INTERSTATE INEQUALITY IN EDUCATIONAL OPPORTUNITY

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For the past half-century, legal and policy efforts to address unequal educational opportunity have largely focused on disparities between schools in the same district or between districts within a state. But the most substantial component of educational inequality across the nation is not disparities within states but disparities among *states, a problem long neglected in constitutional law and public policy. In a companion article, Professor Liu argues that the Fourteenth Amendment obligates Congress to ensure that every child has adequate educational opportunity to achieve equal national citizenship. This Article examines the empirical and policy dimensions of the problem of interstate inequality. It analyzes disparities across states in terms of educational standards, resources, and outcomes, showing that the disparities disproportionately burden children who are poor, minority, or limited in English proficiency. Further, it demonstrates that interstate disparities in school spending have more to do with the ability of states to finance education than with their willingness to do so, highlighting the need for a robust federal role in promoting greater equality. Yet federal education policy has done little to ameliorate interstate disparities in education standards and resources; in fact, significant elements of current policy tend to reinforce rather than reduce such disparities. The Article thus urges Congress to pursue, within an existing framework of cooperative federalism, reforms that create national education standards and an expanded federal role in school finance to serve as building blocks of a national policy to guarantee all children educational adequacy for equal citizenship.*

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INTRODUCTION

For the past half-century, legal and policy efforts to promote greater equality in educational opportunity have focused primarily on two structural problems. The first—the main preoccupation of school desegregation—is inequality between schools within school districts. The second—the principal target of school finance reform—is inequality among school districts within states. This Article addresses a third and bigger problem that has long been ignored: inequality among states across the nation.

As recent commemorations of *Brown v. Board of Education*[1] have made clear, the equality revolution initiated by *Brown* transformed many aspects of our society and legal culture.[2] In education, the decision drew attention to grave disparities between black and white schools within the same district. Although *Brown* assumed equality in the "tangible factors in the Negro and white schools,"[3] the reality was that dual school systems relegated minority schoolchildren to inferior learning environments.[4] In the decades between the Civil Rights Act of 1964 and retrenchment by the Supreme Court in the early 1990s, civil rights advocates sought to remedy these educational disparities through desegregation.

Although desegregation reduced disparities within districts to some degree,[5] demographic forces and judicial indifference have cir-

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1 347 U.S. 483 (1954).

2 *See, e.g.*, Symposium, *50 Years of* Brown v. Board of Education, 90 VA. L. REV. 1537 (2004); Symposium, Brown *at Fifty*, 117 HARV. L. REV. 1302 (2004); Symposium, Brown v. Board of Education *at Fifty: Have We Achieved Its Goals?*, 78 ST. JOHN'S L. REV. 253 (2004); Symposium, Brown@*50*, 47 HOW. L.J. (2003–2004).

3 *Brown*, 347 U.S. at 492.

4 *See* U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 92–100 (1967).

5 Many districts are still racially segregated, and despite an evolving consensus among lower courts since *Grutter v. Bollinger*, 539 U.S. 306 (2003), on the constitutionality of

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cumscribed its efficacy in attacking the larger problem of educational inequality. As middle-class white families moved from central cities to surrounding suburbs, the problem of educational inequality took on an interdistrict character. In 1973, the Supreme Court held that interdistrict disparities in school funding based on local property wealth do not violate the Equal Protection Clause,[6] and in 1974, it all but declared interdistrict segregation to be beyond the reach of busing remedies.[7] These decisions left few options in federal court for minority schoolchildren in high-poverty districts, setting in motion thirty years of ongoing effort in state courts and state legislatures to narrow educational disparities between districts. Relying on education clauses in state constitutions, advocates have filed lawsuits in forty-four states challenging school finance systems.[8] State courts have appeared receptive to educational adequacy claims in recent years,[9] and there is evidence that litigation has produced a modest

voluntary race-conscious efforts to integrate public schools, the Supreme Court has cast legal uncertainty on these programs. *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 6 (1st Cir. 2005) (en banc) (same); McFarland v. Jefferson County Pub. Sch., 416 F.3d 513, 514 (6th Cir. 2005) (same), *cert. granted sub nom.* Meredith v. Jefferson County Bd. of Educ., 126 S. Ct. 2351 (U.S. June 5, 2006) (No. 05-915); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1192–93 (9th Cir. 2005) (en banc) (upholding limited use of race to integrate K–12 schools), *cert. granted*, 126 S. Ct. 2351 (U.S. June 5, 2006) (No. 05-908). In addition to segregation, a major source of intradistrict inequality is the prevalence of district budgeting practices and teacher seniority rules that enable the most experienced and highly paid teachers to work in the best schools with the least disadvantaged students. *See generally* Marguerite Roza & Paul T. Hill, *How Within-District Spending Inequities Help Some Schools to Fail*, *in* BROOKINGS PAPERS ON EDUCATION POLICY 201 (Diane Ravitch ed., 2004). This problem has attracted some legal and policy attention in recent years. *E.g.*, CAL. EDUC. CODE § 33126(b)(3) (West Supp. 2006) (requiring school-level reporting of per-pupil spending that "reflect[s] the actual salaries of personnel assigned to the schoolsite"); WILLIAM G. OUCHI & LYDIA G. SEGAL, MAKING SCHOOLS WORK: A REVOLUTIONARY PLAN TO GET YOUR CHILDREN THE EDUCATION THEY NEED 87–92 (2003) (urging district budgeting reforms to achieve greater equity in school resources); Kelly Warner-King & Veronica Smith-Casem, *Addressing Funding Inequities Within Districts* 14–24 (Ctr. on Reinventing Pub. Educ., Working Paper No. 2005_2, 2005) (arguing that intradistrict inequalities are vulnerable to challenges under state constitutions and possibly under Equal Protection Clause).

[6] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[7] *See* Milliken v. Bradley, 418 U.S. 717 (1974); *cf.* Milliken v. Bradley, 433 U.S. 267 (1977) (upholding compensatory funding for predominantly minority districts as desegregation remedy).

[8] Up-to-date information on the status of school finance litigation in all 50 states is maintained by the ACCESS Project at http://www.schoolfunding.info.

[9] *See, e.g.*, Montoy v. Kansas, 120 P.3d 306 (Kan. 2005); Londonderry Sch. Dist. SAU #12 v. State, No. 05-E-0406, 2006 WL 563120 (N.H. Super. Ct. Mar. 8, 2006); Campaign for Fiscal Equity v. State, 801 N.E.2d 326 (N.Y. 2003); Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 397 (N.C. 2004); W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis, 107 S.W.3d 558, 579–80 (Tex. 2003); *see also* Michael A. Rebell, *Adequacy Litigations: A New Path to Equity?*, *in* BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 291, 297 (Janice Petrovich & Amy Stuart Wells eds., 2005)

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reduction of interdistrict inequality within states.[10]

The legacies of segregation and school finance inequality suggest the important role of state law and policy in structuring educational inequality. However, a *national* goal of remedying unequal educational opportunity cannot be fully achieved through strategies that focus on inequality within states. The reason is simple: The most significant component of educational inequality across the nation is not inequality within states but inequality *between* states. As economists Sheila Evans, William Murray, and Robert Schwab observe, "differences in spending between . . . New Jersey, California, and Texas are much more important than differences in spending between Trenton, Sacramento, and Austin and their suburbs."[11] Even if we were to eliminate interdistrict disparities within each state, enormous disparities across states would remain. In this Article, I analyze the empirical and policy dimensions of this long-neglected problem and propose recommendations for Congress to address it.

This Article grows out of a broader project in which I seek to elaborate, as part of our constitutional law and legal culture, a theory of federal responsibility for ameliorating social and economic inequality. In a companion article,[12] I recover neglected historical strands of constitutional thought that feature the Fourteenth Amendment guarantee of national citizenship as a generative source of sub-

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(observing that "16 of the 18 plaintiff victories in the past 14 years have involved substantial or partial adequacy considerations").

[10] *See* Sheila E. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. ECON. REV. 789, 806–07 (1998) (finding reduction of 19% to 34% in intrastate spending inequality after court decision); David Card & A. Abigail Payne, *School Finance Reform, the Distribution of School Spending, and the Distribution of SAT Scores* 21 (Nat'l Bureau of Econ. Research, Working Paper No. 6766, 1998) (estimating that difference between state aid to poor districts and rich districts increased by $300 per student in states where financing system was found unconstitutional).

[11] Murray et al., *supra* note 10, at 798. The problem has been virtually ignored in legal scholarship. In the educational policy literature, it has received occasional attention. *See, e.g.*, Richard Rothstein, *Equalizing Education Resources on Behalf of Disadvantaged Children*, *in* A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 31, 37–63 (Richard D. Kahlenberg ed., 2000); Ross Rubenstein, *National Evidence on Racial Disparities in School Finance Adequacy*, *in* NAT'L CTR. FOR EDUC. STATISTICS, DEVELOPMENTS IN SCHOOL FINANCE: 2001–02, at 93 (William J. Fowler, Jr. ed., 2003). However, "virtually all current debate over school finance equalization in the United States is focused on equalization among [districts] within states, not on expenditure disparities across states." WAYNE RIDDLE & LIANE WHITE, CONG. RESEARCH SERV., PUBLIC SCHOOL EXPENDITURE DISPARITIES: SIZE, SOURCES, AND DEBATES OVER THEIR SIGNIFICANCE 19 (1995); *accord* Rothstein, *supra*, at 62 ("Because the financing of public education has always been primarily a state and local, not a federal, matter, very little policy attention has been devoted to [interstate] inequality. Yet this might be the most serious financing problem in American education.").

[12] *See* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006).

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stantive rights. Together with Section 5, the affirmative and declaratory Citizenship Clause obligates Congress to secure the full membership, effective participation, and equal dignity of all citizens in the national community. A critical element of this obligation is a legislative duty to ensure that all children have adequate educational opportunity for equal citizenship.

This constitutional perspective flows from an understanding of citizenship rooted in the idea of social equality—what William Forbath has called the "social citizenship tradition"—in our constitutional heritage.[13] The tradition posits that there is a "basic human equality associated with the concept of full membership of a community" and that it is the duty of government to secure the material prerequisites for the realization of this equality.[14] This perspective does not urge the dismantling of competitive markets or the total eradication of economic inequality. Instead, it envisions government securing the basic opportunities and entitlements necessary for each citizen to achieve full standing and equal respect in the social context of the evolving nation. Moreover, the duty to fulfill this role binds the "conscientious legislator" independent of judicial enforcement.[15] Historically "a majoritarian tradition, addressing its arguments to lawmakers and citizens, not to courts,"[16] the social citizenship tradition contemplates the development of constitutional meaning through legislation and the political process, not merely through adjudication.[17]

Soon after ratification of the Fourteenth Amendment, this vision of citizenship animated a series of federal proposals to support public education.[18] Common to these proposals was a federal commitment

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[13] William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1 (1999); *see also* Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 59–64 (1977).

[14] T.H. Marshall, *Citizenship and Social Class* (1950), *reprinted in* T.H. MARSHALL & TOM BOTTOMORE, CITIZENSHIP AND SOCIAL CLASS 3, 6 (1992); *see also* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 23–40 (1997); CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 175–92 (2004).

[15] Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); *see also* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1227 (1978); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 134–44 (1893).

[16] Forbath, *supra* note 13, at 1.

[17] On legislative constitutionalism, see BLACK, *supra* note 14, at 131–39; ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 290–318 (1994); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

[18] *See generally* Liu, *supra* note 12, at 367–95.

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to secure a national floor of educational opportunity for all children—what Senator Henry Blair called "[t]he indispensable standard of education for the people of a republic"[19]—thereby narrowing interstate disparities throughout the newly reconstituted union. Although scuttled by an obstructionist minority, the most ambitious proposals in the 1880s enjoyed widespread support grounded in an understanding that the national citizenship guarantee obligated Congress to ensure the educational opportunity necessary for equal membership in the national polity and for the meaningful exercise of civic virtue.[20] The constitutional underpinnings of those early proposals are as compelling today as they were then: Congress is duty-bound to secure equal national citizenship by serving as the ultimate guarantor of educational opportunity. This Article illuminates the contemporary empirical basis for this imperative and aims to translate the imperative into effective public policy.

Although I argue for narrowing interstate disparities in educational opportunity, my normative concern does not arise from the mere fact of inequality per se, as if anything short of absolute equality would be theoretically problematic. Instead, the ideal of equal citizenship suggests a distributive principle for educational opportunity that secures to each individual the welfare and capabilities necessary for full membership in her society. In general terms, full membership requires sufficient education to ably discharge public duties such as voting and participation in community affairs, to meaningfully exercise civil liberties such as freedom of speech, and to engage in productive work that ensures self-reliance, autonomy, and respect from oneself and from others. Unequal educational opportunity may occur above this threshold; there will always be a Stuyvesant, Boston Latin, or Beverly Hills High that few schools can rival. But the most serious threat to equal citizenship is inequality at the other end of the opportunity structure, at the border between inclusion and exclusion from the mainstream of society.

Accordingly, my perspective implicates a principle of *educational adequacy for equal citizenship*, with adequacy understood as a relational concept. Because citizenship marks full membership

[19] 15 CONG. REC. 2000 (1884) (statement of Sen. Blair). Senator Blair was the chief sponsor of a series of bills throughout the 1880s proposing novel federal grants-in-aid to promote literacy and narrow educational disparities across states. *See* GORDON CANFIELD LEE, THE STRUGGLE FOR FEDERAL AID, FIRST PHASE: A HISTORY OF THE ATTEMPTS TO OBTAIN FEDERAL AID FOR THE COMMON SCHOOLS, 1870–1890, at 88–162 (1949); Liu, *supra* note 12, at 384–94.

[20] *See generally* Liu, *supra* note 12, at 367–95. For a specific discussion of the reasons for the proposals' failures, see *id.* at 380–81, 383–84, 393–94.

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"according to the standards prevailing in the society,"[21] the level of educational opportunity adequate for equal citizenship cannot be reduced to a static, absolute minimum. Instead, it will depend on the evolving demands of one's society and on the range and contours of the society's overall distribution of opportunity.[22] Thus, in highlighting interstate disparities in educational opportunity, my purpose is not to propose a rigid program of national leveling, but to argue for a standard of educational adequacy within the context of national norms. Defined in this socially contingent way, adequacy is best understood as a principle of bounded inequality. As such, adequacy has substantial purchase against interstate inequality in educational opportunity, for such inequality, as we will see, is not legally bounded, and its present magnitude cannot be reconciled with the promise of equal citizenship.

For readers interested in constitutional meaning, this Article is an effort to sketch legislative entailments of the national citizenship guarantee. But the policy arguments I offer here are not dependent upon the constitutional thesis.[23] Readers who are primarily interested in educational equity from a policy perspective may, if they wish, simply look past the constitutional framing and approach this Article with their eyes trained on the proper scope of the federal role in education. To some, the constitutional backdrop may add normative weight to the ideal of equal citizenship. But the policy imperatives arising from the ideal are capable of standing on their own.

The Article proceeds in four Parts. Part I briefly traces the evolution of interstate disparities in educational opportunity. It discusses the differing attitudes toward public education and its varied development from region to region throughout the nineteenth and early twen-

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[21] Marshall, *supra* note 14, at 8.

[22] *See* AMARTYA SEN, INEQUALITY REEXAMINED 115–16 (Harvard Univ. Press 1995) (1992) (arguing that material prerequisites for basic capabilities and social functionings vary according to standard of living in particular society); SUNSTEIN, *supra* note 14, at 191 ("What qualifies as enough, or a decent minimum, is affected by what other people possess."); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 18 (1969) (observing that for goods such as education, "the just minimum is understood to be a function (in part) of the existing maximum"). For similar perspectives in the philosophical literature, see Elizabeth Anderson, *Rethinking Equality of Opportunity: Comment on Adam Swift's* How Not to Be a Hypocrite, 2 THEORY & RES. EDUC. 99, 105–07 (2004), and Debra Satz, The Egalitarian Case for Educational Adequacy 20–25 (Apr. 2005) (unpublished manuscript, on file with the *New York University Law Review*).

[23] Indeed, nothing I propose in this Article is beyond the constitutional authority of Congress to implement under current Spending Clause doctrine. *See* South Dakota v. Dole, 483 U.S. 203 (1987).

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tieth centuries, putting current patterns of interstate inequality in historical context.

Part II takes a detailed look at current educational inequality across states. Using data adjusted for regional differences in educational costs and student needs, I show that per-pupil spending varies considerably across states, with most jurisdictions in the Northeast and Upper Midwest significantly outspending states in the South, Southwest, and West. This geographic pattern disfavors children who are poor, minority, or limited in English proficiency. In addition, interstate comparisons of educational performance show a similar geographic pattern of inequality. Although demographic factors explain some of the variation, the available evidence suggests a significant association between resources and outcomes in low-spending, low-performing states. Further, I show that interstate disparities in education resources have more to do with the ability of states to finance education than with their willingness to do so, highlighting the need for a robust federal role in ameliorating interstate inequality.

Yet, as Part III demonstrates, federal education policy has done little to reduce interstate disparities and, in important ways, reinforces such disparities. Although the reform movement culminating in the federal No Child Left Behind Act of 2001[24] (NCLB) has played a dominant role in education policy, it focuses primarily on intrastate distribution of educational opportunity while ignoring interstate inequality. NCLB neither contemplates national education standards nor a national commitment to remedying resource disparities across states. Instead, federal policy is largely indifferent to wide interstate variation in academic standards, and remarkably, the largest program of federal education aid—Title I of the Elementary and Secondary Education Act of 1965[25]—reinforces rather than reduces interstate inequality in educational resources. This narrow attention to intrastate rather than interstate inequality, I argue, tracks the state-centered mandate of the Equal Protection Clause but improperly neglects the Fourteenth Amendment guarantee of national citizenship.

In Part IV, I propose three building blocks for a national education policy that seeks to ensure educational adequacy for equal citizenship. First, I urge a renewed effort to establish national education standards that provide a clear and coherent vision of what schoolchildren in every state should know and how well they should know it. The standards would be developed by nongovernmental organiza-

[24] Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

[25] Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

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tions, certified by an expert federal body, and made available to states for voluntary adoption. Without federal leadership, the current patchwork of state standards is unlikely to yield common educational expectations or a common baseline of opportunity for all children. Second, I recommend that Congress reform Title I to treat poor children in all states as equal citizens of the United States in the distribution of federal aid. Third, and most ambitiously, I propose a national foundation program of federal aid to ensure a decent floor of educational resources in all states. The program would be designed to compensate for interstate disparities in fiscal capacity while requiring all states to exert a minimum level of revenue-raising effort. The goal would not be equal resources for every state but rather a high national minimum that offers the children of every state a reasonable opportunity to meet national standards. Altogether, these proposals are far-reaching. But, as I explain, they are anchored in the basic ambitions of the current school reform movement as well as the enduring constitutional imperative to secure the guarantee of national citizenship.

I
HISTORICAL CONTEXT

Substantial variation in state approaches to public education has existed since the Founding. Among the twenty-three states in the Union in 1820, ten made no mention of education in their state constitutions.[26] Among the other thirteen, Massachusetts, New Hampshire, Vermont, Maine, Ohio, and Indiana had strong provisions encouraging education.[27] Indiana's 1816 constitution, for example, obligated the legislature "to provide, by law, for a general system of education, ascending in a regular gradation from township schools to a State University, wherein tuition shall be gratis, and equally open to all."[28] A second group of states—Alabama, Delaware, Georgia, and Mississippi—had less directive provisions,[29] and a third group—North Carolina, Pennsylvania, and Vermont—had provisions for public instruction "at low prices."[30]

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26 ELLWOOD P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES: A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY 94 (1934).

27 *See id.* at 95.

28 *Id.* at 96 (quoting IND. CONST. of 1816, art. IX, § 2).

29 *See id.* at 95. For example, Delaware's second constitution, adopted in 1792, stated: "The Legislature shall, as soon as conveniently may be, provide by law for . . . establishing schools, and promoting arts and sciences." *Id.* (quoting DEL. CONST. of 1792, art. VIII, § 12).

30 *Id.* at 96 (quoting VT. CONST. of 1777, ch. 2, § XL and PA. CONST. of 1776, § 44).

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In practice, the early evolution of public education followed a similar pattern in most states, although the pace varied from region to region depending on tradition and attitudes toward free common schools. The first step usually consisted of modest state funding to aid education provided by private, parochial, or philanthropic organizations. In the next phase, states passed laws authorizing local communities to tax their property to fund schools. States subsequently passed legislation requiring minimum rates of taxation, with tuition payments called "rate bills" making up any deficit in school budgets. In the final step, states enacted laws requiring free public education and mechanisms for state supervision.[31]

The principle of tax support for education was established earliest in the Northeast, where colonial settlers saw a strong link between schooling and Protestant religious values.[32] In 1789, Massachusetts enacted a law requiring every town with fifty families to provide six months of schooling and requiring every town with 200 families to maintain a grammar school.[33] The same year, New Hampshire passed a general school law requiring its towns to tax at a minimum rate, eventually leading to the creation of a state school fund in 1821.[34] Based on legislation in effect in 1820, Ellwood Cubberley rated Connecticut, Maine, Massachusetts, New Hampshire, New York, and Vermont as the most advanced in terms of public support for education, curriculum requirements, and even teacher certification.[35] Education was not entirely free, however. Opposition to school taxes came from property owners, rural communities, and many farmers "who saw no practical use in 'book-larnin.'"[36] Throughout the antebellum period, several Northeastern states charged parents rate bills.[37] Eventually, these charges were abolished, and "New England had

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31 The developmental progression is discussed in R. FREEMAN BUTTS & LAWRENCE A. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 243–52 (1953); CUBBERLEY, *supra* note 26, at 176–206; and CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860, at 182–217 (1983).

32 CUBBERLEY, *supra* note 26, at 12 ("The reformers everywhere had insisted upon the necessity of a knowledge of the Gospels as a means to personal salvation. This meant, carried to its logical conclusion, that each child, girls as well as boys, should be taught to read . . . .").

33 BUTTS & CREMIN, *supra* note 31, at 246; *see also* CUBBERLEY, *supra* note 26, at 98.

34 CUBBERLEY, *supra* note 26, at 98.

35 *Id.* at 97–99. Cubberley also included Ohio in this group, observing that it "had become virtually a westward extension of New England by reason of the settlement of . . . all northern Ohio by New England people." *Id.* at 97 (citation omitted).

36 BUTTS & CREMIN, *supra* note 31, at 246.

37 *See id.* at 247–48.

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clearly accepted the principle of public support by the time of the Civil War."[38]

In the new Western states (now the Midwest), public support for education during the antebellum period evolved at a similar rate as in the Northeast. This evolution reflected both the background of the settlers, with free common schools becoming more firmly established as New England emigrants gained legislative control,[39] as well as the indigenous forces of urbanization and economic development comparable to those in the Northeast.[40] Like their counterparts in the Northeast, most Midwestern states achieved free common schooling before the Civil War.[41]

South of New England, the story was different. In the Mid-Atlantic states, strong private and religious interests opposed school taxes during the antebellum period. In Pennsylvania, for example, Quakers, Lutherans, and Mennonites sought to establish their own parochial schools, while a substantial German-speaking population preferred schools reflecting their own customs and language.[42] As a result, many communities in Delaware, New Jersey, and Pennsylvania declined to avail themselves of state permission to levy school taxes. State funds were limited to supporting "pauper schools" that tended to stigmatize poor children.[43] Yet a general system of public education was eventually established in these states only slightly later than in New England. Pennsylvania passed its free schooling law in 1868, New Jersey in 1871, and Delaware in 1875.[44]

The South provides the starkest contrast. There, the movement toward common schools confronted a "century-long tradition that education was primarily a family and a religious affair," a "sparsely settled" terrain, and an agrarian culture in which "the need for formal

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38 *Id.* at 247; *see also* CUBBERLEY, *supra* note 26, at 198–205 (describing rate bills and their elimination in New York and Connecticut).

39 *See* CUBBERLEY, *supra* note 26, at 99, 108–10 (discussing balance of Northern and Southern influences in Ohio, Indiana, Illinois, Michigan, and Wisconsin); BUTTS & CREMIN, *supra* note 31, at 252 (discussing Ohio).

40 KAESTLE, *supra* note 31, at 189–92.

41 In Ohio, for example, after several decades of reforms beginning with an 1821 law authorizing local property taxes, the state legislature in 1853 approved a bill requiring free schooling through local taxation, teacher examinations, and the appointment of a state education commissioner. *Id.* at 186–87. Illinois enacted a similar law in 1854. *Id.* at 187. Wisconsin provided for free public education in 1848, Indiana in 1852, Iowa in 1858, and Michigan in 1869. BUTTS & CREMIN, *supra* note 31, at 252.

42 BUTTS & CREMIN, *supra* note 31, at 249.

43 *See id.*; *see also* CUBBERLEY, *supra* note 26, at 189–97 (discussing how "pauper schools" were established and eventually eliminated in Pennsylvania and New Jersey).

44 BUTTS & CREMIN, *supra* note 31, at 249 (Pennsylvania and New Jersey); CUBBERLEY, *supra* note 26, at 409–10 (Delaware).

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education was but little felt."[45] Perhaps most importantly, the economic and legal edifice of slavery stymied the development of public education for all children, black and white. The criminalization of slave education in the South is well-documented,[46] and its legacy deformed the evolution of free schooling for blacks. But as Professor Kaestle has observed, "southern whites' attitudes about slavery and education affect[ed] [not] only the education of slaves. Slavery influenced educational attitudes and institutions for the whole South."[47] The nature of the influence was threefold. First, "[t]he dominance of slave labor and the cotton cash crop meant that wealthy planters, who dominated southern politics, had little economic interest in the education of white labor."[48] Second, opposition to slave education on the ground that it would incite revolt gave way to broader concern among planters about "the free circulation of dissenting ideas anywhere in southern society"—a concern "that did not depend upon race and that could extend to free whites."[49] Because pro-slavery ideology was not merely racist but fundamentally aristocratic, progress toward democratizing education occurred almost as slowly for poor whites as for enslaved blacks. Third, the class structure of Southern society precluded its adherents from invoking Protestantism as a basis for universal education.[50]

As Northern criticism of slavery increased during the mid-1800s, sectional pride intensified and reinforced Southern opposition to Northern ideas, including common schooling. With the exception of North Carolina, where "more moderate attitudes about slavery, class, and education" and the work of a determined state superintendent sowed the seeds of common schooling before the Civil War,[51] the antebellum development of public education in the South lagged far

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45 CUBBERLEY, *supra* note 26, at 422.

46 *See* Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 NW. U. L. REV. 785, 798 (1995) (discussing 1830 North Carolina statute); A. Leon Higginbotham, Jr. & Greer C. Bosworth, *"Rather than the Free": Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 60 (1991) (discussing 1848 Virginia statute); Michael H. Hoffheimer, *Mississippi Courts: 1790-1868*, 65 MISS. L.J. 99, 130 n.138 (1995) (discussing 1824 Mississippi statute); Bill Quigley & Maha Zaki, *The Significance of Race: Legislative Racial Discrimination in Louisiana, 1803–1865*, 24 S.U. L. REV. 145, 164, 182–83 (1997) (discussing 1830 Louisiana statute).

47 KAESTLE, *supra* note 31, at 195.

48 *Id.* at 205.

49 *Id.* at 206.

50 *See id.* at 205–06 ("Because of slavery, Protestantism could never be wedded to republicanism and to education as vitally in the South as in the North . . . .").

51 BUTTS & CREMIN, *supra* note 31, at 251 (discussing "rapid progress in North Carolina after 1840" due largely to its first superintendent, Calvin Wiley); KAESTLE, *supra* note 31, at 211 (noting Wiley's efforts).

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behind the progress in New England and the Midwest. Throughout most of this period, "there was almost no schooling for slaves, a modicum of state aid for the schooling of paupers, and the rest of education fell to independent institutions."[52] According to one observer, "the wealthy educated their children at home by means of tutors and governesses . . . . A free school to them savored of charity, and was hardly considered respectable."[53] Where common schools did exist, they often suffered from poor teaching, crude administration, harsh discipline, and makeshift facilities.[54]

The Southern states did not establish statewide public education systems until Reconstruction. At that point, the challenges to free schooling posed by slavery and local custom were dwarfed by the more basic problem of economic devastation resulting from the war. With emancipation, the South abruptly lost one of its principal assets—slaves—and the lengthy conflict had decimated numerous bank stocks and railroads in which school funds had been invested.[55] The total value of real estate and personal property per capita in the region plummeted between 1860 and 1880.[56] Although the readmitted states wrote strong provisions for education into their new constitutions and enacted ambitious school laws requiring tax support and state supervision, a severe lack of resources stymied the development of public education. By the turn of the century, moreover, the financial challenge was compounded by the notorious inefficiency of maintaining segregated schools.

Twenty years after the Civil War, regional differences in educational development remained stark. In 1885–1886, the value of taxable property per pupil was $3446 in the Western states, $3382 in the North Atlantic states, $1808 in the North Central states, $1037 in the South Atlantic states, and only $605 in the South Central states.[57] The school attendance rate among children aged six to fourteen in these

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[52] KAESTLE, *supra* note 31, at 198; *see also* CUBBERLEY, *supra* note 26, at 408–25.

