

No Freedom in a Ship of Fools: A Democratic Justification for the Common Core State Standards and Federal Involvement in K-12 Education

*Neelam Takhar**

I. INTRODUCTION: EDUCATION AS AN AMERICAN VALUE

Education in America is unique in that it promises not only to prepare one for their station in life, but also to be the vehicle through which a student transforms him or herself. Following exposure to new and contradictory ideas, theories, concepts and values, a student can only evolve into a more enlightened and empowered thinker. At its best, this is the outcome that education should strive for and achieve.¹

The value of universally accessible public education was fully recognized for the first time in *Brown v. Board of Education*, when the United States Supreme Court declared that equal education equates to equal opportunity, and an equal chance at success in life:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later

*Executive Notes Editor, Volume 26; J.D. Candidate, 2015, University of California Hastings College of the Law; B.A., 2012, International Relations: World Trade and Development, minor in Managerial Economics, University of California, Davis. My deepest gratitude goes to the staff of the *Hastings Women's Law Journal* for their invaluable comments and editorial assistance. Additional thanks go to Professor Lois Schwartz for providing much needed inspiration and guidance; Nimarta Grewal for her equity-minded perspective and expertise; and to my parents, Sunita Takhar (a veteran teacher of the public school system) and Cal Takhar, for their infinite patience and support.

1. The value of my education to me personally is priceless. It has opened windows in my mind, and doors in my life, and the significance of the educational opportunities I have had is not lost on me. Although lucky myself to have had access to quality education; as I advanced through my studies, I grew more and more disturbed by the obvious inequalities in our public school system, beginning with K-12 education.

professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.²

While *Brown v. Board of Education* removed one obvious barrier to equal education opportunities—that of racially segregated education—it left in place another: the obstacle faced by poor school districts that wish to provide an education to their students ‘on equal terms’ relative to the education offered by wealthier school districts.”³

Though policy talk about public education at the kindergarten through twelfth grade (“K-12”) level has ebbed and flowed throughout the entire history of the United States, certain goals recur.⁴ These recurring ideals are that public education should serve *all* children, amalgamate different segments of society, and provide means for social and economic mobility.⁵ It should also prepare children to be participating citizens in our democracy⁶ and train students to earn a successful living in their futures.⁷ Many considerations exist in achieving these goals, including the purpose and quality of teachers; controversy over standardized testing; character education; state and local tension; the scale of class size, school and district; and many, many more.⁸ The exact formula for success is reexamined and renegotiated by each generation.⁹

Although the “motivations for education equity include lofty, romantic ideals of equality and excellence[,] [t]he actual machinery of education equity in any particular state . . . relies on the decidedly unromantic processes of taxes, district boundary lines, state constitutional provisions, and legislative appropriation and redistribution of wealth.”¹⁰

The new Common Core State Standards, launched in 2009, are a single set of uniform educational standards for kindergarten through twelfth grade in English, language arts, and mathematics that states may voluntarily

2. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

3. Jeffery S. Sutton, *San Antonio School District v. Rodriguez and its Aftermath*, 94 VA. L. REV. 1963, 1963 (2008).

4. DAVID TYACK, *SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY* 1 (2003).

5. PATRICIA L. DE COS, *CALIFORNIA'S PUBLIC SCHOOLS: WHAT EXPERTS SAY ABOUT THEIR MISSION AND FUNCTIONS* 3 (2001), available at <https://www.library.ca.gov/crb/01/01/01-001.pdf> (emphasis added).

6. See TYACK, *supra* note 4, at 1 (Our founding fathers firmly believed that our fledgling nation would only survive if its citizens were properly educated.).

7. DE COS, *supra* note 5, at 3.

8. *Id.* at 13–19.

9. TYACK, *supra* note 4, at 2.

10. Steven J. Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 612 (1999).

adopt.¹¹ The standards involve many of these motivational factors, and strive to positively affect the future of education by increasing equity, opportunity, and mobility for students throughout the country. In this paper, I look back at the history of governmental authority and public school financing in K-12 education, and then analyze the role of the new Common Core State Standards Initiative in education equity going forward.

In Part II, I describe the structure of government authority—local, state, and federal—over elementary and secondary public schools. Within the discussion of state authority, I explain how public schools are financed in this country, using California as an example. In Part III, I describe chronologically the major pieces of federal education legislation, from the Elementary and Secondary Education Act (“ESEA”),¹² to the No Child Left Behind (“NCLB”) Act,¹³ and finally the Race To The Top (“RTTT”).¹⁴ In Part IV, I unpack the Common Core State Standards (“CCSS”) Initiative, ultimately arguing that with careful implementation, the CCSS will increase chances for educational equity that is essential to any democracy, and that federal oversight of education standards is long overdue.

II. REGULATING PUBLIC SCHOOLS: ALLOCATION OF AUTHORITY TO LOCAL, STATE, AND FEDERAL GOVERNMENT

American parents place great value on the importance of educating children, and have made calculated choices for generations about where to send their child to school, whether it is a private school, public school, charter school or homeschool.¹⁵ For better or worse, the public school education system itself has become something of a marketplace for parents.¹⁶ Some schools have more resources and better test scores, which correlate with higher property values in the surrounding area; while some schools have few resources to offer students, correlating with low property values in the surrounding areas.¹⁷ It can be extremely confusing for parents, citizens, and taxpayers to comprehend which aspects of government control local schools. Simultaneously, a local school district may pass a parcel tax, a state government set standards, and the federal

11. *Frequently Asked Questions*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/wp-content/uploads/FAQs.pdf> (last visited Feb. 3, 2015); see also *Development Process*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/about-the-standards/development-process/> (last visited Feb. 23, 2015).

12. Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301–7491 (2002).

13. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–7941 (2002).

14. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

15. TYACK, *supra* note 4, at 159.

16. *Id.* (“[F]or every person who sees choice as the doorway to efficiency and equity, there are opponents who see it as a slippery slope for the public schools.”)

17. *Id.*

government offer funding, leaving the uninformed consumer with questions about who really is (or should be) in charge. The U.S. Constitution and sources of funding for public schools are two factors that begin the conversation—and debate—over how educational authority is allocated among local, state, and federal actors.

A. EARLY BEGINNINGS: LOCAL AUTHORITY OVER PUBLIC SCHOOLS

Historically, the local level of control has been at the “heart of the U.S. education system at the primary and secondary levels.”¹⁸ During the seventeenth century, before the U.S. was even an independent nation, early colonial leaders required townships to fund and operate schools, largely as religious endeavors.¹⁹ However, the colonies were geographically, ethnically, and religiously diverse.²⁰ New York, for example, consisted of a diverse population of Quakers, Lutherans, Catholics, and German and other immigrants.²¹ To accommodate the diversity in early American colonies and to allow each community the freedom to educate their children about their own customs, culture, and religion, schools were controlled by local entities like parent groups or churches.²² By the late eighteenth century, the foundations of public education were strongly rooted in locally run programs.²³

Throughout the next century the beginnings of an American education system developed in a steady but disorganized fashion.²⁴ The distinctions between church and school, and private and nonpublic institutions, were unclear and hybrid establishments were common—philanthropic institutions ran schools for the poor, elite private academies catered to wealthy children, and apprenticeships prepared students to learn a craft.²⁵ Classrooms were often comprised of students ranging in age from five to twenty, teachers were not required to have any standard formalized training, and there were no official standards to offer guidelines on what should be taught.²⁶ Meaningful support for public education did not begin until the Civil War.²⁷ Finally, in the nineteenth century, American education made the slow transition from a

18. U.S. Dep't of Educ. Int'l Affairs Office, U.S. Network for Education Information, *Organization of U.S. Education: The Local Role*, U.S. NETWORK FOR EDUCATION INFORMATION (Feb. 2008), available at <https://www2.ed.gov/about/offices/list/ous/international/usnei/us/local.doc>.

19. Ted Brackemyre, *Education to the Masses: The Rise of Public Education in Early America*, U.S. HISTORY SCENE, Aug. 9, 2012, <http://www.ushistoryscene.com/uncategorized/riseofpubliceducation/>.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. TYACK, *supra* note 4, at 164.

26. Brackemyre, *supra* note 19.

27. JAMES W. FRASER, *BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN A MULTICULTURAL AMERICA* 24 (1st ed. 1999).

private affair to public availability in the “Common School Period,” when new waves of immigrants and population growth forced the nation to take greater notice of the country’s inconsistent education system.²⁸ Horace Mann, a Massachusetts Senator at the forefront of the movement, introduced and implemented ideas inspired by a model he observed in Prussia: placing students into grades based on age and ability, creating a network of well trained teachers, and securing tax funding for public schools.²⁹

The concept of local control in primary and secondary education remains strong today. States are divided up into local school districts, of which there are over 14,000 in the country.³⁰ School boards comprised of elected citizens govern these districts, exercising oversight of operations, budgets, and staff, and overseeing local school curricula.³¹ These school boards also manage district operations by hiring professional district superintendents and administrative staff.³² Local education agencies supervise and serve public schools in local cities, districts and counties.³³ Local communities develop their own educational policies, hire professional teaching staff, and raise money to pay for schools through local property taxes and special bond issues, or parcel taxes.³⁴ These local property taxes often make up a significant portion of a school’s budget, and the amount raised by each community varies drastically. In California, local property taxes still comprise almost a third of schools’ overall budgets.³⁵

Nevertheless, the influence of local school authorities on school policy is waning for several reasons. Federal legislation targeting school policies has increased; judicial involvement—particularly school finance litigation—has contributed to a more uniform system of control; and

28. Brackemyre, *supra* note 19.

29. *Id.* See also, FRASER *supra* note 27, at 25–40 (for more about Horace Mann’s Common School movement, and the transition from private to public education in America); TYACK, *supra* note 4 at 164–72 (for a discussion of the connection between choosing common schools, and the democratic underpinnings of our nation).

