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# THE CONGRESSIONAL FAILURE TO ENFORCE EQUAL PROTECTION THROUGH THE ELEMENTARY AND SECONDARY EDUCATION ACT

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## INTRODUCTION

Later this year, Congress will debate the reauthorization of Title I of the Elementary and Secondary Education Act, which distributes nearly fifteen billion dollars a year to public schools.<sup>1</sup> The purpose of the Act is to improve the educational opportunities of poor students and to obligate those districts receiving Title I funds to comply with various federal non-discrimination statutes. Congress passed the first version of the Act in 1964 as part of the war on poverty and included compliance with racial non-discrimination statutes as a condition to receiving the funds.<sup>2</sup> The Act provided supplemental resources for needy students, created a financial incentive for schools to desegregate, and gave the federal government the practical power to force desegregation on those schools that did not desegregate voluntarily.<sup>3</sup> In subsequent years, Congress imposed various additional non-discrimination and equity requirements as conditions on schools that receive federal funds.<sup>4</sup>

The Act, however, has strayed from its original purpose in recent years. In particular, recent versions of Title I, such as the No Child Left Behind Act,<sup>5</sup> have been used to spur general school reform and political agendas more than to further non-discrimination and equity for poor students.<sup>6</sup> Although Title I

<sup>1</sup> U.S. DEP'T OF EDUC., BUDGET SUMMARY AND BACKGROUND INFORMATION, FISCAL YEAR 2010 app. (2009) (Summary of Discretionary Funds, Fiscal Years 2008-2010) [hereinafter BUDGET SUMMARY], available at <http://www.ed.gov/about/overview/budget/budget10/summary/10summary.pdf>.

<sup>2</sup> JULIE ROY JEFFREY, EDUCATION FOR CHILDREN OF THE POOR: A STUDY OF THE ORIGINS AND IMPLEMENTATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965, at 27, 67 (1978).

<sup>3</sup> See GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT 46, 77 (1969).

<sup>4</sup> See, e.g., Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2006) (requiring schools to provide free appropriate public education to students with disabilities); *id.* §§ 1681-1688 (prohibiting gender discrimination); *id.* § 1706 (creating a right of action for those denied equal educational opportunities); McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11431-11435 (2006) (ensuring homeless youths have "equal access to the same free, appropriate public education" as other youths).

<sup>5</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

<sup>6</sup> For instance, the Department of Education states that the four pillars of No Child Left Behind, the most recent version of Title I, are "Stronger Accountability for Results," "More Freedom for States and Communities," "Proven Education Methods," and "More Choices for Parents." U.S. Dep't of Educ., Overview: Four Pillars of NCLB (July 1, 2004), <http://www.ed.gov/nclb/overview/intro/4pillars.html>. Glaringly missing from these pillars is the focus on equity and poor children. Official statements that No Child Left Behind is

now requires schools to close the achievement gap for poor students, this is a small part of the overall requirements that focus on the proficiency levels of all students.<sup>7</sup> Moreover, Title I requires poor students to meet these same proficiency levels without also requiring that they receive equitable resources. In all fairness, the Act purports to require resource equity for poor children and attempts to meet their specific needs,<sup>8</sup> but today these central components of the legislation are often no more than symbolic. Title I's standards have been weakened to the point where they no longer require real equity between schools.<sup>9</sup> The clearest expression of Title I's withdrawal from the furtherance of equity is the caveat that "[n]othing in this subchapter shall be construed to mandate equalized spending per pupil for a State, local educational agency, or school."<sup>10</sup> Even placing this caveat aside, Title I now entirely exempts major categories of school budgets, such as teacher salaries, from any equity or comparative analysis.<sup>11</sup> Thus, school districts and states are essentially free to distribute their resources in most any way they see fit.

States and school districts have taken this freedom and run with it. Rather than using federal funds as part of a larger effort to improve and equalize education for poor students, states and school districts have too often used the federal funds as their exclusive or primary response to the needs of poor students. Even with the assistance of federal funds, states and school districts consistently spend less on the education of students that attend predominantly poor schools than students who do not.<sup>12</sup> Spending per pupil is \$825 less in schools with high levels of low-income students than in schools with low levels of impoverished students.<sup>13</sup> If one factors in the additional cost associated with educating poor students, that gap actually jumps to over \$1300

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"working to close the achievement gap and make sure all students, including those who are disadvantaged, achieve academic proficiency" suggest that poor children are but an excuse to enter the field of education. *Id.*; see also Martha Derthick & Joshua M. Dunn, *False Premises: The Accountability Fetish in Education*, 32 HARV. J.L. & PUB. POL'Y 1015, 1016-17 (2009).