[53] CONG. GLOBE, 41st Cong., 3d Sess. 1072 (1871) (statement of Rep. Clark) (quoting report by Captain McCreery, federal Bureau of Education superintendent stationed in Louisiana).

[54] CUBBERLEY, *supra* note 26, at 424–25.

[55] *Id.* at 431; *see also* Papasan v. Allain, 478 U.S. 265, 272 (1986) (describing Mississippi's sale of lands granted by Congress for schools, investment of proceeds in state railroads, and destruction of railroads during Civil War).

[56] *See* 15 CONG. REC. 2019–20 tbl.11 (1884) (statement of Sen. Blair) (citing census data showing that, between 1860 and 1880, total value of real and personal property decreased by 72% in Alabama, 52% in Arkansas, 61% in Georgia, 63% in Louisiana, 78% in Mississippi, and 73% in South Carolina, even as population substantially increased).

[57] DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954, at 60 tbl.2.3 (citing U.S. COMM'R OF EDUC., REPORT FOR 1885–86, at 20 (1887)).

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regions was 71%, 75%, 76%, 53%, and 49%, respectively.[58] During this period, the South was "so poor, and with so many children in proportion to productive adults, that with the best of legal frameworks for schooling, and without the curse of racial supremacy, it would still have lagged far behind the rest of the country."[59] By 1900, compulsory school attendance laws had been enacted by virtually all states in the North Atlantic, North Central, and Western regions.[60] In the South, such legislation did not appear until 1905 and did not become universal until 1918 when Mississippi became the forty-eighth state to make schooling compulsory.[61]

This regional pattern of inequality has persisted to the present day, although the gap between the South and the rest of the nation narrowed during the early and middle years of the last century. A 1992 study by economists David Card and Alan Krueger calculated the average pupil-teacher ratio, length of school year, and teacher wage in schools attended by students born between 1920 and 1929, between 1930 and 1939, and between 1940 and 1949.[62] For the 1920–1929 birth cohort, average pupil-teacher ratios were 33:1 to 38:1 in the Southern states but only 25:1 to 30:1 in New England, and they were even smaller in sparsely populated states like Kansas and Montana. By the time the 1940–1949 cohort went to school, these ratios had fallen by six points or more throughout the South, compared to decreases of five points or less elsewhere. Similarly, the average school year for the 1920–1929 cohort was 180 days in Michigan, 179 days in Massachusetts, and 177 days in California, but only 161 days in Louisiana, 154 days in South Carolina, and 150 days in Alabama. For the 1940–1949 cohort, the school year was roughly

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[58] *Id.*

[59] *Id.* at 60; *see also* CUBBERLEY, *supra* note 26, at 665–66 (comparing educational conditions in South with conditions in rest of country in 1900).

[60] The enactment of compulsory school laws in the late nineteenth century did not immediately result in a marked rise in enrollment, however, because of "local indifference, inadequate school facilities, and laws too imprecise or unpopular to enforce." TYACK ET AL., *supra* note 57, at 98 (discussing 1889 report of U.S. Commissioner of Education).

[61] *See id.* at 75; CUBBERLEY, *supra* note 26, at 564.

[62] David Card & Alan B. Krueger, *Does School Quality Matter? Returns to Education and the Characteristics of Public Schools in the United States*, 100 J. POL. ECON. 1, 9–10 (1992). Relying on data from the federal *Biennial Survey of Education*, Card and Krueger compiled these measures in a study showing that school quality, as measured by school inputs, is positively associated with students' future labor market returns. *Id.* at 3. In order to control for cost of living and other differences, they expressed teacher wages as a percentage of the level of average wages in each state. *Id.* at 10. The data in this paragraph are from Table 1 of Card and Krueger's study. *Id.* at 12–13 tbl.1. The *Biennial Survey of Education*, published by the U.S. Office of Education from 1918 to 1958, was the forerunner to the *Digest of Education Statistics*, now published annually by the U.S. Department of Education. *Id.* at 9.

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180 days in most states; it had lengthened to 179 days in Louisiana and South Carolina, and to 176 days in Alabama. Teacher wages likewise improved throughout the South relative to the rest of the nation over the same period.[63]

Despite these gains, interstate inequality in educational opportunity has remained substantial and has become pronounced not only along a North-South axis but also from East to West. Table 1 shows each state's per-pupil expenditure for 1969–70, 1979–80, 1989–90, and 1999–2000 in constant 1999–2000 dollars.[64] At the bottom of the table are two measures comparing the extent of interstate variation from year to year. The first is the ratio of the average per-pupil expenditure in the top ten states to the average per-pupil expenditure in the bottom ten states.[65] The second is the enrollment-weighted coefficient of variation, a measure of dispersion equal to the standard deviation as a percentage of the mean.[66]

Both the top quintile/bottom quintile ratio and the coefficient of variation show that interstate variation in per-pupil spending increased during the 1980s and then decreased during the 1990s. According to the coefficient of variation but not the ratio, interstate variation was somewhat less in 1999–2000 than in 1969–70. On both

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[63] *See also* Julian R. Betts, *Does School Quality Matter? Evidence from the National Longitudinal Survey of Youth*, 77 REV. ECON & STAT. 231, 242, 244 tbl.7 & figs.1 & 2 (1995) (showing decrease in interstate variation in teacher salaries and student-teacher ratios between 1939 and 1979). The poor quality of opportunities facing the 1920–1929 birth cohort in the South is confirmed by the rates at which Army induction boards rejected World War II recruits for educational deficiencies such as illiteracy or not having completed fourth grade. "The rejection rate for educational deficiencies alone ranged from zero in Delaware, Montana, and Wyoming, to 136 per 1000 in Georgia. Every one of the twelve states ranking highest in educational rejections was in the Southeast or the Southwest . . . ." NAT'L EDUC. ASS'N OF THE U.S., EDUCATION—WHY THE FEDERAL GOVERNMENT MUST HELP 6 (1945).

[64] *See* NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2002, at 199 tbl.169 (2003) [hereinafter DIGEST 2002], *available at* http://nces.ed.gov/pubs2003/2003060b.pdf. These data represent amounts spent on the day-to-day operation of public elementary and secondary schools; they do not include capital outlays or debt repayment. *Id.* at 542, *available at* http://nces.ed.gov/pubs2003/2003060h.pdf (defining "current expenditures").

[65] In other words, it is the ratio of (a) the total expenditures of the top quintile of states divided by their total enrollment to (b) the total expenditures in the bottom quintile of states divided by their total enrollment.

[66] I have weighted the coefficient of variation by state enrollment so that the total amount of variation nationally is calibrated by each state's relative contribution. Without such weighting, two high-spending states like Alaska and New York would count equally in terms of their contribution to total interstate variation, even though Alaska has far fewer schoolchildren than New York. I used enrollment data from DIGEST 2002, *supra* note 64, at 50–51 tbl.37 (fall 1999 and fall 1989) and from U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1981, at 147 tbl.240 (1981) (fall 1979 and fall 1969) [hereinafter STATISTICAL ABSTRACT 1981].

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TABLE 1: PER-PUPIL EXPENDITURES IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS, 1969–70 TO 1999–2000

	(constant 1999–2000 dollars with state rank)								Change in rank
	1969–70		1979–80		1989–90		1999–00		1969 to 1999
United States	$3,367		$4,554		$6,190		$6,911		
Alabama	2,293	*47*	3,316	*48*	4,191	*47*	5,638	*42*	+5
Alaska	4,747	*2*	9,305	*1*	10,103	*1*	8,806	*5*	–3
Arizona	3,022	*28*	4,067	*29*	4,956	*39*	4,999	*49*	–21
Arkansas	2,290	*48*	3,210	*50*	4,305	*46*	5,277	*47*	+1
California	3,735	*10*	4,855	*17*	6,003	*23*	6,314	*28*	–18
Colorado	3,075	*25*	4,924	*15*	5,809	*25*	6,215	*32*	–7
Connecticut	4,082	*4*	4,725	*19*	9,950	*3*	9,753	*3*	+1
Delaware	3,735	*9*	5,641	*4*	7,101	*10*	8,310	*8*	+1
Florida	3,059	*26*	4,000	*30*	6,129	*19*	5,831	*37*	–11
Georgia	2,415	*45*	3,251	*49*	5,333	*34*	6,437	*26*	+19
Hawaii	3,549	*18*	4,550	*21*	5,506	*30*	6,530	*25*	–7
Idaho	2,569	*40*	3,376	*46*	3,894	*49*	5,315	*46*	–6
Illinois	3,656	*11*	4,887	*16*	6,027	*22*	7,133	*19*	–8
Indiana	2,963	*32*	3,725	*38*	5,693	*27*	7,192	*15*	+17
Iowa	3,577	*16*	4,719	*20*	5,586	*29*	6,564	*24*	–8
Kansas	3,132	*24*	4,280	*23*	5,719	*26*	6,294	*30*	–6
Kentucky	2,250	*49*	3,396	*44*	4,511	*44*	5,921	*36*	+13
Louisiana	2,641	*39*	3,552	*41*	4,833	*40*	5,804	*39*	0
Maine	2,909	*35*	3,690	*39*	6,537	*14*	7,667	*13*	+22
Maryland	3,627	*13*	5,000	*13*	7,431	*9*	7,731	*12*	+1
Massachusetts	3,543	*19*	5,556	*5*	7,688	*7*	8,761	*6*	+13
Michigan	3,771	*8*	5,442	*6*	6,786	*12*	8,110	*9*	–1
Minnesota	3,831	*5*	5,008	*12*	6,264	*17*	7,190	*16*	–11
Mississippi	2,047	*50*	3,420	*43*	3,911	*48*	5,014	*48*	+2
Missouri	2,671	*37*	3,760	*37*	5,427	*31*	6,187	*33*	+4
Montana	3,261	*21*	4,936	*14*	5,653	*28*	6,314	*29*	–8
Nebraska	3,136	*23*	4,415	*22*	6,070	*20*	6,683	*23*	0
Nevada	3,163	*22*	4,161	*26*	5,087	*37*	5,760	*40*	–18
New Hampshire	2,985	*29*	3,777	*36*	6,381	*16*	6,860	*21*	+8
New Jersey	4,140	*3*	6,161	*3*	10,061	*2*	10,337	*1*	+2
New Mexico	2,980	*30*	4,079	*28*	4,594	*42*	5,825	*38*	–8
New York	5,352	*1*	6,434	*2*	9,400	*4*	9,846	*2*	–1
North Carolina	2,556	*41*	3,566	*40*	5,358	*33*	6,045	*35*	+6
North Dakota	2,969	*31*	4,234	*24*	5,199	*35*	5,667	*41*	–10
Ohio	3,032	*27*	4,131	*27*	6,041	*21*	7,065	*20*	+7
Oklahoma	2,482	*43*	3,946	*32*	4,391	*45*	5,395	*44*	–1
Oregon	3,779	*7*	5,260	*7*	6,486	*15*	7,149	*18*	–11
Pennsylvania	3,654	*12*	5,078	*11*	7,649	*8*	7,772	*11*	+1
Rhode Island	3,615	*14*	5,103	*10*	7,877	*5*	8,904	*4*	+10
South Carolina	2,542	*42*	3,483	*42*	5,026	*38*	6,130	*34*	+8
South Dakota	2,941	*33*	3,883	*33*	4,681	*41*	5,632	*43*	–10
Tennessee	2,379	*46*	3,322	*47*	4,540	*43*	5,383	*45*	+1
Texas	2,470	*44*	3,794	*35*	5,113	*36*	6,288	*31*	+13
Utah	2,667	*38*	3,393	*45*	3,436	*50*	4,378	*50*	–12
Vermont	3,538	*20*	4,209	*25*	7,693	*6*	8,323	*7*	+13
Virginia	2,933	*34*	3,978	*31*	6,253	*18*	6,841	*22*	+12
Washington	3,823	*6*	5,205	*8*	5,843	*24*	6,376	*27*	–21
West Virginia	2,785	*36*	3,813	*34*	5,359	*32*	7,152	*17*	+19
Wisconsin	3,554	*17*	4,851	*18*	6,693	*13*	7,806	*10*	+7
Wyoming	3,608	*15*	5,166	*9*	6,985	*11*	7,425	*14*	+1
Top 10/bottom 10	1.74		1.75		2.05		1.76		
Weighted COV	0.237		0.205		0.239		0.192		

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measures, the level of variation in 1999–2000 is comparable to the level that existed twenty years ago. These findings are consistent with other research.[67] In Part II, I adjust these nominal spending data to account for interstate differences in educational costs and student needs. Here, the nominal data suffice to show that the extent of interstate variation has stayed fairly constant in recent decades.

At the same time, the relative standing of certain states has changed significantly from 1969–70 to 1999–2000. In addition to per-pupil spending, Table 1 lists each state's rank for each year. The far right column shows the difference in rank for each state between 1969–70 and 1999–2000. On the whole, the national pattern of variation is fairly stable, with two-thirds of states moving no more than ten steps in either direction. By increasing school funding at a rate significantly above the national average, a few states have moved up considerably in the ranking—for example, Georgia, whose economic growth has boosted education spending;[68] Maine, where an increased state role in ensuring equity raised school spending in the 1980s;[69] and Kentucky and West Virginia, whose legislatures overhauled their school finance systems after they were held unconstitutional.[70]

Meanwhile, some states have moved down considerably as their per-pupil spending increased more slowly than other states'. The five states whose rankings fell the farthest—Arizona, California, Nevada, Utah, and Washington—are clustered in the West. In part, this

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[67] *See* Murray et al., *supra* note 10, at 799 tbl.2 (observing similar pattern of variation between states from 1972 to 1992).

[68] *See* Dana Tofig & Maurice Tamman, *State School Spending Doubles in a Decade*, ATLANTA J.-CONST., Mar. 12, 2003, at 1A (attributing increase in school spending over past decade to lottery funds, population growth in excess of enrollment growth, and statewide "economic boom").

[69] *See* Ralph Townsend, *Insure Adequate K-12 Funding*, BANGOR DAILY NEWS, Mar. 17, 1998, at 1;Ralph Townsend, *Rethink the School Funding Formula*, BANGOR DAILY NEWS, Mar. 18, 1998, at 1; Patrick M. Dow & Ralph Townsend, *Reforming Maine's Education Funding Process*, ME. POL'Y REV., Fall 1998, at 10, 11–12.

[70] *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 34, 58–60 (Helen F. Ladd et al. eds., 1999) (discussing *Rose* and subsequent reforms); A. Thomas Stubbs, Note, *After* Rodriguez*: Recent Developments in School Finance Reform*, 44 TAX LAW. 313, 326–28 (1990) (describing school finance reforms enacted by Kentucky legislature after *Rose*); *Pauley v. Kelly*, 255 S.E.2d 859, 877–78 (W. Va. 1979) (explicating state constitutional requirements and remanding for application); Pauley v. Bailey, 324 S.E.2d 128, 131 (W. Va. 1984) (noting that lower court in unreported opinion found school system unconstitutional); Minorini & Sugarman, *supra*, at 52–53 (discussing *Pauley* litigation and subsequent reforms); Ryan Keith, *Funding Credited with School Scores; Recht Says State Could Do More to Help Schools*, CHARLESTON DAILY MAIL, Dec. 24, 2001, at 2A (discussing increase in school funding since *Pauley* litigation).

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reflects the political history of school finance reform, with California providing a familiar example.[71] Yet robust increases in public school enrollment have also played a role. Arizona and Nevada, for example, saw the highest percentage increases in enrollment in the nation over the past three decades; each served more than twice the number of students in 1999–2000 than in 1969–70.[72] Moreover, the relative decline in per-pupil spending in the West appears to be part of a broader trend. Among the twenty-six states whose ranking rose from 1969–70 to 1999–2000, only two—Texas and Wyoming—are located west of the Mississippi River. As Table 1 suggests, the map of educational inequality has become one in which the South, the Southwest, and far West trail the rest of the country.

II
THE CURRENT STATE OF INTERSTATE INEQUALITY

I now take a closer look at the current dimensions of educational inequality across states, marshaling data in support of four points. First, even when adjusted for regional differences in educational costs and student needs, per-pupil spending varies considerably from state to state. Disparities between states account for more of the variation in district per-pupil spending nationally than do disparities within states. Second, low-spending states have disproportionate shares of children who are poor, minority, or limited in English proficiency

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[71] *See* Daniel L. Rubinfeld, *California Fiscal Federalism: A School Finance Perspective*, *in* CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE 431, 434–43 (Bruce E. Cain & Roger G. Noll eds., 1995) (discussing decline in California school funding since *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), and Proposition 13). *Compare* William A. Fischel, *How* Serrano *Caused Proposition 13*, 12 J.L. & POL'Y 607 (1996) (arguing that court-ordered school finance equalization catalyzed tax revolt in California), *with* Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did* Serrano *Really Cause Proposition 13?*, 50 UCLA L. REV. 801 (2003) (disagreeing with Fischel). In Washington, school funding equalization has likewise been associated with limited growth in per-pupil spending. *See* Bradley W. Joondeph, *The Good, the Bad, and the Ugly: An Empirical Analysis of Litigation-Prompted School Reform*, 35 SANTA CLARA L. REV. 763, 802–04, 814–22 (1995) (observing that growth in Washington's per-pupil spending trailed national average even as interdistrict inequality decreased between 1978–79 and 1991–92). In Nevada, the configuration of school districts into large countywide areas, while promoting equity, has prompted efforts by some wealthy communities to secede. *See* James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 477 n.237 (1999); *cf.* U.S. GEN. ACCOUNTING OFFICE, SCHOOL FINANCE: STATE EFFORTS TO REDUCE FUNDING GAPS BETWEEN POOR AND WEALTHY DISTRICTS 16 (1997) (finding Nevada's school finance system to be highly equitable in 1991–92 because each district could spend state average per pupil with average tax effort).

[72] Between 1969–70 and 1999–2000, K–12 enrollment increased by 163% in Nevada, 104% in Arizona, 59% in Utah, 31% in California, and 22% in Washington, compared to only 3% nationally. DIGEST 2002, *supra* note 64, at 51 tbl.37 (fall 1999); STATISTICAL ABSTRACT 1981, *supra* note 66, at 147 tbl.240 (fall 1969).

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(LEP). Third, educational standards and performance vary significantly from state to state, and low outcomes are significantly associated with low resources. Fourth, interstate disparities in educational resources are more strongly associated with the ability of states to finance education than with their willingness to do so.

A. Interstate Disparities in Education Spending: A Closer Look

Although Table 1 shows wide disparities across states, raw spending data provide only a rough basis of comparison for two reasons. First, there is considerable variation in the cost of providing the same educational services in different geographic regions; for example, it costs more in New York than in Alabama to hire teachers of identical quality. To control for this, we need to apply a geographic cost index to equalize educational purchasing power across states.[73] Education economists have computed three leading cost indices, the most comprehensive of which is the Geographic Cost-of-Education Index (GCEI) developed by Jay Chambers.[74] This index estimates how much different jurisdictions must pay to hire a teacher with a given level of qualifications, taking into account the cost of living as well as key attributes of a region or school district that affect its attractiveness as a place to live and work.[75] It then combines this model of

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[73] *See generally* WILLIAM J. FOWLER, JR. & DAVID H. MONK, NAT'L CTR. FOR EDUC. STATISTICS, A PRIMER FOR MAKING COST ADJUSTMENTS IN EDUCATION (2001).

[74] Jay G. Chambers, *Geographic Variations in Public Schools' Costs* 1, 8 (Nat'l Ctr. for Educ. Statistics, Working Paper No. 98-04, 1998) [hereinafter Chambers, *Geographic Variations*]; *see also* JAY CHAMBERS & WILLIAM J. FOWLER, JR., NAT'L CTR. FOR EDUC. STATISTICS, PUBLIC SCHOOL TEACHER COST DIFFERENCES ACROSS THE UNITED STATES, at xiv–xvi (1995) (describing an earlier, conceptually similar model called Teacher Cost Index). The other two indices are the Teacher Attribute Model, which estimates "what each state's average teacher salary would be if the state's teachers had the same average experience and training as teachers in the nation" as a whole, Stephen M. Barro, *Cost-of-Education Differentials Across the States* 122 (Nat'l Ctr. for Educ. Statistics, Working Paper No. 94-05, 1994), and the "market basket" approach, which focuses on cost of living as the key determinant of educational purchasing power, Walter W. McMahon & Shao-Chung Chang, *Geographical Cost-of-Living Differences: Interstate and Intrastate, Update 1991*, at 1, 2 (Ctr. for Study of Educ. Fin., MacArthur/Spencer Series No. 20, 1991). The latter two models are more cautious in their approach and less complete than Chambers's GCEI because they do not account for intangible job amenities that affect the cost of hiring school personnel. On the other hand, Chambers's effort to account for more potential influences on salaries produces a more complex model incorporating factors for which available data may not be fully adequate. *See* FOWLER & MONK, *supra* note 73, at 46–49; *see also* Chambers, *Geographic Variations*, *supra*, at 34–38 (discussing potential improvements to GCEI model). Nevertheless, the teacher cost indices estimated by the three models are strongly correlated. *See* CHAMBERS & FOWLER, *supra*, at 56–58 & tbl.4.3.

[75] CHAMBERS & FOWLER, *supra* note 74, at 15–46. Such amenities include the level of competition in the teaching market, crime rates, the weather, rate of population growth, proximity to a metropolitan center, and racial composition of the student body, among others. *Id.* at 35–46.

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teacher compensation with price indices for other school inputs to produce an index value for each state.[76] Table 2 applies the GCEI to per-pupil spending data for 2001–02. Column A shows unadjusted per-pupil spending with state rank, and Column B shows cost-adjusted figures.[77]

A second reason why raw spending provides only a rough comparison is that states differ significantly in their student demographics and thus in the magnitude of their educational task. For example, although North Dakota and Texas have comparable per-pupil spending, Texas faces a greater educational challenge because a higher percentage of its children are poor or LEP. In order to meaningfully compare spending across states, we need to know "the extent to which [states] with a harsh educational environment, as measured by the characteristics of their students, must pay more to achieve the same performance as other [states]."[78] Ideally, we would estimate educational resource needs at an individual level based on each student's family background, school and neighborhood environment, past academic achievement, and other factors. But because such data are not available on a national basis, adjustments for student need are typically done by weighting enrollment data based on the number of students belonging to groups known to require additional resources to attain a given performance level. To adjust per-pupil spending for student needs, I assigned a weight of 1.6 to students from poor families

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> The intuitive notion underlying this [approach] is that individuals care both about the quality of their work environment as well as the monetary rewards associated with particular employment alternatives, and that they will seek to attain the greatest possible personal satisfaction by selecting a job with the appropriate combination of monetary and non-monetary rewards.

Id. at xv (citation omitted).

[76] *See* Chambers, *Geographic Variations*, *supra* note 74, at 11–21.

[77] The figures in Column A are from CRECILLA COHEN & FRANK JOHNSON, NAT'L CTR. FOR EDUC. STATISTICS, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2001–02, at 12 tbl.5 (2004). To obtain the figures in Column B, I divided the values in Column A by the mean values of Chambers's GCEI based on 1993–94 data. *See* Chambers, *Geographic Variations*, *supra* note 74, at 19–21 tbl.III-3, col. 14. Although applying an index based on 1993–94 data to adjust 2001–02 expenditures introduces some error, *see* Richard Rothstein & Lawrence Mishel, *Alternative Options for Deflating Education Expenditures Over Time*, *in* NAT'L CTR. FOR EDUC. STATISTICS, DEVELOPMENTS IN SCHOOL FINANCE, 1996, at 161 (William J. Fowler, Jr. ed., 1997), the error is probably slight because "geographic cost variations appear to be relatively stable over time." Chambers, *Geographic Variations*, *supra* note 74, at 15; *see id.* ("The correlation for the *GCEI* between . . . 1987–88 and 1990–91 and between 1990–91 and 1993–94 is about 0.98. [Between 1987–88 and 1993–94], the correlation exceeds 0.96.").

[78] William D. Duncombe & John M. Yinger, *Performance Standards and Educational Cost Indexes: You Can't Have One Without the Other*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE, *supra* note 70, at 260, 267.

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(in other words, poor students are estimated to require 60% more resources than non-poor students),[79] 1.9 to students with disabilities,[80] and 1.2 to LEP students.[81] I then divided each state's total cost-adjusted expenditures by its weighted pupil count to derive its cost-adjusted spending per weighted pupil.[82] Column C of Table 2 lists these results in rank order.

While pupil weighting helps put interstate disparities into proper perspective, this adjustment is rudimentary in several respects. First, to the extent that weights are based on actual funding practices, they may reflect the outcomes of political negotiation rather than research-based estimates of the true cost of educating disadvantaged children.[83] Second, estimating a fixed weight for individual poverty status ignores

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[79] The 1.6 figure is the median weight assigned to poor students by state education finance systems, according to a study by the U.S. General Accounting Office. *See* U.S. GEN. ACCOUNTING OFFICE, SCHOOL FINANCE: STATE AND FEDERAL EFFORTS TO TARGET POOR STUDENTS 34–35 (1998) (examining 1991–92 data for 47 states). Other studies have produced varying estimates. *See* THOMAS B. PARRISH ET AL., NAT'L CTR. FOR EDUC. STATISTICS, DISPARITIES IN PUBLIC SCHOOL DISTRICT SPENDING 1989–90, at 7 (1995) [hereinafter PARRISH ET AL., DISPARITIES] (determining poverty weight of 1.2 "based on the average Chapter 1 allocation per student in relation to the average total expenditure per student in 1987"); Andrew Reschovsky & Jennifer Imazeki, *The Development of School Finance Formulas to Guarantee the Provision of Adequate Education to Low Income Students*, *in* DEVELOPMENTS IN SCHOOL FINANCE 1997, at 121, 143 (William J. Fowler, Jr. ed., 1998) (poverty weight of 2.6 based on education cost function for Wisconsin school districts); *cf.* Henry M. Levin, *Financing the Education of At-Risk Students*, 11 EDUC. EVALUATION & POL'Y ANALYSIS 47, 55–56 (1989) (assuming poverty weight of 1.5 would be required to fund programs for at-risk students such as Success for All).

[80] The 1.9 figure is the ratio of total spending nationwide on special education students to total spending on non–special education students in 1999–2000. THOMAS PARRISH ET AL., CTR. FOR SPECIAL EDUC. FIN., STATE SPECIAL EDUCATION FINANCE SYSTEMS, 1999–2000, PART II: SPECIAL EDUCATION REVENUES AND EXPENDITURES 24 (2004) [hereinafter PARRISH ET AL., STATE SPECIAL EDUCATION].

[81] *See* Thomas B. Parrish, *A Cost Analysis of Alternative Instructional Models for Limited English Proficient Students in California*, 19 J. EDUC. FIN. 256, 263 tbl.1, 276 tbl.6 (1994) (using data from fifteen public schools in eleven California districts to estimate total marginal cost per LEP student of $361 above approximately $1800 cost per student in non-LEP classrooms); *see also* Bruce D. Baker & Paul L. Markham, *State School Funding Policies and Limited English Proficient Students*, 26 BILINGUAL RES. J. 659, 666 (2002) (describing 1.2 figure estimated by Parrish as "weight commonly recommended in policy literature").

[82] To compute each state's weighted pupil count, I used data from COHEN & JOHNSON, *supra* note 77, at 12 tbl.5 (fall 2001 enrollment); 2 U.S. DEP'T OF EDUC., 25TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 5–7 tbl.AA3 (2005) [hereinafter 25TH IDEA REPORT] (number of children six to twenty-one years old served under Part B of IDEA in 2001–02); DIGEST 2002, *supra* note 64, at 27 tbl.20 (percentage of children five to seventeen years old living in poverty in 2001); and Nat'l Clearinghouse for English Language Acquisition and Language Instruction Educ. Programs, ELL Demographics by State, http://www.ncela.gwu.edu/stats/3_bystate.htm [hereinafter NCELA] (number of LEP children in 2001–02) (last visited Aug. 21, 2006).

[83] *See* Reschovsky & Imazeki, *supra* note 79, at 143.