30. U.S. Dep’t of Educ. Int’l Affairs Office, *supra* note 18.

31. *Id.*

32. *Id.*

33. Brackemyre, *supra* note 19. *Race to the Top District Competition Draft*, U.S. DEP’T OF EDUC., <http://www.ed.gov/race-top/district-competition/definitions> (last visited Mar. 2, 2015); *Local Educational Agency Plan*, CAL. DEP’T OF EDUC., <http://www.cde.ca.gov/nclb/sr/le/> (last visited Mar. 2, 2015).

34. Brackemyre, *supra* note 19; U.S. Dep’t of Educ. Int’l Affairs Office, *supra* note 18.

35. Jonathan Kaplan, *How Do California Schools Get and Spend Their Money?*, CALIFORNIA BUDGET PROJECT (May 2012), available at http://www.cbpp.org/pdfs/2012/120523_Education_Funding_PB.pdf. In 2013, the California funding system changed significantly to allocate more money to disadvantaged students. Despite this change, a large share of almost one-third of the total budget still comes from local taxes, not state funding. *California Upends School Funding to Give Poor Kids a Boost*, NPR (Aug. 19, 2013) <http://www.npr.org/2013/08/19/212294111/california-upends-school-funding-to-give-poor-kids-a-boost>; *Education Budget – CalEdFacts*, CAL. DEP’T OF EDUC., <http://www.cde.ca.gov/fg/fr/eb/cefedbudget.asp> (last visited Mar. 2, 2015).

today's highly technological society diminishes the desirability of specialized education customized to a local population's religion, class, values, or immigrant demographic.³⁶ Beyond being simply undesirable, specialized narrow education can only be a disadvantage in modern society. A student only given some pieces of a puzzle is not prepared to reach their full potential, and is not experiencing the tremendous learning that occurs from wide exposure to ideas. Perhaps as a reflection of these times,³⁷ states are adopting more and more uniform learning objectives, to provide a challenging education to all American children, regardless of background.³⁸ An example of the shift of involvement of local government in education can be seen in Tennessee, where specifics like textbook choice, method of instruction, and lesson plans are left up to local teachers and principals so long as they relate to statewide goals and state-mandated curriculum.³⁹ As states adopt uniform learning objectives, this standardizes the types of decisions that local officials and teachers make, which explains why local districts' decisions are beginning to look more and more uniform.⁴⁰

B. SHIFT TO THE STATES: STATE AUTHORITY OVER PUBLIC SCHOOLS

As the Common School movement gained momentum, the locus of control shifted from local to state.⁴¹ Senator Horace Mann fought to create a board of education in Massachusetts, and the state adopted a standardized system of education in the 1840s.⁴² Mann's successful reforms were widely favored, and other states quickly followed suit.⁴³ Today, governance of education at the state level is established in the State Constitution of all but one state, either explicitly or implicitly.⁴⁴ Due to the

36. Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 131–32 (2006).

37. Also due to federal involvement and public support for more centralized education. Kimberly Jenkins Robinson, *The Case for A Collaborative Enforcement Model for A Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1658 (2007).

38. Heise, *supra* note 36, at 131–32.

39. *The Common Core State Standards: History and Fact Sheet*, TENN. DEP'T OF EDUC. 1, http://www.tn.gov/sbe/FAQ_Page/Common_Core_Facts_History.pdf (last visited Mar. 31, 2015) (explaining that in Tennessee, the state sets many guidelines for local districts—especially curricular decisions.)

40. *Id.* at 1.

41. Brackemyre, *supra* note 19.

42. *Id.*

43. *Id.*

44. The one exception is Iowa. See ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. V, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1, cl. a; MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art.

nuanced nature of each state's exact system and laws, for the sake of simplicity this section will focus primarily on California history and legislation as an illustration of state authority.

In 1879, the framers of the California Constitution recognized the importance of education as a value essential to the rights and liberties of the people of California with the enactment of Article IX, Section 1,⁴⁵ which requires the State Legislature to encourage intellectual, scientific, moral, and agricultural improvement in the state.⁴⁶ Section 5 of Article IX requires the State Legislature to provide for a state system of common schools with a free school in each district.⁴⁷ The California judiciary also recognized that a primary purpose for establishing a statewide "educational system [was] to train school children in good citizenship, patriotism and loyalty to the state and the nation as a means of protecting the public welfare"⁴⁸ and therefore, the school system was reinforced as a matter of statewide concern.⁴⁹ The California Constitution authorizes school districts to carry out any program, activity, or "otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established."⁵⁰

During the shift of educational policy-making from local to state authority, two related movements arose: school finance litigation, and the establishment of standards and assessments.⁵¹ School finance controversy exerted considerable "momentum for increased state control over education policy."⁵² Money is power, and financing structures have contributed to "relocat[ing] significant education policy authority to the nation's statehouses," rather than local communities.⁵³

VIII, § 4, para. 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 1; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

45. RONALD D. WENKART, THE CALIFORNIA EDUCATORS' GUIDE TO SCHOOL LAW 2-1 (7th ed., 2012), available at <http://www.ocde.us/LegalServices/Documents/2012%20Ed%20Guide%207th%20Edition%209.2012%20.pdf>.

46. CAL. CONST. art. IX § 1 states, "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."

47. CAL. CONST. art. IX § 5 states, "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."

48. *In Re Shinn*, 195 Cal.App.2d 683, 686 (1961) (citing *Gabrielli v. Knickerbocker*, 12 Cal.2d 85, 92).

49. *Hall v. City of Taft*, 47 Cal.2d 177, 179 (1956).

50. CAL. CONST., art. IX § 14.

51. Heise, *supra* note 36, at 132.

52. *Id.*

53. *Id.*

1. The Economics of Public Education: School Financing

In accordance with State Constitutions, State Legislatures provide funds to public schools, subject to state rules and procedures governing level and distribution of funding.⁵⁴ This funding primarily comes from states' general revenue funds consisting of state income and sales taxes, again varying by state.⁵⁵ Distribution of funding is most often determined by formulas based on the number of pupils in a district, although the formulas can include factors other than raw numbers, like the "number of students with disabilities, the number of students living in poverty, or the number of students for whom English is a second language."⁵⁶ Additionally, some states formulate the distribution of funding so that higher poverty districts receive higher levels of aid.⁵⁷

The share of total education monies provided by the state government differs greatly from state to state—ranging from a high of 81.6 percent in Vermont to a low of 28.4 percent in Illinois.⁵⁸ The remaining funds are derived from local community taxes, and the federal government provides the smallest percentage through formula and competitive grant programs.⁵⁹

2. Problems with the Public Education Finance Structure: The Connection Between Locally Sourced Funds and Funding Gaps

Since the 1960s, legal challenges have charged inadequacy and equity in the public school finance system, raising Equal Protection Clause claims on

54. *School Finance: Federal, State and Local K–12 School Finance Overview*, NEW AM. FOUND. (Apr. 21 2014), <http://febp.newamerica.net/background-analysis/school-finance>.

55. *Id.*; Kaplan, *supra* note 35.

56. *School Finance*, *supra* note 54.

57. *Id.* "On July 1, 2013 California Governor Jerry Brown signed into law the 2013–2014 state budget package and instituted a new Local Control Funding Formula (LCFF) that overhauls how California funds its K–12 schools." Education Data Partnership, *Understanding the Local Control Funding Formula: California's New School Financing System*, ED-DATA, <https://www.ed-data.k12.ca.us/Pages/LCFF.aspx> (last updated July 17, 2014). The LCFF replaced complex funding formulas that were in place for almost forty years, and replaced it with a per student base grant. *Id.* Whereas previously, low performing school districts received extra funding from the state for specific purposes, like summer school programs, school safety or funding for certain school populations, the LCFF eliminates most state categorical funding streams. *Id.* Instead, it provides twenty percent more funding for high needs students, defined as low-income, English learner and foster youth students, and even more for schools with large concentrations of these populations. *Id.* Schools have broad discretion over how to spend base funds, subject to rules for transparency and accountability, but extra money for high-need students must be spent in proportion to the increase in funds apportioned. *Id.*

58. *School Finance*, *supra* note 54.