<sup>7</sup> 20 U.S.C. § 6311.

<sup>8</sup> See *id.* § 6321(c) ("State and local funds will be used . . . to provide services . . . at least comparable to services in schools that are not receiving funds under this part."); see also *id.* § 6321(a) (indicating that an "educational agency may receive funds . . . only if . . . the local educational agency has maintained the agency's fiscal effort").

<sup>9</sup> See, e.g., *id.* § 6321(c)(1)(B) (requiring only "substantially comparable" services without setting any objective standards for comparability); *id.* § 7901 (permitting schools to allow their funds to fall to ninety percent of the previous year's levels, in contrast to previous standards that required ninety-five percent).

<sup>10</sup> *Id.* § 6576.

<sup>11</sup> *Id.* § 6321(c)(2)(b).

<sup>12</sup> THE EDUCATION TRUST, FUNDING GAPS 2006, at 7 tbl.3 (2006), available at <http://www2.edtrust.org/NR/rdonlyres/CDEF9403-5A75-437E-93FF-EBF1174181FB/0/FundingGap2006.pdf>.

<sup>13</sup> *Id.*

per student.<sup>14</sup> In an average elementary school of four hundred students, these spending practices create an average shortfall of over \$500,000 in each low-income school. More important, these funding inequities are accompanied by significant negative achievement consequences for poor students. Based on the eighth grade national assessments in 2007, students in high-poverty schools lag behind students in low-poverty schools by thirty-nine scaled points in reading and forty-one points in math.<sup>15</sup> These achievement gaps are equivalent to approximately four years of learning.<sup>16</sup> Thus, eighth grade students in high-poverty schools are earning scores equivalent to fourth graders in low-poverty schools. Title I, however, in its current form, does little, if anything, to remedy these problems.

The existence of resource inequities and the resulting inadequate opportunities not only raise policy concerns, they also raise constitutional concerns for both the schools and Congress. Recent scholarship emphasizes the constitutional responsibility of states and school districts to address school inequities and inadequacies,<sup>17</sup> noting that all fifty states have a state constitutional clause that obligates them to provide education.<sup>18</sup> Moreover, a majority of state supreme courts have interpreted these clauses to include a qualitative or equitable standard that imposes specific obligations on the state.<sup>19</sup> Based on these state court decisions and other factual developments in states, recent scholarship demonstrates that when a state fails to carry out its state-based educational obligations it not only violates its state constitution, it often also violates federal equal protection.<sup>20</sup> This Article addresses whether

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<sup>14</sup> *Id.*; see also *infra* note 47 (discussing the higher cost of securing quality teachers in high needs schools); *infra* notes 177-78 (discussing the amount of additional funding that low-income students require).

<sup>15</sup> INST. OF EDUC. SCIS., NAT'L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2009, at 153 tbl.A-12-2, 157 tbl.A-13-2 (2009), available at <http://nces.ed.gov/pubs2009/2009081.pdf> (comparing students in schools with less than ten percent poverty to schools with more than seventy-five percent poverty).

<sup>16</sup> *Id.*; see also CHRISTOPHER LUBIENSKI & SARAH THEULE LUBIENSKI, NAT'L CTR. FOR THE STUDY OF PRIVATIZATION IN EDUC., CHARTER, PRIVATE, PUBLIC SCHOOLS AND ACADEMIC ACHIEVEMENT: NEW EVIDENCE FROM NAEP MATHEMATICS DATA 5 (2006), available at [http://www.ncspe.org/publications\\_files/OP111.pdf](http://www.ncspe.org/publications_files/OP111.pdf) (explaining that ten to eleven points are equivalent to approximately one grade level when interpreting National Assessment of Educational Progress mathematics exam scores).

<sup>17</sup> See generally Derek W. Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. (forthcoming 2010).

<sup>18</sup> See Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 96-97 (1989).

<sup>19</sup> See Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1527 (2007) (discussing the outcomes in school finance cases at the state level).

<sup>20</sup> Black, *supra* note 17 (manuscript at 5-6).

Congress has a Fourteenth Amendment responsibility to respond to these constitutional violations and, if so, whether Title I is consistent with that responsibility.