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TABLE 2: PER-PUPIL EXPENDITURES IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS, 2001–02

	A Unadjusted		B Cost-adjusted		C Cost-adjusted and pupil-weighted	
United States	$7,734		$7,678		$6,313	
New Jersey	11,793	*1*	10,237	*1*	8,500	*1*
Vermont	9,806	*5*	9,915	*3*	8,450	*2*
Wyoming	8,645	*12*	9,438	*4*	8,028	*3*
New York	11,218	*2*	9,998	*2*	8,007	*4*
Connecticut	10,577	*3*	9,189	*5*	7,856	*5*
Delaware	9,284	*8*	9,075	*6*	7,712	*6*
Wisconsin	8,634	*13*	9,031	*7*	7,553	*7*
Maine	8,818	*9*	8,989	*8*	7,418	*8*
Maryland	8,692	*10*	8,513	*14*	7,385	*9*
Massachusetts	10,232	*4*	8,730	*12*	7,252	*10*
Nebraska	7,741	*19*	8,737	*11*	7,221	*11*
Michigan	8,653	*11*	8,517	*13*	7,207	*12*
Rhode Island	9,703	*6*	8,797	*9*	7,133	*13*
Iowa	7,338	*27*	8,320	*16*	7,127	*14*
Pennsylvania	8,537	*14*	8,329	*15*	6,986	*15*
Indiana	7,734	*21*	8,272	*17*	6,934	*16*
West Virginia	7,844	*18*	8,754	*10*	6,911	*17*
Kansas	7,339	*26*	8,209	*18*	6,906	*18*
Ohio	8,069	*15*	8,167	*19*	6,806	*19*
Minnesota	7,736	*20*	7,886	*22*	6,770	*20*
Virginia	7,496	*23*	7,736	*26*	6,600	*21*
Georgia	7,380	*25*	7,927	*20*	6,532	*22*
Oregon	7,642	*22*	7,911	*21*	6,531	*23*
South Dakota	6,424	*40*	7,522	*30*	6,518	*24*
Montana	7,062	*30*	7,769	*24*	6,494	*25*
New Hampshire	7,935	*17*	7,572	*28*	6,489	*26*
North Dakota	6,709	*36*	7,865	*23*	6,440	*27*
Missouri	7,135	*29*	7,518	*31*	6,293	*28*
Illinois	7,956	*16*	7,709	*27*	6,290	*29*
Alaska	9,563	*7*	7,548	*29*	6,284	*30*
South Carolina	7,017	*32*	7,754	*25*	6,127	*31*
Hawaii	7,306	*28*	7,328	*34*	6,070	*32*
Kentucky	6,523	*38*	7,296	*35*	6,053	*33*
Colorado	6,941	*33*	7,040	*39*	6,023	*34*
Louisiana	6,567	*37*	7,346	*33*	5,924	*35*
North Carolina	6,501	*39*	7,089	*38*	5,853	*36*
Texas	6,771	*35*	7,180	*37*	5,745	*37*
Washington	7,039	*31*	6,781	*41*	5,728	*38*
Arkansas	6,276	*41*	7,206	*36*	5,699	*39*
New Mexico	6,882	*34*	7,408	*32*	5,625	*40*
Oklahoma	6,229	*42*	6,906	*40*	5,572	*41*
Idaho	6,011	*46*	6,534	*44*	5,506	*42*
Nevada	6,079	*44*	6,379	*47*	5,464	*43*
Alabama	6,029	*45*	6,751	*42*	5,456	*44*
California	7,434	*24*	6,661	*43*	5,426	*45*
Tennessee	5,959	*48*	6,527	*45*	5,356	*46*
Florida	6,213	*43*	6,492	*46*	5,181	*47*
Mississippi	5,354	*49*	6,140	*48*	4,928	*48*
Arizona	5,964	*47*	6,012	*49*	4,853	*49*
Utah	4,900	*50*	5,131	*50*	4,374	*50*
Top 10/bottom 10	1.78		1.49		1.49	
Weighted COV	0.197		0.143		0.149	

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the fact that school-level poverty is an equal, if not greater, determinant of educational disadvantage than a student's own poverty.[84] A more accurate approach would be to increase pupil weights as school poverty increases.[85] Third, assigning independent weights for poverty, disability, and LEP status treats the resource needs of students belonging to more than one group as additive. Although these disadvantages are likely cumulative in some way, the nature of the interplay and its impact on educational costs remain largely unknown. Despite these problems, however, pupil weighting together with geographic cost adjustment offers a more valid comparison across states than raw spending data.[86]

As Table 2 shows, adjusting for cost and student needs reduces overall variation across states, but the extent of variation remains substantial. The top ten states in Column C spent an average of $7861 per weighted pupil in 2001–02, which was nearly 50% more than the $5292 per weighted pupil spent by the bottom ten states. While the cost of providing education tends to be lower in low-spending states, such states tend to have higher percentages of students with special needs. West Virginia, ranked tenth in Column B, drops to seventeenth in Column C largely because its child poverty rate is over 20%, compared to 15% nationally.[87] New Mexico, ranked thirty-second in Column B, drops to fortieth in Column C; 24% of its children are poor, and 20% are LEP.[88]

Tables 3a and 3b compare the demographics of students in high- and low-spending states according to adjusted per-pupil spending. Whereas the student body in the top third of states is approximately

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[84] *See* RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 25 (2001) (summarizing research showing that "[t]aken together, being poor and attending schools with classmates who are poor constitutes a clear 'double handicap.'"); Rothstein, *supra* note 11, at 35 ("Because of the powerful influence of peer expectations and role models, the concentration of school poverty probably has a more important impact on the cost of educating poor children than an individual's poverty status itself.").

[85] One example of a variable weighting system is the "targeted grants" formula under Title I of the Elementary and Secondary Education Act. *See* 20 U.S.C. § 6335 (Supp. III 2003) (weighting grant allocations by percentage or number of children in county). Alternatively, poverty weights can be estimated district by district with a cost function that includes school poverty as an independent variable. *See, e.g.*, Thomas A. Downes & Thomas F. Pogue, *Adjusting School Aid Formulas for the Higher Cost of Educating Disadvantaged Students*, 47 NAT'L TAX J. 89 (1994).

[86] Ideally, we would also control for interstate differences in economies of scale and efficiency in education spending, but such controls are not yet available on a national basis. *See* Duncombe & Yinger, *supra* note 78, at 274–77 (discussing efficiency); Chambers, *Geographic Variations*, *supra* note 74, at 38 (discussing scale).

[87] *See* DIGEST 2002, *supra* note 64, at 27 tbl.20.

[88] *Id.* (percent poor); *see* NCELA, *supra* note 82 (percent LEP).

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TABLE 3A: DEMOGRAPHICS OF SCHOOL-AGE CHILDREN, 2001–02

	(percentages)				
	White	Black	Latino	Poor	LEP
United States	60.1	17.0	17.0	15.0	8.3
Top third	70.2	16.2	9.4	12.4	3.9
Bottom third	49.3	16.2	27.3	17.2	13.4

TABLE 3B: ENROLLMENT AS A PERCENTAGE OF NATIONAL TOTAL BY GROUP, 2001–02

	(percentages)					
	All	White	Black	Latino	Poor	LEP
United States	100	100	100	100	100	100
Top third	28.9	33.8	27.6	16.0	23.9	13.2
Bottom third	46.8	38.4	44.5	75.1	53.6	75.5

70% white, 12% poor, and 4% LEP, the student body in the bottom third is 50% white, 17% poor, and 13% LEP. Black students appear to be evenly distributed across high- and low-spending states. But the states in the bottom third of spending, while enrolling 47% of the nation's schoolchildren, serve 54% of all poor students, 75% of all Latino students, and 76% of all LEP students. By contrast, the states in the top third enroll 29% of all schoolchildren, but only 24% of the nation's poor students, 16% of Latino students, and 13% of LEP students. In short, children with the greatest educational needs live disproportionately in states with the lowest education spending.[89] Moreover, as Column C of Table 2 shows, the bottom third is exclusively comprised of states in the South, Southwest, and West.

We can better comprehend the magnitude of interstate spending disparities by comparing them to intrastate disparities. I obtained data from the National Center for Education Statistics on the per-pupil expenditure of unified school districts at the tenth, fiftieth, and ninetieth percentile of spending in each state in 2001–02.[90] These

[89] *Accord* Rubenstein, *supra* note 11, at 104 (stating that "[m]inority children, particularly Hispanics, are often heavily concentrated in lower spending states," although "African American, Hispanic, and Asian children are not systematically overrepresented in the lowest spending districts in most states"). The percentage of students with disabilities does not vary much from state to state. *See* 25TH IDEA REPORT, *supra* note 82, at 27 tbl.AA11 (listing state percentages from 7% to 12%).

[90] E-mail from Frank Johnson, National Ctr. for Educ. Statistics, to author (Aug. 22, 2005) (on file with the *New York University Law Review*). The per-pupil expenditure at the tenth percentile means that 10% of all districts in the state spent at or below that level; the per-pupil expenditure at the ninetieth percentile means that 10% of all districts spent

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data, adjusted for differences in educational costs and student needs,[91] appear in Table 4. What we observe is that large intrastate disparities exist in jurisdictions like Colorado, New York, and North Dakota, while disparities are much smaller in states like Alabama, Kentucky, and West Virginia. Intrastate disparity is positively correlated with median district spending; states with higher spending tend to have greater intrastate disparity.[92] States with a large expenditure range tend to be comprised of numerous small school districts, whereas those with a small expenditure range tend to be dominated by large countywide school districts.[93] For all states, the range of variation below the median is smaller than the range above the median.

Figure 1a uses these data to illustrate the large disparities *across* states. For each state, the bar represents the range of expenditures from the tenth percentile to the median. As the figure shows, the tenth percentile districts in fourteen states (Wyoming to Kansas) spend more than the median districts in fifteen states (Louisiana to Arizona). In other words, even if school finance reform in the fifteen low-spending states were to raise spending in the bottom half of districts up to the state median, those districts would still trail 90% of districts in the fourteen high-spending states.

Figure 1b offers a variant of this type of comparison, with each bar representing the range of expenditures from the median to the ninetieth percentile district in each state. The figure shows that the ninetieth percentile districts in eleven low-spending states (North Carolina to Florida) spend less per pupil than the median districts in eleven high-spending states (Alaska to Maine). Even if the vast majority of districts were to raise spending up to the ninetieth percentile in the low-spending states, those districts would still be outspent by more than half the districts in the high-spending states. Finally, Figure 1c depicts the starkest interstate inequalities. The tenth per-

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at or above that level. Because elementary education typically costs less than secondary education, PARRISH ET AL., DISPARITIES, *supra* note 79, at 27 & tbl.7, focusing on unified districts (i.e., districts with both elementary and secondary schools) instead of all districts narrows the intrastate range of per-pupil spending and provides a fairer basis for interdistrict comparison. In every state except Montana and Vermont, the vast majority of students go to school in unified districts. Johnson, *supra*. I excluded Hawaii from this analysis because its school system is a single district. *Id.*

[91] I applied state-level cost and need adjustments to the tenth, fiftieth, and ninetieth percentile districts in each state, recognizing that this is somewhat crude since educational costs and student demographics vary within states as well as across states. But my purpose here is simply to facilitate meaningful interdistrict comparisons across states while preserving the relative values of low, median, and high district expenditures within states.

[92] In Table 4, the correlation between median district spending and the spending gap between the tenth and ninetieth percentile is 0.62.

[93] *See* RIDDLE & WHITE, *supra* note 11, at 12, 29.

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TABLE 4: COST-ADJUSTED EXPENDITURES PER WEIGHTED PUPIL FOR UNIFIED SCHOOL DISTRICTS, 2001–02

	(percentile of spending within each state)		
	10th	50th	90th
Alabama	$5,044	$5,469	$6,222
Alaska	5,678	9,560	14,258
Arizona	3,904	4,832	6,509
Arkansas	4,757	5,279	6,713
California	4,620	5,098	6,685
Colorado	5,032	6,161	9,291
Connecticut	6,477	7,121	8,855
Delaware	6,189	7,262	8,368
Florida	4,671	5,016	5,699
Georgia	5,556	6,165	7,418
Idaho	4,825	5,936	8,375
Illinois	4,513	5,371	6,386
Indiana	5,568	6,177	7,558
Iowa	5,988	6,589	7,413
Kansas	5,901	6,960	8,654
Kentucky	5,291	5,772	6,581
Louisiana	5,247	5,886	6,872
Maine	6,175	7,022	8,474
Maryland	6,273	6,862	7,864
Massachusetts	5,600	6,495	8,368
Michigan	5,511	6,040	7,644
Minnesota	5,379	6,106	7,246
Mississippi	4,391	4,962	5,933
Missouri	4,838	5,644	7,109
Montana	5,673	8,237	15,017
Nebraska	5,995	7,182	8,966
Nevada	5,459	6,890	9,045
New Hampshire	5,659	6,667	8,377
New Jersey	6,782	7,728	9,812
New Mexico	5,070	6,706	9,871
New York	6,654	7,917	10,744
North Carolina	5,361	5,972	7,004
North Dakota	5,149	6,770	9,475
Ohio	5,057	5,686	7,245
Oklahoma	4,809	5,827	7,559
Oregon	5,554	6,233	9,209
Pennsylvania	5,377	6,239	7,651
Rhode Island	5,960	6,955	7,854
South Carolina	5,404	6,056	7,448
South Dakota	5,666	6,787	9,152
Tennessee	4,463	4,964	5,830
Texas	5,149	5,961	8,400
Utah	4,018	5,049	7,842
Vermont	6,304	7,282	9,629
Virginia	5,568	6,154	7,737
Washington	5,154	5,666	8,763
West Virginia	6,308	6,759	7,384
Wisconsin	6,417	7,258	8,257
Wyoming	7,308	8,715	11,771

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FIGURE 1A: ADJUSTED PER-PUPIL EXPENDITURES FOR UNIFIED DISTRICTS AT THE 10TH TO 50TH PERCENTILE, 2001–02

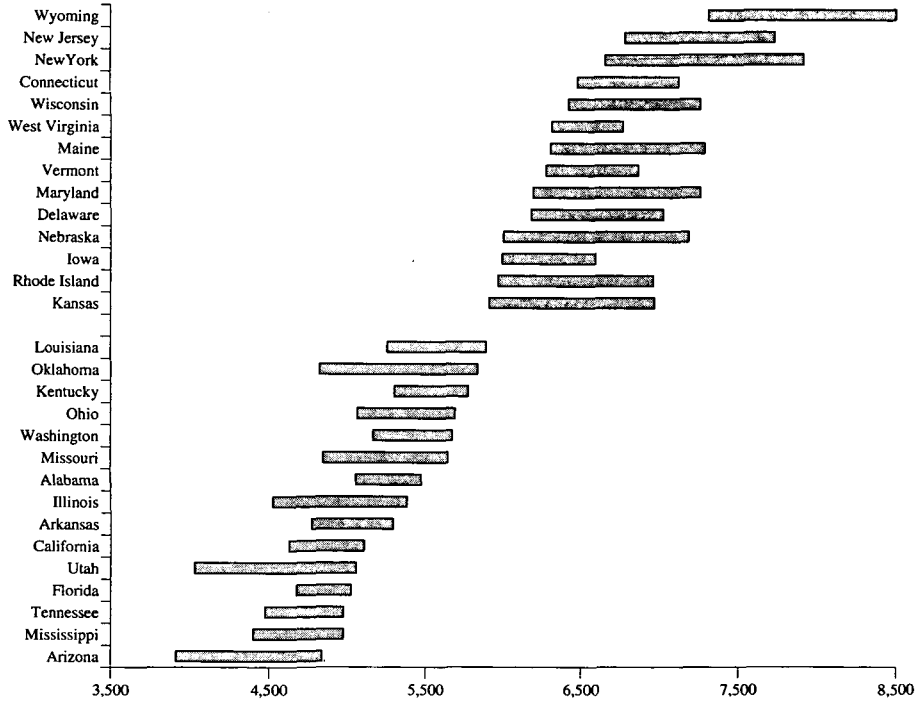
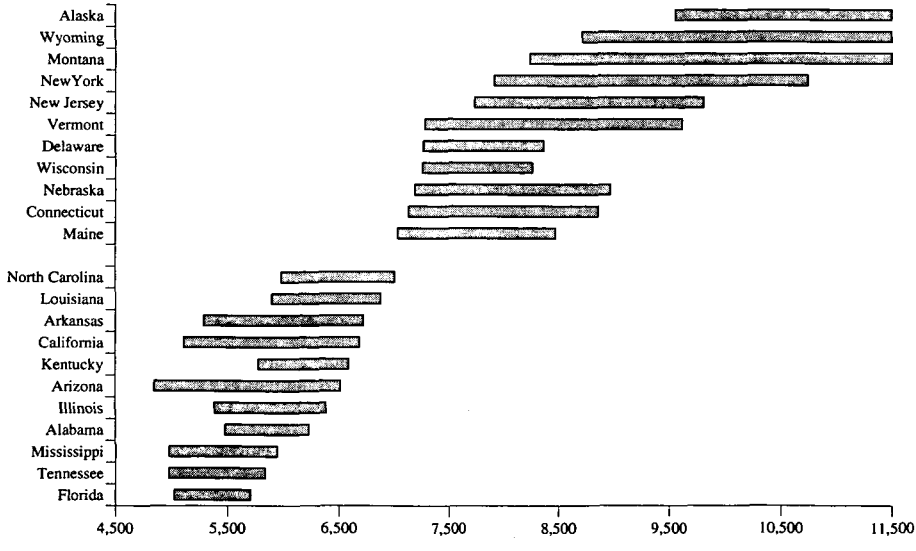


FIGURE 1B: ADJUSTED PER-PUPIL EXPENDITURES FOR UNIFIED DISTRICTS AT THE 50TH TO 90TH PERCENTILE, 2001–02



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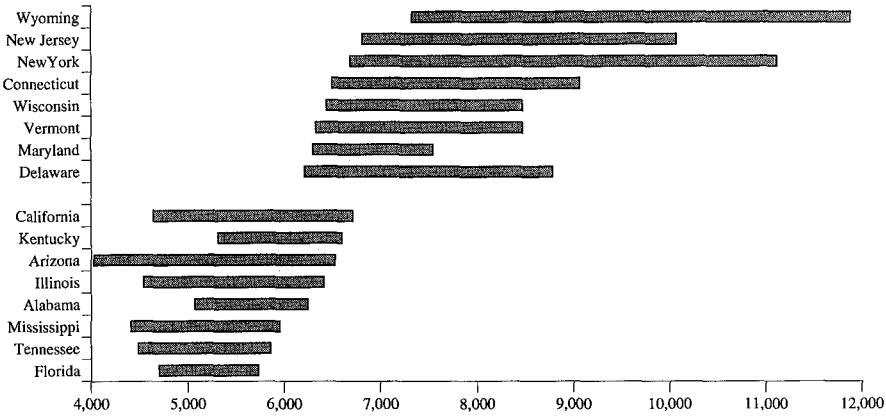
centile districts in eight high-spending states (Wyoming to Delaware) have per-pupil spending within $500 of the amount spent by the ninetieth percentile district in eight low-spending states (California to Florida). These comparisons illuminate the relative magnitudes of interstate versus intrastate disparities.

FIGURE 1C: ADJUSTED PER-PUPIL EXPENDITURES FOR UNIFIED DISTRICTS AT THE 10TH TO 90TH PERCENTILE, 2001–02



The dominance of interstate as opposed to intrastate disparities in the total extent of interdistrict inequality nationally is confirmed by economists Murray, Evans, and Schwab.[94] In studying the impact of school finance litigation on the distribution of school resources, they examined inequalities in education spending within states and between states from 1972 to 1992. With inflation-adjusted spending data from over 10,000 districts in forty-six states, they quantified interdistrict variation using two measures that can be decomposed to show the extent of variation within and across states. The first measure, the Theil index, focuses on the ratio of each district's share of total expenditures in the relevant jurisdiction (state or nation) to the district's share of the jurisdiction's total enrollment.[95] The second

[94] *See* Murray et al., *supra* note 10, at 808.

[95] As used by Murray et al., the Theil index is the sum of the natural logarithms of the ratio between each district's share of expenditures and its share of enrollment in the relevant jurisdiction, weighted by the district's per-pupil expenditure and further weighted by the district's enrollment. *Id.* at 797. The basic idea is that, where a district's share of expenditures is equal to its share of enrollment—i.e., where its per-pupil expenditure is equal to the average—the ratio of the shares is one, the natural logarithm of the ratio is zero, and the district contributes nothing to the level of inequality in the jurisdiction. Above-average districts contribute positively to the index, while below-average districts contribute negatively. But because the logarithm is weighted by each district's per-pupil expenditure, the positive contributions are always greater; thus the index value is never

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measure, the coefficient of variation, focuses on the difference between per-pupil spending in each district and average per-pupil spending in the relevant jurisdiction.[96] For both measures, the total amount of interdistrict variation nationally is the sum of two components: one that compares per-pupil spending in a given district to the state mean, and another that compares state mean spending with the national mean. The former is a measure of variation within states; the latter is a measure of variation across states.

Using these measures, Murray, Evans, and Schwab conclude that "roughly two-thirds of nationwide inequality in spending is between states and only one-third is within states."[97] In 1972, the share of interdistrict variation attributable to interstate inequality was 69% measured by the Theil index and 68% measured by the coefficient of variation.[98] This share, while falling between 1972 and 1982, returned to 1972 levels in the following decade. In 1992, interstate disparities comprised 67% of national interdistrict inequality according to the Theil index and 65% according to the coefficient of variation.[99] These estimates are slightly inflated, however, because they do not account for geographic differences in educational costs. In a subsequent study, the same authors showed that on a cost-adjusted basis, interstate variation measured by the Theil index comprised 53% to 60% of total interdistrict inequality in 1992, depending on the geographic cost index used.[100] In sum, education spending varies widely across states, and these wide disparities account for more of the total interdistrict inequality nationally than do disparities within states.

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negative. One feature of the Theil index is that it is non-linear; it decreases more with redistributive transfers between very unequal districts than with equivalent transfers between less unequal districts. *See id.*

96 For a given jurisdiction, the coefficient of variation is calculated by summing the squares of the difference between each district's per-pupil expenditure and the average per-pupil expenditure, with each square weighted by the district's enrollment, and then dividing that sum by the total enrollment in the jurisdiction. The coefficient of variation treats transfers between very unequal districts the same as equivalent transfers between less unequal districts. *See id.*

97 *Id.* at 808.

98 *Id.* at 799 tbl.2.

99 *Id.*; *see also* WILLIAM HUSSAR & WILLIAM SONNENBERG, NAT'L CTR. FOR EDUC. STATISTICS, TRENDS IN DISPARITIES IN SCHOOL DISTRICT LEVEL EXPENDITURES PER PUPIL 28–29 (2000) (finding that interstate disparities in district spending increased from 1980 to 1994).

100 William N. Evans et al., *The Impact of Court-Mandated School Finance Reform*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE, *supra* note 70, at 72, 84–86 & tbls.3 & 4. Under Chambers' teacher cost index (a component of GCEI), interstate variation comprised 58% of total interdistrict inequality in 1992. *Id.* For additional evidence of the dominant role of interstate disparities in total interdistrict variation nationally, see PARRISH ET AL., DISPARITIES, *supra* note 79, at 29–32.

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B. Educational Standards and Outcomes

Historically, meaningful comparison of educational performance across states has been hampered by the absence of a uniform national assessment valid for this purpose. Nevertheless, pundits and policymakers have fed the public's appetite for such comparison by ranking states on the basis of misleading data. SAT scores have been a perennial favorite since 1984, when then–U.S. Secretary of Education Terrel Bell created a well-publicized "wall chart" comparing states based on the SAT and other indices.[101] Using SAT scores in this way is clearly invalid because of selection bias. Students who take the SAT are not representative of students as a whole, and "[a] remarkably strong negative relationship exists between participation rate and state SAT scores: a high percentage of test-takers in a state is associated with low average state SAT scores."[102] This selection effect casts doubt on claims that, because many low-spending states have high SAT scores, educational expenditures are uncorrelated with educational quality.[103] Indeed, once scores are adjusted for selection effects, there is evidence that the relationship between expenditures and SAT scores is positive and statistically significant.[104]

Since 1990, the National Assessment of Educational Progress (NAEP) has provided a statistically valid basis for comparing student achievement across states. Authorized and financed by the federal government, NAEP is a collection of tests administered to nationally representative samples of fourth, eighth, and twelfth graders in a variety of subjects.[105] Because the federal government is prohibited

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101 *See Bennett Issues Mixed Grades on School Improvement Effort; Overall Pace Held Steady in '85-'86, Secretary Says*, L.A. TIMES, Feb. 10, 1987, at A2.

102 Brian Powell & Lala Carr Steelman, *Bewitched, Bothered, and Bewildering: The Use and Misuse of State SAT and ACT Scores*, 66 HARV. EDUC. REV. 27, 37 (1996). Based on 1993 data, Powell and Steelman find that participation rates explain over 85% of state variation in mean SAT scores. *Id.*; *see also* Eric A. Hanushek & Lori L. Taylor, *Alternative Assessments of the Performance of Schools: Measurement of State Variations in Achievement*, 25 J. HUM. RESOURCES 179, 196–99 (1990) (discussing invalidity of SAT for interstate comparison of student achievement); Howard Wainer, *Does Spending Money on Education Help?*, EDUC. RES., Dec. 1993, at 22, 23 (same).

103 *See, e.g.*, George F. Will, *Meaningless Money Factor*, WASH. POST, Sept. 12, 1993, at C7 (arguing that money and school quality are uncorrelated by comparing state rankings on SAT scores and per-pupil spending); *cf.* Ralph Reed, Op-Ed., *Feds Butting in Again*, USA TODAY, Oct. 5, 1995, at 10A ("SAT and other tests show that, if anything, states with the lowest spending provide the best education.").

104 *See* Powell & Steelman, *supra* note 102, at 44 (concluding that "each additional $1000 per student translates into approximately an additional 14.8 points on state SAT scores" after controlling for participation rate and other variables). Powell and Steelman's study examined data aggregated at the state level and thus implicates a methodological debate discussed *infra* at note 129.

105 20 U.S.C. § 9622 (Supp. III 2003).

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from using NAEP for purposes of student, school, district, or state accountability,[106] assessment results are largely untainted by efforts to "teach to the test." NAEP has been dubbed the "Nation's Report Card" for its breadth, consistency, and insulation from politics.[107] In addition to measuring national achievement, NAEP has been administered biennially since 1990 to representative samples of public school students in individual states.[108] These state NAEP results provide a valid basis for interstate comparison.

From 1990 to 2000, state participation in state NAEP testing was voluntary. Since 2002, the No Child Left Behind Act has required states to participate in state NAEP tests in reading and math at fourth and eighth grades as a condition of receiving federal funds under Title I of the Elementary and Secondary Education Act.[109] However, as I discuss in Part III, NCLB does not require states to adopt national academic standards. Despite NAEP testing, states remain free to fashion their own standards and assessment systems for purposes of holding schools and districts accountable for educational progress.

With data from state NAEP tests and from each state's own assessment system, we can observe variation in educational standards and outcomes across states. Figures 2a and 2b compare the percentage of fourth graders in each state achieving a "proficient" score on 2005 NAEP math and reading tests with the percentage of fourth graders achieving a "proficient" score on 2005 state tests.[110] In each

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106 *Id.* § 9622(b)(4).

107 Nat'l Ctr. for Educ. Statistics, The Nation's Report Card, NAEP Overview, http://nces.ed.gov/nationsreportcard/about/ (last visited Aug. 4, 2006).

108 In an average state, around 2500 students from 100 public schools are assessed per subject. The schools are selected randomly within classes of schools with similar characteristics, and around thirty students per subject per grade are selected randomly within each school. For more information about state NAEP sampling, see Nat'l Ctr. for Educ. Statistics, The Nation's Report Card: How the Samples of Schools and Students Are Selected for the Main Assessments (State and National), http://nces.ed.gov/nationsreportcard/about/nathow.asp (last visited Aug. 18, 2006).

109 *See* 20 U.S.C. § 6311(c)(2) (Supp. III 2003).

110 The data, which cover public schools only, are from Melissa McCabe, *State of the States*, EDUC. WEEK, Jan. 5, 2006, at 72, 79 (reporting test results as part of tenth edition of *Quality Counts*, annual report grading states on education policy and school peformance), and Nat'l Ctr. for Educ. Statistics, The Nation's Report Card, State Profiles, http://nces.ed.gov/nationsreportcard/states/ (last visited Jan. 24, 2006) [hereinafter NAEP State Profiles]. The definition of "proficiency" on NAEP is set by the National Assessment Governing Board in consultation with teachers, other educators, and members of the general public. *See* NAT'L ASSESSMENT GOVERNING BD., NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS ACHIEVEMENT LEVELS, 1992–1998: MATHEMATICS, at 2 (Susan Cooper Loomis & Mary Lyn Borque eds., 2001). The definition of "proficiency" on state assessments is set by each state according to its own standards. *See* 20 U.S.C. § 6311(b)(1)(D)(ii)(II) (Supp. III 2003). For similar graphs with less complete 2003 data, see Forum, *Do We Need to Repair the Monument? Debating the Future of No Child Left*

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graph, the solid sloping line shows where states would line up if their proficiency standards matched NAEP's. The dotted sloping line is the best-fit line indicating the relationship between NAEP and state tests in an "average" state. The vertical line marks the percentage of students nationally who scored proficient on NAEP.

From these graphs, we learn three things. First, state standards of academic proficiency are literally all over the map and are mostly less rigorous than NAEP's. In Tennessee, for example, 87% of fourth graders achieved a proficient score on the state math test, but only 28% scored proficient on NAEP. Similarly, 83% of students in Alabama were proficient on the state reading test while only 22% were proficient on NAEP. By contrast, states like Maine, Massachusetts, South Carolina, and Wyoming have proficiency standards that approximate NAEP's. The enormous variation in Figures 2a and 2b has been confirmed by other studies comparing state standards in terms of their rigor, comprehensiveness, clarity, and measurability.[111] This wide-ranging patchwork of educational standards is unsurprising in view of the broad discretion states have to define what content their students should know, how well they should know it, and what assessments are used to hold schools accountable.[112]

Second, student performance varies considerably from state to state when measured against a common standard. While 35% of fourth graders nationwide achieved proficiency on the NAEP math test, state figures ranged from 49% in Massachusetts and 47% in Kansas and Minnesota to 21% in Alabama and 19% in Mississippi and New Mexico. Likewise, the share of students scoring proficient on the NAEP reading test varied from 44% in Massachusetts and 38% in Connecticut and Minnesota to 20% in Louisiana and New Mexico and 18% in Mississippi, with 30% proficient nationwide. NAEP also reports scores in math and reading for all grade levels on a single 500-

Behind, EDUC. NEXT, Spring 2005, at 8, 15 fig.2. Three states—New Hampshire, Rhode Island, and Vermont—are not included in Figures 2a and 2b because they did not have standards-aligned tests in 2005. *See* McCabe, *supra*, at 74, 79.