59. *Id.* (stating that much of federal funding is discretionary, meaning it is set annually by Congress through the appropriations process. Funds flow mainly through the Department of Education, which is responsible for the administration of Title I grants from federal programs like No Child Left Behind, and Race To the Top. Other federal agencies include the Department of Agriculture, which coordinates child nutrition programs, the Department of Health and Human Services, which coordinates Head Start, the Department of Labor which supports the Youth Employment and Training Activities and Youthbuild, and more).

both state and federal levels.⁶⁰ “Adequacy” simply means the “minimum amount to be sufficient.”⁶¹ In public school finance litigation, adequacy is often based on clauses in state constitutions that reference providing students a basic level of education.⁶² The adequacy debate in this context focuses on defining a minimum level of funding needed for schools to teach their students.⁶³ “There is a wide range of estimates for what researchers and educators believe a ‘sound, basic education’ actually costs [N]ot all of the studies incorporate [the] additional costs for students who are more expensive to educate” (like students with disabilities), and courts disagree on the appropriate standard for an adequate education.⁶⁴

Equity in public school finance refers to reducing the disparity between wealthy and poor school districts’ abilities to raise revenue.⁶⁵ Local funding is very closely tied with local property values and property taxes.⁶⁶ The poorer the community, the less funding it is able to contribute to its schools, leaving those children at a significant disadvantage compared to children of wealthier local districts.⁶⁷ It follows then, that states that force schools to rely more heavily on local property taxes, as opposed to state funding, have larger disparities in school district budgets from county to county.⁶⁸ Conversely, when state funding is a higher share of a school’s budget, relieving some of the tax burden on local communities, there are better chances for equity.⁶⁹

There are three main types of funding disparities: interstate (school finance inequities among different states), intrastate (school finance inequity among districts within a state), and intradistrict disparity (school finance inequities among schools within the same district).⁷⁰

60. Farr & Trachtenberg, *supra* note 10, at 610.

61. Intercultural Dev. Research Ass’n, *Equity vs Adequacy*, IDRA.ORG, http://www.idra.org/Education_Policy.htm/Fair_Funding_for_the_Common_Good/Equity_vs_Adequacy/ (last visited Jan. 18, 2015).

62. For example, the California Constitution specifically allocates a minimum of between \$120 and \$180 per student “in average daily attendance,” per school. CAL. CONST. art. IX § 6. The constitution also explicitly gives school funding priority, requiring that “[f]rom all state revenues there shall first be set apart the moneys to be applied by the state for support of the public school system and public institutions of higher education.” CAL. CONST. art. XVI § 8. See also Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L., 47, 81 (2012); Education Week Research Center, *School Finance*, EDUC. WEEK, <http://www.edweek.org/ew/issues/school-finance/> (last updated June 20, 2011).

63. Intercultural Dev. Research Ass’n, *supra* note 61.

64. Education Week Research Center, *supra* note 62. See Robinson, *supra* note 37 at 1667–73. For more information on the waves of adequacy litigation, and the variations in the way courts have interpreted the word ‘adequate,’ see Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L., 47, 80–84 (2012).

65. Education Week Research Center, *supra* note 62.

66. *Id.*

67. *Id.*

68. *School Finance*, *supra* note 54.

69. Education Week Research Center, *supra* note 62.

70. *School Finance*, *supra* note 54.

Interstate disparity shows that large gaps exist between states even when adjusting for regional costs of living.⁷¹ For example, in 2009–10, spending per student in New Jersey was \$17,379, whereas in Utah, it was only \$6,452.⁷² The disparity is caused by a number of factors. One is capacity, which refers to the ability of the state to fund education based on its economy and resources.⁷³ Another is effort, or the willingness of state voters and politicians to provide funding for education.⁷⁴ Wealthy states with high fiscal capacity spend more on education than states with fewer resources.⁷⁵ However, some states with severely limited resources, like Montana, devote a higher percentage of total available funding on education, designating them a low fiscal capacity but high fiscal effort state.⁷⁶

Intrastate disparities exist when there are large differences in funding among school districts within the same state.⁷⁷ Financing relies in part on local property taxes, meaning that spending on education from district to district in the same state can differ vastly depending on property values.⁷⁸ For example, in 2009–10, the New Trier Township High School District, located just outside of Chicago, Illinois spent \$21,465 per student.⁷⁹ Less than 200 miles into the interior of the state, the Farmington Central Community Unit School District spent only \$7,259 per student.⁸⁰

Finally, even within a single school district, the funding each individual school receives varies.⁸¹ This issue does not generally apply to small school districts, but in large school districts that operate many schools, like Los Angeles Unified School District, the disparities can be significant.⁸² Intradistrict inequality was highlighted following the *Brown v. Board of Education* decision, as “separate but equal” schools within the same district were forced to desegregate.⁸³ Unfortunately, there is less information about resource allocation at the individual school level today, due to lack of transparency and the variances in budgeting at such a micro level.⁸⁴

71. *School Finance*, *supra* note 54.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. See Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334 (2004).

84. *School Finance*, *supra* note 54.

3. Public School Finance Litigation in California: *Serrano v. Priest*

In response to inequalities resulting from gaps in education funding, California shifted its funding from mostly local to mostly state sources. Today, California's school system receives over half of its funding from the state.⁸⁵ This shift is the result of two major events in the 1970s: the *Serrano v. Priest* decision, and the passage of Proposition 13.⁸⁶ Prior to 1971, K-12 education was financed almost exclusively at the local level, with limited supplemental funding from the state and the federal government.⁸⁷ The California Legislature, in Article IX, Section 6 of the Constitution, authorized the governing body of each county and city "to levy taxes on the real property within a school district at a rate necessary to meet the district's annual education budget."⁸⁸ The amount of revenue a district could raise in this manner depended largely on its tax base, or the value of property in the particular school district,⁸⁹ coupled with the level of priority the district's residents gave to education.⁹⁰ Regardless of the degree of tax effort, however, "districts with small tax bases simply . . . [could not] levy taxes at a rate sufficient to produce the revenue that more affluent districts reap[ed] with minimal tax efforts."⁹¹ The state attempted to solve this problem by supplementing the revenue raised by the districts with grants, but it was inadequate to overcome disparities inherent in this financing system.⁹²

In *Serrano v. Priest*, the California Supreme Court in 1971 compared two Los Angeles-area school districts, Beverly Hills and Baldwin Park, ultimately finding that the existing school financing scheme was unconstitutional.⁹³ The property-rich Beverly Hills School District spent more than twice per student as the Baldwin Park School District, a low income and property-poor community twenty-five miles east of Los Angeles.⁹⁴ Beverly Hills had a far stronger tax base, but paid a school property tax rate less than half of that of Baldwin Park.⁹⁵ Beverly Hills residents were taxed at a rate of only \$2.38 per \$100.⁹⁶ Baldwin Park citizens paid nearly twice as much proportionally, with tax of \$5.48 per \$100 in 1968–69, but still were only able to raise a fraction of the

85. Margaret Weston, *Rethinking the State-Local Relationship: K-12 Education*, PUB. POLICY INST. OF CAL. 2 (June 2011), http://www.ppic.org/content/pubs/report/R_611MWR.pdf.

86. *Id.* at 5.

87. *Id.*

88. *Serrano v. Priest*, 487 P.2d 1242, 1246 (1971).

89. *Id.* at 1246.

90. *Id.*

91. *Id.* at 1250.

92. *Id.* at 1247–48.

93. *Id.* at 1248.

94. *Serrano*, 487 P.2d at 1248.

95. *Id.* at 1247, 1250.

96. *Id.* at 1250.

educational funding of Beverly Hills.⁹⁷ In *Serrano*, Justice Sullivan of the California Supreme Court lamented:

To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of . . . property is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments. Surely, this is to rely on the most irrelevant of factors as the basis for educational financing.⁹⁸

The *Serrano* court ruled taxation at the local level unconstitutional,⁹⁹ and shifted responsibility for funding public education from local school districts to the state.¹⁰⁰

4. Further Limiting Local Tax Revenue as a Source of Funding: Proposition 13 in California

In 1978, California voters pushed education funding even further away from local control when they passed Proposition 13.¹⁰¹ Prior to Proposition 13, local administrative agencies set their own property tax rates and managed revenue collection.¹⁰² Proposition 13's passage limited local government's ability to raise revenue by capping the property tax rate at one percent of the value of the property.¹⁰³ The value of property was locked in at the 1975–76 level, and only allowed to increase up to two percent a year to account for inflation, although it could be revalued upon sale.¹⁰⁴ It also raised the threshold for approval for parcel and other special taxes, requiring a two-thirds majority from voters.¹⁰⁵ To cover losses in local government tax revenues post Proposition 13, the state legislature slashed school district budgets by nine to fifteen percent on a sliding scale, meaning wealthier districts felt larger cuts.¹⁰⁶ Property tax losses beyond the cuts were made up with state grants.¹⁰⁷ Local sources of K-12 funding dropped from forty-nine percent in 1977–78, to only twenty-five percent in 1978–79, and state support increased from thirty-eight percent to sixty-one percent in the same respective years.¹⁰⁸ Although the implementations were meant to be one-time emergency proceedings, they had a long-term

97. *Serrano*, 487 P.2d at 1250.

98. *Id.* at 1252-53.

99. *Id.* at 1259.

100. Weston, *supra* note 85.

101. CAL. CONST. art. XIII-A § 1. See also Weston, *supra* note 85, at 6.

102. Jeffrey Chapman, *Proposition 13: Some Unintended Consequences*, PUB. POLICY INST. OF CAL. 3 (1998), http://www.ppic.org/content/pubs/op/OP_998JCOP.pdf.

