reasons,³²⁷ my theory relies upon the legislative and executive branches as the avenues for reform. Nevertheless, my theory also could inform judicial understanding of the need to reform education federalism so that education federalism does not continue to serve as one of the obstacles to effective reform.

320. *See id.* at 1729.

321. *See id.* at 1734.

322. *See id.* at 1730.

323. *See id.* at 1732.

324. *See id.* at 1734.

325. *See id.* at 1733–34.

326. *See id.*

327. For the full discussion of why a court-centered reform agenda should not be the focus of federal reforms that seek equal educational opportunity, see *id.* at 1728–34.

C. How Disrupting Education Federalism Would Empower New Aspects of State and Local Control of and Accountability for Education and Encourage Innovation

Some may critique my proposed theory for reducing state and local control of and accountability for education. As analyzed in Part I.B.1, it is important to remember that state and local control of education has greatly diminished over the last few decades and that scholars have noted that local control has not characterized the nation's schools for quite some time.³²⁸ In addition, local control is not typically considered an end in itself. As political scientist Douglas Reed insightfully noted, "Local control is a good thing to the extent that it improves educational performance and builds strong communities; to the extent that it isolates, excludes, and homogenizes our schools, rendering them grossly unequal, localism is a problem."³²⁹ Therefore, my theory seeks to reduce harmful aspects of state and local control of education while simultaneously empowering beneficial and collaborative aspects.

Under my proposed theory, states admittedly would lose some control over education because they would be accountable to the federal government for ending longstanding disparities in educational opportunity. A hallmark of the American education system has been the freedom that mostly affluent parents enjoy: to provide their children a better education than the one given to less privileged children.³³⁰ In addition, some states and localities also may contend that they should retain the ability to focus their resources on some children rather than spreading them more equitably to all children.³³¹ I contend that the loss of this type of state and local control would benefit the nation's education system.

At the same time, other aspects of state and local control of education would remain if my theory was adopted. Under this theory, states would

328. See *supra* text accompanying notes 88–92; see also Ryan, *supra* note 52, at 60 ("There is a popular belief that public schools are locally controlled. As a legal matter, this has always been something of a myth."); Heise, *supra* note 52, at 131 ("However alluring, such notions of local control over America's school policy have not accurately described the reality of American education policy for decades.").

329. DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY 179–80 (2001).

330. See JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 138–39 (2003).

331. For instance, the state of Texas suggested such an argument when it argued that it should not be required to provide an education to children of undocumented immigrants because these students are not "persons" protected by the Equal Protection and Due Process Clauses of the United States Constitution. See *Plyler v. Doe*, 457 U.S. 202, 210–14 (1982).

retain authority to control education policymaking through education governance, the nature and content of a school finance system, state assessments and graduation standards, and a wide variety of teaching and curricular decisions.³³² Localities would continue to administer education, manage the daily operation of schools, hire teachers and staff, build and maintain schools, and transport students.³³³ Issues such as class size and governance would remain within the purview of state and local government. Furthermore, maintaining these functions under state and local authority fosters continuance of most of the existing levels of state and local accountability for education.

Most importantly, my proposed theory would foster new types of state and local control over education. Currently, substantial disparities exist in each state's capacity to offer high-quality educational opportunities.³³⁴ The absence of federal intervention to address these disparate capacities leaves many states without the ability to offer their citizens an excellent education. Placing primary responsibility on the federal government for leading a national effort to close opportunity and achievement gaps will expand state and local control of education because it will provide state and local governments both a greater and more equal capacity to offer all children an excellent education.³³⁵ This enhanced capacity will empower states and localities to engage in innovative reforms that were previously hindered by capacity limitations. In this way, greater equity in the distribution of state and local control and equal access to an excellent education can co-exist as complementary rather than competing goals.