The question of whether Congress has a duty is the more complicated of the two. The Fourteenth Amendment guarantees citizens equal protection of the laws, but it also grants Congress the power to enforce equal protection.<sup>21</sup> This grant of power gives Congress the authority to address school inequalities, but whether this grant of power obligates Congress to address inequalities is less certain. Viewed independently, the language of the Fourteenth Amendment suggests that Congress's enforcement power includes a significant amount of discretion.<sup>22</sup> But the basic language and nature of Congress's Fourteenth Amendment powers are distinct from that of other constitutional powers that are inherently and entirely discretionary.<sup>23</sup> These distinctions suggest that Congress's discretion under the Fourteenth Amendment, unlike other powers, is not unlimited. Further comparison and analysis suggest that Congress is obligated to act in the face of known equal protection violations, but has wide discretion in how it acts. Yet even if Congress has no obligation to act, reason dictates that any action that Congress voluntarily takes must be consistent with the Amendment's equal protection guarantee. Since Congress, in enacting Title I, has already entered the field of education, identifying a preexisting duty to remedy inequality becomes less important. Congress now must ensure that Title I furthers, rather than undermines, equal protection.

As currently enacted, Title I fails to satisfy this requirement. Even worse, Title I actually sanctions, undermines, and exacerbates educational inequalities in several respects. First, the Title I funding formulas rely on irrational factors to distribute funds. As a result, they randomly and disproportionately drive resources to some school districts and deprive other districts, which undermines both equity and the goal of meeting student needs.<sup>24</sup> For instance, the formulas guarantee a certain level of funding to small states regardless of the number of poor students who live there.<sup>25</sup> Because these small states tend to have smaller percentages of poor students, they receive more Title I funds per pupil than many other states with higher levels of poverty.<sup>26</sup> The formulas also increase the funding per pupil as the size of the district grows,

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<sup>21</sup> U.S. CONST. amend. XIV.

<sup>22</sup> See *id.* § 5 ("Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

<sup>23</sup> See, e.g., *id.* art. I, § 8, cls. 3, 11.

<sup>24</sup> See, e.g., 20 U.S.C. § 6333 (2006) (basing funding on states' per-pupil expenditures); *id.* § 6334 (guaranteeing small states a fixed amount regardless of need); *id.* § 6335(c)(1)(B) (capping the weight for concentrated poverty at 29.20% poverty); *id.* § 6335(c)(1)(C) (weighting funding based on the total number of children in a school district).

<sup>25</sup> *Id.* § 6334.

<sup>26</sup> THE EDUCATION TRUST, *supra* note 12, at 3 tbl.1.

advantaging large school districts over small districts.<sup>27</sup> However, the size of a school district does not correlate with geographic costs or the percentage of poor students therein.<sup>28</sup> In addition, although the formulas exponentially increase the Title I funds per pupil as the percentage of poor students in a school district approaches thirty, the formulas stop exponentially increasing funds beyond that point.<sup>29</sup> Yet student need continues to increase, if not skyrocket, as the percentage of poor students rises above thirty percent.<sup>30</sup> Finally, the formulas allot money based on each state's per-pupil expenditure on education.<sup>31</sup> As a result, the richest states receive the most Title I dollars and the poorest states receive the fewest. In all fairness, richer states generally have higher locality costs as well, but these states do not uniformly have significant levels of poor students whereas poor states more often do.<sup>32</sup> In short, these funding formula flaws provide fewer funds to the schools and students who need the funds most, forcing them to make their Title I dollars stretch further than other schools. In this respect, rather than narrowing inequities, Title I expands them. It takes money and resources that poor students and schools need and delivers them elsewhere.

The second categorical failure to carry out equal protection is far more obvious. Title I includes symbolic statements regarding equity, but the actual standards do little to require equity. Rather, Title I ignores some inequities and sanctions others. For instance, to ensure that schools do not reduce their local funding and replace it with federal dollars – which would produce a net result of zero gain for poor students – Title I includes a standard that requires school

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<sup>27</sup> 20 U.S.C. § 6335(c)(1)(C).

<sup>28</sup> U.S. GEN. ACCOUNTING OFFICE, TITLE I FUNDING: POOR CHILDREN BENEFIT THROUGH FUNDING PER POOR CHILD DIFFERS 33 (2002), available at <http://www.gao.gov/new.items/d02242.pdf>.