111 *See generally* G. GAGE KINGSBURY ET AL., NW. EVALUATION ASS'N, THE STATE OF STATE STANDARDS: RESEARCH INVESTIGATING PROFICIENCY LEVELS IN FOURTEEN STATES (2003); DAVID KLEIN ET AL., THOMAS B. FORDHAM FOUND., THE STATE OF STATE MATH STANDARDS, 2005 (2005); SANDRA STOTSKY, THOMAS B. FORDHAM FOUND., THE STATE OF STATE ENGLISH STANDARDS 2005 (2005); Chester E. Finn, Jr. & Marci Kanstoroom, *State Academic Standards*, *in* BROOKINGS PAPERS ON EDUCATION POLICY: 2001, at 131 (Diane Ravitch ed., 2001).

112 *See* Ford Fessenden, *How to Measure Student Proficiency? States Disagree on Setting Standards and Tests*, N.Y. TIMES, Dec. 31, 2003, at B8; Rosalind S. Helderman & Ylan Q. Mui, *Comparing Schools' Progress Difficult; No Child Left Behind Law Allows States to Choose Their Own Tests and Passing Standards*, WASH. POST, Sept. 25, 2003, at B1; *infra* notes 165–68 and accompanying text.

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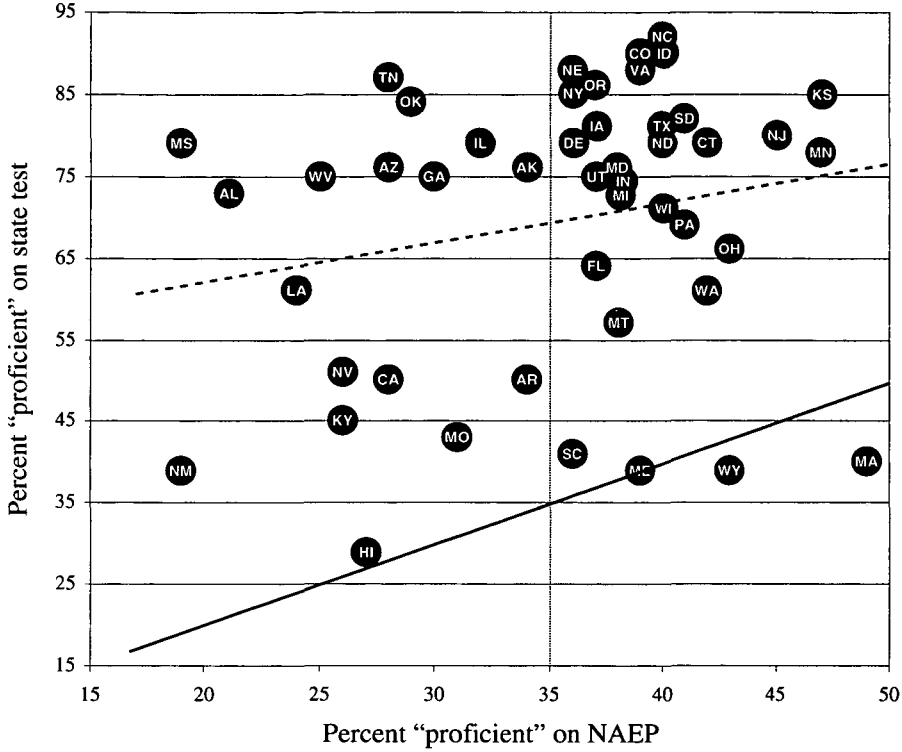
FIGURE 2A: FOURTH GRADE MATH PERFORMANCE, 2005



point scale. Those data show that the average fourth grader in Massachusetts, Minnesota, and Vermont scored almost twenty points higher in math and reading than her peers in Alabama, Mississippi, and New Mexico—a difference of roughly two grade levels.[113]

Third, the states with NAEP proficiency rates lower than the national average are almost all low-spending states in the South, Southwest, and far West. Among the twenty-one states to the left of the vertical line in either Figure 2a or Figure 2b, only three (Georgia, Oregon, and West Virginia) are in the top half of the nation in terms of adjusted per-pupil spending. Conversely, while a few low-spending states have above-average rates of proficiency on NAEP in math and

[113] For these states, average NAEP scores in 2005 (math, reading) are as follows: Massachusetts (247, 231), Minnesota (246, 225), Vermont (244, 227), Alabama (225, 208), Mississippi (227, 204), and New Mexico (224, 207). NAEP State Profiles, *supra* note 110. A rule of thumb is that a ten-point margin on the NAEP scale corresponds to one grade level of learning. Nationwide in 2005, for example, eighth graders scored 278 in math while fourth graders scored 237, a difference of 41 points over four grade levels; similarly, eighth graders scored 260 in reading while fourth graders scored 217, a difference of 43 points. *Id.*

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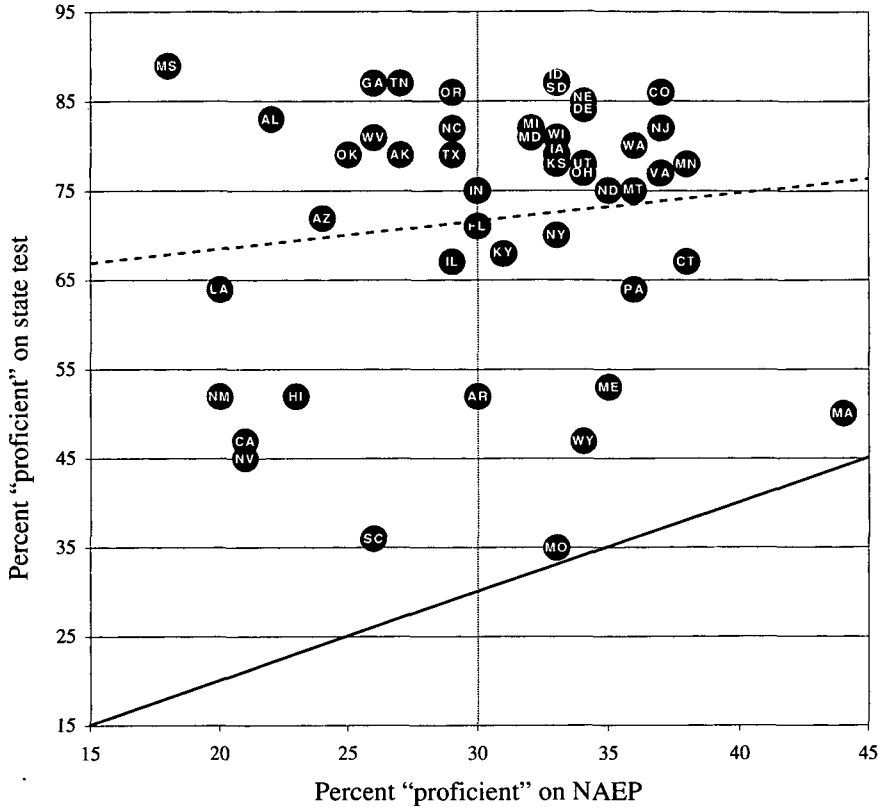
FIGURE 2B: FOURTH GRADE READING PERFORMANCE, 2005



reading (e.g., Idaho, South Dakota, and Washington), the vast majority of high-performing states are high-spending.[114]

Although this pattern suggests a relationship between resources and outcomes, more sophisticated analysis is needed to support a firm inference. As noted earlier, low-spending states have a disproportionate share of poor, minority, and LEP children whose educational needs are only roughly taken into account by applying pupil weights to spending data. Student demographics, parental education and income, and other aspects of family background undoubtedly play a role in explaining performance disparities across states. Moreover, states vary in how they spend education funds, in their degree of intrastate finance equity, in the standards they set for teachers and stu-

[114] The same pattern can be observed in state NAEP math and reading scores for eighth graders. *See id.* For graphic depictions of the distribution of state NAEP scores for 2003, see the maps in JAMES S. BRASWELL ET AL., U.S. DEP'T OF EDUC., THE NATION'S REPORT CARD: MATHEMATICS 2003, at 25 figs.2.5 & 2.6 (2005); PATRICIA L. DONAHUE ET AL., U.S. DEP'T OF EDUC., THE NATION'S REPORT CARD: READING 2003, at 28 fig.2.5, 29 fig.2.6 (2004).

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dents, and in the policy and regulatory environment they establish for schools and districts on matters ranging from collective bargaining to assessments and accountability. All of these factors likely bear on the efficacy of education spending and complicate the relationship between resources and results.[115]

Sorting out the debate over the significance of money to educational outcomes is beyond the scope of this Article.[116] But the notion that students in low-spending states would benefit from additional resources need not depend on a clean linear relationship between dollars and achievement gains. Indeed, one might expect the relationship to be stronger where current spending is low and somewhat weaker or unpredictable where spending is already high. This intuition is a reasonable inference from the principle of marginal utility, which generally predicts that additional resources will make the greatest difference to those who have the least. As it turns out, this view is supported by the leading empirical study of state NAEP results, published by RAND in 2000.[117]

Using NAEP math and reading scores from forty-four states between 1990 and 1996, the RAND study compared educational per-

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115 To take an oft-cited example, the District of Columbia has the grim distinction of having one of the highest levels of per-pupil spending but lower educational performance than every state in the nation. *See* COHEN & JOHNSON, *supra* note 77, at 12 tbl.5; NAEP State Profiles, *supra* note 110. To be sure, the District has higher-than-average educational costs, Chambers, *Geographic Variations*, *supra* note 74, at 19 tbl.III-3, and its child poverty rate is twice the national average, DIGEST 2002, *supra* note 64, at 27 tbl.20. But it also devotes an unusually small percentage (49.6%) of its current expenditures to instruction compared to the national average (61.5%) and even compared to the next lowest state (New Mexico, 55.9%). COHEN & JOHNSON, *supra* note 77, at 11 tbl.4. Because the District's resource utilization, student demographics, and governance by Congress are anomalous in the context of the fifty states, I have not included it in the analysis here. But the example is a stark reminder that no simple relationship exists between money and outcomes.

116 For an overview, see DOES MONEY MATTER? THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS (Gary Burtless ed., 1996). For evidence that resources are positively associated with outcomes, see Ronald F. Ferguson & Helen F. Ladd, *How and Why Money Matters: An Analysis of Alabama Schools*, *in* HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORM IN EDUCATION 265 (Helen F. Ladd ed., 1996); Jeremy D. Finn & Charles M. Achilles, *Tennessee's Class Size Study: Findings, Implications, Misconceptions*, 21 EDUC. EVALUATION & POL'Y ANALYSIS 97 (1999); and Larry V. Hedges et al., *Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes*, EDUC. RESEARCHER, Apr. 1994, at 5. For skeptical views, see Julian R. Betts, *Is There a Link Between School Inputs and Earnings? Fresh Scrutiny of an Old Literature*, *in* DOES MONEY MATTER?, *supra*, at 141; Eric A. Hanushek, *Assessing the Effects of School Resources on Student Performance: An Update*, 19 EDUC. EVALUATION & POL'Y ANALYSIS 141 (1997); and the famed Coleman Report, JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966).

117 *See* DAVID GRISSMER ET AL., IMPROVING STUDENT ACHIEVEMENT: WHAT STATE NAEP TEST SCORES TELL US, at xxviii (2000).

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formance across states in order to determine the efficacy of varying levels of per-pupil spending and varying state approaches to resource utilization. As an initial step, the authors estimated "differences in scores for students from similar families across states" in order to account for the effects of family and social capital on student achievement.[118] With controls for parental education, income, race, family size, single-parent status, and other socioeconomic status (SES) indicators, variation in state NAEP scores fell within a range of one-third of a standard deviation on a national scale.[119] In other words, students in the highest-scoring states were roughly one and one-third grade levels ahead of similar students in the lowest-scoring states.[120] Some low-spending states (e.g., Texas, Missouri) performed better than the average state, and some high-spending states (e.g., Rhode Island, Vermont) performed worse. But overall, spending was positively correlated with performance when similar students were compared.[121]

Importantly, the study went on to investigate what uses of resources were most effective. The authors found that increased performance on NAEP was associated with additional resources for increasing participation in public pre-kindergarten (pre-K) programs, for lowering pupil-teacher ratios in grades one to four, and for improving resources for teachers.[122] Moreover—and this is a key finding—the size of the effect from lowering pupil-teacher ratios in the early grades varied inversely with family socioeconomic status: Children from low-SES families gained more from lower pupil-teacher ratios than children from medium-SES families, and the latter gained more than children from high-SES families.[123] The study similarly found that children from low-SES families benefited more from greater access to public pre-K programs than children from medium-

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118 *Id.* at 66.

119 *Id.* at 68–69, 181–85.

120 One standard deviation on the NAEP is roughly equivalent to four grade levels of learning. Paul E. Peterson, *Ticket to Nowhere*, EDUC. NEXT, Spring 2003, at 39, 40. Thus, one-third of a standard deviation corresponds to one and one-third grade levels.

121 *See* GRISSMER ET AL., *supra* note 117, at 68–69 tbl.6.1. The increase in achievement associated with incremental dollars was statistically significant but modest in magnitude. *See id.* at 75–76, 77 tbl.7.1 (estimating that additional $1000 per student in 1993–94 dollars would raise state NAEP scores by 0.04 to 0.10 standard deviation).

122 *Id.* at 76–78, 77 tbl.7.2. Teacher salary and educational level do not appear to have significant effects, although years of experience seem to have some positive effect. *See id.* at 76, 78, 79 tbl.7.3.

123 *Id.* at 79, 80 tbl.7.4. The study defined "low" SES to correspond to overall family characteristics in Louisiana, "medium" SES to correspond to Arkansas, North Carolina, and Tennessee, and "high" SES to correspond to Iowa, Maine, and Massachusetts. *Id.* at 79.

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SES families, who in turn benefited more than children from high-SES families.[124]

These findings suggest that resource-dependent interventions are most effective when targeted to low-SES states and, within states, to low-SES districts and schools.[125] Thus the study estimated that, when additional spending is used to lower pupil-teacher ratios in grades one to four, the amount per pupil required to raise NAEP performance by 0.10 standard deviation is $150 in low-SES states, $450 in medium-SES states, and over $1000 in high-SES states.[126] Similarly, when additional resources are used to expand pre-K programs, the estimated amount per pupil required to increase performance by 0.10 standard deviation is $120 in low-SES states, $320 in medium-SES states, and over $1000 in high-SES states.[127] While "resources spent in many high-SES states might be quite inefficient," the study concluded, "very significant score gains could be obtained for minority and lower-SES students with additional expenditures of less than $1000 per student if the resources are appropriately targeted."[128]

Although the RAND study has its skeptics,[129] its results cohere with three other lines of empirical study that find positive resource

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[124] *Id.* at 80, 81 tbl.7.5. The study found no variation across SES levels in the size of the effect of improving teacher resources and instructional materials. *Id.* at 80.

[125] *See id.* at 91–93.

[126] *Id.* at 91 tbl.8.4. In addition, the higher the beginning class size, the larger the effect associated with lowering the pupil-teacher ratio. *See id.* at 80 tbl.7.4. Thus "[t]he predicted gains from reductions of three pupils per teacher can be as large as 0.17 standard deviation . . . for the lowest SES states with very high pupil-teacher ratios to no effects for states with higher SES." *Id.* at 79.

[127] *Id.* at 91 tbl.8.4.

[128] *Id.* at 93; *see also* David Grissmer, Letter to the Editor, *RAND Responds*, EDUC. MATTERS, Summer 2001, at 4 ("[E]stimates from our equations show that modest increases in resources (of $500–$750 per student) can lead to significant score gains (one-third of a standard deviation) among disadvantaged students.").

[129] The main criticism of the study is that its data on student achievement, school resources, and family background are aggregated at the state level. *See* Eric A. Hanushek, *Deconstructing RAND*, EDUC. MATTERS, Spring 2001, at 65, 66–67; *cf.* Grissmer, *supra* note 128 (responding to Hanushek). Over the years, studies using aggregated state data have shown positive effects of school resources on student achievement more consistently than studies using classroom-level, school-level, or district-level data, leading some to argue that "aggregation appears to exacerbate problems of omitted variables bias and produce incorrectly large school resource coefficients." Eric A. Hanushek et al., *Aggregation and the Estimated Effects of School Resources*, 78 REV. ECON. & STAT. 611, 612 (1996). The RAND study acknowledged that "[o]ther things being equal, researchers prefer individual-level data," "because the sample sizes are inherently larger and because there are generally more of and a greater range of variables." GRISSMER ET AL., *supra* note 117, at 153. For several reasons, however, the study suggested that state-level data may be less biased than less-aggregate data in this area and that past measures of resource effects at less-aggregate levels may be biased downward.

First, research findings with state-level data are more consistent with experimental results from class size reduction studies. *See id.* at 37, 153. Second, in less-aggregate

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effects on the performance of the most disadvantaged students and schools. First, randomized experiments on class size reduction—notable for their rigorous research design[130]—have found that smaller classes produce gains by all students but significantly larger gains by minority students, low-income students, and low-achieving students compared to their more advantaged peers.[131] Second, some econometric studies have similarly found that greater resources are associated with greater gains by low-achieving students relative to their high-achieving peers and by students in low-spending versus high-spending districts.[132] Third, from the late 1960s to early 1990s, increased education spending largely directed at compensatory programs for low-income children coincided with robust gains in reading and math by black, Latino, and low-scoring white students, with the greatest gains in the South, even as the broad majority of whites made little or no improvement.[133] Changes in parental income and education explain only part of the gains by disadvantaged students,[134] and

studies, the absence of variables that account for schooling conditions in years prior to the study period may bias resource effects downward. *See id.* at 37–38, 156–58, 159 tbl.C.1. If resource effects are cumulative across grades, then studying only the resources in a current grade while omitting resources in previous grades will tend to underestimate resource effects. Third, data quality may be better, and certain forms of bias may be less prevalent or may offset each other, at higher levels of aggregation. *See id.* at 158–62. Fourth, critics of state-level measures have yet to specify the omitted variables that account for alleged upward bias. *See id.* at 41, 155. This methodological debate has been rehearsed elsewhere, *compare* Card & Krueger, *supra* note 62, at 3–4 (defending use of state-level data), *with* Betts, *supra* note 116, at 175–78 (identifying potential sources of bias in aggregate data), and calls for further research on differential bias at different levels of aggregation.

130 *See* Barbara Nye et al., *The Effects of Small Classes on Academic Achievement: The Results of the Tennessee Class Size Experiment*, 37 AM. EDUC. RES. J. 123, 125–36 (2000) (describing experimental design of Tennessee's Project STAR and finding minimal bias from attrition or switching of students between small and large classes).

131 *See* Alan B. Krueger, *Experimental Estimates of Education Production Functions*, 114 Q.J. ECON. 497, 524, 525 tbl.X (1999); *see also* Finn & Achilles, *supra* note 116, at 99–100 & tbl.1 (reviewing research on Project STAR and finding that "[i]n most comparisons, the benefit for minority students was about *two to three times as large* as that for Whites").

132 *See* Ferguson & Ladd, *supra* note 116, at 287–88 (finding that increased spending in Alabama had large effects on student achievement concentrated in districts spending below the state median); Jonathan Guryan, *Does Money Matter? Regression-Discontinuity Estimates from Education Finance Reform in Massachusetts* 22–23 (Nat'l Bureau of Econ. Research, Working Paper No. 8269, 2001) (finding increased per-pupil spending produced higher fourth-grade test scores in math, science, and social studies primarily due to gains by lowest-achieving students).

133 *See* David Grissmer et al., *Why Did the Black-White Score Gap Narrow in the 1970s and 1980s?*, *in* THE BLACK-WHITE TEST SCORE GAP 182, 185–95 (Christopher Jencks & Meredith Phillips eds., 1998); Larry V. Hedges & Amy Nowell, *Black-White Test Score Convergence Since 1965*, *in* THE BLACK-WHITE TEST SCORE GAP, *supra*, at 149, 159–61.

134 *See* Grissmer et al., *supra* note 133, at 195–201 (asserting that family characteristics explain one quarter or less of reduction in black-white achievement gap between 1970 and

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the evidence suggests that investments in schooling over this period, including substantial reductions in pupil-teacher ratios, had differential positive effects for disadvantaged students.[135]

To be sure, past gains associated with increased spending do not necessarily entail the same trajectory going forward. Further, we must continue to enhance our understanding of the types of expenditures or policy conditions that make for effective use of resources.[136] But the available research does not suggest that the lowest-spending states with the lowest educational performance have already reached a putative plateau in the relationship between resources and outcomes. Instead, the evidence supports the commonsense inference that additional resources are likely to produce educational benefits—indeed, the greatest benefits—for the most disadvantaged children. Because these children live disproportionately in the lowest-spending states, it makes sense from the standpoint of efficacy as well as equity to augment school resources in the jurisdictions that most clearly fall short of providing adequate educational opportunity for equal citizenship.

C. *State Fiscal Capacity and Effort*

Before discussing how this might be done, we need to ask a further question: Do interstate disparities reflect differences in state *effort* in support of public schools or differences in state *fiscal capacity*? If the problem is mainly one of effort, then the emphasis of law and policy should be on encouraging low-spending states to devote more of their own resources to education. If the problem is mainly one of capacity, then it is important to consider the federal role in expanding the resources available to low-spending states. I begin by defining capacity and effort, and then compare the relationship of each to state education revenue.

Because the types of wealth used to support public education vary from state to state, no common measure of fiscal capacity can be derived from the actual practices of states in financing schools. Local

1990); Hedges & Nowell, *supra* note 133, at 161–66 (arriving at similar finding with multiple data sets).

[135] *See* Grissmer et al., *supra* note 133, at 212–16 (comparing reduction in pupil-teacher ratio between 1960 and 1990 to Tennessee class size reduction experiment, and positing parallel differential effects on blacks and whites). Desegregation likely also played a role in producing gains in the South, although it does not explain minority gains in regions where segregation increased between the late 1960s and early 1990s. *See id.* at 206–11.

[136] *See, e.g.*, W. Norton Grubb, *When Money Might Matter: Using NELS88 to Examine the Weak Effects of School Funding*, 31 J. EDUC. FIN. 360, 361 (2006) (proposing "improved school finance" perspective, which holds that "money may be necessary, but it is not sufficient, and other conditions of teachers, leadership, and district support are necessary to develop effective resources").

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property taxes play a role in almost all states, but to a widely varying degree,[137] and property assessment is not uniform within states, much less across states. Some states have lotteries, others rely on sales taxes, and most but not all states tax personal income to fund education.[138] To be comparable across states, fiscal capacity must be defined not by reference to the tax base on which a state actually relies, but in terms of "a state's *potential* ability to raise revenue from its own sources."[139] In other words, fiscal capacity is "an inherent characteristic of a state's economy, determined by the state's resources or revenue bases . . . without regard to current public or private resource use decisions."[140]

So defined, fiscal capacity can be measured in various imperfect ways.[141] The most common measure is state personal income (SPI), the total income received by the residents of a state. Per capita SPI is a sound indicator of resident taxpaying ability, but it is incomplete as a measure of fiscal capacity. It does not include taxable income of nonresidents who work, own property, or do business in a state or who receive dividends from resident corporations.[142] It also omits profits retained by corporations that may be subject to corporate income taxes.[143] Another common measure of fiscal capacity is gross state product (GSP), "the total value of goods and services produced by land, labor, and capital in a state area."[144] GSP is more comprehensive than SPI because it captures all income from within-state production received by persons and business entities regardless of place of

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137 For example, in 2001–02, local funding accounted for 62% of total education revenue in Nevada, 58% in Illinois, and 55% in Pennsylvania, but only 27% in Delaware, 24% in Vermont, and 14% in New Mexico. COHEN & JOHNSON, *supra* note 77, at 9 tbl.2.

138 Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming have no personal income tax, and New Hampshire and Tennessee tax only dividend and interest income. Federation of Tax Administrators, State Individual Income Taxes, http://www.taxadmin.org/fta/rate/ind_inc.pdf (last visited Oct. 23, 2006).

139 Michael Compson & John Navratil, *An Improved Method for Estimating the Total Taxable Resources of the States* 1 (U.S. Dep't of Treas., Treas. Research Paper No. 9702, 1997), *available at* http://www.treas.gov/offices/economic-policy/resources/wpnewm.pdf (emphasis added); *see id.* at 3 ("The distinction between [income] flows which a state can potentially tax and the actual fiscal choices made by states is critical. [A capacity measure] says nothing about, nor does it consider, the actual fiscal choices made by the states.").

140 Stephen M. Barro, *State Fiscal Capacity Measures: A Theoretical Critique*, *in* MEASURING FISCAL CAPACITY 51, 55 (H. Clyde Reeves ed., 1986).

141 *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, MEASURING STATE FISCAL CAPACITY 107–20 (1987) [hereinafter ACIR] (discussing alternative measures of fiscal capacity and their uses); Barro, *supra* note 140, at 61–84 (same).

142 ACIR, *supra* note 141, at 110. Such income can be substantial. *See* Compson & Navratil, *supra* note 139, at 3 ("[A] large portion of the income produced in Alaska [from oil and gas] is earned by individuals who do not reside in Alaska.").

143 Compson & Navratil, *supra* note 139, at 3.

144 ACIR, *supra* note 141, at 110.

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residence. Nevertheless, GSP omits a component that SPI does capture—namely, resident income from out-of-state sources.[145] It also omits federal cash transfers received by state residents, such as disability and retirement payments.[146] On the other hand, GSP overstates fiscal capacity by including payments to the federal government that states cannot legally tax.[147]

To enhance the responsiveness of federal grantmaking to the fiscal capacities of state and local governments, Congress in 1983 directed the Treasury Department to study alternatives for measuring fiscal capacity.[148] In 1985, the Department introduced a new measure, Total Taxable Resources (TTR), to provide a comprehensive account of all income flows, including flows across state lines, that each state can tax without double counting.[149] State TTR is estimated by taking GSP as a starting point, subtracting payments to the federal government that states cannot legally tax, and then adding several income flows, including resident wages from out-of-state employment, dividends and interest income, and payments from federal social insurance programs.[150] Although TTR also has shortcomings as a measure of fiscal capacity,[151] it is more complete than SPI or GSP and has been

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145 Such income includes interest and dividends from nonresident corporations and wages earned by commuters who work in another state. *See id.* at 111; Compson & Navratil, *supra* note 139, at 3 ("According to unpublished [U.S. Bureau of Economic Analysis] estimates, the commuter income inflows of 10 states (including the District of Columbia) were more than 4 percent of GSP in 1994.").

146 ACIR, *supra* note 141, at 111–12.

147 Such payments include certain federal business taxes and social insurance contributions. *Id.* at 111; Compson & Navratil, *supra* note 139, at 13–15.

148 Local Government Fiscal Assistance Amendments of 1983, Pub. L. No. 98-185, § 10, 97 Stat. 1309, 1312–13 (codified at 31 U.S.C. § 6701 note (Supp. I 1983) (repealed 1986)).

149 OFFICE OF ECON. POLICY, U.S. DEP'T OF TREAS., TREASURY METHODOLOGY FOR ESTIMATING TOTAL TAXABLE RESOURCES 2 (2002), *available at* http://www.treas.gov/offices/economic-policy/resources/nmpubsum.pdf ("TTR is defined as the unduplicated sum of the income flows produced within a state (GSP) and the income flows received by its residents (SPI) which a state can potentially tax."); Compson & Navratil, *supra* note 139, at 1.

150 OFFICE OF ECON. POLICY, *supra* note 149, at 2–4.

151 Ideally, state TTR should "exclude all taxes paid to the Federal government and include all transfers from the Federal government." Compson & Navratil, *supra* note 139, at 16. However, TTR "does not adjust for income tax payments to the Federal government and only includes Federal transfer payments for which the corresponding taxes can be identified (e.g. social insurance contributions)." *Id.* at 17. As a result, TTR may understate the fiscal capacity of states that enjoy net federal transfers, while overstating the capacity of states with net outflows to the federal government. Moreover, by adding to GSP all dividends and interest income received by state residents regardless of their source "on the presumption that most of this income comes from out-of-state sources," TTR double counts any dividends or interest from home state production. *Id.* at 15.

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the U.S. General Accounting Office's preferred measure of state capacity to fund public services, including education.[152]

We can compare capacity to finance education across states by computing each state's cost-adjusted TTR per weighted pupil.[153] Column A of Table 5 lists these data for 2001 in rank order, along with each state's ratio to the national average. As Column A shows, there are substantial differences in state fiscal capacity. Most states in the Northeast and Upper Midwest are above the national average, while most states in the South and Southwest are below average. The fiscal capacity of the top quintile of states taken as a whole ($238,000 per weighted pupil) is over 57% greater than the capacity of the bottom quintile ($151,000 per weighted pupil).