103. Weston, *supra* note 85, at 6.

104. Chapman, *supra* note 102. See also Weston, *supra* note 85.

105. Weston, *supra* note 85, at 6.

106. *Id.*

107. *Id.*

108. *Id.*

precedential effect,¹⁰⁹ and after Proposition 13 the primary responsibility for financing California's schools shifted firmly onto the state's shoulders. Today, California's school finance system is among one of the most centralized in the nation in large part because of increased state control following Proposition 13.¹¹⁰

5. Federal Public School Finance Litigation: The *San Antonio Independent School District v. Rodriguez* Case

In 1968, the public finance system made its way to the United States Supreme Court in *San Antonio v. Rodriguez*.¹¹¹ Mexican-American families in poor school districts with a low property tax base challenged the Texas school financing system based on local property taxation as discriminatory on the basis of wealth.¹¹² Decided three years after *Serrano* in 1973, the Court ruled that the poor were not a suspect class and that given the infinite variables affecting education, the system could merely assure an *adequate*—not *equal*—quality of education.¹¹³ Disappointingly, the Court ignored the obvious correlation that wealth affords a family to live in a better school district, instead relying on a single study out of Connecticut, which “concluded that ‘it is clearly incorrect . . . to contend that the ‘poor’ live in ‘poor’ districts.’”¹¹⁴ Despite its ruling, the court ended its opinion by recognizing its lack of expertise and familiarity with raising funds for local schools and offered two possible solutions. First, the creation of a “‘statewide financing’ system, which would eliminate school districts as fund-raising bodies and presumably would require all revenue to be raised by the State and to be allocated evenly by it.”¹¹⁵ The second alternative was called “district power equalizing” (“DPE”), whereby a state guaranteed that at a particular property tax rate, the district would receive a set amount of money, regardless of how many or how few dollars that local property tax rate actually generated.¹¹⁶ Under a DPE system, state educational funds are based on the amount of tax effort, not tax revenue, thereby neutralizing property-wealth disparities among districts up to that rate of taxation.¹¹⁷

109. Chapman, *supra* note 102.

110. Weston, *supra* note 85, at 5.

111. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

112. *Id.* at 4–5.

113. *Id.* at 22–25. The Court reasoned that the “Equal Protection Clause does not require absolute equality, or precisely equal advantages.” *Id.* In addition, there was no absolute deprivation of education. *Id.* By providing twelve years of free public school, and assuring teachers, books, transportation and operating funds, the Texas Legislature appeared to provide an “adequate” education. *Id.*

114. *Id.* at 23. (quoting *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1328 (1972)).

115. Sutton, *supra* note 3, at 1971.

116. *Id.*

117. Robert L. Manteuffel, *The Quest for Efficiency: Public School Funding in Texas*, 43 Sw L.J. 1119, 1129 (1990).

Almost every state in the country has grappled with state court challenges to its school financing method.¹¹⁸ At least twenty-four other states now join California in partially or fully overturning the property tax based system.¹¹⁹ In about the same number of states, courts have upheld the constitutionality of property tax based financing systems.¹²⁰

C. ON THE RISE: FEDERAL AUTHORITY OVER PUBLIC SCHOOLS

Article I of the United States Constitution establishes Congress' enumerated powers, including the power to levy taxes, regulate commerce, declare war, and create laws that are necessary and proper.¹²¹ It does not refer to public education directly. The Tenth Amendment reserves power not given explicitly to the federal government to the states.¹²² Thus, the power to directly regulate public education is reserved to the states.¹²³ Despite this limitation Congress does possess the power to spend for the general welfare, and it is under this indirect authority that it regulates public education.¹²⁴ Congress uses its spending power in two ways: first, to incentivize states and local governments to adopt programs by offering funding and grants; and second, to require states and local districts that receive federal funding to comply with conditions that serve federal policy goals, such as public safety or civil rights protections.¹²⁵ States or districts that act in opposition to federal policy goals lose federal funding.¹²⁶

The federal government also adopts administrative rules and regulations affecting education.¹²⁷ The U.S. Department of Education was

118. Farr & Trachtenberg, *supra* note 10, at 609–10.

119. *Id.* at 609. These twenty-four states are Alabama, Arizona, Arkansas, California, Connecticut, Idaho, Kansas, Kentucky, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

120. *Id.* at 610. These states are Arizona, Colorado, Georgia, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Virginia, and Wisconsin. Some of these states' education systems have been upheld initially only to be overturned in subsequent challenges. *Id.*

121. U.S. CONST. art. I, § 8. *See also* Julie Underwood, *The Legal System, in UNDERSTANDING AND LIMITING SCHOOL BOARD MEMBER LIABILITY* 1–10 (Naomi Gittins ed., 2002).

122. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. *See also* Underwood, *supra* note 121.

123. U.S. CONST. amend. X. *See also* Anthony Consiglio, *Nervous Laughter and the High Cost of Equality: Renewing ‘No Child Left Behind’ Will Safeguard a Vibrant Federalism and a Path Towards Educational Excellence*, B.Y.U EDUC. & L.J. 365, 372 (2009).

124. U.S. CONST. art. I, § 8. *See also* Underwood, *supra* note 121.

125. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that conditioning federal funding on states' adoption of minimum drinking age is appropriate use of Congress' spending power).

126. Underwood, *supra* note 121.

127. *Id.*

created in 1867, with the modest mission of “collect[ing] information on schools and teaching that would help the States establish effective school systems.”¹²⁸ In 1980, the Department of Education became a Cabinet level agency,¹²⁹ and today, it is the primary federal agency that issues regulations to implement federal education statutes, and monitors districts for compliance.¹³⁰ Its ultimate power is the authority to withhold federal funds from schools found to be in non-compliance with federal statutes.¹³¹ The U.S. Department of Education’s actual control over school operations and policy decisions is somewhat limited, because federal dollars typically account for less than ten percent of the average district budget.¹³² Although courts grant broad discretion to administrative agencies like the Department of Education,¹³³ “critical federal institutions—including the courts—[have] reinforced the prevailing ethos that education in the United States was the principal dominion of state and local authority.”¹³⁴

In light of the constitutional framework and sources of school funding, federal involvement in K-12 education has traditionally been marginal. The federal government’s involvement in elementary and secondary schools began by focusing on groups with narrowly defined needs, such as students with disabilities, low socio-economic status, and other “insular and discrete subpopulations.”¹³⁵ Most prominent of these programs is Title I of the Elementary and Secondary Education Act which concentrates on the nation’s most disadvantaged students.¹³⁶ This important piece of federal legislation, as well as the No Child Left Behind Act, The Race To The Top,

128. *The Federal Role in Education*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/overview/fed/role.html> (last modified Feb. 13, 2012).

129. *Id.* A cabinet level agency, or executive agency, is an agency whose officials are appointed by the President, with the advice and consent of the Senate. Officials in executive agencies are removable by the President at-will. Andrew T. Bond, *Parting the Chevron Sea An Argument for Chevron’s Greater Applicability to Cabinet Than Independent Agencies*, 90 NOTRE DAME L. REV. 397, 409–10 (2014).

130. *An Overview of the U.S. Department of Education: How Does the Department of Education Serve America’s Students?*, U.S. DEP’T OF EDUC. (Sept. 2010), http://www2.ed.gov/about/overview/focus/what_pg3.html#howdoes (last modified Feb. 27, 2014).

131. See Spending Clause of the U.S. Constitution, U.S. CONST. art. I, § 8; *South Dakota v. Dole*, 483 U.S. 203 (1987). See also Underwood, *supra* note 121; U.S. Dep’t of Educ., *An Overview of the U.S. Department of Education*, ED.GOV, http://www2.ed.gov/about/overview/focus/what_pg3.html#howdoes (last modified Sept. 2010). For example, the Individuals with Disabilities Education Act allocates money to states to help them provide an appropriate education for children with disabilities. States must accurately report the number of students meeting certain qualifying criteria described in the Act before the Department of Education will distribute the funds. *Id.*

132. Heise, *supra* note 36, at 134.

133. Underwood, *supra* note 121. See generally, *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

134. Heise, *supra* note 36, at 134; *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

135. Heise, *supra* note 36, at 134; Robinson, *supra* note 37 at 1674.

136. Heise, *supra* note 36, at 134; Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301–7491 (2002).

and most recently The Common Core State Standards Initiative are all discussed in detail later in this article.¹³⁷

Critics of federal education legislation perceive it as federal interference in a matter that constitutionally has been reserved to the states.¹³⁸ However, the Supreme Court has held that although the federal government has limited enumerated powers under Article I, Congress may exercise its Spending Clause¹³⁹ power to attach conditions to federal funds, requiring state and local governments to comply with federal statutory and administrative directives.¹⁴⁰ This broad interpretation of the Spending Clause has been applied to federal education legislation as well.¹⁴¹

III. FEDERAL EDUCATION LEGISLATION: THE SLOW AND STEADY EXPANSION OF FEDERAL INVOLVEMENT IN K-12 EDUCATION

Comprehensive federal education legislation emerged during the Cold War as American education became a matter of national pride.¹⁴² After witnessing the Soviet Union launch Sputnik in 1958, Congress passed the National Defense Education Act (NDEA).¹⁴³ To ensure that highly trained individuals would be available to help America compete with the Soviet Union in scientific and technical fields, the NDEA supported many educational programs, including foreign language instruction in elementary and secondary schools.¹⁴⁴ The now-defunct NDEA was passed in the wake of the New Deal, a series of legislation that dramatically expanded the role of the federal government. In addition to national acceptance of an expanded executive branch, the motivation for federal education legislation was to organize the nation's decentralized education structure and maximize students' ability to and compete at a higher caliber globally.¹⁴⁵

137. *Infra*, pp. 371, 372, 374, and 375, respectively.