<sup>29</sup> 20 U.S.C. § 6335(c)(1)(B).

<sup>30</sup> See JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 21-22 (1966); RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC CHOICE 25-31 (2000) [hereinafter KAHLENBERG, ALL TOGETHER NOW]; RICHARD D. KAHLENBERG, THE CENTURY FOUND., RESCUING *BROWN V. BOARD OF EDUCATION*: PROFILES OF TWELVE SCHOOL DISTRICTS PURSUING SOCIOECONOMIC SCHOOL INTEGRATION 6-7 (2007) [hereinafter KAHLENBERG, THE CENTURY FOUND.], available at <http://www.tcf.org/publications/education/districtprofiles.pdf>; UNC CTR. FOR CIVIL RIGHTS, THE SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS: A CRUCIAL CONSIDERATION IN STUDENT ASSIGNMENT POLICY 1-4 (2005), available at <http://www.law.unc.edu/documents/civilrights/briefs/charlottereport.pdf>; Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1335 (2004) (arguing the best way to reach the goal of *Brown* is desegregation by economic class); see also INST. FOR EDUC. SCIS., *supra* note 15, at 153, 157 (showing a decrease in student achievement with each increase in the percentage of poor students in a school).

<sup>31</sup> 20 U.S.C. § 6333.

<sup>32</sup> THE EDUCATION TRUST, *supra* note 12, at 3 tbl.1.

districts to maintain their state and local funding contribution from the previous year.<sup>33</sup> But that same standard permits school districts to draw down their current funding to ninety percent of the previous year.<sup>34</sup> Given that federal funds are on average only eight percent of schools' education budgets,<sup>35</sup> school districts could theoretically reduce their local contribution by eight percent, replace that reduction with federal funds, and still meet the requirement of maintaining their local funding at ninety percent of the previous year. Although such action would clearly subvert the entire purpose of Title I, it would not violate the maintenance-of-effort standard. Furthermore, other standards that should catch this subversion simply go unenforced in practice.<sup>36</sup>

A more glaring omission is Title I's comparability standard, which on its face states that Title I schools must provide services comparable to other schools.<sup>37</sup> But like the maintenance-of-effort standard, the comparability standard is watered down to the point of ineffectiveness. Rather than focusing on concrete resource comparisons, the current standard is based on the ambiguous and subjective concept of comparable overall "services."<sup>38</sup> Moreover, the Act effectively eviscerates comparison of actual resources by exempting major portions of state and school budgets from scrutiny. Title I exempts teacher salaries from comparison even though they are the largest portion of most schools' budgets.<sup>39</sup> To establish comparability in this area, a school district need only show that it has a uniform salary schedule for all the teachers in the district, regardless of how those teachers are distributed.<sup>40</sup> Finally, Title I's comparability standards do not even apply to inequities between school districts. Thus, states are free to allocate resources among their school districts in any way they wish, regardless of the level of inequity they might create. In short, Title I no longer requires equity between schools or school districts, and the prevailing reality of inequity has simply become irrelevant.

Congress's third, and least excusable, categorical failure to carry out its equal protection duty is its total disregard for states' and school districts' obligations under their state constitutions and statutes. As noted above, violations of state constitutions and statutes can also amount to violations of federal equal protection.<sup>41</sup> Notwithstanding the fact that numerous states have

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<sup>33</sup> 20 U.S.C. § 6321(a) (conditioning receipt of funds on maintaining "fiscal effort").

<sup>34</sup> *Id.* § 7901 (requiring that expenditures be at least ninety percent of the "combined fiscal effort or aggregate expenditures for the second preceding fiscal year").

<sup>35</sup> U.S. DEP'T OF EDUC., 10 FACTS ABOUT K-12 EDUCATION FUNDING 2 (2005), <http://www.ed.gov/about/overview/fed/10facts/10facts.pdf>.

<sup>36</sup> See U.S. GEN. ACCOUNTING OFFICE, *supra* note 28, at 25.

<sup>37</sup> 20 U.S.C. § 6321(c)(2).

<sup>38</sup> *Id.* (referring to "services . . . taken as a whole").

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* § 6321(c)(2)(A)(i).