Turning now to effort, each state's educational effort may be defined as the hypothetical tax rate that, when levied against the state's fiscal capacity, produces the observed level of nonfederal education revenue in that state. The tax rate is hypothetical because no such tax is actually levied; in almost all states, nonfederal education revenue is derived from a combination of state and local sources at various tax rates. At the same time, the definition assumes that the level of nonfederal education revenue in a state is a function of policy choices within the state's control. Thus, effort is an aggregate measure of the state's willingness to leverage available resources for education.[154]

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[152] TTR is currently used in federal grantmaking to states under the Community Mental Health Services and Substance Abuse Prevention and Treatment programs. *See* 42 U.S.C. §§ 300x-7(a)(6)(B)(i), 300x-33(a)(1)(A) (2000). The U.S. General Accounting Office (now the U.S. Government Accountability Office) has used TTR to study trends in states' ability to raise revenue for public education. *See* U.S. GEN. ACCOUNTING OFFICE, SCHOOL FINANCE: TRENDS IN U.S. EDUCATION SPENDING 18–19 (1995). It has also recommended use of TTR to measure state fiscal capacity for purposes of distributing federal highway money, Medicaid funds, federal aid for home- and community-based elder care, and maternal and child health block grants. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, FEDERAL-AID HIGHWAYS: TRENDS, EFFECT ON STATE SPENDING, AND OPTIONS FOR FUTURE PROGRAM DESIGN 42 n.39, 90 (2004); U.S. GEN. ACCOUNTING OFFICE, MEDICAID FORMULA: DIFFERENCES IN FUNDING ABILITY AMONG STATES OFTEN ARE WIDENED 14–15 (2003); U.S. GEN. ACCOUNTING OFFICE, OLDER AMERICANS ACT: FUNDING FORMULA COULD BETTER REFLECT STATE NEEDS 51–54 (1994); U.S. GEN. ACCOUNTING OFFICE, MATERNAL AND CHILD HEALTH: BLOCK GRANT FUNDS SHOULD BE DISTRIBUTED MORE EQUITABLY 50–51 (1992).

[153] For state TTR estimates, see OFFICE OF ECON. POLICY, U.S. DEP'T OF TREAS., TOTAL TAXABLE RESOURCES (2005), *available at* http://www.treas.gov/offices/economic-policy/resources/2005est.pdf [hereinafter TOTAL TAXABLE RESOURCES]. I adjusted the data for 2001 by using the GCEI and pupil weights described earlier. *See supra* notes 74–82 and accompanying text.

[154] So defined, effort is not simply the willingness of a state's residents to tax themselves, since fiscal capacity includes income to nonresidents who do business in the state. Conceptually, effort encompasses both the willingness of residents to tax themselves as well as

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TABLE 5: STATE FISCAL CAPACITY AND EDUCATIONAL EFFORT, 2001–02

	(figures with percentage of national average)					
	A Total taxable resources*		B Educational effort		C Nonfederal revenue*	
Alabama	$162,612	*84*	3.47	*100*	$5,643	*85*
Alaska	139,316	*72*	4.21	*121*	5,859	*88*
Arizona	160,091	*83*	3.40	*98*	5,439	*82*
Arkansas	154,396	*80*	3.73	*108*	5,765	*87*
California	166,550	*86*	3.34	*96*	5,560	*84*
Colorado	227,095	*117*	2.82	*81*	6,410	*97*
Connecticut	254,776	*132*	3.29	*95*	8,393	*127*
Delaware	356,062	*184*	2.10	*60*	7,472	*113*
Florida	198,904	*103*	2.71	*78*	5,386	*81*
Georgia	193,816	*100*	3.74	*108*	7,246	*109*
Hawaii	205,404	*106*	3.77	*109*	7,741	*117*
Idaho	153,727	*79*	3.63	*105*	5,583	*84*
Illinois	201,918	*104*	3.25	*94*	6,572	*99*
Indiana	197,808	*102*	3.82	*110*	7,556	*114*
Iowa	209,477	*108*	3.61	*104*	7,562	*114*
Kansas	202,020	*104*	3.57	*103*	7,208	*109*
Kentucky	184,717	*95*	3.19	*92*	5,900	*89*
Louisiana	178,749	*92*	3.20	*92*	5,725	*86*
Maine	173,205	*89*	4.45	*128*	7,701	*116*
Maryland	238,353	*123*	3.26	*94*	7,764	*117*
Massachusetts	231,755	*120*	3.27	*94*	7,583	*115*
Michigan	174,776	*90*	4.48	*129*	7,822	*118*
Minnesota	214,846	*111*	3.60	*104*	7,740	*117*
Mississippi	140,452	*73*	3.42	*99*	4,803	*73*
Missouri	198,517	*103*	3.39	*98*	6,735	*102*
Montana	159,272	*82*	3.85	*111*	6,135	*93*
Nebraska	210,804	*109*	3.54	*102*	7,458	*113*
Nevada	223,435	*115*	2.77	*80*	6,179	*93*
New Hampshire	218,728	*113*	3.14	*90*	6,859	*104*
New Jersey	233,517	*121*	3.81	*110*	8,906	*134*
New Mexico	146,888	*76*	3.90	*112*	5,722	*86*
New York	220,390	*114*	3.76	*108*	8,292	*125*
North Carolina	211,376	*109*	2.76	*80*	5,837	*88*
North Dakota	191,779	*99*	3.22	*93*	6,182	*93*
Ohio	191,108	*99*	4.00	*115*	7,645	*115*
Oklahoma	149,935	*77*	3.49	*101*	5,238	*79*
Oregon	192,655	*100*	3.51	*101*	6,762	*102*
Pennsylvania	207,423	*107*	3.60	*104*	7,469	*113*
Rhode Island	199,144	*103*	3.62	*104*	7,202	*109*
South Carolina	169,120	*87*	3.90	*112*	6,600	*100*
South Dakota	221,177	*114*	2.85	*82*	6,304	*95*
Tennessee	190,398	*98*	2.73	*79*	5,204	*79*
Texas	162,666	*84*	3.67	*106*	5,966	*90*
Utah	138,964	*72*	3.53	*102*	4,900	*74*
Vermont	183,494	*95*	4.80	*138*	8,801	*133*
Virginia	240,384	*124*	2.87	*83*	6,896	*104*
Washington	199,596	*103*	3.10	*89*	6,186	*93*
West Virginia	159,302	*82*	4.32	*125*	6,888	*104*
Wisconsin	202,675	*105*	3.96	*114*	8,022	*121*
Wyoming	235,231	*122*	3.73	*107*	8,770	*132*

* cost-adjusted figures per weighted pupil

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The state-level spending data we have examined so far are not differentiated by federal, state, or local source. In order to isolate education funding from state and local sources, we must look to data on revenue instead of expenditures. Column C of Table 5 shows each state's cost-adjusted revenue per weighted pupil from nonfederal sources in 2001–02, along with its ratio to the national average.[155] With these data, each state's educational effort can be determined by taking nonfederal revenue per weighted pupil as a percentage of state fiscal capacity per weighted pupil. The results appear in Column B, along with each state's effort as a percentage of the national average. Like fiscal capacity, educational effort varies across states, with some exerting greater effort than others by 50% or more. However, a regional pattern is difficult to discern. The ten states with the highest effort (Alaska, Maine, Michigan, Montana, New Mexico, Ohio, South Carolina, Vermont, West Virginia, and Wisconsin) are spread across the country, as are the ten states with the lowest effort (Colorado, Delaware, Florida, Nevada, New Hampshire, North Carolina, South Dakota, Tennessee, Virginia, and Washington).

Table 5 provides some insights into the resource disparities across states described earlier. Some states, like New Jersey and New York, combine high fiscal capacity with above-average effort to generate a much higher level of education revenue than in most other states. Other states, like Maryland and Massachusetts, can achieve high revenue with below-average effort because of their high fiscal capacities. Delaware, home to many corporate headquarters, exerts the lowest level of effort but still has high revenue per pupil because it has the highest fiscal capacity in the nation. By contrast, some states generate high revenue (e.g., Maine, Michigan) or average revenue (e.g., South Carolina, West Virginia) by exerting high effort against low fiscal capacities. Among states with low revenue, many exert average effort (e.g., Arizona, Oklahoma) or even above-average effort (e.g., Arkansas, New Mexico) but draw limited revenue because of low capacity. Other states have low capacity and low effort (e.g., California, Louisiana), while some appear to have low revenue primarily because of low effort (e.g., Florida, Nevada).

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policy decisions made by residents that shape the business climate (i.e., tax advantages or disadvantages) for nonresidents.

155 Unadjusted revenue data for 2001–02 are published in COHEN & JOHNSON, *supra* note 77, at 8 tbl.1. The per-pupil revenue figures are slightly higher than the per-pupil expenditures in Column C of Table 2 because the expenditure data do not include capital outlays and debt repayment to which revenue is applied. Nevertheless, revenues and expenditures are highly correlated and, for our purposes, are similarly probative of the educational opportunity provided by each state.

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TABLE 6: CORRELATION OF STATE FISCAL CAPACITY AND EDUCATIONAL EFFORT TO NONFEDERAL REVENUE PER PUPIL, 2001–02

	Measure of fiscal capacity		
	Total taxable resources	State personal income	Gross state product
Unadjusted			
Capacity	0.70	0.78	0.66
Effort	0.35	0.48	0.41
Adjusted			
Capacity	0.56	0.64	0.51
Effort	0.39	0.50	0.45

These examples show that both effort and capacity play a role in explaining interstate disparities in educational resources. We can gauge the relative importance of the two factors by comparing the relationship between capacity and revenue with the relationship between effort and revenue. Table 6 describes these relationships with simple correlation coefficients using TTR, SPI, and GSP as alternative measures of fiscal capacity. Using unadjusted data on revenue and capacity, we find that, while revenue is positively associated with both capacity and effort (top panel), the relationship between revenue and capacity is much stronger. When the data are adjusted for geographic cost differences and pupil weights (bottom panel), there is an attenuated but similar difference between capacity and effort as a correlate of state revenue. Thus, while some states with low capacity manage to achieve high revenue with high effort, and while others with high capacity have low revenue because of low effort, Table 6 suggests that variation in fiscal capacity plays a larger role in explaining interstate differences in nonfederal education revenue than variation in effort.

The advantage of high fiscal capacity is further evident from the negative correlation between state capacity and state effort.[156] In other words, states with higher capacity tend to exert lower effort. Among the ten states with the highest fiscal capacity, only two exerted above-average effort in 2001–02, and neither one exceeded the average by more than 10%. By contrast, among the ten states with the lowest capacity, eight showed above-average effort, and four exceeded the average by more than 10%. Despite the generally higher effort exerted by states with lower capacity, nonfederal revenue per weighted pupil was almost 40% greater on average in the ten

[156] Based on adjusted 2001–02 data using TTR as the measure of fiscal capacity, the correlation between state capacity and state effort is –0.53.

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states with the highest capacity ($7615) than in the ten states with the lowest capacity ($5480). This pattern is analogous to the familiar inequality between school districts in states whose education finance systems rely heavily on local property taxes.[157]

In sum, fiscal capacity and effort are both determinants of interstate disparities in educational resources, and between the two, capacity plays the larger role. States with higher capacity tend to make less effort yet raise more revenue than states with lower capacity. This reality highlights the need for a robust federal role in ameliorating interstate inequality.[158]

III
THE FEDERAL ROLE IN INTERSTATE INEQUALITY

As it turns out, the federal government has done little to narrow educational inequality across states, although the issue has garnered attention on several occasions. As mentioned earlier, Congress considered a series of proposals to narrow interstate disparities in educational resources during Reconstruction.[159] Congress debated similar

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[157] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 12–16 (1973); Serrano v. Priest, 487 P.2d 1241, 1250 (Cal. 1971).

[158] It may be objected that fiscal capacity is not entirely separable from notions of effort or state control. As Professor Sugarman has written:

> [S]ome states might argue that their own state fiscal capacity is a function of the people working hard, building up the state economy, and so on. This line of analysis implies that to bail out the poorer states with federal funds makes it seem that their lesser fiscal capacity is inevitable (say, reflecting the natural resources of the state), when that may not be the case.

Stephen D. Sugarman, *Two School-Finance Roles for the Federal Government: Promoting Equity and Choice*, 17 ST. LOUIS PUB. L. REV. 79, 98 (1997). Although the argument is not implausible, it is unclear how one could evaluate how "hard working" each state's citizens are. Do white-collar professionals work harder than blue-collar laborers who clock fewer hours and earn less but do more physically demanding work? Are states with more women in the labor force more hard working than states with more stay-at-home moms? More to the point, some states might argue that they enjoy high fiscal capacity precisely because they have cultivated their citizens' productivity through educational investments and that low-capacity states likewise should grow their economies by sacrificing more for education instead of receiving federal aid. To be sure, federal money should not be used to compensate for misguided state policy choices that favor low taxes over greater investment in education. *See, e.g.*, Paul Krugman, *Toyota, Moving Northward*, N.Y. TIMES, July 25, 2005, at A19 (discussing Toyota's decision not to locate new assembly plant in Alabama because of state's poor educational level, two years after Alabama voters rejected higher taxes to improve education). However, the argument for state self-reliance ignores the important role that geography, climate, natural resources, and other factors beyond state control play as determinants of fiscal capacity. As I discuss in Part IV, *infra*, the challenge for federal policy is to strike a balance that recognizes the significant differences in fiscal capacity that state policies cannot alter in the near term while requiring a reasonable level of state educational effort as a condition of federal aid.

[159] *See supra* notes 18–19 and accompanying text.

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proposals after World War I and again after World War II.[160] In 1972, President Nixon's Commission on School Finance, while reluctant to propose increased education spending, recommended that the federal government "provide incentives and mechanisms designed to more nearly equalize resources among the States for elementary and secondary education."[161] In 1979, a committee of the National Academy of Education emphasized that "[r]educing gross disparities in educational opportunity," including "gross interstate fiscal inequities," should be a key priority for the federal government.[162] And in the late 1980s and early 1990s, the idea of national standards in education had a prominent, if brief, turn on the legislative agenda.[163] Despite this episodic concern, however, federal policy has not narrowed interstate disparities in educational opportunity very much. In fact, the federal government has facilitated the continued existence of such disparities in important ways.

A. Education Standards

The federal role in education, while greatly expanded by the No Child Left Behind Act, does not envision a common standard of learning for all children throughout the nation. In theory, NCLB aims to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education" and to "clos[e] . . . achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers."[164] But in practice, the statute holds schools accountable for demonstrating student "proficiency on challenging *State* academic achievement standards and [*S*]*tate* academic assessments."[165] While the law requires schools to make "adequate yearly progress" toward bringing all students to a "proficient level of academic achievement" by 2013–14,[166] each state has virtually unfettered discretion, free of federal influence, to set and revise the content and performance standards on which "proficiency" is based.[167]

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160 *See infra* notes 265–66 and accompanying text.

161 PRESIDENT'S COMM'N ON SCH. FIN., SCHOOLS, PEOPLE, AND MONEY: THE NEED FOR EDUCATIONAL REFORM 24 (1972).

162 NAT'L ACAD. OF EDUC., THE APPROPRIATE FEDERAL ROLE IN EDUCATION: SOME GUIDING PRINCIPLES 2 (1979).

163 *See infra* notes 220–29 and accompanying text.

164 20 U.S.C. § 6301, 6301(3) (Supp. III 2003).

165 *Id.* § 6301 (emphases added).

166 *Id.* § 6311(b)(2)(F).

167 *See id.* § 6311(b)(1)(A) (requiring states to adopt "challenging" content and achievement standards, but providing that "a State shall not be required to submit such standards to the Secretary [of Education]" for approval); *id.* § 6311(b)(1)(F) (authorizing states to

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The predictable result, as shown earlier in Part II.B, is that state standards and assessments vary considerably in ambition and rigor. As more schools each year fail to meet ever-higher performance targets, states will face increasing pressure to relax their standards and assessments in order to reduce the number of schools identified for sanctions or remedial measures.[168] Though well-intentioned, the statute's tough-minded accountability gives states an incentive not to pursue ambitious standards, but to calibrate their standards to what they can afford to deliver. In addition to working against high standards overall, the scheme tends to perpetuate, not attenuate, existing inequalities between states.

This concern motivates NCLB's one small but significant innovation in the direction of national standards. The statute requires each state, as a condition of receiving Title I funds, to participate in biennial NAEP math and reading tests administered to samples of the state's fourth and eighth graders.[169] But the federal government is prohibited from using NAEP to hold schools or districts accountable.[170] Instead, the test results are published online and in the press, giving the public a valid way to compare student achievement from state to state. James Liebman and Charles Sabel have argued that this creates an incentive for states to maintain high standards and to keep their own assessments rigorous: "If a state's standards are so low that all students are easily proficient [on its own assessments], but a sample of these students shows poorly on [NAEP], substantial pressure is likely to arise to bring that state's standards and its students' performance in line with those elsewhere . . . ."[171]

But is this incentive enough to offset the pressures from NCLB's state-centered accountability requirements? Professors Liebman and Sabel argue that it could be, if proper mechanisms are in place to facilitate "rapid learning" by states from one another.[172] They emphasize the role of media and nongovernmental advocacy groups—what they call "new publics"—in monitoring state performance, facilitating

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revise standards); *id.* § 6311(e)(1)(F) (prohibiting Secretary of Education from "requir[ing] a State, as a condition of approval of the State plan, to include in, or delete from, such plan one or more specific elements of the State's academic content standards").

168 *See* James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 944–961 (2004) (arguing that NCLB's rigorous accountability requirements will drive race among states to academic bottom); *infra* note 176 and accompanying text (providing evidence that states have lowered standards to meet NCLB requirements).

169 20 U.S.C. § 6311(a)(1), (c)(2) (Supp. III 2003).

170 *Id.* § 9622(b)(4).

171 James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1729–30 (2003).

172 *Id.* at 1735–36.

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exchange of best practices, and building public demand for high standards.[173] They also propose that the federal government periodically convene states to enable them to learn from "their pooled experience" and "to revise their standards, assessments and accountability systems accordingly."[174] These informal mechanisms, they argue, are likely to "touch off a mutually reinforcing race to the top nationwide."[175]

Despite this optimism, however, it does not appear that data-driven monitoring of this sort has pushed states to raise academic standards. The evidence to date shows that the risk of states lowering their standards to enable more schools to meet annual NCLB improvement targets is quite real.[176] Moreover, federal policy, instead of discouraging this trend, has aided and abetted it.[177] State NAEP participation cannot be expected to diminish this risk very much, since NAEP tests only a sample of fourth and eighth graders within a

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[173] *Id.* at 1738, 1742 (noting that trade publication *Education Week* publishes annual comparison of state educational performance, including NAEP scores, and that intermediary organizations such as Citizens' Commission on Civil Rights are monitoring performance across states).

[174] *Id.* at 1737.

[175] *Id.* at 1736. Liebman and Sabel's reasoning echoes one of the earliest arguments made in support of creating a federal Bureau of Education:

> The reports of that bureau should show the relative rank and respective accomplishments of the different States in respect to public education. What State which should appear from the authoritative report of a national department of education to be lowest in rank as regards the education of its children would fail to exert itself to the extent of its power to remove the stigma?

CONG. GLOBE, 41st Cong., 2d Sess. app. at 485 (1870) (statement of Rep. Hoar). Educational progress in the states, Congressman Hoar argued, would occur through "the beneficent and stimulating effect of . . . emulation." *Id.*

[176] *See* Carolyn Bower, *Missouri Scales Back Student Testing Goals*, ST. LOUIS POST-DISPATCH, Jan. 22, 2005, at A14; Nathan Crabbe, *State to Ease School Standards, More Schools Would Meet Federal Guidelines*, PITT. POST-GAZETTE, May 26, 2004, at A18; Sam Dillon, *States Are Relaxing Education Standards to Avoid Sanctions from Federal Law*, N.Y. TIMES, May 22, 2003, at A29; David J. Hoff, *States Revise the Meaning of 'Proficient,'* EDUC. WK., Oct. 9, 2002, at 1; Richard Rothstein, *How U.S. Punishes States That Set Higher Standards*, N.Y. TIMES, Sept. 18, 2002, at B8; Diana Jean Schemo, *Sidestepping of New School Standards Is Seen*, N.Y. TIMES, Oct. 15, 2002, at A21; Caitlin Scott, *'Cut Score' Put to the Test*, CATALYST CLEVELAND, June 2004, at 6, *available at* http://www.catalyst-cleveland.org/06-04/0604story1.htm; Linda Shaw, *Panel Lowers Bar for Passing Parts of WASL*, SEATTLE TIMES, May 11, 2004, at B2; *see also* Robert L. Linn, *Accountability: Responsibility and Reasonable Expectations*, EDUC. RESEARCHER, Oct. 2003, at 3, 9 (describing Colorado's "reasonable" decision to lower its proficiency standard in order to ease compliance with NCLB).

[177] *See* GAIL L. SUNDERMAN, HARVARD CIVIL RIGHTS PROJECT, THE UNRAVELING OF NO CHILD LEFT BEHIND: HOW NEGOTIATED CHANGES TRANSFORM THE LAW 27–39 (2006) (documenting federally approved changes to state accountability plans that have watered down state standards).

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sample of schools in each state every two years.[178] By contrast, the state assessments required by NCLB are given annually to all students in grades three through eight and once in grades ten through twelve, and the results are reported by district, by school, and, within each school, by various subgroups—with consequences at each level for failure to make adequate yearly progress.[179] Given this accountability framework, each state will look primarily to its own assessment system, not NAEP, to determine whether its standards are rigorous enough.[180]

Consequently, federal policy, while insisting that all children *within* Mississippi, Missouri, and Minnesota be educated to uniform standards, is largely indifferent to whether children *across* those states are educated to the same standards. Yet even if states were to meet their own proficiency goals and narrow achievement gaps as NCLB requires, wide disparities across the nation would remain. The need for national standards in federal education policy is a topic I address in Part IV.

B. School Funding

Federal policy has likewise been attentive to intrastate distribution of educational opportunity while neglecting interstate inequality in the area of school funding. On the whole, federal spending on public elementary and secondary schools is small, comprising 7.9% of total education revenue in 2001–02.[181] The federal share of the national K–12 education budget has never exceeded 10%; since 1981–82, it has stayed between 6% and 8%.[182] Although federal aid disproportionately benefits poorer states, the equalizing effect is

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178 *See supra* note 108 and accompanying text.

179 20 U.S.C. §§ 6311(b)(3), (b)(2)(B)–(C), 6316(b)–(c) (Supp. III 2003).

180 *See* Ryan, *supra* note 168, at 959–60. Professor Ryan observes:

> Performance on state tests, and the labels and sanctions that attend failure on those tests, surely will be more salient than performance on the NAEP. It thus seems unlikely that state and local officials—or their constituents—will be bothered by a gap between state test results and NAEP results.

Id. at 960.

181 COHEN & JOHNSON, *supra* note 77, at 9 tbl.2. In this Article, I address only federal *direct* expenditures on education. The federal government also provides *indirect* subsidies to education primarily through the federal income tax deduction for state and local property taxes. *See* 26 U.S.C. § 164(a)(1) (2000). These tax expenditures more than double the federal contribution to education and are so regressive that, even when they are combined with direct education spending, more federal funds go to high-income than to low-income school districts. *See* Susanna Loeb & Miguel Socias, *Federal Contributions to High-Income School Districts: The Use of Tax Deductions for Funding K-12 Education*, 23 ECON. EDUC. REV. 85 (2004). A comprehensive effort to rethink the federal role in school finance would have to take these tax expenditures into account.

182 DIGEST 2002, *supra* note 64, at 191 tbl.156.

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modest. Counting only state and local revenue, cost-adjusted revenue per weighted pupil in 2001–02 was 50% greater in the ten highest states as a whole ($8180) than in the ten lowest states ($5438). Taking federal revenue into account, cost-adjusted revenue per weighted pupil remained 44% greater in the ten highest states ($8745) than in the ten lowest ($6056). The addition of federal funds to state and local revenue reduced the coefficient of interstate variation in cost-adjusted revenue per weighted pupil by only 11%.[183] In short, the federal government cannot buy much equality with eight cents of every education dollar.

The limited leverage of the federal share is a function not only of its small size but also of the way it is allocated. Federal education aid largely flows through categorical programs, not through general assistance grants. Among the three biggest programs, two—special education for children with disabilities and nutritional aid for low-income children—allocate funds largely in proportion to each state's share of the target population.[184] These monies account for the mildly equalizing effect of federal aid across states because low-spending states tend to have higher shares of low-income children and because equal federal dollars per child provide a bigger boost, proportionally speaking, to low-spending states than to high-spending states. However, the single largest federal investment in the nation's public schools—Title I of the Elementary and Secondary Education Act of 1965—does not reduce but instead *reinforces* interstate inequality in educational opportunity.

Conceived during the War on Poverty and recently reauthorized by the No Child Left Behind Act, Title I is the federal government's primary vehicle for improving education for disadvantaged children.

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183 These figures are based on data in COHEN & JOHNSON, *supra* note 77, at 9 tbl.2, 12 tbl.5, adjusted for geographic cost differences and pupil weights. The enrollment-weighted coefficient of interstate variation for cost-adjusted nonfederal revenue per weighted pupil in 2001–02 was 16.2; with the addition of federal revenue, it was 14.4.

184 Individuals with Disabilities Education Act, 20 U.S.C.A. § 1411(d) (West 2006) (special education grants for school-age children); *id.* § 1419(c) (special education grants for preschoolers). Fifteen percent of funds above the 1999 baseline are allocated based on the number of children with disabilities who are living in poverty. *Id.* § 1411(d)(3)(A)(i)(III) (West 2006). Regarding child nutrition, states are reimbursed at nationally uniform rates according to the number of meals served to eligible children, 42 U.S.C. § 1753 (2000); Reimbursement Process for States and School Food Authorities, 7 C.F.R. § 210.4(b)(1) (2000), with special assistance provided to states with high concentrations of poverty, 42 U.S.C. § 1753(b)(2) (2000). Children from families below 130% of the poverty line are eligible for free lunch, and children from families below 185% of the poverty line are eligible for reduced-price lunch. *See* Child Nutrition Programs—Income Eligibility Guidelines, 68 Fed. Reg. 12,028, 12,029–30 (Mar. 13, 2003). Special education and child nutrition together accounted for 38% of education revenue from federal sources in 2001–02. U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES 2002, at 2 tbl.2 (2004).

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With over $13 billion appropriated in 2005,[185] the program aims to ensure equal educational opportunity for all children throughout the nation, whether poor, minority, or limited in English proficiency. Given this broad ambition, one might expect Title I to disproportionately benefit low-spending states, where disadvantaged students are concentrated. But the reality is otherwise. Like the bulk of equity-based policy and litigation in recent decades, Title I primarily works to reduce educational inequality within states, not between states.

The reason is simple. Each state's Title I allocation is largely a product of two factors. The first factor—the number and concentration of poor children in the school districts of each state[186]—tends to benefit low-spending states because they have disproportionate numbers of poor children. However, the second factor—"the average per-pupil expenditure in the State" (the state expenditure factor)[187]—causes the existing pattern of interstate inequality in education spending to be reproduced in the allocation of Title I funds. Although the statute limits the state expenditure factor to a range from 80% to 120% of the national average,[188] significant interstate disparities remain.

These disparities are evident in Table 7. Column A lists the number and percentage of the nation's poor children in each state in 2001, and Column B lists each state's share of Title I funds in 2001.[189]

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185 Title I comprised 37% of federal appropriations for elementary and secondary education in 2005. *See* Dep't of Educ., Summary of Discretionary Funds, Fiscal Years 2001–2007 (Aug. 2006), http://www.ed.gov/about/overview/budget/budget07/07bylevel.pdf. The Title I allocation formula (discussed below) is important not only because Title I itself is a large program but also because grants under several other federal education programs follow the Title I formula. WAYNE RIDDLE, CONG. RESEARCH SERV., EDUCATION FOR THE DISADVANTAGED: ESEA TITLE I ALLOCATION FORMULA PROVISIONS 1, 20 (2001).

186 *See* 20 U.S.C. § 6333(a)(1)(A), (c) (Supp. III 2003) (basic grants); *id.* § 6334(a)(2)(A) (concentration grants); *id.* § 6335(b)(1)(A), (c) (targeted grants). In addition to children from poor families, children who are counted for purposes of Title I allocations include neglected or delinquent children, children in correctional facilities, and children from families receiving federal welfare benefits. *See id.* § 6333(c).

187 *Id.* § 6333(a)(1)(B) (basic grants); *see also id.* § 6334(a)(2)(B) (concentration grants); *id.* § 6335(b)(1)(B) (targeted grants); *id.* § 7801(2) (defining "average per-pupil expenditure" as each state's current per-pupil spending, regardless of source, in third fiscal year prior to allocation year).

188 *Id.* § 6333(a)(1)(B).