138. Heise, *supra* note 36, at 125. *See also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

139. U.S. CONST. art. I, § 8.

140. *South Dakota v. Dole*, 483 U.S. 203 (1987). The Supreme Court most recently considered Congress' authority to condition federal funding on state compliance with federal policy in 1987 in the *South Dakota v. Dole* case. *Id.* The Court upheld Congress' authority to condition federal highway funds on a state's enactment of a minimum drinking age of 21, and affirmed the principle that "encouragement to state action . . . is a valid use of the spending power." *Id.* at 212. Congress may "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Id.* at 206.

141. Robinson, *supra* note 37, at 1745.

142. *The Federal Role in Education*, *supra* note 128.

143. *Id.* *See also* National Defense Education Act, 20 U.S.C. § 401 (1976).

144. National Defense Education Act, *supra* note 143. *See also* *The Federal Role in Education*, *supra* note 129.

145. *See* Reuel E. Schiller, *Administrative Agencies*, in 1 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 25 (Stanley N. Katz ed., 2009).

The civil rights movement of the 1960s and 1970s triggered the development of the Department of Education's strong equal access mission.¹⁴⁶ The passage of laws such as Title VI of the Civil Rights Act of 1964,¹⁴⁷ Title IX of the Education Amendments of 1972,¹⁴⁸ and Section 504 of the Rehabilitation Act of 1973¹⁴⁹ "which prohibited discrimination based on race, sex, and disability, respectively, made civil rights enforcement a fundamental and long-lasting focus" of the federal government.¹⁵⁰

A. FIRST OF ITS KIND: THE ENACTMENT OF THE ELEMENTARY AND SECONDARY EDUCATION ACT

In 1965, recognizing the need to provide all children with equal access to a quality education, President Lyndon B. Johnson enacted the Elementary and Secondary Education Act ("ESEA"), the most far-reaching federal legislation affecting education ever passed by Congress.¹⁵¹ The law prioritized educational equity for students from low-income families by providing federal funds for districts serving those communities.¹⁵² Although the ESEA launched multiple programs, the most notable is Title I, the federal government's flagship aid effort for low income and minority children.¹⁵³ Title I funding still supplements state and local budgets today.¹⁵⁴

Since its initial introduction, the ESEA has been reauthorized seven times by different administrations.¹⁵⁵ Its most recent reauthorization, by

146. *The Federal Role in Education*, *supra* note 128.

147. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (1964).

148. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (1972).

149. Section 504 of the Rehabilitation Act of 1973, Pub. L No. 93-112, 87 § 355 (1973).

150. *The Federal Role in Education*, *supra* note 128.

151. Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301-7491 (2002). *See also* National Alliance for Partnerships in Equity, *Elementary and Secondary Education Act*, NAPEQUITY.ORG, <http://www.napequity.org/public-policy/current-laws-and-bills/elementary-secondary-education-act/> (last visited Feb. 3, 2015). Unfortunately, President Johnson's equal access mission stemmed less from a genuine desire for racial equality, and more from a concern with reducing racial violence at the time. McUsic, *supra* note 83 at 41. President Johnson has been quoted saying about Black people, "If they're working, they won't be throwing bombs in your homes and plants . . . Keep them busy and they won't have time to burn your cars" to garner support from business leaders for Executive Order 11246, an affirmative action program requiring government contractors to hire minorities. *Id.*

152. *Background & Analysis: No Child Left Behind – Overview*, NEW AM. FOUND., Apr. 24, 2014, <http://feb.p.newamerica.net/background-analysis/no-child-left-behind-overview>.

153. *The Federal Role in Education*, *supra* note 128. (Title I is a federal program that operates by providing funds to school districts and schools with high numbers or percentages of disadvantaged students. Its purpose is to ensure that all children have a fair, equitable and significant opportunity to obtain an education, and reach minimum proficiency). *See Title I – Improving the Academic Achievement of the Disadvantaged*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/policy/elsec/leg/esea02/pg1.html> (last modified Sept. 15, 2004).

154. For the latest data on the amount of Title I funding to each state and school district, see *Revised ESEA Title I LEA Allocations, FY 2014*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/overview/budget/titlei/fy14/index.html> (last modified Oct. 7, 2014).

155. *Background & Analysis: No Child Left Behind – Overview*, *supra* note 152.

President George W. Bush in 2002, was the No Child Left Behind Act (“NCLB”).¹⁵⁶ Although each reauthorization brought its own changes, the central goal of the ESEA to strive for equity for disadvantaged children has remained the same.¹⁵⁷ The 1994 reauthorization, the Improving America’s Schools Act (“IASA”), heavily emphasized accountability elements, like standardized testing.¹⁵⁸ The IASA used federal funding as a bargaining chip to encourage states to comply with accountability measures in exchange for more flexibility and better access to Title I funding.¹⁵⁹ Although the IASA achieved mixed results,¹⁶⁰ it embodied the growing support for standards based accountability, which was further developed in the No Child Left Behind Act.

B. ONE-SIZE-FITS-ALL REFORM: NO CHILD LEFT BEHIND

On January 8, 2002, President George W. Bush signed the No Child Left Behind Act into law as a reauthorization of the ESEA.¹⁶¹ The NCLB legislation set in place strict, sweeping requirements that reached into every public school and expanded accountability for states, school districts, and schools receiving federal education funds.¹⁶² It required states and local districts to (1) have state-wide academic standards, (2) make annual progress towards having every student achieve the standards, and closing gaps between all students and certain subgroups of students, (3) test students to see if they are learning, and (4) collect data on their progress.¹⁶³

Additional requirements included annual report cards from each state with student achievement and district performance data.¹⁶⁴ Districts were required to do the same with individual school data.¹⁶⁵ Teachers in core content areas were required to be highly qualified in their subject matter, meaning they had certification and were demonstrably proficient in their field.¹⁶⁶ All school professionals hired with Title I funding had to have completed at least an associate’s degree and have passed an evaluation to demonstrate their qualifications.¹⁶⁷

156. *Background & Analysis: No Child Left Behind – Overview*, *supra* note 152; *see also* No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–7941 (2002).

157. *Background & Analysis: No Child Left Behind – Overview*, *supra* note 152.

158. *Id.*

159. *Id.*; *see also* Improving America’s Schools Act of 1994, Pub. L. No. 103–382, 108 Stat. 3518 (1994); Robinson, *supra* note 37, at 1677.

160. Robinson, *supra* note 37, at 1677.

161. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–7941 (2002).

162. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 933 (2004).

163. No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2002).

164. Education Week Research Center, *No Child Left Behind*, EDUC. WEEK (Aug. 4, 2004), <http://www.edweek.org/ew/issues/no-child-left-behind/> (last updated Sept. 19, 2011).

165. *Id.*

166. *Id.*

167. *Id.*

NCLB's requirements also had a punitive aspect. The law required states to identify schools and school districts that were not making enough progress.¹⁶⁸ If after two years, a school failed to meet its goals, it would be provided extra assistance, and its students would have the option of attending another public school.¹⁶⁹ After three years of failure to meet adequate progress, the school would be offered additional assistance, including private tutoring.¹⁷⁰ Failure to meet goals beyond that resulted in corrective measures such as change in leadership, or even complete closure.¹⁷¹

NCLB's scope was incredibly vast, and part of its significance resulted from its sheer magnitude.¹⁷² It dramatically altered the relationship between the federal and state government.¹⁷³ Historically, the federal government's intersections with public K-12 schools was through Title I funding, which "focused on either specific types of schools, such as those predominately serving children from low-income households, or discrete subpopulations of students, such as those with qualifying disabilities."¹⁷⁴ Although NCLB was expected to better target resources to school districts with high concentrations of poor children,¹⁷⁵ the legislation impacted all participating states and schools, regardless of whether they received Title I funding.¹⁷⁶ In "upsetting the education federalism status quo, NCLB generated substantial pushback on both the legal and political fronts."¹⁷⁷

Although perhaps noble in its intent, as NCLB unfolded educators and policymakers questioned its feasibility and fairness, and today it is generally regarded as somewhat of a failure.¹⁷⁸ Concerns about NCLB's unrealistic benchmarks grew, "particularly concerning its rules surrounding adequate yearly progress and the goal of 100 percent proficiency by 2013–14."¹⁷⁹ The law assumed that what schools needed were more incentives and punishments, rather than actual changes, and did not address the

168. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 942.

169. Education Week Research Center, *supra* note 164.

170. *Id.*

171. *Id.*

172. Heise, *supra* note 36, at 126.

173. *Id.*

174. *Id.* at 127.

175. *Id.* at 126; *see also* Education Week Research Center, *supra* note 164. A component of NCLB was a program called Reading First, "funded at \$1.02 billion in 2004, to help states and districts set up 'scientific, research-based' reading programs for children in grades K–3 (with priority given to high-poverty areas)." *Id.* "The program's funding was later cut drastically by Congress amid budget talks." *Id.*

176. Heise, *supra* note 36, at 127.

177. *Id.*

178. Linda Darling-Hammond, *Evaluating "No Child Left Behind,"* THE NATION, May 2, 2007, <http://www.thenation.com/article/evaluating-no-child-left-behind>.