<sup>41</sup> See *supra* note 20 and accompanying text.

been or currently are subject to state court orders as a result of their violations,<sup>42</sup> Congress has never conditioned federal funding on states' and school districts' compliance with these obligations. Congress has simply proceeded as though students' rights under state constitutions, and by extension the Federal Constitution, do not exist.<sup>43</sup>

The Fourteenth Amendment demands a response to these existing inequities. Congress's willingness to reinvigorate Title I as a tool of equal protection, however, is unclear. Currently, a largely unnoticed Student Bill of Rights, which would cure some of the aforementioned problems, is pending before Congress.<sup>44</sup> But the wider conversation regarding reauthorization of Title I has yet to acknowledge the need for equitable change.<sup>45</sup> In fact, the current United States Secretary of Education recently credited the last version of Title I, No Child Left Behind, with focusing on "outcomes, rather than inputs."<sup>46</sup> Such statements fail to acknowledge that input inequities are not disconnected from disparities in student outcomes.<sup>47</sup> Moreover, these input inequities are at the core of equal protection concerns.

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<sup>42</sup> See SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY app. at 345-58 (Martin R. West & Paul E. Peterson eds., 2007) (listing the judgments in school finance cases).

<sup>43</sup> See Black, *supra* note 17 (manuscript at 5) (demonstrating that changes in state law over the past two decades have elevated education to a substantive constitutional right under state law and, thus, educational inequities would require elevated scrutiny under federal equal protection regardless of whether the federal constitution independently recognizes a right to education); *infra* notes 133-39 and accompanying text.

<sup>44</sup> Student Bill of Rights, H.R. 2451, 111th Cong. (1st Sess. 2009).

<sup>45</sup> See, e.g., Arne Duncan, U.S. Sec'y of Educ., Reauthorization of ESEA: Why We Can't Wait, Remarks at the Monthly Stakeholders Meeting (Sept. 24, 2009), available at <http://www.ed.gov/news/speeches/2009/09/09242009.html> (identifying the current flaw of Title I as being the focus on standardized tests rather than high learning standards).

<sup>46</sup> *Id.*

<sup>47</sup> See generally COMM. ON EDUC. FIN., NAT'L RESEARCH COUNCIL, MAKING MONEY MATTER: FINANCING AMERICA'S SCHOOLS (Helen F. Ladd & Janet S. Hansen eds., 1999) (analyzing the need for adequate funding and the ways to maximize the effect of funding on student outcomes); MICHAEL A. REBELL & JOSEPH J. WARDENSKI, THE CAMPAIGN FOR FISCAL EQUITY, INC., OF COURSE MONEY MATTERS: WHY THE ARGUMENTS TO THE CONTRARY NEVER ADDED UP (2004), available at [http://www.schoolfunding.info/resource\\_center/research/MoneyMattersFeb2004.pdf](http://www.schoolfunding.info/resource_center/research/MoneyMattersFeb2004.pdf) (providing an overview of the research and court opinions on the importance of these inputs and resources to secure them). In fact, access to the most important factor in student achievement, teacher quality, is directly tied to money. See ALLIANCE FOR EXCELLENT EDUC., IMPROVING THE DISTRIBUTION OF TEACHERS IN LOW-PERFORMING HIGH SCHOOLS 7 (2008), available at [http://www.all4ed.org/files/TeachDist\\_PolicyBrief.pdf](http://www.all4ed.org/files/TeachDist_PolicyBrief.pdf) (indicating that several states already have incentive pay for low-performing schools, but pay increase alone is insufficient to attract teachers); Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 J. HUM. RESOURCES 326, 350 (2004) (finding that a roughly ten percent salary increase would be necessary for each increase of ten percent in minority student enrollment to induce white females to teach in the school);



This Article seeks to insert equity and student need into the Title I reauthorization conversation and offers a series of recommendations that would cure most of Title I's constitutional flaws. In short, this Article proposes that Congress: (1) condition the receipt of federal funds on compliance with state constitutional and statutory obligations; (2) require equitable funding and resource distribution between schools and districts; (3) create a private cause of action to enforce these provisions; and (4) incentivize the foregoing compliance through funding formulas so as to prevent undue hardships as school systems transition toward equity. Not only would these recommendations cure constitutional flaws, they would restore the federal government to its proper role as a leader in education equality rather than a disinterested party.