189 *See* COHEN & JOHNSON, *supra* note 77, at 12 tbl.5 (fall 2001 enrollment); DIGEST 2002, *supra* note 64, at 27 tbl.20 (percentage of school-age children in poverty by state for 2001); U.S. Dep't of Educ., ESEA Title I Grants to Local Educational Agencies (Sept. 2005), http://www.ed.gov/about/overview/budget/statetables/07stbyprogram.pdf (Title I expenditures by state) [hereinafter State Tables]. Although Table 7 lists Title I allocations and child poverty data from the same year (2001), Title I allocations in a given year are actually based on poverty data from the nearest prior year for which such figures are available. Before NCLB, the use of out-of-date child poverty data to compute Title I grants resulted in significant slippage between allocations and actual needs. *See* WAYNE RIDDLE

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TABLE 7: CHILDREN IN POVERTY AND TITLE I ALLOCATIONS, 2001

	(figures with percentage of national total)				
	A		B		C
	Poor children		Title I allocation		Title I allocation per poor child
Wyoming	7,843	*0.1*	$19,569,782	*0.2*	$2,495
South Dakota	8,800	*0.1*	21,817,001	*0.3*	2,479
Delaware	9,823	*0.1*	22,823,695	*0.3*	2,324
Maryland	58,524	*0.8*	127,402,013	*1.5*	2,177
Rhode Island	14,382	*0.2*	27,777,184	*0.3*	1,931
Iowa	29,642	*0.4*	56,568,655	*0.7*	1,908
Vermont	10,017	*0.1*	18,495,475	*0.2*	1,846
New Jersey	119,407	*1.7*	214,945,797	*2.6*	1,800
Michigan	200,757	*2.8*	358,607,664	*4.3*	1,786
Alaska	13,839	*0.2*	23,678,445	*0.3*	1,711
Massachusetts	109,965	*1.5*	185,806,221	*2.2*	1,690
Virginia	86,069	*1.2*	142,093,625	*1.7*	1,651
Connecticut	54,742	*0.8*	86,043,713	*1.0*	1,572
New York	545,705	*7.6*	844,562,951	*10.1*	1,548
Pennsylvania	231,347	*3.2*	355,513,288	*4.2*	1,537
New Hampshire	14,686	*0.2*	21,967,666	*0.3*	1,496
Missouri	97,348	*1.4*	144,321,583	*1.7*	1,483
Maine	23,026	*0.3*	33,353,347	*0.4*	1,449
Minnesota	68,962	*1.0*	97,849,251	*1.2*	1,419
Montana	20,817	*0.3*	28,994,848	*0.3*	1,393
Indiana	95,629	*1.3*	132,224,535	*1.6*	1,383
Kentucky	101,426	*1.4*	134,102,960	*1.6*	1,322
West Virginia	57,991	*0.8*	75,714,969	*0.9*	1,306
Louisiana	155,773	*2.2*	196,676,713	*2.3*	1,263
Wisconsin	106,403	*1.5*	132,502,385	*1.6*	1,245
California	958,468	*13.4*	1,185,906,438	*14.2*	1,237
North Dakota	17,710	*0.2*	21,644,987	*0.3*	1,222
Illinois	316,923	*4.4*	366,758,858	*4.4*	1,157
Ohio	274,648	*3.8*	312,082,800	*3.7*	1,136
Kansas	57,835	*0.8*	62,890,292	*0.8*	1,087
Mississippi	118,442	*1.7*	128,122,836	*1.5*	1,082
Nevada	31,756	*0.4*	33,244,062	*0.4*	1,047
Colorado	77,925	*1.1*	80,654,322	*1.0*	1,035
Oregon	76,104	*1.1*	78,756,011	*0.9*	1,035
Washington	122,113	*1.7*	121,223,965	*1.4*	993
Hawaii	26,944	*0.4*	26,459,563	*0.3*	982
Georgia	270,597	*3.8*	257,548,311	*3.1*	952
Nebraska	35,637	*0.5*	33,811,476	*0.4*	949
Florida	437,584	*6.1*	411,516,369	*4.9*	940
Oklahoma	111,985	*1.6*	104,042,162	*1.2*	929
North Carolina	193,358	*2.7*	176,895,046	*2.1*	915
New Mexico	77,183	*1.1*	70,328,325	*0.8*	911
Alabama	155,547	*2.2*	137,362,747	*1.6*	883
Tennessee	160,008	*2.2*	141,008,400	*1.7*	881
Idaho	32,294	*0.5*	27,264,543	*0.3*	844
Texas	849,343	*11.9*	711,350,526	*8.5*	838
South Carolina	150,116	*2.1*	115,017,162	*1.4*	766
Arizona	185,358	*2.6*	141,106,004	*1.7*	761
Arkansas	112,451	*1.6*	85,474,705	*1.0*	760
Utah	52,345	*0.7*	38,414,963	*0.5*	734

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Columns A and B demonstrate that high- and low-spending states do not receive Title I money in proportion to their shares of the nation's poor children. Michigan, for example, had slightly more poor children than North Carolina but received well over twice as much Title I aid. Similarly, Massachusetts had fewer poor children than Oklahoma but received almost 80% more Title I aid. Column C shows each state's Title I funding per poor child in rank order. Some of the highest amounts in Column C reflect statutorily guaranteed minimum allocations for small states.[190] Leaving those states aside, the amounts per poor child at the top are as much as double the amounts at the bottom, with the variation essentially mirroring interstate variation in per-pupil spending.[191]

Of course, by channeling aid to high-poverty districts, Title I has the effect of narrowing disparities in educational opportunity for poor versus non-poor children. Indeed, federal education aid is significantly more targeted to poor children than either state or local funding.[192] However, as Table 7 suggests, the equalizing effect occurs only within states, not across states, because of the state expenditure factor in the Title I formula.

The disparities in Table 7 are somewhat overstated because the dollar figures are not adjusted for geographic cost differences. But even when cost adjustments are applied, the state expenditure factor effectively neutralizes whatever interstate equalization Title I achieves as a result of targeting funds to poor children. Indeed, the addition of Title I funds leaves the extent of interstate variation in revenue per weighted pupil virtually unchanged.[193] What the poverty factor in Title I does for interstate equalization, the state expenditure factor negates. Thus, remarkably, the mildly equalizing effect that the

& RICHARD APLING, CONG. RESEARCH SERV., EDUCATION FOR THE DISADVANTAGED: ALLOCATION FORMULA ISSUES IN ESEA TITLE I REAUTHORIZATION LEGISLATION 11–12 (2000). NCLB now requires Title I grants to be based on poverty data that are updated at least every two years. 20 U.S.C. § 6333(c)(3)(A) (2000 & Supp. III 2003).

190 *See* 20 U.S.C. §§ 6333(d), 6334(b), 6335(e), 6337(b)(1)(B) (Supp. III 2003).

191 Although the state expenditure factor is bounded between 80% and 120% of the national average, disparities between the top and bottom states exceed 150% because, in addition to the state expenditure factor, Title I allocations vary from state to state depending on poverty concentration and interdistrict equity. In addition, Title I's "hold-harmless" provisions limit the movement of funds in accordance with population shifts, *see id.* § 6332(c), which produces increased variation in state amounts per poor child based on current population data. *See* RIDDLE, *supra* note 185, at 10.

192 *See* U.S. DEP'T OF EDUC., PROMISING RESULTS, CONTINUING CHALLENGES: THE FINAL REPORT OF THE NATIONAL ASSESSMENT OF TITLE I, at 78–79 (1999) [hereinafter PROMISING RESULTS].

193 In 2001–02, the coefficient of interstate variation in cost-adjusted state and local education revenue per weighted pupil was 16.6. With the addition of Title I funds, it was 16.3, a difference of less than 2%.

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totality of federal education aid has across states occurs not because of, but in spite of, Title I.

What is especially troubling is that this distribution of federal aid serves no convincing policy rationale.[194] The state expenditure factor cannot be said to adjust Title I allocations for geographic differences in educational costs, since state expenditures vary for many reasons having nothing to do with interstate cost differences. Indeed, even on a cost-adjusted basis, there is substantial interstate variation in Title I allocations per poor child.[195] Nor can Title I be said to reward state effort; as discussed above, state per-pupil expenditure is more closely associated with state fiscal capacity than with state effort.[196]

Furthermore, the Title I formula cannot be understood to create an incentive for states and school districts to devote more of their own resources to public education. Title I aid is simply too small for this purpose. Suppose, for example, that Mississippi in 2000–01 had raised its per-pupil spending by $100 from $5175 to $5275, a 1.9% increase.[197] Assuming that Title I aid increases proportionally, Mississippi would have received $160 million under Title I in 2003 instead of $157 million, an increase of $3 million.[198] However, this increment is just 6% of the $50 million that Mississippi would have had to spend to raise its per-pupil average by $100.[199] As Congress's own researchers have observed, "[i]t seems unlikely that such a relatively small 'bonus' would provide substantial motivation to states and [school districts] in deciding whether to increase their level of spending for public elementary and secondary education."[200]

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[194] *See* RIDDLE & APLING, *supra* note 189, at 15–16 (reviewing and rejecting various policy objectives purportedly served by state expenditure factor). The committee reports accompanying Title I provide no explanation of the state expenditure factor, *see* S. REP. NO. 89-146 (1965); H.R. REP. NO. 89-143 (1965), although the resulting interstate inequality was noted in the minority views of the Senate report, *see* S. REP. NO. 89-146, at 87 (individual views of Senators Dominick, Murphy, and Fannin).

[195] If the state expenditure factor were a valid means of cost adjustment, then the application of a cost index, such as GCEI, to actual Title I allocations would be expected to show that states receive fairly equal Title I funding per poor child on a cost-adjusted basis. But this is not the case. Large interstate disparities remain when Title I allocations are adjusted with any of the three leading geographic cost indices discussed *supra* at note 74.

[196] *See supra* Part II.C.

[197] NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2003, at 208 tbl.170 (2004) [hereinafter DIGEST 2003].

[198] *See* State Tables, *supra* note 189, at 1. I have translated a $100 per pupil increase in 2000–01 into an increased Title I allocation in 2003 because, under the statute, the state expenditure factor is based on the state's per-pupil average in the third fiscal year prior to the allocation year. 20 U.S.C. § 7801(2) (Supp. III 2003).

[199] Mississippi's elementary and secondary school enrollment in the fall of 2000 was nearly 498,000. DIGEST 2003, *supra* note 197, at 57 tbl.37.

[200] RIDDLE & APLING, *supra* note 189, at 16. Because Mississippi has low per-pupil spending and a high child poverty rate, the example provides an estimate of the upper

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A third possible rationale for the state expenditure factor is largely historical and inapplicable today. Four decades ago, when Title I was enacted, the weak condition of public education throughout the nation was evident not only in low per-pupil spending but also in feeble infrastructure at the state level.[201] The Senate report on the Elementary and Secondary Education Act cited the example of "a medium-sized department in a middle-income State" where "75 professional staff members assist 1300 schools and 20,000 local school people in the administration of State and Federal funds and programs . . . but these 75 State consultants can visit the schools of their State on the average of only one-half day every 7 years."[202] In this context, calibrating Title I aid to state expenditures might have ensured that states did not receive more funds than they had the capacity to use efficiently. In 1965, Title I had the effect of significantly increasing the education budget of some states; in some schools, the new program increased funding by as much as 50%.[203] The ability of states and their subunits to effectively utilize this infusion of resources was not yet known, and the early years of Title I saw some instances of malfeasance.[204]

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bound of Title I's incentive effect. For the vast majority of states, the Title I "bonus" generated by incremental state and local spending is far less than 6%. Moreover, the incentive effect is further attenuated for two reasons. First, because a school district's Title I aid increases only when *state* per-pupil spending increases, Title I's incentive effect on *local* expenditures is negligible; the remote prospect of raising the state per-pupil average is unlikely to affect *local* school finance decisions. Second, because the state expenditure factor is bounded between 80% and 120% of national per-pupil spending, states below 80% (there were eight such states in 2000–01, including Mississippi) gain no additional Title I funds with incremental spending below that threshold.

201 *See* S. REP. NO. 89-146, at 32–33 (1965); JOHN F. HUGHES & ANNE O. HUGHES, EQUAL EDUCATION: A NEW NATIONAL STRATEGY 69–73, 76–80 (1972).

202 S. REP. NO. 89-146, at 32; *see* HUGHES & HUGHES, *supra* note 201, at 76 ("[T]he state agencies in all regions of the country were generally lacking in their capability for positive leadership in the critical areas of education priorities and policies."). In response, the original Act included a separate grant program to strengthen the role of state education departments in planning, evaluation, teacher training, and curriculum development. *See* Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, §§ 501–03, 79 Stat. 27, 47–50 (1965).

203 *See* HUGHES & HUGHES, *supra* note 201, at 78 ("In the case of many school districts throughout the nation, the entitlement resulted in very large sums of money—representing major expansions of their meager school budgets—being placed in the hands of thousands of rural superintendents and school boards."); *id.* at 74 (observing that magnitude of new money in 1965 was sufficient to bring Southern states into compliance with desegregation, a condition of Title I funding under regulations issued by Department of Health, Education, and Welfare).

204 *See id.* at 62–69, 79 (discussing misuse of funds in Chicago, New York, Detroit, and Mississippi).

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Forty years later, the educational infrastructure in most if not all states has become stronger.[205] State education spending has increased markedly, and state administrative capacity has increased in tandem. The states' ability to plan, implement, and evaluate educational programs has grown, as control of policy and funding has drifted upward from local school boards to large and professionalized state departments of education.[206] Equally important, Title I comprises a smaller share of education budgets today than forty years ago. As a result, Title I's marginal impact on state administrative capacity is much less now than it was in 1965. Moreover, the current statute authorizes states to devote a portion of Title I money to administration, evaluation, and technical assistance in order to enhance the efficacy of program funds.[207] These considerations tend to erode any justification for the state expenditure factor as a means of limiting Title I grants to what states can effectively use.

Nor is it convincing to suggest that the state expenditure factor reflects a policy of deference to diversity in educational approaches among the states. Of course, there is no single, optimal level of per-pupil spending given the many combinations of resources, accountability, choice, and other variables that potentially comprise an effective state education policy. At the margin, it may be unclear what difference an additional hundred dollars per pupil will make in a given state, and Congress may reasonably wish to encourage variation. But as Table 7 shows, the disparities in Title I allocations are not marginal but quite substantial. It is perverse to justify this scheme as a kind of national experiment to test whether low-spending states can educate poor children equally well with one-half or two-thirds of the resources available in high-spending states. Such inequality may spur innovation, but only with unacceptable risks. To my knowledge, the state expenditure factor has never been defended in these terms.

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205 An early advocate of strengthened educational policymaking at the state level was former Harvard president James Bryant Conant. *See generally* JAMES BRYANT CONANT, SHAPING EDUCATIONAL POLICY (1964). Conant's vision led to the formation in 1965 of the Education Commission of the States, a resource on legislation, research, and best practices for state policymakers.

206 *See* Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 872–75 (2006).

207 20 U.S.C. § 6304(a) (Supp. III 2003) (allowing states to reserve 1% of Title I funds or $400,000, whichever is greater, for administration); *see also id.* § 6303(a) (requiring states, beginning in 2004, to reserve 4% of Title I funds to implement "statewide system of technical assistance and support" for schools and school districts needing improvement).

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C. *From Equal Protection to National Citizenship*

Ultimately, the Title I formula and NCLB's state-centered approach to education standards seem best explained not by an instrumental policy objective, but instead by a normative perspective that treats intrastate inequality as problematic in a way that interstate inequality is not. Simply put, current federal policy reflects and reinforces the dominant constitutional paradigm for attacking educational inequality over the past fifty years. That paradigm is animated by the Fourteenth Amendment's mandate that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[208] Under this mandate and Section Five's assignment of enforcement authority to Congress,[209] inequality within states seems to implicate a federal responsibility that inequality between states does not. NCLB instantiates this notion of federal responsibility. In addressing intrastate disparities in educational opportunity, the statute may be understood as an effort by Congress to enforce the equal protection guarantee.[210] On this account, neither the Title I state expenditure factor nor the NCLB framework for state-based accountability seems objectionable. They simply direct federal energies toward the type of inequality to which our constitutional radar is most sensitized.

But the equal protection mandate is not the only guarantee of equality in the Fourteenth Amendment. As I have argued elsewhere, the first principle of equality in the Fourteenth Amendment is embedded in its opening declaration of national citizenship.[211] If the citizenship guarantee means full membership, equal standing, and effective participation in the national polity, then it cannot be squared with a federal education policy that relegates schoolchildren to the uneven distribution of opportunity resulting from highly varied state effort and fiscal capacity. We might reach a different conclusion if Congress, in the regular course of reauthorizing Title I, made a deter-

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208 U.S. CONST. amend. XIV, § 1.

209 *Id.* § 5.

210 This is notwithstanding the Court's holding in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), that such disparities do not violate the Equal Protection Clause. *Id.* at 55; *cf.* Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding congressional ban on literacy tests as proper enforcement legislation despite earlier Court decision upholding literacy tests against equal protection challenge); Post & Siegel, *supra* note 17, at 1966–71 (discussing institutionally differentiated roles of Congress and courts in enforcing Fourteenth Amendment guarantees). Formally, of course, Title I is a conditional grant program and thus an exercise of Congress's spending power, although this does not preclude the possibility that it may also be Section 5 legislation. *Cf.* Fullilove v. Klutznick, 448 U.S. 448, 476–78 (1980) (plurality opinion) (upholding application of minority set-aside to state and local grantees in federal contracting program as valid Section 5 and spending legislation).

211 Liu, *supra* note 12, at 334–35.

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mination every few years that the lowest-spending or lowest-performing states actually satisfy a nationally agreed-upon floor of educational adequacy for equal citizenship. But neither Congress nor its delegates in the executive branch (nor the federal courts for that matter) have ever made such a determination, nor have they ever developed or approved any nationally applicable criteria for evaluating educational adequacy.

Given this major shortcoming of federal policy, our current approach to education treats the nation's schoolchildren not as "citizens of the United States" but foremost as "citizens . . . of the State wherein they reside"—an improper inversion of the Fourteenth Amendment guarantee.[212] The main accomplishment of the Citizenship Clause, in addition to extending citizenship to black Americans, was to establish and elevate national citizenship over state citizenship and to place the essential attributes of national citizenship within the ambit of federal protection.[213] Yet despite the widely recognized importance of education to each individual and to the nation as a whole, we have no coherent national approach to education policy and no substantive floor of opportunity recognized as essential to securing equal national citizenship. I turn now to this longstanding gap in federal policy.

IV
ENSURING EDUCATIONAL ADEQUACY FOR EQUAL CITIZENSHIP

For the conscientious legislator seeking to ensure educational adequacy for equal citizenship, many policy approaches are theoretically possible. The options range from highly centralized approaches like a fully nationalized system of finance and administration, as in

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212 U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."). The inversion echoes the infamous misreading of the Citizenship Clause in the *Slaughter-House Cases*, 83 U.S. 36 (1873), where the Court, in a 5-4 decision with few contemporary defenders, rendered the guarantee of national citizenship and its "privileges" and "immunities" a virtual nullity. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 7-3, at 1303–11, § 7-6, at 1324 & n.17 (3d ed. 2000) (collecting criticisms of *Slaughter-House Cases*).

213 *See Slaughter-House Cases*, 83 U.S. at 94–95 (Field, J., dissenting); JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 71–93 (1951); Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3, 23–24 (1954); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 914–17 (1986).

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France and Japan,[214] to highly decentralized approaches like a national system of school vouchers, as in Chile and Sweden.[215] Such approaches, if properly designed, could squarely position the national government not merely as a facilitator of state-driven choices and ambitions, but as the ultimate guarantor of the educational opportunity necessary for every child to have equal standing as a full member and active participant in the national community. In enforcing the national citizenship guarantee, Congress has discretion to consider a wide range of policy options so long as it undertakes a genuinely rational process of legislative inquiry and judgment that results in affirmative steps to secure to all children a common baseline of educational opportunity for equal citizenship.[216]

In practical terms, however, neither a nationalized system of education nor a universal voucher system seems likely to be adopted in the United States. The only serious legislative proposal for nationalization that I have encountered was an 1870 bill to establish "national schools" run by the President and his appointees in states without an adequate system of common schools.[217] Although the bill spawned two decades of vigorous debate on the federal role in education, its heavy-handed approach gained few adherents during Reconstruction, and the idea has not been revived since. Likewise, although school vouchers have been a prominent topic of policy debate for many years,[218] the prospect of a well-regulated voucher system on a national

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214 *See* DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN'S GUIDE 14–17 (1995) (discussing national education policies of Japan and France, among other nations).

215 *See generally* Martin Carnoy, *National Voucher Plans in Chile and Sweden: Did Privatization Reforms Make for Better Education?*, 42 COMP. EDUC. REV. 309 (1998).

216 *See* Liu, *supra* note 12, at 399–401 (proposing requirement of "legislative rationality" in congressional enforcement of Citizenship Clause and distinguishing it from nominal rationality requirement in judicial doctrine of rational basis review).

217 *See* H.R. 1326, 41st Cong. (1870). For discussion of this bill and its role in Reconstruction-era thought on the federal role in public education, see LEE, *supra* note 19, at 29–55, and Liu, *supra* note 12, at 375–80.

218 At least since the 1960s, publicly funded school vouchers have been proposed by conservatives, *see* JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS 215–26 (1990); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 89–95 (1962), and by liberals, *see* JOHN E. COONS & STEPHEN D. SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL 2–3 (1978); Theodore R. Sizer & Philip Whitten, *A Proposal for a Poor Children's Bill of Rights*, PSYCHOL. TODAY, Aug. 1968, at 59, as a means to ensure a common baseline of educational opportunity for all children. Friedman, who objects to the government's monopoly position in running K–12 schools, nevertheless accepts that "both the imposition of a minimum required level of schooling and the financing of this schooling" by government are justified by the positive externalities from education's role in "promoting a stable and democratic society." FRIEDMAN, *supra*, at 86, 89. He argues that "[g]overnment could require a minimum level of schooling financed by giving parents vouchers redeemable for a specified maximum sum per child

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scale seems unlikely. As James Ryan and Michael Heise have observed, suburban resistance to school choice presents significant political obstacles to the expansion of vouchers, as evidenced by the limited success of such proposals in the political process.[219]

Far short of a radical reorganization of the education system, the options available to Congress include promising and viable reform possibilities that grow out of the current policy environment. Although current policies fail to effectuate the national citizenship guarantee, the basic elements of the contemporary standards-based reform movement may be adapted to securing a national floor of educational adequacy and thereby narrowing interstate disparities within an ongoing framework of cooperative federalism. In this Part, I propose two sensible and achievable policy initiatives to advance the goal of equal citizenship: establishing national education standards, and reforming and expanding the federal role in school finance.

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per year if spent on 'approved' educational services." *Id.* at 89; *cf.* Sizer & Whitten, *supra*, at 61 (proposing sliding-scale system with voucher amounts varying inversely with family income). Such proposals, implemented at a national level, are plausibly consistent with the national citizenship guarantee.

219 *See* James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2078–91 (2002). Publicly funded voucher programs exist in Milwaukee, Washington, D.C., and Ohio for students in low-income families or low-performing schools, and in Florida and Utah for students with disabilities. Altogether, these programs serve fewer than 50,000 students nationwide. *See* Alliance for Sch. Choice, School Choice Around the Nation, http://www.allianceforschoolchoice.org/school_choice_states.aspx (last visited Aug. 25, 2006). Colorado and Florida have also enacted small-scale voucher plans for students in low-performing schools, but the plans were invalidated under their state constitutions. *See* Owens v. Colo. Cong. of Teachers, Parents & Students, 92 P.3d 933, 935–36 (Colo. 2004); Bush v. Holmes, 919 So. 2d 392, 398 (Fla. 2006). Meanwhile, large-scale voucher proposals have been soundly rejected in ballot initiatives in California, Colorado, Michigan, and Washington. *See* TERRY M. MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC 359–69 (2001). In addition, such proposals have stalled in the legislative process in Florida, Indiana, Missouri, South Carolina, and Texas even after the Supreme Court upheld the constitutionality of vouchers in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). *See* Alan Richard, *School Choice Loses Legislative Momentum*, EDUC. WK., June 8, 2005, at 20.

According to some observers, Congress recently took a step toward a national voucher plan when it enacted the Hurricane Education Recovery Act, which provides Alabama, Louisiana, Mississippi, and Texas students displaced by Hurricanes Katrina and Rita with $6000 vouchers ($7500 for children with disabilities) redeemable at public and private schools in other states. *See* Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, § 107, 119 Stat. 2680, 2798–05 (2005); Meghan Clyne, *Bush to Sign 'Monumental' School Voucher Law*, N.Y. SUN, Dec. 30, 2005, at 1. Although the national portability and uniform amount of the vouchers are consistent with treating eligible students as "citizens of the United States," U.S. CONST. amend. XIV, § 1, voucher students are still educated to standards wholly defined by the state where they reside. Elsewhere, I have argued for the judicious use of school vouchers to promote educational equity while noting the inherent limits of this strategy. Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 795–96 (2005).

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A. Toward National Standards

If national citizenship is to have the same meaning from state to state, then the expectations we have of our education system should, in its broad outlines, also be consistent from state to state. This applies to standards for educational content (what students should know or be able to do) as well as standards for performance (how well students should know or be able to do it). A common understanding of the knowledge and abilities needed for full participation in our society would provide an essential framework for aligning disparate sites of educational policymaking, and it would focus the task of ameliorating interstate disparities on achieving a common substantive baseline of educational opportunity. In short, national standards are the most direct and fundamental expression of the principle of national citizenship in education policy.

The idea of national standards has been a significant, if contested, part of recent discourse on education reform, beginning with the 1983 report *A Nation at Risk*, which recommended a nationally uniform set of course requirements for high school graduation.[220] Although *A Nation at Risk* did not propose national content or performance standards, the idea was not far behind. Six years later, President George H.W. Bush convened state governors at an "education summit" in Charlottesville, Virginia, that resulted in the establishment of national education goals in 1990.[221] The following year, Congress established the National Council on Education Standards and Testing, a bipartisan group charged with studying the desirability and feasibility of national education standards and voluntary national tests.[222] In 1992, the Council released a report calling for the development of national standards and assessments in English, math, science, history, and geography, and for the creation of a federal entity to coordinate the effort and to certify standards and assessment criteria.[223] Around the same time, the Bush administration "awarded grants to groups of scholars and teachers to develop voluntary national standards" in

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220 NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 24–27 (1983).

221 MARIS A. VINOVSKIS, NAT'L EDUC. GOALS PANEL, THE ROAD TO CHARLOTTESVILLE: THE 1989 EDUCATION SUMMIT (1999); President George H.W. Bush, Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 129, 131 (Jan. 31, 1990); *see also* Chester E. Finn, Jr., *National Standards: A Plan for Consensus*, 91 TEACHERS COLL. REC. 3 (1989).

222 Education Council Act of 1991, Pub. L. No. 102-62, §§ 401–411, 105 Stat. 305, 314–18 (codified as amended at 20 U.S.C. §§ 1221–1222 (2000)).

223 NAT'L COUNCIL ON EDUC. STANDARDS & TESTING, RAISING STANDARDS FOR AMERICAN EDUCATION 21–26, 33–37 (1992).

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those subjects as well as the arts, civics, and foreign languages.[224] These initiatives informed legislation adopted in 1994 under President Clinton, called Goals 2000, which codified the national education goals created under President Bush, provided funding to states to develop academic content and performance standards, and authorized the establishment of a National Education Standards and Improvement Council (NESIC) to certify national standards that states may voluntarily adopt.[225]

These efforts abruptly fizzled in the heat of the 1994 midterm elections, when Republicans captured both houses of Congress on an anti–federal government platform emphasizing devolution of authority to the states. The political obstacles were compounded in the fall of 1994 by a controversy over proposed national history standards that, in the view of conservative and some moderate critics, unfairly cast the United States in a negative light, uncritically espoused multiculturalism, and gave insufficient attention to traditional white male heroes.[226] After a series of revisions, the standards were reissued two years later and praised by former critics as "rigorous, honest, and as nearly accurate as any group of historians could make them."[227] But in the wake of the 1994 events, President Clinton decided not to appoint anyone to NESIC, and the momentum behind national standards dissipated.[228] In 1996, the Republican Party platform proposed the termination of Goals 2000 and renewed President Reagan's call to abolish the federal Department of Education.[229]

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224 Diane Ravitch, *The Controversy over National History Standards*, *in* RECONSTRUCTING HISTORY: THE EMERGENCE OF A NEW HISTORICAL SOCIETY 242, 243 (Elizabeth Fox Genovese & Elisabeth Lasch-Quinn eds., 1999). Highly regarded national mathematics standards had already been published by the National Council of Teachers of Mathematics in 1989. RAVITCH, *supra* note 214, at 126–29.

225 *See* Goals 2000: Educate America Act, Pub. L. No. 103-227, §§ 102, 211–221, 108 Stat. 125, 139–51 (1994) (repealed 1996).

226 *See* Lynne V. Cheney, Editorial, *The End of History*, WALL ST. J., Oct. 20, 1994, at A22. The controversy is examined by historians John Patrick Diggins, Walter McDougall, Diane Ravitch, and Sean Wilentz in RECONSTRUCTING HISTORY, *supra* note 224, at 237–98, and by the leading individuals who drafted the standards in LINDA SYMCOX, WHOSE HISTORY? THE STRUGGLE FOR NATIONAL STANDARDS IN AMERICAN CLASSROOMS (2002), and Gary B. Nash, *The History Standards Controversy and Social History*, 29 J. SOC. HIST. (SUPPLEMENT) 39, 42–47 (1995).