Once each state has a more uniform ability to offer equal access to an excellent education, the states will decide how they want to achieve this goal. By leaving the methods for achieving this goal to the states, my theory will preserve the states and localities as laboratories of reform. Moreover, these laboratories would have new federal research, technical expertise, and financial assistance to support the identification and implementation of effective reforms. Therefore, those who believe that excellence is best fostered through state and local control may find comfort in the fact that under my proposed theory, the states ultimately would decide how to ensure equal access to an excellent education.

332. See Ryan, *supra* note 52, at 57–59.

333. See Hill, *supra* note 46, at 78; Ryan, *supra* note 52, at 57.

334. See COLLISION COURSE, *supra* note 56, at 49–52; Liu, *supra* note 3, at 2047.

335. See David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 389 (2001) (noting that for a central intervention to support the values of local control it must “promote the capacity of the local government to adopt policies that current central law frustrates”).

Federal reform consistent with my theory for disrupting education federalism might diminish some state and local accountability for education. Once the federal government takes responsibility as the final guarantor of equal access to an excellent education and thereafter monitors state progress toward achieving this goal, the public will begin to hold the federal government accountable for educational disparities. This accountability is more diffuse and less effective than state and local accountability because federal officials are more removed from state and local electorates and are held accountable for a wider range of decisions.³³⁶

However, it is important to note two responses to this concern. First, the public has not effectively held state and local officials accountable for closing opportunity gaps. For that reason, adding an additional layer of accountability—even a diffuse layer—could facilitate achievement of this objective. Second, as noted above, this proposed theory would not remove state and local accountability for ensuring equal access to an excellent education. Instead, state and local officials would be charged with designing and implementing plans to achieve this goal and thus critical aspects of state and local accountability would be preserved.³³⁷ Federal officials would be responsible for offering some of the incentives, research, expertise, and financial support that is needed to accomplish this objective. In these ways, my proposed theory ultimately would increase total government accountability for achieving this goal. For these reasons, it would more effectively reap some of the benefits that education federalism is designed to achieve.

D. Building the Political Will for Education Reform that Ensures Equal Access to an Excellent Education

Additional objections to my theory may focus on the lack of political will to adopt it. Some may argue that the nation is not ready to do what it takes to complete a comprehensive assault on opportunity and achievement gaps. My proposed theory is intentionally unapologetic in its comprehensive and aspirational scope. Its comprehensive nature seeks to address the fact that past education reforms have not attempted to address the magnitude of the problem confronting the nation.³³⁸ It leverages the expanding federal role in education as the opportune time to restructure

336. See Ryan, *supra* note 100, at 607.

337. See Adler, *supra* note 177, at 204.

338. See Michael A. Rebell, *The Need for Comprehensive Educational Equality*, in *THE PRICE WE PAY*, *supra* note 10, at 255, 257; *EQUITY & EXCELLENCE COMM'N*, *supra* note 1, at 14.

education federalism in ways that support the nation's education goals. As leading education historian Carl Kaestle has noted, "Presidents and Congress will continue to reinvent the federal role, because education has become a top-tier domestic agenda item and because federalist traditions do not make clear what the federal role in education is, nor how reformers should proceed to improve education on a national scale."³³⁹ As the federal role in education continues to expand, this Article seeks to supply some of the critical answers that debates on education reform lack regarding how education federalism should be restructured to support effective, comprehensive reform.

Although this theory is aspirational because the United States currently lacks sufficient political will to adopt all aspects of my theory, I seek to contribute to the growing momentum for reform³⁴⁰ in several ways. I want to spark a national dialogue about why changing education federalism should be included among the education reform conversations. The public needs to understand the many costs that the United States has paid for its approach to education federalism. The United States also needs to adopt a research-driven basis for how education federalism should be restructured to achieve the nation's education goals. My theory injects the foundational issue of education federalism and how it must be restructured as a critical missing element of the ongoing education reform agenda.