179. Education Week Research Center, *supra* note 164.

profound educational inequalities that exist in our nation.¹⁸⁰ Other areas left unaddressed were procedural: How would state standards and testing interact with the federal mandates? Against what measure would test scores, proficiency and progress be evaluated? How exactly would test results be reported?¹⁸¹ In part because of the extreme focus on testing and assessment, rather than actual retention of knowledge,¹⁸² by 2010 thirty-eight percent of schools in the nation were considered failing to make adequate yearly progress.¹⁸³ NCLB's practice of labeling schools' failures made it even harder to attract and keep qualified teachers, and created incentives for schools to rid themselves of students who were not performing, for the sake of higher test scores. Rather than support equal opportunity for education, and college and career readiness, this practice essentially excluded low-scoring students from college admissions, and instead encouraged transfer or dropping out.¹⁸⁴

C. FINDING BALANCE: THE RACE TO THE TOP

In early 2009 President Obama responded to the failure of NCLB by signing into law the American Recovery and Reinvestment Act ("ARRA"), which provided funds for the Department's Race to the Top ("RTTT") program, a competitive grant designed to spur progress in K-12 education.¹⁸⁵ Whereas NCLB mandated changes in education as a condition for receiving Title I funds, RTTT is a competitive grant program that gives states monetary incentives to reform their education systems.¹⁸⁶ The two programs have largely the same goals, but RTTT has more leeway to implement sophisticated reform because states are able to choose whether or not to apply for funds, rather than risk losing funding.¹⁸⁷ This program builds on the No Child Left Behind program by introducing reform in four areas: (1) creating challenging standards and testing; (2) finding, training, and keeping dedicated teachers and staff; (3) building data systems that accurately inform teachers and administrators of student

180. Darling-Hammond, *supra* note 178.

181. *The New Rules: An Overview of the Testing and Accountability Provisions of the No Child Left Behind Act*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/schools/nochild/nclb.html> (last visited Feb. 3, 2015).

182. Darling-Hammond, *supra* note 178.

183. Education Week Research Center, *supra* note 164.

184. Darling-Hammond, *supra* note 178.

185. American Recovery and Reinvestment Act (ARRA), Pub. L. No. 111-5, 123 Stat. 182 (2009). See also Robert S. Eitel & Kent D. Talbert, *The Road to a National Curriculum: The Legal Aspects of the Common Core Standards, Race to the Top, and Conditional Waivers*, 13 ENGAGE: J FEDERALIST SOC'Y PRACTICE GROUPS 7 (2012).

186. Judith Lohman, *Comparing No Child Left Behind and Race to the Top*, OLR RESEARCH REPORT (June 4, 2010), <http://www.cga.ct.gov/2010/rpt/2010-R-0235.html>.

187. Lohman, *supra* note 186

success; and (4) boosting performance in the worst performing schools.¹⁸⁸ The program allocated \$4 billion to disperse to the states to achieve these goals, and attracted applications from forty-six states.¹⁸⁹

The first of these goals, the implementation of standards, was the precursor to the Common Core State Standards that are currently being implemented. Participation in the Race to the Top was contingent upon each state working individually toward developing a common set of evidence-based K-12 standards that reflected compliance with the Common Core State Standards (“CCSS”).¹⁹⁰ Although adoption of the CCSS was not required, many states that were ambivalent about the CCSS or had not adopted them yet, were enticed to adopt them by the prospect of the Race to the Top grants since the Obama administration included participation in the Common Core as an eligibility criterion for many of the programs.¹⁹¹ Because new standards necessarily mean new curriculum, this further reinforced federal control over curriculum development.¹⁹²

IV. LOOKING FORWARD: THE COMMON CORE STATE STANDARDS

Although RTTT and NCLB were noble efforts by the federal government to elevate students’ potential and success in school and provide incentives to local school decision-makers, the practice of requiring states to develop their own content standards is not effective. Without at least

188. *Annual Performance Report*, RACE TO THE TOP, <https://www.rtt-apr.us/> (last visited Feb. 3, 2015).

189. Eitel & Talbert, *supra* note 185, at 7. Although they did not have to do so, the twelve states that won Phase 1 and 2 of the RTTT competition all adopted, or indicated their intent to adopt the CCSS for the purposes of meeting the requirement of adopting internationally benchmarked standards. See Application of Delaware B-3 (2010), available at <http://www2.ed.gov/programs/racetothetop/phase1-applications/delaware.pdf>; Application of Tennessee 48 (2010), available at <http://www2.ed.gov/programs/racetothetop/phase1-applications/tennessee.pdf>; Application of District of Columbia 53 (2010), available at <http://www2.ed.gov/programs/racetothetop/phase2-applications/district-of-columbia.pdf>; Application of Florida 73 (2010), available at <http://www2.ed.gov/programs/racetothetop/phase2-applications/florida.pdf>; Application of Georgia 62 (2010), available at <http://www2.ed.gov/programs/racetothetop/phase2-applications/georgia.pdf>; Application of Hawaii 45 (2010), available at <http://www2.ed.gov/programs/racetothetop/phase2-applications/hawaii.pdf>; Application of Maryland 75 (2010), available at <http://www2.ed.gov/programs/racetothetop/phase2-applications/maryland.pdf>; Application of Massachusetts 52 (2010), available at <http://www2.ed.gov/programs/racetothetop/phase2-applications/massachusetts.pdf>; Application of New York 24 (2010), available at <http://www2.ed.gov/programs/racetothetop/phase2-applications/new-york.pdf>; Application of North Carolina 58 (2010), available at <http://www2.ed.gov/programs/racetothetop/phase2-applications/northcarolina.pdf>; Application of Ohio B1-1, B1-2 (2010), available at <http://www2.ed.gov/programs/racetothetop/phase2-applications/ohio.pdf>; Application of Rhode Island A-8 (2010), available at <http://www2.ed.gov/programs/racetothetop/phase2-applications/rhode-island.pdf>.

190. Eitel & Talbert, *supra* note 185, at 8.

191. *Id.* at 9.

192. *Id.* at 9–10.

minimally uniform content standards, RTTT and NCLB only highlight disparities among expectations for students, because a “proficient” understanding in one state might be only a “basic” understanding in another.¹⁹³ This means that, despite having met all state-mandated graduation requirements, some U.S. students are unprepared and unable to compete in a global market for employment and college admission.¹⁹⁴ In addition, the mismatched standards have been widely criticized for being so numerous in some states that they prevent complete coverage, wildly inconsistent across state borders, and insufficiently rigorous such that even students who do master the state standards remain unprepared for post-secondary success.¹⁹⁵

It is helpful to consider how American standards fare compared to the rest of the world. There is an embarrassingly “large disconnect between American states’ standards and those adopted by the countries that rank among the highest on international assessments of student learning,” namely Finland, Korea, Japan, Canada, and Singapore.¹⁹⁶ These gaps span numerous variables, including the number, progression, and rigor of standards.¹⁹⁷ In a study on domestic and international math standards, researchers “found that rather than emphasizing a progression of increasingly complex core concepts, as is done by the highest performing countries worldwide, American standards literally cover the same topics over and over and over again.”¹⁹⁸ Of twenty-one sets of American state

193. “The National Center for Education Statistics (NCES) has compared each state standard for proficient performance in reading and math by placing the state standards onto a common scale defined by [National Assessment of Educational Progress] (NAEP) scores.” *National Assessment of Education Progress (NAEP): Mapping State Proficiency Standards*, NAT’L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/nationsreportcard/studies/statemapping/> (last modified June 22, 2012). Where a state falls in the NAEP scale provides important information for analysis and comparison. *Id.* The 2009 NAEP study discovered that there is wide variation among state proficiency standards. *Id.* For example, for grade 4 reading, the difference in the level required for proficient performance between the five states with the highest standards and the five with the lowest standards was comparable to the difference between “basic” and “proficient” performance on NAEP. *National Assessment of Education Progress (NAEP): Key Findings from the 2009 NAEP State Mapping Analysis*, NAT’L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/nationsreportcard/studies/statemapping/findings.aspx> (last updated Aug. 4, 2011). See also Eric Lerum, *Uncommon Equity and Rigor: Students First Supports the Common Core* (Feb. 21, 2013), <https://www.studentsfirst.org/blogs/entry/uncommon-equity-and-rigor-studentsfirst-supports-the-common-core>.

194. Lerum, *supra* note 193.

195. Lisa Quay, *Higher Standards for All: Implications of the Common Core for Equity in Education*, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY (Apr. 2010), available at <http://files.eric.ed.gov/fulltext/ED536694.pdf>.

196. *Id.* at 5.