227 Diane Ravitch & Arthur Schlesinger, Jr., *The New, Improved History Standards*, WALL ST. J., Apr. 3, 1996, at A14.

228 *See* Carol Innerst, *Riley Kills Panel of Overseers; Grass-Roots Objections to Federal School Standards Prevail*, WASH. TIMES, Mar. 14, 1995, at A11.

229 *See Excerpts from the Platform Adopted Yesterday by the Republican National Convention*, N.Y. TIMES, Aug. 13, 1996, at A12.

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However, the story of education policy over the past half-century has primarily been one of increasing centralization.[230] From today's vantage point, the education politics of the mid-1990s, far from inciting a countermovement in favor of state authority, have the semblance of a last gasp before the consolidation of a new paradigm. The 1994 reauthorization of the Elementary and Secondary Education Act expanded the federal role in standards-based reform by requiring states, as a condition of Title I funding, to establish content and performance standards as well as assessments aligned to those standards by 2000–01.[231] Continuing on the same path, President George W. Bush won passage of the No Child Left Behind Act in 2001 (again reauthorizing the Elementary and Secondary Education Act) with a wide bipartisan consensus in both houses of Congress.[232] Despite its many shortcomings, the 670-page statute is a remarkable testament to the political will for a substantial federal role in public education. Whether that political will can be sustained and harnessed to a renewed effort to establish national standards is a key question in the current policy environment.[233]

While there are many ways national standards could evolve from the NCLB framework, federal leadership will be required.[234] One proposal, put forward by President Bush in crafting NCLB but omitted from the final legislation, is to alter the existing balance of policy incentives by holding states accountable for progress not only on their own assessments but also on federally mandated NAEP tests. The President's approach would financially reward states that narrow achievement gaps and show overall gains on state assessments, but

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230 *See* Carl F. Kaestle & Marshall S. Smith, *The Federal Role in Elementary and Secondary Education, 1940–1980*, 52 HARV. EDUC. REV. 384 (1982); Erik W. Robelen, *40 Years After ESEA, Federal Role in Schools is Broader than Ever*, EDUC. WK., Apr. 13, 2005, at 1.

231 Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 1111(b), 108 Stat. 3518, 3523–25 (codified as amended in scattered sections of 20 U.S.C.).

232 *See* Elisabeth Bumiller, *Focusing on Home Front, Bush Signs Education Bill*, N.Y. TIMES, Jan. 9, 2002, at A16.

233 For thoughtful commentary urging revision of NCLB to establish national standards, see CHESTER E. FINN, JR. ET AL., THOMAS B. FORDHAM FOUND., TO DREAM THE IMPOSSIBLE DREAM: FOUR APPROACHES TO NATIONAL STANDARDS AND TESTS FOR AMERICA'S SCHOOLS 35–37 (2006), *available at* http://edexcellence.net/doc/National%20Standards%20Final%20PDF.pdf; William J. Bennett & Rod Paige, Editorial, *Why We Need a National School Test*, WASH. POST, Sept. 21, 2006, at A25; Robert Gordon, *The Federalism Debate: Why the Idea of National Education Standards Is Crossing Party Lines*, EDUC. WK., Mar. 15, 2006, at 48; Diane Ravitch, *Every State Left Behind*, N.Y. TIMES, Nov. 7, 2005, at A23. For an earlier skeptical view on the potential of national standards to improve public education, see Linda Darling-Hammond, *National Standards and Assessments: Will They Improve Education?*, 102 AM. J. EDUC. 478 (1994).

234 As I argued earlier, national standards are unlikely to evolve informally from competition among states to raise NAEP scores. *See supra* notes 176–80 and accompanying text.

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only if the gains are confirmed by state NAEP results. Conversely, the Secretary of Education would be authorized to reduce administrative funds for states that failed to make progress based on state assessments and confirmed by NAEP.[235]

Although this proposal raises technical questions as to how NAEP may be used to "confirm" state test scores, testing experts have indicated that the hurdles are surmountable.[236] The thornier issue is whether using NAEP even for mild forms of state accountability would unduly politicize the test or threaten its integrity. Although it is unlikely that states would teach to the test since it is taken by only a small sample of students, the concern is that using NAEP to confirm state assessment results would heighten attention to what content NAEP covers and how test items are developed. By law, NAEP's governing board uses a "national consensus approach" involving teachers, principals, curriculum specialists, and members of the public to decide what knowledge will be tested.[237] In addition, the board must "ensure that all [test] items . . . are free from racial, cultural, gender, or regional bias and are secular, neutral, and non-ideological."[238] It is easy to imagine how achieving consensus and neutrality would become more difficult if state rewards and penalties turned on test results. The mere perception of politics in NAEP testing could undermine public confidence in its longstanding role as an objective measure of student achievement.

Instead of a system of state standards and national assessments, the better alternative in the near term would be a system of *national* standards and *state* assessments. This would combine the idea of a common core of knowledge and abilities essential for full membership and participation in society with state and local flexibility to design curriculum, instruction, and assessment geared toward the common core. Although a state-by-state approach to assessment might produce some inefficiency and undue variation,[239] it would cultivate state

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235 *See* Lynn Olson, *Experts Preach Caution on Use of 'Precious' NAEP*, EDUC. WK., Mar. 14, 2001, at 1.

236 *See* NAT'L ASSESSMENT GOVERNING BD., USING THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS TO CONFIRM STATE TEST RESULTS 13–14 (2002), *available at* http://www.nagb.org/pubs/color_document.pdf.

237 20 U.S.C. § 9622(e)(2)(A)–(B) (Supp. III 2003); *see id.* § 9621(e)(1)(D) (requiring "process of review" assessment by community members).

238 *Id.* § 9621(e)(4).

239 *Cf.* RAVITCH, *supra* note 214, at 158 ("There will be no way to know whether performance standards and assessments are comparable and equally challenging in the fifty states."); Gordon, *supra* note 233, at 35 (arguing that money that states currently "spen[d] on variations of the same test" could be used to "fund a single set of national tests far better than any we now have"). *But cf.* Millicent Lawton, *States Set to Examine How to Make Testing Nationally Comparable*, EDUC. WK., Jan. 21, 1998, at 7 (describing voluntary

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buy-in and support for national standards without the fractious and entangling politics of national testing.[240] A national assessment system could emerge as a viable option in the future,[241] but this seems unlikely unless a majority of states first comes to accept and operationalize the idea of national standards on its own.

Importantly, national standards do not mean *federal* standards or a national *curriculum*. Congress has long abandoned any ambition to nationalize education,[242] and since 1970 it has expressly prohibited the federal government from dictating what schools should teach, how they should teach, or what materials they should use.[243] Consistent with this prohibition, national content and performance standards should be developed by the states themselves[244] or by nongovernmental entities, such as universities, professional teacher organizations (e.g., National Council of Teachers of Mathematics), and the National Academy of Sciences, through a public process of inquiry and refinement that involves scholars, teachers, curriculum specialists, and, importantly, parents and ordinary citizens.[245] We already have exam-

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state efforts to enhance comparability of state tests in absence of national examination system). Short of creating national tests, one way to reduce the current cost of state assessments would be to amend NCLB to require biennial instead of annual testing from grades three through eight. *See* Sam Dillon, *U.S. Is Sued by Connecticut over Mandates on School Tests*, N.Y. TIMES, Aug. 23, 2005, at B1.

240 Early in his second term, President Clinton called for voluntary national tests in reading and math but faced stiff resistance from conservatives wary of federal control over the curriculum and from liberals concerned that the tests would be used to disadvantage poor and minority students. *See* Christopher Edley, Jr., *Education Reform in Context: Research, Politics, and Civil Rights*, *in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL 123, 126–29 (Timothy Ready et al. eds., 2002) (examining civil rights concerns about national tests); Eric Pianin, *Deal on National Testing Crumbles Under Pressure; Proposal Sharply Criticized by Conservatives*, WASH. POST, Oct. 31, 1997, at A16 (discussing conservative opposition to national tests). In retrospect, the proposal for voluntary national tests seemed premature as states were then only beginning to solidify their own standards and assessments, and no groundwork had been laid for national standards after the demise of NESIC.

241 *Cf.* THOMAS TOCH, MARGINS OF ERROR: THE EDUCATION TESTING INDUSTRY IN THE NO CHILD LEFT BEHIND ERA 21 (2006) (urging federal government to fund collaboration among states toward efficient development of common assessments, leading to "a single national testing system").

242 *See supra* note 217 and accompanying text.

243 *See* 20 U.S.C. §§ 1232a, 3403(b) (2000).

244 A prominent current effort in this vein is the American Diploma Project, launched in 2004 by the educational nonprofit organization Achieve. *See* ACHIEVE, INC., AMERICAN DIPLOMA PROJECT NETWORK, PREPARING TODAY'S HIGH SCHOOL STUDENTS FOR TOMORROW'S OPPORTUNITIES (2006), *available at* http://www.achieve.org/files/ADPNetworkbrochure.pdf; Lynn Olson, *States Acting to Raise Bar on H.S. Skills*, EDUC. WK., Feb. 22, 2006, at 1.

245 Reviewing the controversy over proposed history standards, Professor Ravitch cautions that the standard-setting process should include not only subject-matter experts but also "a significant representation of public members from the very beginning," including

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ples of national standards in a variety of subjects,[246] and the best ones show that it is possible to distill essential concepts, skills, and principles without being overly prescriptive as to how they should be taught or assessed. While the content of a given subject can be organized, presented, and evaluated in many different ways—with different materials and different emphases based on local interests, concerns, and resources—national standards would provide consistent criteria for maintaining the rigor and coherence of diverse educational practices.[247]

To encourage states voluntarily to implement national standards, it is worth revisiting the road paved but not traveled just over a decade ago. The Goals 2000 legislation contemplated that an independent federal entity, NESIC, would enhance the legitimacy and visibility of nongovernmentally-developed content and performance standards through a voluntary process of certification. Certification would hinge on whether the proposed standards "are internationally competitive and comparable to the best in the world," "reflect the best available knowledge about how all students learn and about how the content area can be most effectively taught," and "have been developed through an open and public process" involving a wide range of constituencies.[248] Once certified, national standards in a given subject would provide a model for states to emulate or adopt. NESIC was also authorized to certify content and performance stan-

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"journalists, civic leaders, legislators, parents, and others," to ensure that the standards "pass[ ] the 'barbershop test' before [being] released to the public." Ravitch, *supra* note 224, at 251–52. This is also the lesson learned from the national English standards proposed in 1996 by the National Council of Teachers of English and the International Reading Association, which have been characterized as "[r]ich in professional jargon but poor in specific guidance about what students of English should know and be able to do." Diane Ravitch, *50 States, 50 Standards? The Continuing Need for National Voluntary Standards in Education*, BROOKINGS REV., Summer 1996, at 6, 7. The standards were also criticized by the *New York Times* as written "in a tongue barely recognizable as English," Editorial, *How Not to Write English*, N.Y. TIMES, Mar. 14, 1996, at A22.

246 *E.g.*, CTR. FOR CIVIC EDUC., NATIONAL STANDARDS FOR CIVICS AND GOVERNMENT (1994); NAT'L CTR. FOR HIST. IN SCH., UCLA, NATIONAL STANDARDS FOR HISTORY (1996); NAT'L COUNCIL OF TEACHERS OF MATHEMATICS, PRINCIPLES AND STANDARDS FOR SCHOOL MATHEMATICS (2000); NAT'L RESEARCH COUNCIL, NATIONAL SCIENCE EDUCATION STANDARDS (1996). Most of these standards were developed under U.S. Department of Education grants awarded at the end of the first Bush administration and continued under President Clinton. *Cf supra* note 240. Although generally well-regarded, the standards have had limited influence on policy because the demise of NESIC "left no avenue for sober public evaluation" of the standards and "no external agency" to review and certify their quality. Ravitch, *supra* note 224, at 248.

247 *See* RAVITCH, *supra* note 214, at 12–13, 25–27; Marshall S. Smith & Jennifer O'Day, *Systemic School Reform*, 1990 POLITICS OF EDUC. ASS'N Y.B. 233, 247–49, 260.

248 Goals 2000: Educate America Act, Pub. L. No. 103-227, § 213(a)(2)(B)(i)–(iii), 108 Stat. 125, 143 (1994) (repealed 1996).

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dards voluntarily submitted by states "if such standards are comparable or higher in rigor and quality" to certified national standards.[249] In addition, states could seek certification of assessments that are aligned to certified state standards and that meet technical requirements for validity and reliability.

By making certification voluntary at all levels, Goals 2000 envisioned a federal role that would be only as expansive as states and nongovernmental groups allowed it to be. At the same time, the federal role could have become quite significant if the certification process had sufficient quality, integrity, and visibility to stimulate healthy competition among states in a race to the academic top. The success of such a design depends on the political independence, broad-based legitimacy, and sound judgment of the certifying entity, as well as on public understanding of the certification process and its educational significance. For guidance in developing a credible process, the certifying entity might look to well-respected programs that maintain rigorous academic criteria across subject areas, such as the College Board's Advanced Placement program, the International Baccalaureate program, and the certification program of the National Board for Professional Teaching Standards.

Although this certification scheme stalled during the mid-1990s, there are two reasons why it may be reinvigorated in coming years. First, the notion of standards has achieved an increasing measure of familiarity and acceptance (even if grudging in some quarters) among policymakers, school officials, and the public.[250] While fewer than half of all states had content and performance standards in math, science, and English language arts in 1994, today nearly all states have adopted a system of statewide standards in these core subjects, though

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249 *Id.* § 213(b), 108 Stat. at 143.

250 *See* BRYAN GOODWIN, MID-CONTINENT RESEARCH FOR EDUC. & LEARNING, DIGGING DEEPER: WHERE DOES THE PUBLIC STAND ON STANDARDS-BASED EDUCATION? 3 (2003) (concluding based on opinion polls and focus groups that "most people see standards and testing as a common sense measure to improve student learning" despite "widespread reservations about judging schools or students based upon a single measure"); Diane Ravitch, *National Standards: '50 Standards for 50 States' Is a Formula for Incoherence and Obfuscation*, EDUC. WK., Jan. 5, 2006, at 54, 56 ("The No Child Left Behind law should be seen as an important transitional step toward [national standards], by demonstrating the rationale for and the benefits of standards-based education, especially for disadvantaged students, and by building a constituency for change."). State courts have also added legitimacy to standards by invoking them as benchmarks for educational adequacy under state constitutions. *See, e.g.*, Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 734–35 (Idaho 1993); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1186 (Kan. 1994); Abbott v. Burke, 693 A.2d 417, 428 (N.J. 1997); Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 381–83 (N.C. 2004).

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of varying quality.[251] There are legitimate concerns that standards-based assessment and accountability measures may unduly narrow curriculum and instruction or improperly penalize schools, teachers, and students.[252] But there is also encouraging, if preliminary, evidence that an aligned system of standards, assessment, and accountability can usefully focus instruction and resources on improving student achievement.[253] Having invested more than a decade in this path of reform, neither the federal government nor the states are likely to abandon it soon. They are more likely to work within the reform paradigm to improve the balance between centralization and flexibility, and between motivating and punishing schools. In this policy environment, upgrading state standards to meet national standards for certification would build on familiar principles and processes. Instead of a new direction in education policy, it would be an evolutionary next step.

Second, ongoing implementation of the current incarnation of standards-based reform will increasingly reveal the incongruity between the aspiration of high standards for all children and the reality of unfettered state-based standard setting. If all goes according to plan under NCLB (an unrealistic assumption, to be sure), then all states in the year 2014 will declare 100% of their students "proficient" based on state standards, even though interstate disparities measured by NAEP will likely remain as wide as they are today. As the inherent limitations of a fifty-state approach to ensuring equal opportunity and closing national achievement gaps become more evident, Congress will have the opportunity and duty to encourage states to adopt or emulate rigorous national standards. A voluntary certification process would give national standards a concrete expression in

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251 *See* EDUC. COMM'N OF STATES, ECS REPORT TO THE NATION: STATE IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT 2–3 (2004); ELEMENTARY AND SECONDARY EDUC. DIV., U.S. DEP'T OF EDUC., MAPPING OUT THE NATIONAL ASSESSMENT OF TITLE I: THE INTERIM REPORT 21–22 (1996) [hereinafter TITLE I INTERIM REPORT]; KLEIN ET AL., *supra* note 111; PROMISING RESULTS, *supra* note 192, at 41–42; STOTSKY, *supra* note 111.

252 *See, e.g.*, Linda McNeil & Angela Valenzuela, *The Harmful Impact of the TAAS System of Testing in Texas: Beneath the Accountability Rhetoric*, *in* RAISING STANDARDS OR RAISING BARRIERS? INEQUALITY AND HIGH-STAKES TESTING IN PUBLIC EDUCATION 127, 129–30 (Gary Orfield & Mindy L. Kornhaber eds., 2001); Deborah Meier, *Educating a Democracy*, *in* WILL STANDARDS SAVE PUBLIC EDUCATION? 3, 4–5 (Joshua Cohen & Joel Rogers eds., 2000); Sam Dillon, *Schools Cut Back Subjects to Push Reading and Math*, N.Y. TIMES, Mar. 26, 2006, at A1.

253 *See, e.g.*, JOAN BOYKOFF BARON, NAT'L EDUC. GOALS PANEL, EXPLORING HIGH AND IMPROVING READING ACHIEVEMENT IN CONNECTICUT 24–29 (1999); CTR. ON EDUC. POLICY, FROM THE CAPITAL TO THE CLASSROOM: YEAR 3 OF THE NO CHILD LEFT BEHIND ACT 2–3, 11–18, 31 (2005); DAVID GRISSMER & ANN FLANAGAN, NAT'L EDUC. GOALS PANEL, EXPLORING RAPID ACHIEVEMENT GAINS IN NORTH CAROLINA AND TEXAS, at i (1998).

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public policy while stopping short of a federal mandate. Properly implemented, it would provide a focal point for public understanding of and demand for high standards that states would find difficult to ignore.

In hindsight, it was perhaps too much to expect that Goals 2000 could accomplish in one fell swoop what now seems more realistically achieved through a progressive evolution of the federal role. Yet even as a federal system of voluntary certification can help channel public support for national standards and encourage improvements on paper, few states are likely to avail themselves of the certification process absent new resources to enrich educational offerings on the ground. Assuming that NCLB's basic approach to accountability prevails, getting states to embrace public demand for upgrading standards will require that school finance, not just educational expectations, also reflect a stronger national approach. Just as a patchwork of state standards offers little guidance for educating a national citizenry, a patchwork of state funding practices reflecting disparate levels of fiscal capacity and effort cannot effectively support ambitious national education goals. Narrowing those disparities ought to be a central focus of the federal role in school finance.

B. Reforming the Federal Role in School Finance

There are many possible ways to structure education funding to reflect a federal commitment to securing national citizenship. Instead of proposing a precise formula, my aim here is to elaborate key principles to guide policy design. Most importantly, federal aid should work to reduce not only intrastate but also interstate inequality, and toward that end, the federal role in school finance should be significantly expanded. I begin with a discussion of general principles for structuring federal aid and then sketch the outlines of a national foundation plan to ensure educational adequacy for equal citizenship.

1. Principles for Federal Education Aid

As explained in Part III, the largest stream of federal education aid, Title I, is best understood as a program of *intra*state equalization. Because low-income children face greater hurdles to achieving equal citizenship than their more advantaged peers in every state, Congress should continue to target education aid within each state to the highest-poverty districts and schools. *Across* states, however, federal aid should also work to reduce inequality, not reinforce it as Title I currently does. This can be achieved with the following four guideposts for policy design.

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First, because interstate differences in education funding primarily reflect interstate differences in fiscal capacity, the distribution of federal aid should compensate for differences across states in their ability to support education. Narrowing such differences is a school finance role that only the federal government can fulfill, and it is the key reform that would orient the federal role toward treating the nation's schoolchildren as equal members of a single political community.

Second, in aiding states with low education spending, federal policy should distinguish between low fiscal capacity and low effort. Where low spending is due to low effort, the primary federal role should be to motivate states toward greater effort. Similarly, the federal government should ensure that states receiving increased federal aid do not reduce their effort or use federal money to supplant state or local funds. The reality is that, even in a system with an expanded federal role, states and local jurisdictions will continue to bear most of the burden for school finance. Because a fully federalized finance system is neither realistic nor desirable, narrowing interstate disparities will require a progressive distribution of federal aid that is layered on top of a commitment by each state to do its fair share.

Third, federal aid should take into account geographic differences in educational costs. Because educational purchasing power varies significantly among states and within states, the efficacy of federal aid in reducing real differences in opportunity requires that cost differences be part of the equation.

Finally, federal aid will not go far toward reducing interstate disparities or motivating states to adopt high standards so long as it constitutes only 8% of the national education budget. There is growing evidence that the ambitions of the standards-based reform movement demand significantly more resources than what is being committed today. The assessment and accountability mandates of NCLB as well as educational adequacy litigation in state courts have spawned a rich collection of studies estimating the cost of educating students to specific standards of academic proficiency.[254] Though imperfect in many ways, these cost studies by different researchers using different meth-

[254] *See, e.g.*, State v. Campbell County Sch. Dist., 19 P.3d 518, 526–27 (Wyo. 2001) (reviewing Wyoming cost study); JAY G. CHAMBERS ET AL., AM. INST. FOR RESEARCH, THE NEW YORK ADEQUACY STUDY: DETERMINING THE COST OF PROVIDING ALL CHILDREN IN NEW YORK AN ADEQUATE EDUCATION (2004); WILLIAM DRISCOLL & HOWARD FLEETER, LEVIN, DRISCOLL & FLEETER, PROJECTED COSTS OF IMPLEMENTING THE FEDERAL "NO CHILD LEFT BEHIND ACT" IN OHIO (2003); Jennifer Imazeki & Andrew Reschovsky, *Is No Child Left Behind an Un (or Under) funded Federal Mandate? Evidence from Texas*, 57 NAT'L TAX J. 571 (2004); William J. Mathis, *No Child Left Behind: Costs and Benefits*, 84 PHI DELTA KAPPAN 679, 680–82, 686 & nn.10–24 (2003) (summarizing

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odologies have consistently found that base per-pupil spending and compensatory spending for children with special needs must increase substantially if all students are to meet current state standards—which is to say nothing of the cost of upgrading state standards where they lag behind national standards and enabling students, especially in the poorest states, to attain equal citizenship on par with their peers across the nation.

Because the federal government has assumed a leading role in standards-based reform, it is fair to expect increased federal responsibility for the associated costs. Indeed, the systemic reach of NCLB reforms imposed as conditions of Title I funding suggests the need to rethink the federal role in education finance. Whereas Title I was once limited programmatically to remedial instruction for poor children,[255] it is today a vehicle for promoting a far-reaching education reform agenda. In order to receive Title I money, each state is required to adopt standards that apply to all of its schools and students, not only those with Title I aid.[256] Similarly, states must test all students, not just those in Title I–funded schools, and report results for all schools and students in the manner prescribed by the statute.[257] Although the interventions triggered by failure to meet annual progress goals apply only to schools and districts receiving Title I funds, states are nevertheless required to implement "a single, statewide . . . accountability system" that is "the same accountability system the State uses for all public elementary schools and secondary schools or all [districts] in the State."[258] Moreover, states must ensure that all students reach proficiency on state assessments by 2013–14[259] and that all public school teachers must have met statutory qualifications by 2005–06.[260]

Although targeting aid to high-poverty schools remains an important federal objective, the *systemic* ambitions of the NCLB reform agenda point to the need for a broader federal role in school funding. The need is especially acute if states are to maintain high standards. Given interstate disparities in fiscal capacity, a high national standard of educational adequacy cannot be achieved without an equalizing

studies in Indiana, Maryland, Montana, Nebraska, New Hampshire, New York, South Carolina, Texas, Vermont, and Wisconsin).

255 *See* TITLE I INTERIM REPORT, *supra* note 251, at 29 (describing widespread use of "pull-out" programs for Title I children focused on "drill and practice to reinforce basic skills" until early 1990s).

256 20 U.S.C. § 6311(b)(1)(B) (Supp. III 2003).

257 *Id.* § 6311(b)(3)(C)(i), (xii).

258 *Id.* § 6311(b)(2)(A).

259 *Id.* § 6311(b)(2)(F).

260 *Id.* § 6319(a)(2).

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foundation of federal aid—that is, a program of federal aid that assures each state an adequate floor of funding per weighted pupil. As Allan Odden and Lori Kim observed at the start of the current reform movement, "some type of nationwide base per-pupil spending level is the logical school finance policy for the implementation of national education goals, especially since spending differs across states and spending differences are correlated with a variety of student outcomes."[261]

In sum, the federal role in school finance, in addition to targeting aid to districts and schools with the greatest needs within each state, should (a) promote interstate equality by compensating for interstate disparities in fiscal capacity, (b) motivate states to exert reasonable effort in support of their schools, (c) adjust federal aid for geographic cost differences, and (d) provide a foundation of aid substantial enough to enable even the poorest states to educate their children to national standards.

2. *Policy Recommendations*

With these principles in mind, I conclude by offering two recommendations for reshaping federal education aid. One is a modest proposal to reform Title I. The other is a more ambitious proposal to subsume Title I within a larger national program of foundation aid that would guarantee each state, whatever its fiscal capacity, a minimum level of educational resources per weighted pupil.

a. Reforming Title I

Title I is anomalous among the major categorical programs of federal education aid in that it treats eligible children as state citizens, not national citizens, in allocating funds. As explained in Part III, the state expenditure factor in the Title I formula reinforces interstate inequality and has no persuasive justification. It should be eliminated. This reform would bring Title I into line with the aid formulas for special education, English language instruction, and child nutrition, all of which assign equal weight to eligible children regardless of the state where they reside.[262] There is no reason why the federal government's relationship to poor children should differ from its relationship to children with disabilities or children who are English language

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[261] Allan R. Odden & Lori Kim, *Reducing Disparities Across the States: A New Federal Role in School Finance*, *in* RETHINKING SCHOOL FINANCE: AN AGENDA FOR THE 1990s, at 260, 291 (Allan R. Odden ed., 1992).

[262] 20 U.S.C. § 6821(c)(3)(A) (Supp. III 2003) (allocation formula for English language instruction); *supra* note 184 (allocation formulas for special education and child nutrition).

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learners. Federal education policy should treat all of them as national citizens of equal standing.

In lieu of the state expenditure factor, the Title I formula should simply allocate aid in proportion to each state's share of poor children, while incorporating a cost factor to adjust for geographic differences in educational costs.[263] Nonpartisan research on cost adjustment commissioned by the National Center for Education Statistics should be updated regularly and used for this purpose.[264] Politically, it is worth noting that, while eliminating the state expenditure factor would shift money from high-spending states to low-spending states, replacing it with a cost factor would soften the effect since high-spending states have relatively high costs. Overall, this reform would maintain a federal role in enhancing equality of opportunity within states while reducing inequality across states to the extent that disadvantaged children live disproportionately in low-spending states.

Nevertheless, the effect of this reform on interstate inequality would be modest because Title I would continue to provide only a thin layer of federal categorical aid on top of large interstate disparities in nonfederal education revenue. Any serious effort to reduce interstate inequality must directly address the wide variation in state effort and fiscal capacity. This can be done through a national program of foundation aid.

b. Creating a National Foundation Plan

Although creating a national foundation aid plan would require substantial innovation in the federal role, the ambition is not without precedent.[265] During the 1940s and 1950s, Congress considered a raft of bills pushed by the National Education Association to establish a

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263 *See* RIDDLE & APLING, *supra* note 189, at 16 (suggesting replacement of state expenditure factor with different expenditure factor, such as average teacher salaries or teacher cost index).

264 *See supra* note 77 (noting that Chambers' GCEI, though fairly stable from year to year, has not been updated since 1993–94). Data permitting, cost adjustments should also be applied to district-level allocations within states.

265 After Reconstruction, the earliest proposals for general federal aid were several bills backed by the National Education Association in the late 1910s and early 1920s, *see* CUBBERLEY, *supra* note 26, at 740–41, and another set of bills proposed in the 1930s after President Hoover's National Advisory Committee on Education recommended a federal program of general aid, *see* FEDERAL RELATIONS TO EDUCATION: REPORT OF THE NATIONAL ADVISORY COMMITTEE ON EDUCATION 38 (1931); CHARLES A. QUATTLEBAUM, FEDERAL AID TO ELEMENTARY AND SECONDARY EDUCATION 42–43 (1948); *see also* PAUL R. MORT ET AL., COLUMBIA UNIV., FEDERAL SUPPORT FOR PUBLIC EDUCATION 18–43 (1936) (outlining plan for national minimum foundation program).

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national foundation aid plan, some of which nearly passed.[266] In the 1970s, President Nixon considered an enlarged federal role in school finance to ease the burden of rising property taxes, although his blue-ribbon Commission on School Finance ultimately recommended that local tax relief occur through increased state funding.[267] Historically, proposals to expand federal aid have been accompanied by a commitment to preserve state and local control of education policy.[268] Today, the worry that increased federal aid will provide a wedge for eroding state or local control seems misplaced if only because the federal regulatory role has *already* become a dominant element of the policy landscape. Given the systemic reach of NCLB and the plausible evolution of federal policy toward national standards, a national foundation aid program seems overdue. Its purpose would be to complement and sustain the current path of standards-based reform, not to facilitate radically different forms of federal control.