#### I. THE SCOPE OF CONGRESS'S RESPONSIBILITY UNDER THE FOURTEENTH AMENDMENT

Although rarely tested or analyzed, one of the foremost means of improving educational opportunities for disadvantaged children may be exploring Congress's constitutional responsibility for addressing educational inequities, rather than focusing solely on whether students have an equal protection claim in court. A congressional responsibility would presumptively lead to far greater improvement in education than any number of lawsuits. Moreover, if Congress has such a duty, the duty would call into question whether Congress's current funding of public schools is consistent with its constitutional duty or actually runs contrary to it. To the extent Congress has a duty, it rests in the Fourteenth Amendment. Unfortunately, although the Amendment explicitly grants Congress power to enforce equal protection, the Amendment's language does not provide an explicit or obvious answer to whether that enforcement power is mandatory or discretionary.

##### A. *The Relevance of Judicial Interpretation*

Section One of the Fourteenth Amendment requires that states afford all persons within their jurisdiction equal protection of the law.<sup>48</sup> This Section provides the basis for private citizens to bring suit against state actors when they believe they have been the victim of discrimination and other forms of disparate treatment. The courts have entertained thousands of cases under Section One and thoroughly explored its contours. In contrast, Section Five of the Fourteenth Amendment does not speak to the rights of citizens. Instead,

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*id.* at 351 (finding that a twenty-five to forty percent salary increase would be necessary to induce white female teachers with two or fewer years of experience to transfer from a suburban to an urban school); Bill Turque, *In Second Year, Rhee Is Facing Major Tests; Chancellor Is National Figure*, WASH. POST, Aug. 21, 2008, at DZ01 (discussing a proposal to raise teacher salaries to \$120,000 "in exchange for concessions on tenure and linkage of pay to student performance" and teachers' resistance).

<sup>48</sup> U.S. CONST. amend. XIV, § 1.

Section Five speaks to Congress's responsibility regarding equal protection, indicating that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."<sup>49</sup>

Although it has not done so regularly, the Supreme Court has addressed this grant of congressional power on a few occasions when litigants have challenged civil rights legislation as exceeding Congress's authority. For instance, in *Katzenbach v. Morgan*,<sup>50</sup> the plaintiffs argued that congressional legislation invalidating New York's requirement that all voters be able to read and write in English was unconstitutional.<sup>51</sup> The issue in the case was whether Congress's power under Section Five of the Fourteenth Amendment was limited to simply furthering and enforcing the federal courts' equal protection decrees and interpretations, or whether Congress had authority independent of the courts. The Supreme Court found that Congress's power was not confined to the dictates of the judiciary, writing:

"It is the power of Congress which has been enlarged[ by the Fourteenth Amendment]. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment.<sup>52</sup>

Thus, the Court's inquiry of Congress's equal protection legislation does not focus on whether the behavior Congress is attempting to prohibit violates the Equal Protection Clause, but whether the legislation is "appropriate" legislation to enforce the Clause.<sup>53</sup>

Many argue that because Congress has the independent authority to identify and rectify equal protection violations of its own volition, it necessarily has the power to interpret the Constitution more broadly than the courts.<sup>54</sup> Judicial

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<sup>49</sup> *Id.* § 5.

<sup>50</sup> 384 U.S. 641 (1966).

<sup>51</sup> *Id.* at 643.

<sup>52</sup> *Id.* at 648-49 (citation omitted).

<sup>53</sup> *Id.* at 648 (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1879)).

<sup>54</sup> See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7 (2004); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 5 (1999); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 338 (2006); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*,

interpretations of equal protection only mark the boundary of courts' own enforcement of the Constitution, not Congress's.<sup>55</sup> Given this distinction, "the adjudicated Constitution often falls short of exhausting the substantive meaning of the Constitution's open-textured guarantees," such as equal protection.<sup>56</sup> Moreover, independent and broader congressional authority is a practical necessity if equal protection is to be consistently enforced. In many respects, courts simply lack the capacity or power to enforce the Constitution to its full extent and in all instances. Congress, in contrast, has the ability through funding, administrative structures, and legislation to exercise more expansive power.<sup>57</sup>

The foregoing, however, does not mean that Congress has the power to enact legislation that directly contradicts or attempts to overturn judicial interpretations of equal protection. In recent decisions, the Court has made it clear that Congress lacks this power.<sup>58</sup> The Court has further indicated that Congress needs an evidentiary basis for believing that enforcing equal protection is necessary.<sup>59</sup> Thus, it is not free to pursue unrelated policies under the guise of enforcing equal protection. These caveats, however, do not suggest that Congress lacks authority to interpret and enforce equal protection, but rather that those interpretations and enforcements cannot blatantly contradict the Court's.<sup>60</sup>