197. *Id.*

198. Quay, *supra* note 195, at 2–3. American “teachers reported being frustrated by the challenge of addressing numerous state standards and determining which were the most essential to cover.” *Id.* at 3. “They also felt that standards were too vague to be useful in

standards reviewed, the average duration of coverage of a single topic was six years.¹⁹⁹ The “‘organizing principle’ of state standards ‘seems to be to include every topic at almost every grade.’”²⁰⁰ At the same time, the sheer volume of required, and often repetitive standards is so numerous that teachers find them impossible to cover. This results in a grab bag, haphazard selection of standards covered in any given school year. The topics that get “the least coverage in state standards tend to be the most important—those deeper topics that build student’s conceptual understanding,” and critical thinking.²⁰¹

The implementation of Common Core State Standards “responds to [these] increasing concern[s] . . . that American students are ill-equipped to meet post-secondary and career demands, and are falling behind their international peers.”²⁰² The initiative is a public-private partnership and effort coordinated by organizations based in Washington, D.C., the National Governors Association Center for Best Practices (“NGA Center”) and the Council of Chief State School Officers.²⁰³ Common Core aligns the states to a set of core standards that are backed by research to be the most crucial and essential for college and career prep.²⁰⁴ States may not adopt the standards in a piecemeal fashion; if they elect to participate, they must adopt the entirety of the standards.²⁰⁵ In addition, the CCSS must constitute at least 85 percent of the state’s overall standards.²⁰⁶ These requirements lay the foundation for nationally centralized reform and signal the beginning of the end of “50 states—50 standards.”²⁰⁷ The standards were developed by teachers, school administrators, and education experts

actually guiding instruction.” Quay, *supra* note 195, at 3. By contrast, “high-performing countries such as Singapore, Japan, Korea, and the Czech Republic provide their teachers with much clearer guidance on the concepts to be addressed and mastered in each grade.” *Id.*

199. *Id.* at 3; see also William H. Schmidt, Hsing Chi Wang, & Curtis C. McKnight, *Curriculum Coherence: An Examination of US Mathematics and Science Content Standards From an International Perspective*, 37 J. CURRICULUM COHERENCE 5, 540 (2005), <http://www.ode.state.or.us/teachlearn/subjects/science/curriculum/coherence/articlejcs375.pdf> (considering data from one of the most extensive and far-reaching cross-national comparative studies ever attempted within education, the Third International Mathematics and Science Study (TIMSS) highlights the differences in content standards between the highest achieving TIMSS countries and the United States).

200. Quay, *supra* note 195, at 3.

201. *Id.* at 4. See also Schmidt et al., *supra* note 199, at 555 (arguing that the precise grade levels at which the U.S. fell behind other countries in achievement was the middle grades, at which elementary mathematics and science shifted to more complex conceptual ideas).

202. Quay, *supra* note 195, at 1.

203. *About the Standards*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/about-the-standards> (last visited Feb. 4, 2015).

204. Quay, *supra* note 195, at 1.

205. *Id.*

206. *Id.* at 5.

207. *Id.* at 1, 5.

from across the country.²⁰⁸ National organizations, as well as teachers, post-secondary educators, civil rights groups, students, and English language learning specialists provided input on drafts of the standards.²⁰⁹ After edits were incorporated, the latest draft standards were opened to public comment, and received nearly 10,000 responses.²¹⁰

As of June 2014, forty-three states, the District of Columbia, the Northern Mariana Islands, the U.S. Virgin Islands, and the Department of Defense Education Activity are participating fully in the Common Core State Standards Initiative.²¹¹ Texas and Alaska are not members of the initiative because of strong opposition to federal interference in what is seen as a local jurisdiction.²¹² “Nebraska and Virginia are members [of the initiative], but have decided not to adopt the standards. Minnesota has adopted the English language arts standards but not the math standards.”²¹³

V. CONCLUSION: THE EFFECT OF THE COMMON CORE STANDARDS ON EQUITY AND RECOMMENDATIONS FOR IMPLEMENTATION

“Almost 60 years after *Brown v. Board of Education*, we are still struggling to ensure the civil rights and equitable education of all students—a sad fact that underscores the urgency of implementing the Common Core in a way . . . [that] serves all students equally well.”²¹⁴ There are several advantages to the CCSS that will further an equitable education for all

208. *About the Standards*, *supra* note 203. For the names of individuals and organizations on the work team responsible for developing the standards, see *K–12 Standards Development Team*, Common Core State Standards Initiative, NATIONAL GOVERNORS ASSOCIATION (NGA), <http://www.nga.org/files/live/sites/NGA/files/pdf/2010COMMONCOREK12TEAM.PDF>.

209. *Development Process*, *supra* note 11. For a summary of public comments on draft standards, see *Summary of Public Feedback on the Draft College and Career Readiness Standards for English-Language Arts and Mathematics*, COMMON CORE STATE STANDARDS INITIATIVE (Oct. 21, 2009), <http://www.corestandards.org/assets/CorePublicFeedback.pdf>.

210. *Development Process*, *supra* note 11.

211. *Id.*

212. See Lindsey Burke, *Alaska, Texas Reject Common Core Standards*, HEARTLANDER MAGAZINE, Mar. 25, 2010, <http://news.heartland.org/newspaper-article/2010/03/25/alaska-texas-reject-common-core-standards>. For more recent discussion of states' differing perspectives on the CCSS, see Stephen Sawchuk, *What to Make of the Debate Over Common Core*, SMITHSONIAN.COM, Sept. 4, 2013, <http://www.smithsonianmag.com/innovation/what-to-make-of-the-debate-over-common-core-3900291/?all&no-ist>; Allie Bidwell, *The Politics of Common Core*, U.S. NEWS & WORLD REPORT, Mar. 6, 2014, <http://www.usnews.com/news/special-reports/a-guide-to-common-core/articles/2014/03/06/the-politics-of-common-core>.

213. *The Common Core State Standards, History and Fact Sheet*, *supra* note 39, at 5.

214. REGIONAL EQUITY ASSISTANCE CENTERS, HOW THE COMMON CORE MUST ENSURE EQUITY BY FULLY PREPARING EVERY STUDENT FOR POSTSECONDARY SUCCESS: RECOMMENDATIONS FROM THE REGIONAL EQUITY ASSISTANCE CENTERS ON IMPLEMENTATION OF THE COMMON CORE STATE STANDARDS 2 (2013), <http://educationnorthwest.org/sites/default/files/equity-common-core.pdf>.

children. First, the use of the CCSS has the nationwide effect of allowing “all students regardless of class, race, gender, and location to be provided the same high standards for learning.”²¹⁵ Regardless of the public school financing structure, local property tax rates, and the students’ geographic location, the standards remain constant.²¹⁶ Common standards encourage equal outcomes because students across the nation are both accountable for, and have *access to*, the same body of knowledge.

Another distinct “advantage to the standards is that they do not detail exactly how the [standardized] goals must be met; they just ‘articulate the fundamentals.’”²¹⁷ By way of contrast, one of NCLB’s greatest pitfalls was its one-size-fits-all approach. Teachers were often required to follow strict pacing guides and day-by-day teaching scripts, robbing them of the chance to apply their personalized understanding of teaching and unique discoveries they made with their students.²¹⁸ “Teachers were thought to be ‘consumers of curriculum knowledge,’ but not wise enough to be able to ‘create or critique that knowledge.’”²¹⁹ After NCLB was passed “[m]any teachers left the teaching profession due to testing pressures and stifling restrictions on what and how they could teach.”²²⁰ The drafters of the CCSS intentionally placed limitations on the standards by leaving significant ambiguity.²²¹ “Consequently, teachers are required to unpack the standards, design curriculum, and make instructional decisions for their students” based on their assessments of students’ needs.²²² When this responsibility shifts back to teachers, it cultivates buy-in, and teachers become stakeholders in achieving equitable outcomes for their students.

CCSS’s flexible curriculum is extremely crucial to a more equal education for diverse students. Scholarship on gender, sexuality, students of color, and disabled students attests to the many blind spots in traditional K-12 curriculum.²²³ White males see numerous “mirrors” of themselves in history, literature, civics, and science; but few “windows” into other lives.²²⁴ On the other hand, minorities, students with disabilities, and LGBTQ students “find almost no ‘mirrors’ of themselves in . . . curriculum; for them

215. Emily Liebttag, *Moving Forward with Common Core State Standards Implementation: Possibilities and Potential Problems*, 7 J. CURRICULUM & INSTRUCTION 56, 59 (2013).

216. *Id.* at 59.

217. *Id.*

218. *Id.*

219. *Id.* at 62.

220. *Id.*

221. *Id.*

222. *Id.* at 64.

223. See generally, HANDBOOK OF SOCIAL JUSTICE IN EDUCATION (William Ayers, Therese Quinn & Davis Stovall, eds., 2009). See also Emily Style, *Curriculum as Window & Mirror*, 33:2 SOC. SCI. RECORD 35 (1996), reprinted by NATIONAL SEED PROJECT, WELLESLEY CENTERS FOR WOMEN (2014), http://www.nationalseedproject.org/images/documents/Curriculum_As_Window_and_Mirror.pdf.

224. Style, *supra* note 223.

it is often all windows”²²⁵ All students deserve a curriculum that occasionally mirrors their own experience back to them, thus publicly validating it.²²⁶ And “curriculum must also insist upon the fresh air of windows into the experience of others—who also need and deserve the public validation of the school curriculum.”²²⁷ Windows and mirrors do not only benefit minorities—when culturally relevant teaching is incorporated into classrooms, it helps *all* students understand that there is more than one way to see the world.²²⁸ Surely an understanding of multiple perspectives is a “foundation of good citizenship” in any democracy, and should be accommodated for in any curriculum.²²⁹

CCSS’ flexibility gives teachers “opportunities to incorporate students’ cultures, backgrounds, and ideas of respect and understanding into lessons,” providing both mirrors and windows for their students.²³⁰ While not every teacher will take advantage of the opportunity to incorporate diversity into their curriculum, “trust in teachers’ opinions about what to teach and how to teach it will hopefully renew educators’ passion for their craft,” while also allowing broader inclusivity of students’ diverse backgrounds.²³¹ It will take time, but a shift away from a scripted curriculum acknowledges that teachers understand and are well equipped to address students’ diverse needs.²³²

Finally, CCSS increases the potential for collaboration and sharing of teaching materials across the country.²³³ Because adoption of the CCSS is nearly universal, experts can create and share professional development and training materials across a much larger market.²³⁴ In the past, each district and school had different standards, and the most capable person

225. Style, *supra* note 223. Research shows that teaching behavior is largely influenced by how teachers themselves were taught, and yet school populations today are often much more diverse than those that teachers knew as children. For more about how teachers can influence equitable classrooms, see Elois Scott & Heather McCollum, *Making It Happen: Gender Equitable Classrooms*, in GENDER AND EDUCATION: NINETY-SECOND YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION 174 (Sari Knopp Biklen & Diane Pollard eds., 1993).