There are many ways to design a foundation program that compensates for interstate disparities in fiscal capacity.[269] One possibility is a modified form of "power equalizing" whereby the federal govern-

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[266] *See* BUTTS & CREMIN, *supra* note 31, at 534–38; QUATTLEBAUM, *supra* note 265, at 43–59; SIDNEY W. TIEDT, THE ROLE OF THE FEDERAL GOVERNMENT IN EDUCATION 26–29 (1966). A $300 million national minimum foundation program sponsored by Senators Robert Taft of Ohio and Elbert Thomas of Utah passed the Senate in 1948 and again in 1949 but foundered in the House on the question of aid to religious schools. *See* BUTTS & CREMIN, *supra* note 31, at 535–36. In 1959, the House and Senate passed a bill by Senators James Murray and Lee Metcalf, both of Montana, proposing over $1 billion annually in federal aid, but the House failed to appoint a conference committee to reconcile the House and Senate versions. *See* TIEDT, *supra*, at 29. Recent proposals to consolidate federal categorical aid programs into block grants, *see, e.g.*, Education Flexibility Partnership Act of 1999, 20 U.S.C. §§ 5891a–5891b (2000), should not be likened to foundation aid proposals such as the Taft-Thomas and Murray-Metcalf bills. The main thrust of block grant proposals is to increase state flexibility in the use of federal funds (an interest also served by foundation aid proposals), not to ensure that all states have a minimum level of educational resources.

[267] PRESIDENT'S COMM'N ON SCH. FIN., *supra* note 161, at 36–37. Nevertheless, President Nixon's interest put the issue of greater federalization of school finance on the national agenda. *See, e.g.*, Lawrence L. Brown, III & Alan L. Ginsburg, *A Federal Role in the General Program of School Finance*, *in* THE FEDERAL INTEREST IN FINANCING SCHOOLING 119 (Michael Timpane ed., 1978); John J. Callahan, *The Case for Full Federal Funding of Education*, 63 CURRENT HIST. 76 (1972).

[268] *See, e.g.*, BUTTS & CREMIN, *supra* note 31, at 535 (observing that in 1945 National Education Association and American Council on Education "deplored centralization of *control* of education by the federal government and pointed to its dangers" but argued that "the federal government should aid the states to achieve a minimum . . . quality of education" with grants based on "wealth, ability to tax, and need"); President Richard M. Nixon, Annual Message to Congress on the State of the Union, 1 PUB. PAPERS 41, 68 (January 20, 1972) (urging reform in school finance but promising "no compromise" on local control of schools).

[269] For some alternatives, see Brown & Ginsburg, *supra* note 267, at 135–41; Odden & Kim, *supra* note 261, at 290–91; and Sugarman, *supra* note 158, at 93–99.

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ment would guarantee each state a minimum amount per weighted pupil for a given level of state effort.[270] For example, the government could assure each state an amount per weighted pupil at least equal to what the state would have raised had it applied its tax effort against the average fiscal capacity among all states. For poorer states, whose actual revenue at a given level of effort is less than the guaranteed amount, federal aid would make up the difference. Richer states whose actual revenue exceeds the guaranteed amount would retain their revenue but would receive no aid. Under this scheme, federal aid would boost the fiscal capacity of poorer states while leaving wealthier states to their superior means, thereby narrowing (though not eliminating) interstate inequality. Moreover, by treating *weighted* pupils as the unit of analysis, the funding scheme integrates the compensatory thrust of categorical aid like Title I.

This type of program is a step in the right direction, although three modifications are warranted. First, if an important objective is to establish a national foundation of aid, then the program must specify a minimum level of effort that participating states must meet. Without a minimum effort level, a poor state choosing low taxes could fall below a national standard of adequacy even with federal aid. The foundation program should not function as insurance against state indifference. Instead, it should serve as a framework for state and federal cooperation toward ensuring educational adequacy. For every state exerting at least the minimum effort, the federal government would guarantee a foundation level of spending per weighted pupil.[271] Although a state conceivably could refuse to make the required minimum effort, any serious program of national foundation aid would necessarily involve large sums of federal money that states would find difficult to forgo.

Second, although it would be equitable to limit federal aid to low-capacity states, a power-equalizing foundation program is unlikely to succeed politically unless it spreads federal aid widely so that every

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[270] *See* JOHN E. COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION 33–35, 255–56 (1970). Although "state effort" is actually a composite of different local and state tax efforts in any given state, I treat it here as a unitary concept on the assumption that each state has ultimate control of its school finance system and can raise or lower its overall effort through mechanisms of state law.

[271] Because some states with high fiscal capacity will already meet or exceed the foundation level with less than the minimum effort, the requirement would apply only to states spending below the foundation level. For states already above the foundation level, the "maintenance of effort" requirement in federal law would apply to ensure that federal aid supplements rather than supplants state and local funding. *See* 20 U.S.C. § 7901 (Supp. III 2003).

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state receives some.[272] Instead of offering no aid to wealthier states that already exceed the federally guaranteed amount at any given effort level, a better approach would be a graduated system that provides some aid to every state. One example of this approach is the variable "federal medical assistance percentage" used by Medicaid. Under Medicaid, the federal government matches state spending on health-related services for low-income people at a rate that is different for each state depending on the square of the ratio of its per capita income to national per capita income.[273] States with lower per capita income have a higher federal matching rate, and states with higher per capita income have a lower matching rate, with all rates bounded by a minimum of 50% and a maximum of 83%.[274]

An analogous "federal educational assistance percentage" could be created to provide foundation aid to public schools. For each state at or above a minimum effort level, the federal government would match its cost-adjusted education spending per weighted pupil at a rate that takes into account the state's fiscal capacity relative to the average fiscal capacity among all states. Fiscal capacity would be measured by a state's total taxable resources adjusted for geographic cost differences and then divided by its weighted pupil count. For poorer states, the federal matching rate would be higher and, for the poorest states, high enough to ensure an educationally adequate foundation. For wealthier states, the matching rate would be lower and, for the wealthiest states, bounded by a politically acceptable minimum (say, 4%). To be sure, graduating the system in this way attenuates the program's interstate equalizing effect, making each increment of equalization more expensive. But a program benefiting all states is more apt to garner political support and to be sustained in the long run.

Third, the federal aid program will not serve the goal of educational adequacy for equal citizenship unless it furthers not only interstate but also intrastate equality. If we wish to ensure a foundation level of resources per weighted pupil, it makes little sense to allow states to channel large portions of federal aid toward the most advantaged districts or the most advantaged students. To participate

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[272] *See* Brown & Ginsburg, *supra* note 267, at 140 ("A politically acceptable equalization program . . . would have to assure some federal aid to everyone.").

[273] 42 U.S.C. § 1396d(b) (2000) (defining "federal medical assistance percentage"). The federal aid formulas for foster care, adoption assistance, and the Children's Health Insurance Program also use the federal matching rate under Medicaid. *See id.* § 674(a)(1) (foster care); *id.* § 674(a)(2) (adoption); *id.* § 1397ee(a)(1) (children's health assistance). In addition, federal aid for technical and vocational education is allocated to states in inverse proportion to per capita income. *See* 20 U.S.C. § 2321(c)(1) (2000).

[274] 42 U.S.C. § 1396d(b)(1).

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in the program, each state should be required to use federal aid not only to bring all districts up to at least the foundation level[275] but also to narrow both interdistrict and intradistrict resource disparities.[276] One approach would be to require each state to use federal aid to reduce its coefficient of interdistrict variation by a minimum percentage, while offering small increases in the federal matching rate to states that reduce interdistrict disparities by more than the minimum percentage.[277] This requirement of intrastate equalization would drive federal aid to the neediest districts and schools within each state, thereby subsuming the objectives of Title I. To enhance continuity with Title I, the program could specify that intrastate allocations in accordance with the current district- and school-level allocation formulas of Title I would presumptively satisfy the intrastate equalization requirement.[278]

In sketching the basic contours of a national foundation program, I recognize that, in the hands of Congress, all of the parameters—pupil weights, cost adjustments, minimum state effort, federal matching rate, and the foundation level itself—would be informed by a complex mix of research, expert judgment, and politics. The practical balance of benefits and burdens is as important as any distributive principle in determining the shape of a viable program. Nevertheless, as long as public demand for high standards can be sustained, and as we learn more from cost studies about current shortcomings in financing a truly adequate education, the case for a robust

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275 It may not be realistic to expect the poorest states to bring *all* of their districts up to the national foundation level, for if federal aid is calibrated to provide those states with average per-pupil spending just equal to the foundation level, then they would have to eliminate *all* interdistrict disparities in order to ensure that every district spends at the foundation level. Some flexibility in the requirement for the poorest states seems warranted.

276 Because wealthy, high-spending states may not need to use all of their federal aid to bring their lowest-spending districts up to the foundation level, this additional requirement is necessary to prevent those states from channeling the rest of the aid disproportionately toward already advantaged districts and schools.

277 An example of a federal aid formula that rewards states that narrow interdistrict disparities measured by the coefficient of variation is the Education Finance Incentive Grant program under Title I. *See* 20 U.S.C. § 6337 (Supp. III 2003). Although on the books since the 1994 reauthorization of the Elementary and Secondary Education Act, the program was not funded by Congress until 2002. *See* E-mail from Thomas Corwin, Deputy Assistant Sec'y, Office of Elementary and Secondary Educ., U.S. Dep't of Educ., to author (Sept. 13, 2004) (on file with the *New York University Law Review*).

278 District-level allocations could follow one or a combination of three Title I formulas that, to varying degrees, tie aid levels to district poverty concentration. *See* 20 U.S.C. § 6333 (Supp. III 2003) (basic grants); *id.* § 6334 (concentration grants); *id.* § 6335 (targeted grants). For Title I school-level allocations, see *id.* § 6313.

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federal role in narrowing interstate disparities and ensuring a national foundation level of resources will remain strong.

To gauge the potential impact of this reform, I compared the interstate equalizing effect of federal education aid in 2002–03 with the effect of a program with the following parameters:

i. *Foundation guarantee.* The program assures every state at least $6500 in cost-adjusted revenue per weighted pupil, an amount that Congress has hypothetically determined, based on the best available evidence, to be a reasonable estimate of the cost of adequate educational opportunity for equal citizenship.

ii. *Minimum state effort.* As a condition of federal aid, each state with nonfederal per-pupil revenue below $6500 must devote (a) at least 3.25% of its total taxable resources to education or (b) the level of effort necessary to produce the $6500 foundation level, whichever is less. In other words, a state is ineligible for federal aid if it has not made sufficient effort to bring its per-pupil revenue up to the foundation level.

iii. *Federal matching rate.* Each state's nonfederal revenue is matched by federal aid at a rate inversely proportional to the ratio of the state's fiscal capacity to the national average.

iv. *Minimum matching rate.* The minimum federal matching rate is set at 4%, a figure hypothetically judged by Congress to be high enough to garner support for the program from relatively wealthy states.

Table 8 simulates the results of this program. Column A shows cost-adjusted revenue per weighted pupil from all sources for each state in 2002–03, and Column B shows cost-adjusted revenue per weighted pupil from nonfederal sources.[279] Column C shows per-pupil revenue after applying the minimum effort requirement to states in Column B below the $6500 foundation.[280] Column D lists the fed-

[279] The revenue data are from U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES 2003, at 1 tbl.1 (2005). The data are adjusted for geographic costs and pupil weighted using the method discussed at notes 74–82 *supra* and accompanying text. Pupil weighting is based on data in NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2004 tbl.37 (2005), http://nces.ed.gov/programs/digest/d04/tables/dt04_037.asp (fall 2002 enrollment); *id.* at tbl.54 (number of children six to twenty-one years old served under Part B of Individuals with Disabilities Education Act in 2002–03 by state); NCELA, *supra* note 82 (LEP enrollment data for 2002–03 by state); and U.S. Census Bureau, American Community Survey: Percent of Related Children Under 18 Years Below Poverty Level in the Past 12 Months (2002), http://www.census.gov/acs/www/Products/Ranking/2002/R11T040.htm (child poverty rates for 2002 by state).

[280] Eight states in 2002–03 (Arizona, Florida, Kentucky, Nevada, North Carolina, South Dakota, Tennessee, and Washington) had cost-adjusted nonfederal revenue per weighted pupil below $6500 and state effort below 3.25% based on nonfederal education revenue as a percentage of TTR. *See* TOTAL TAXABLE RESOURCES, *supra* note 153. Five of the states

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eral matching rate for each state according to a formula that increases the rate as state fiscal capacity decreases, with a minimum rate of 4%.[281] Column E applies the matching rates to the figures in Column C to produce the total cost-adjusted revenue per weighted pupil for each state under the program.[282] The enrollment-weighted coefficient of interstate variation is shown at the bottom of the columns.

As the matching rates in Column D indicate, the simulated national foundation plan disproportionately benefits states with relatively low fiscal capacity that have exerted at least the minimum effort, such as Alabama, California, Idaho, Montana, New Mexico, and Oklahoma. The plan is less generous toward states with relatively high fiscal capacity, including not only states with historically high education spending, such as Connecticut, Massachusetts, and New York, but also states whose low education revenue is largely due to low effort, such as Florida, Nevada, North Carolina, and South Dakota. The plan thus ensures a base level of per-pupil funding by directing substantial aid to poorer states, where additional money is likely to yield the greatest educational dividends,[283] while encouraging wealthier states to do their fair share.

The parameters of the federal matching rate, foundation amount, and minimum level of state effort can be adjusted to produce greater or lesser degrees of interstate equalization. The main point is that the program in its essentials is structured to deliver far more equality of opportunity across states than does current federal policy. The program simulated in Column E would have narrowed interstate inequality in per-pupil revenue by nearly one-third (32%) at a cost of $43.5 billion in 2002–03.[284] By comparison, actual federal education

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(all but Arizona, Kentucky, and Tennessee) could have produced the $6500 foundation with less than 3.25% effort.

281 Similar to the Medicaid formula, the federal matching rate here can take the general form $R_S = 1 - X^*(C_S / C_{AVG})^Y$, where R_S is the federal matching rate for state S, C_S is the cost-adjusted fiscal capacity per weighted pupil of state S, C_{AVG} is the average fiscal capacity of all states, and X and Y are constants that can be adjusted to produce greater or lesser degrees of interstate equalization. In Column D of Table 8, I have set $X = 0.95$ and $Y = 1$, with R_S having a minimum value of 0.04. Column F uses the same values of X and Y but sets no minimum for R_S.

282 For any state whose matching rate is insufficient to produce per-pupil revenue of $6500, the program contributes additional federal aid to ensure the foundation level. In Columns E and G, this is the case for Arizona and Utah.

283 *See supra* notes 117–35 and accompanying text.

284 I computed the 32% figure by comparing the enrollment-weighted coefficient of interstate variation in cost-adjusted revenue per weighted pupil in Column B (16.5) with the coefficient in Column E (11.2). The $43.5 billion total is derived by subtracting the values in Column B from those in Column E to yield cost-adjusted federal aid per weighted pupil for each state, and then converting the cost- and need-adjusted aid into

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revenue in 2002–03 totaled $36.8 billion and reduced the coefficient of interstate variation by only 12%.[285]

If Congress were to adopt this national foundation plan as a major reform and expansion of Title I, it would require approximately $30 billion in new money above the $13 billion currently spent under Title I.[286] Large as this increase may seem, it is consistent with other estimates of the cost of a national foundation plan,[287] and the federal share of the national education budget would still be less than 15%.[288] Moreover, a significant component of the $43.5 billion estimate in Table 8 is attributable to the 4% minimum federal matching rate. As Columns F and G show, the plan without any minimum would have produced an even greater degree of interstate equalization (a 37% reduction in the coefficient of variation) at a lesser cost ($37.2 billion) in 2002–03, although only thirty states—perhaps too few for an effective political majority—would have received significant federal aid.[289]

Finally, a fair assessment of the magnitude of new education spending must take into account the social and economic costs of educational inadequacy.[290] Increases in schooling have long been associ-

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unadjusted amounts, multiplying the unadjusted per-pupil federal aid for each state by its fall 2002 enrollment, and summing across all states.

285 The 12% figure is derived by comparing the coefficients of variation in Column B (16.5) and Column A (14.6). The $36.8 billion total is from U.S. CENSUS BUREAU, *supra* note 279, at 1 tbl.1.

286 *See* U.S. DEP'T OF EDUC., SUMMARY OF DISCRETIONARY FUNDS, FISCAL YEARS 2001–2007 (2006), http://www.ed.gov/about/overview/budget/budget07/summary/appendix1.pdf. The $30 billion estimate assumes that the current $13 billion in Title I spending would go into the foundation plan and leaves untouched all non–Title I elementary and secondary education aid (roughly $25 billion in 2005–06). Because non–Title I aid tends to be equalizing across states, *see supra* text accompanying note 184, the total federal role would reduce interstate inequality even more than the national foundation plan alone.

287 *See* Rothstein, *supra* note 11, at 63 (estimating that over $20 billion would have been required in 1996 (doubling federal K–12 spending) to bring per-pupil spending in all states up to national average); Odden & Kim, *supra* note 261, at 291 (arguing that "20 percent federal/80 percent state and local division does not seem to be unreasonable" for funding national foundation program).

288 In 2002–03, an additional $30 billion in federal aid would have increased total education revenue to $470 billion while raising the federal share to $66.8 billion, or 14% of the total. *See* U.S. CENSUS BUREAU, *supra* note 279, at 1 tbl.1.

289 Without the 4% minimum, the coefficient of variation in 2002–03 would have dropped from 16.5 in Column B to 10.4 in Column G, but eighteen states would have received no federal aid and two would have received less than $100 per pupil. *Cf.* GRISSMER ET AL., *supra* note 117, at 93 ("Targeting appears to be perhaps the most important variable for achieving efficiency [in educational resources], but the most efficient targeting is often impossible in the political process.").

290 *See id.* at 86–87 (cost-effectiveness of K–12 expenditures must account for effects on wages, delinquency, and government spending on social programs); THE SOCIAL BENEFITS OF EDUCATION (Jere R. Behrman & Nevzer Stacey eds., 1997) (addressing benefits of education beyond economic effects); *see also* Campaign for Educational Equity, Fall 2005

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TABLE 8: COST-ADJUSTED REVENUE PER WEIGHTED PUPIL UNDER HYPOTHETICAL NATIONAL FOUNDATION PLAN, 2002–03

	A	B	C	D	E	F	G
	Total revenue	Nonfederal revenue	Nonfederal revenue (min effort)	Federal match % (min 4%)	Total revenue under plan (min 4%)	Federal match % (no min)	Total revenue under plan (no min)
Alabama	$6,296	$5,608	$5,608	*19.3*	$6,690	*19.3*	$6,690
Alaska	6,996	5,723	5,723	*27.5*	7,299	*27.5*	7,299
Arizona	5,615	4,974	5,278	*22.2*	6,500	*22.2*	6,500
Arkansas	6,596	5,820	5,820	*22.0*	7,101	*22.0*	7,101
California	6,560	5,904	5,904	*20.8*	7,130	*20.8*	7,130
Colorado	7,147	6,690	6,690	*4.0*	6,958	*0.0*	6,690
Connecticut	8,895	8,439	8,439	*4.0*	8,776	*0.0*	8,439
Delaware	8,478	7,832	7,832	*4.0*	8,146	*0.0*	7,832
Florida	6,393	5,753	6,500	*4.0*	6,760	*3.9*	6,754
Georgia	8,014	7,391	7,391	*7.2*	7,922	*7.2*	7,922
Hawaii	9,445	8,671	8,671	*4.0*	9,018	*0.0*	8,671
Idaho	6,155	5,562	5,562	*24.3*	6,914	*24.3*	6,914
Illinois	7,202	6,591	6,591	*4.0*	6,854	*3.2*	6,803
Indiana	6,959	6,452	6,452	*5.0*	6,772	*5.0*	6,772
Iowa	8,166	7,576	7,576	*4.0*	7,879	*0.0*	7,576
Kansas	7,982	7,371	7,371	*4.0*	7,666	*3.2*	7,605
Kentucky	6,670	5,980	5,999	*11.5*	6,690	*11.5*	6,690
Louisiana	6,571	5,684	5,684	*19.8*	6,808	*19.8*	6,808
Maine	8,361	7,702	7,702	*15.0*	8,855	*15.0*	8,855
Maryland	8,346	7,797	7,797	*4.0*	8,109	*0.0*	7,797
Massachusetts	8,228	7,718	7,718	*4.0*	8,026	*0.0*	7,718
Michigan	8,134	7,512	7,512	*17.4*	8,818	*17.4*	8,818
Minnesota	8,355	7,884	7,884	*4.0*	8,199	*0.0*	7,884
Mississippi	5,941	5,060	5,060	*31.4*	6,651	*31.4*	6,651
Missouri	7,030	6,509	6,509	*6.9*	6,958	*6.9*	6,958
Montana	7,140	6,115	6,115	*22.4*	7,482	*22.4*	7,482
Nebraska	8,297	7,561	7,561	*4.0*	7,863	*0.0*	7,561
Nevada	6,450	6,004	6,500	*4.0*	6,760	*0.0*	6,500
New Hampshire	7,678	7,280	7,280	*4.0*	7,571	*0.0*	7,280
New Jersey	10,002	9,585	9,585	*4.0*	9,968	*0.0*	9,585
New Mexico	6,621	5,654	5,654	*29.0*	7,292	*29.0*	7,292
New York	9,385	8,743	8,743	*4.0*	9,093	*0.0*	8,743
North Carolina	6,490	5,907	6,500	*4.0*	6,760	*0.0*	6,500
North Dakota	7,887	6,705	6,705	*4.0*	6,973	*1.2*	6,785
Ohio	8,068	7,570	7,570	*7.3*	8,120	*7.3*	8,120
Oklahoma	6,240	5,445	5,445	*28.4*	6,991	*28.4*	6,991
Oregon	6,939	6,322	6,322	*7.8*	6,814	*7.8*	6,814
Pennsylvania	8,350	7,721	7,721	*4.0*	8,030	*0.0*	7,721
Rhode Island	7,691	7,204	7,204	*6.6*	7,677	*6.6*	7,677
South Carolina	7,264	6,582	6,582	*17.6*	7,739	*17.6*	7,739
South Dakota	7,365	6,229	6,500	*4.0*	6,760	*0.0*	6,500
Tennessee	5,723	5,140	6,240	*6.6*	6,654	*6.6*	6,654
Texas	6,942	6,275	6,275	*22.7*	7,701	*22.7*	7,701
Utah	5,171	4,698	4,698	*33.4*	6,500	*33.4*	6,500
Vermont	9,735	9,043	9,043	*6.9*	9,667	*6.9*	9,667
Virginia	7,515	7,007	7,007	*4.0*	7,287	*0.0*	7,007
Washington	6,765	6,209	6,500	*4.0*	6,760	*3.9*	6,753
West Virginia	7,631	6,813	6,813	*21.7*	8,290	*21.7*	8,290
Wisconsin	8,712	8,189	8,189	*4.0*	8,517	*0.5*	8,227
Wyoming	9,902	9,033	9,033	*4.0*	9,394	*0.0*	9,033
Weighted COV	14.6	16.5	15.2		11.2		10.4

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ated with reduced crime, incarceration, and related costs,[291] and with greater political participation and likelihood of voting.[292] Educational attainment is also positively associated with lower utilization of public health insurance, cash assistance, food stamps, and public assistance.[293] And Princeton economist Cecilia Rouse has recently concluded that annual losses in federal and state income taxes due to high-school noncompletion, aggregated over all working age adults, "likely exceed $50 billion—enough to cover the annual discretionary expenditures of the U.S. Department of Education."[294] A thorough accounting of returns to education is necessary to properly evaluate the cost of expanding the federal role in school finance.[295]

CONCLUSION

To be sure, the shortcomings of American public education are too complex and multifaceted to be remedied by simply "throwing money at the problem." The national foundation plan I propose must grow out of, and bear a reasonable empirical relationship to, national

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Symposium on the "Social Costs of Inadequate Education," http://www.tc.columbia.edu/centers/EquitySymposium/symposium/resource.asp (last visited Oct. 7, 2006).

[291] *See* Enrico Moretti, Does Education Reduce Participation in Criminal Activities? 8 (Oct. 24–25, 2005) (unpublished manuscript, *available at* http://devweb.tc.columbia.edu/manager/symposium/Files/74_Moretti_Symp.pdf) ("[T]he social benefits of a one percent increase in male U.S. high school graduation rates (from reduced crime alone) would have amounted to $1.4 billion.").

[292] *See* Jane Junn, The Political Costs of Unequal Education 5 (Oct. 24–25, 2005) (unpublished manuscript, *available at* http://devweb.tc.columbia.edu/manager/symposium/Files/73_junn_paper.ed.pdf) (reporting "a remarkably consistent pattern of a strong, positive and mostly linear relationship between educational attainment and voting").

[293] *See* Peter Muennig, Health Returns to Education Interventions 17 (Oct. 24–25, 2005) (unpublished manuscript, *available at* http://devweb.tc.columbia.edu/manager/symposium/Files/81_Muennig_paper.ed.pdf) ("Aggregated over a lifetime, a conservative valuation of the health losses associated with the 600,000 18-year-olds who failed to graduate from high school in 2004 is $57.9 billion . . . ."); Jane Waldfogel et al., Public Assistance Programs: How Much Could Be Saved with Improved Education? 15 (Oct. 24–25, 2005) (unpublished manuscript, *available at* http://devweb.tc.columbia.edu/manager/symposium/Files/79_waldfogel_paper.ed.pdf) (reporting rough estimate of $7.9 billion to $10.8 billion in annual savings on federal welfare, food stamps, and housing assistance if all single mothers who are dropouts were to graduate from high school and if one-third were to go beyond high school education).

[294] Cecilia Elena Rouse, The Labor Market Consequences of an Inadequate Education 24 (Oct. 24–25, 2005) (unpublished manuscript, *available at* http://devweb.tc.columbia.edu/manager/symposium/Files/77_Rouse_paper.pdf).

[295] Such inquiry might lead to comparative cost-benefit analysis of social interventions outside of public education that produce educational dividends. For example, Richard Rothstein has argued that narrowing income inequality, providing stable housing, and ensuring access to quality health care and early childhood programs might have equal or even greater impact on educational outcomes than conventional school reforms. RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP 37–50, 133–42 (2004).

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standards that lend coherence and strategic direction to education policy in the area of school finance and beyond. In addition, such reforms must be nested within ongoing efforts to improve the accountability and efficiency of public education. In recent years, scholars have sought to determine the key conditions of governance, choice, and competition that promote effective use of school resources,[296] and the issues call for sustained attention. Moreover, beyond these systemic concerns, districts and schools need concrete solutions to intensely practical challenges, such as how to provide teachers with sufficient time and professional development to align their knowledge and practice with higher standards, and how to implement and refine best practices for improving the performance of the most disadvantaged students. Given this context, the ideas presented here are not intended to be panaceas. To be effective, they must leverage and integrate other reform agendas in the policy environment.

At the same time, however, it is difficult to believe that our gaping interstate disparities in educational standards and resources have little or no bearing on unequal opportunity and outcomes. From a policy perspective, the problem is one that only the federal government can meaningfully address. From a constitutional perspective, the existing interstate patchwork fails to comport with the guarantee of national citizenship, and current federal policies do not reflect a reasonable approach to congressional enforcement of the guarantee. This predicament underscores the need for a national commitment to educational adequacy for equal citizenship. The most promising means of instantiating this commitment, I have argued, is to extend and build upon recent standards-based reforms within a framework of cooperative federalism.

This agenda for the future inherits the ambitions of the past. As I have explained elsewhere, the goal of educational adequacy for equal citizenship was once a major focus of legislative constitutionalism that sought to fulfill the new promises of nationhood.[297] The political alignment necessary to address the problem of interstate inequality is similar now to what it was then. It must bring together Southern

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[296] *See, e.g.*, OUCHI & SEGAL, *supra* note 5 (urging decentralized management systems that devolve budget and personnel authority to school principals while holding them accountable for school performance); SCHOOL ACCOUNTABILITY (Williamson M. Evers & Herbert J. Walberg eds., 2002) (discussing features of effective accountability systems); Grubb, *supra* note 136 (proposing new focus on "effective resources" instead of dollars in school finance); Caroline M. Hoxby, *Does Competition Among Public Schools Benefit Students and Taxpayers?*, 90 AM. ECON. REV. 1209 (2000) (finding that metropolitan areas with more choice among school districts have better public schools and less private schooling).

[297] *See* Liu, *supra* note 12.

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moderates who see the benefits of federal assistance outweighing the threat to states' rights with Northern liberals who support a fairer distribution of the nation's wealth. Today the coalition might also include legislators from the West and Southwest, where high poverty and immigration have produced formidable educational challenges. The viability of any reform will of course depend on the balance of winners and losers. But ultimately, for the conscientious legislator, the motivation to alter the current balance will come at least in part from a commitment to the constitutional guarantee of national citizenship.

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