#### B. *Distinguishing Mandatory, Discretionary, and Intermediate Duties*

Determining the scope of congressional authority under equal protection only resolves the matter of whether Congress can intervene in a given situation, and this Article does not challenge Congress's power to remedy equal protection violations. Rather, the salient question for this Article is the extent to which congressional action in response to equal protection violations is mandatory, entirely discretionary, or something in between. The language of the Fourteenth Amendment grants Congress the power to act, but does not

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112 YALE L.J. 1943, 1945 (2003); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212 (1978).

<sup>55</sup> Sager, *supra* note 54, at 1213.

<sup>56</sup> Liu, *supra* note 54, at 338.

<sup>57</sup> It is important to note, however, that the Supreme Court has indicated that Congress does need a factual and legal basis for acting, so as to ensure that its exercise of Section Five power is remedial rather than political or an attempt to usurp or counteract the Court's holdings. See *City of Boerne v. Flores*, 521 U.S. 507, 526-27 (1997).

<sup>58</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598, 619 (2000); *Boerne*, 521 U.S. at 524.

<sup>59</sup> *Morrison*, 529 U.S. at 628 ("The business of the courts is to review the congressional assessment . . . for the rationality of concluding that a jurisdictional basis exists in fact.").

<sup>60</sup> For further discussion of the competing views of Congress's Section Five authority, see ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 299-300 (3d ed. 2006).

explicitly mandate the exercise of this power. Yet, neither does the language indicate the opposite: that Congress “may,” rather than “shall,” act in the face of equal protection violations.

Analyzing Congress’s Section Five power, Goodwin Liu argues that a grant of power does not automatically carry with it a grant of full discretion. “[T]he concepts of power and duty – and authority and responsibility – do not always travel separately.”<sup>61</sup> Liu’s notion recognizes that the discretionary language in Section Five refers to the type of legislation that Congress might enact, not the choice of whether to enact legislation. Having the power to determine what legislation is “appropriate”<sup>62</sup> is not equivalent to having the power to determine whether enforcement of the Fourteenth Amendment itself is appropriate. Yet, discretion regarding what legislation to enact must in some instances include the discretion to determine that no legislation is appropriate. In short, the basic language of the Amendment is ambiguous as to the exact nature of Congress’s duty or discretion.

Analyzing the language of Section Five of the Fourteenth Amendment in the overall context of other constitutional congressional powers and the structure of the Amendment itself offers more clarity. Several other constitutional congressional powers are prefaced with the same language as Section Five. Article One, Section Eight, mirroring Section Five of the Fourteenth Amendment, indicates “Congress shall have Power To”<sup>63</sup> and then proceeds to enumerate eighteen distinct powers that Congress shall have.<sup>64</sup> Among the eighteen powers enumerated in Article One, Section Eight are powers such as that “To declare War”<sup>65</sup> and to regulate commerce.<sup>66</sup> Article One, however, provides no context for these powers. Rather, it simply executes broad grants of power that are by their very nature left open to Congress. For instance, the basic grant of power “To declare War”<sup>67</sup> offers no basis to infer that Congress is obligated to declare war against anyone, at any time, or under any circumstances. Rather, by granting Congress an un-circumscribed power, Congress could use its discretion and never declare war.<sup>68</sup> Thus, the grant of power comes with discretion to exercise the power only should Congress so

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<sup>61</sup> Liu, *supra* note 54, at 363.

<sup>62</sup> U.S. CONST. amend. XIV, § 5.

<sup>63</sup> *Id.* art. I, § 8.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* cl. 11.

<sup>66</sup> *Id.* cl. 3.

<sup>67</sup> *Id.* cl. 11.

<sup>68</sup> See *Holtzman v. Schlesinger*, 414 U.S. 1316, 1319 (1973) (holding that Article One, Section Eight, Clause Eleven gives only Congress the power to declare war); *Ex parte Quirin*, 317 U.S. 1, 26 (1942) (stating that the Constitution gives the President power to wage war, which Congress, rather than the President, has declared); see JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3 (1993).

choose. The same applies to the power to regulate Commerce. Congress clearly has the power to regulate commerce,<sup>69</sup> but very well could choose never to exercise it.<sup>70</sup> In fact, this was Congress's approach at various points in United States history and even today, Congress has yet to exercise its commerce power fully.<sup>71</sup> Yet, there is no suggestion that the failure to entirely dominate interstate commerce is a dereliction of duty. In short, these Article One grants of power are entirely discretionary.