226. Style, *supra* note 223.

227. *Id.*

228. *Id.*

229. *Brown*, 347 U.S. at 493.

230. Liebttag, *supra* note 215, at 62.

231. *Id.*

232. *Id.* For more information on teachers’ views on the CCSS, see Education Week Research Center, *From Adoption to Practice: Teacher Perspectives on the Common Core*, EDUC. WEEK (2014), http://www.edweek.org/media/ewrc_teacherscommoncore_2014.pdf (reporting that “educators feel moderately prepared to teach the common core to their students as a whole, [but] confidence drops for certain student groups, particularly English-language learners, and students with disabilities”).

233. Liebttag, *supra* note 215, at 62.

234. *Id.*

available in the area typically did training.²³⁵ Districts with fewer resources were on an uneven playing field because they were less equipped and prepared to teach, which inevitably meant a lower quality of instruction. With common standards, knowledge and expertise can be pooled to improve the quality of professional development across the country, and hopefully lead to a consistently higher quality of teaching across wealthy and poor districts and schools.²³⁶

Despite these potential advantages, the CCSS initiative is not perfect. There are still opportunities for inequality, most of which will result from unequal implementation. Unfortunately, it is nearly impossible for the implementation of CCSS to be even across the nation.²³⁷ Scholars believe there are three ways implementation will unfold: (1) States will continue to use hard-copy textbooks and assessments, and in-person professional development; (2) States will shift to using online materials and resources, as a low cost alternative; and (3) States will use a mixture of digital components and hard-copy materials.²³⁸ Due to inherent differences between these approaches to professional development and experiences offered to students, Common Core implementation is unlikely to be completely equal.²³⁹ We are also still a long way from wholly erasing funding disparities between school districts. Some districts, for example, will be less equipped to implement digital components; or may not be able to afford new textbooks as readily as others. Nevertheless, equalizing curriculum requirements is one significant step in the right direction.

Society has undoubtedly changed since the United States was founded. The world is transforming into what the United Nations calls a “knowledge society,” meaning knowledge is mass-produced and disseminated much more easily than ever before, changing the way we work, live, play and learn.²⁴⁰ Education must similarly evolve in order to adequately to prepare our children for the changing world around them. The CCSS were designed to prepare students for college and career readiness in the changing global economy, emphasizing 21st century skills and relying heavily on the use of technology.²⁴¹ In reality, some states are less

235. Liebttag, *supra* note 215, at 62.

236. *Id.*

237. *Id.* at 60.

238. *Id.*

239. *Id.*

240. U.N. DEP'T OF ECON. & SOC. AFFAIRS, UNDERSTANDING KNOWLEDGE SOCIETIES 4 (2005), available at <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN020643.pdf>. See also, U.N. EDUC. SCIENTIFIC & CULTURAL ORG. (UNESCO), UNESCO WORLD REPORT: TOWARDS KNOWLEDGE SOCIETIES (2005), available at <http://unesdoc.unesco.org/images/0014/001418/141843e.pdf>.

241. See FRESNO COUNTY OFFICE OF EDUCATION, TECHNOLOGY STANDARDS (EXTRACTED FROM THE CONTENT STANDARDS) PAGES 63–80, available at <http://commoncore.fcoe.org/sites/commoncore.fcoe.org/files/resources/SPIRAL%20FINAL.pdf> (last visited Apr. 4, 2015) (for a list of standards where technology is explicitly stated, and standards where use

prepared for this digital dependency than others,²⁴² and states whose budgets do not fully support implementing the intended standards will not fully benefit from the reforms. In order to close the gap, the less technologically equipped states will need to allocate significant funding to get their schools up to speed. If this does not happen, students of lower socio-economic status, or with less opportunity for technological literacy, will be at a huge disadvantage in high-stakes testing and in college and career readiness, compared to more economically advantaged students.

A. THE KEY TO SUCCESS: FEDERAL INVOLVEMENT

Over 60 years ago, the federal government decided that providing all citizens equal access to education was an essential quality of our democracy.²⁴³ Although equal access is a noble goal, it has yet to be fully realized. The CCSS are certainly not a silver bullet, but they do make progress toward equality by reducing the correlation between education quality and the happenstance of a student's location. Responsibility for implementation of the new standards should not fall only to the states; the federal government must scaffold the initiative to increase the probability of success. The federal government can incentivize compliance by offering federal funding, and by making full use of its policy levers, like reauthorization of the ESEA and competitive RTTT grants, to help states implement essential elements of the CCSS.²⁴⁴

I recommend three specific ways that the federal government can support the CCSS. First, a fundamental tenet of the new standards is to hold all students to the same high standards. Separate lower standards no longer exist for students with disabilities or for English Language Learners ("ELL students"), although the CCSS do recommend certain accommodations be made for these learners, such as extra time to complete tasks, additional technological support, and tailored instructional materials. The federal government should focus on filling in the gaps for these learners by directing funding towards adapting instructional materials and aligned assessments for ELL students and students with disabilities.²⁴⁵

of technology is implied); *see also*, *California Common Core: Technology*, FRESNO COUNTY OFFICE OF EDUCATION, <http://commoncore.fcoe.org/subject/technology> (last visited Apr. 4, 2015) (for additional resources about Common Core technology integration, mobile learning resources, online practice tests, and adopting a "bring-your-own-device" model).

242. Liebttag, *supra* note 215, at 60.

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

244. Quay, *supra* note 195, at 7.

245. *Id.* at 8. The authors of the CCSS offer general suggestions for implementing the standards with ELL students. *Application of Common Core State Standards for English Language Learners*, COMMON CORE STATE STANDARDS INITIATIVE (Mar. 19, 2014), <http://www.corestandards.org/assets/application-for-english-learners.pdf>. A similar document exists for students with disabilities. *Application to Students with Disabilities*, COMMON CORE STATE STANDARDS INITIATIVE (Mar. 18, 2014), <http://www.corestandards.org/assets/application-to-students-with-disabilities.pdf>.

Second, although state and districts have ultimate decision-making authority over curriculum, the federal government can encourage the success of the new standards by producing, and making available standards-aligned curriculum and instructional materials that incorporate diversity and include recommendations for students whose achievement lags.²⁴⁶ Finally, efforts to strengthen the standards will fall flat unless administrators can boost teachers' capacity to successfully instruct.²⁴⁷ The federal government should focus on improving teacher training and professional programs, and align them with the new demands of the standards.²⁴⁸

Although they present challenges, the Common Core State Standards represent a necessary first step in a renewed drive to improve the performance of the nation's public schools, and provide continuity and uniformity throughout the nation for all students. Their greatest promise lies in the opportunity to achieve a long-sought alignment of strong standards to the high quality assessments, curriculum, and instruction that research suggest are critical to improving student performance.

The necessity of quality education to a functioning democracy is well accepted and recognized.²⁴⁹ Education is essential to democracy and freedom; therefore everyone must have equal access to it, not just privileged students. Education should be viewed as an individual civil liberty, serving its democratic purpose as an essential foundation for civic engagement and social equality—as the *Brown* court intended.²⁵⁰ Although at first blush it seems contradictory to view education as an individual right and simultaneously argue for more federal oversight, I don't believe the two are mutually exclusive. Once one can make the connection between equal education and a stronger democracy and citizenry, it makes sense to divorce education quality from local property values and income taxes. "It is limiting and inaccurate to only educate our children provincially, when they must live

246. Quay, *supra* note 195, at 8.

247. *Id.*

248. *Id.*

249. See *Brown*, 347 U.S. at 493 (holding that the opportunity of receiving an education must be available to all children on equal terms, because it is such an important foundation of good citizenship); Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2048 (2006) ("[T]he 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.")

250. See *Brown*, 347 U.S. at 493; see also Kehinde Durowade, *The Role of American Individualism in the Current State of Public Schools*, 5 WIDENER J. L. ECON. & RACE 37 (2013) (arguing that American individualism, coupled with historic and modern-day racism has led to a nation of indifferent individuals who hide behind private choice to justify blatant educational inequities).

their lives in a global context.”²⁵¹ States that continue to struggle for individual control over curriculum and insist on maintaining locally tailored education do so with blind disregard for the increasingly globalized needs of their students. Indeed, there is no freedom in a ship of fools.

A patchwork of standards is unlikely to lead to a baseline of opportunity. Common standards are a step in the right direction, presenting American children with equal opportunities to learn, exposure to multiple perspectives, and opportunities to realize their full potential. These critical thinkers will grow up to become our future leaders and innovators, and contribute to the global economy, preserving the pride and beauty of the American spirit.

251. Style, *supra* note 223.