CONCLUSION: TOWARD A MORE EQUITABLE FUTURE

My theory for reconstructing education federalism envisions the federal, state, and local governments joining together in a shoulder-to-shoulder partnership to build an education system in which all schoolchildren receive equal access to an excellent education. By establishing the federal government as the final guarantor of equal educational opportunity, it offers innovative ways to empower and incentivize state and local governments to close opportunity and achievement gaps. It would require the federal government both to demand much from state and local governments and give much to them.

339. See Kaestle, *supra* note 41, at 37.

340. See, e.g., WENDY KOPP, A CHANCE TO MAKE HISTORY: WHAT WORKS AND WHAT DOESN'T IN PROVIDING AN EXCELLENT EDUCATION FOR ALL 207-08 (2012); QUALITY EDUCATION AS A CONSTITUTIONAL RIGHT: CREATING A GRASSROOTS MOVEMENT TO TRANSFORM PUBLIC SCHOOLS (Theresa Perry et al. eds., 2010); S. EDUC. FOUND., NO TIME TO LOSE: WHY AMERICA NEEDS AN EDUCATION AMENDMENT TO THE U.S. CONSTITUTION TO IMPROVE PUBLIC EDUCATION (2009); EQUITY & EXCELLENCE COMM'N, *supra* note 1, at 34-35.

My theory is particularly timely because it is offered at a time when the nation has already begun to embrace a historic expansion of the federal role in education.³⁴¹ A substantial federal role in education is likely to continue because it generally enjoys bipartisan support as well as support from the business community, civil rights groups, and many other Americans.³⁴² Although support for federal involvement in education has been growing, the United States has lacked a theory for how this role should evolve.³⁴³ Several scholars and the Equity and Excellence Commission have offered a variety of proposals for how the federal role in education should be strengthened to advance equal educational opportunity.³⁴⁴ I offer a theory of education federalism that could guide implementation of such proposals by analyzing how the nation should improve upon the strengths of federal education policymaking and identifying critical missing components of an effective reform movement.

Disrupting the nation's longstanding approach to education federalism and reconstructing it in ways that support the nation's education goals will be essential to successful education reform. Federal education law and policy built upon my theory would restructure education federalism in ways that support closing opportunity gaps. Closing these gaps is essential to closing achievement gaps and thereby enabling all children to enjoy the possibilities of the American dream. Research reveals that closing achievement gaps would both greatly increase the nation's economic growth and lead to future economic strength and competitiveness of the U.S. economy.³⁴⁵ As the United States continues to search for new ways to expand educational opportunity and improve educational quality, my theory offers some pioneering ideas for moving our national dialogue away from educational paralysis and toward educational excellence.

341. See MCGUINN, *supra* note 30, at 179, 202; Jacobsen & Saultz, *supra* note 70, at 384.

342. See MCGUINN, *supra* note 30, at 192; REBELL & WOLFF, *supra* note 8, at 147; Jacobsen & Saultz, *supra* note 70, at 384.

343. See Kaestle, *supra* note 41, at 17.

344. See, e.g., REBELL & WOLFF, *supra* note 8, at 152–55; EQUITY & EXCELLENCE COMM'N, *supra* note 1, at 34–35; Liu, *supra* note 3, at 2049; Robinson, *supra* note 37, at 1715–22.

345. See, e.g., COUNCIL ON FOREIGN RELATIONS, *supra* note 2, at 1 (“[T]he real scourge of the U.S. education system—and its greatest competitive weakness—is the deep and growing achievement gap between socioeconomic groups that begins early and lasts through a student’s academic career. . . . It is an economist’s rule that an increase of one year in a country’s average schooling level corresponds to an increase of 3 to 4 percent in long-term economic growth.”); EQUITY & EXCELLENCE COMM'N, *supra* note 1, at 13 (“If Hispanic and African American student performance grew to be comparable to white performance and remained there over the next 80 years, the historical evidence indicates that the impact would be staggering—adding some \$50 trillion (in present value terms) to our economy.”).