Further reinforcing the discretionary nature of these powers is the fact that they do not create a responsibility toward, or right on behalf of, any entity other than Congress. Under Congress's Article One, Section Eight powers, no individual, constituent, or state has a right to declare war, to regulate interstate commerce, to borrow money in the name of the United States, to have a certain type of money coined, or to exercise several other powers listed in Section Eight.<sup>72</sup> Thus, one could not demand anything of Congress in these respects, nor suggest Congress was derelict in its duty if it failed to act. In effect, Congress's Article One, Section Eight powers are powers of exclusion. The grant of congressional power excludes others from acting in these areas or, at least, supplant other actors who may have concurrent power in these areas.<sup>73</sup>

The Fourteenth Amendment's structure, however, is entirely different, suggesting that the Section Five grant of power is not entirely discretionary. First, Section Five is not a basic grant of power unconnected to other legal rights or obligations. The Fourteenth Amendment, in whole, grants legally enforceable individual rights.<sup>74</sup> In fact, Section One of the Amendment explicitly creates vast individual rights, the protection of which is the foremost purpose of the Amendment.<sup>75</sup> Thus, Section Five does not stand alone as a

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<sup>69</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>70</sup> The history of congressional regulation of commerce is gradual regulation where previously there was none. Prior to 1937, however, the Court regularly acted to limit Congress's commerce power. *See, e.g.,* *Carter v. Carter Coal Co.*, 298 U.S. 238, 245 (1936); *United States v. E.C. Knight Co.*, 156 U.S. 1, 11 (1895). But after 1937, the Court has consistently allowed Congress to expand its commerce power and reclaim those areas from which the Court previously excluded Congress. *See* CHEMERINSKY, *supra* note 60, at 254-64.

<sup>71</sup> Consider the freedom of the internet and the relative lack of regulation and taxation of its use.

<sup>72</sup> *See generally* CHEMERINSKY, *supra* note 60, at 242-87.

<sup>73</sup> *Id.* at 236-42.

<sup>74</sup> *See, e.g.,* *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

<sup>75</sup> *See Plyler v. Doe*, 457 U.S. 202, 239 (1982) (overturning a statute that deprived students of the opportunity to attend school and would have created an "underclass" because it was contrary to the purpose of the Fourteenth Amendment); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) ("[A] central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.").

broad or undefined power, but rather is linked to, and given substance by, these individual rights.

Second, Section Five is not an exclusionary power. While the power to regulate commerce gives Congress the ability to exclude states from acting in the area,<sup>76</sup> Congress's Section Five power does not do the same for equal protection. The Amendment does not prevent states from acting in the field of equal protection. In fact, most states have their own equal protection clauses and on occasion act progressively in implementing them.<sup>77</sup> The point of Section Five of the Fourteenth Amendment is to further strengthen the effect of Section One by tethering Congress to it and making it clear that Congress, in addition to the states and the courts, has a responsibility to enforce the rights therein.<sup>78</sup> As Goodwin Liu writes, Section Five "speaks directly to Congress and independently binds Congress to its commands."<sup>79</sup>

Third and most important, Section Five cannot be entirely discretionary because the primary right to equal protection, unlike other congressional powers, does not belong to Congress; the primary right belongs to the individual.<sup>80</sup> Thus, under Section Five, Congress has a responsibility to the individual and to the protection of specifically identified rights of the individual. In contrast, to the extent any of Congress's other powers create any responsibility or constituency, the responsibility is to Congress itself, and Congress can presumably be trusted with acting responsibly to protect its own powers and rights. The same is not necessarily true in regard to protecting or respecting others.

In short, these distinctions indicate that unlike Congress's Article One, Section Eight powers, Congress's Fourteenth Amendment, Section Five powers are not entirely discretionary. However, ruling out the notion that Congress's power is entirely discretionary does not dictate that Congress's duty is entirely mandatory. Again, the language of Section Five explicitly contradicts a specific mandatory duty, granting Congress the power to determine what legislation is "appropriate."<sup>81</sup>

Congress's Section Five power appears to fall somewhere between a non-discretionary and completely discretionary duty. The most appropriate

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<sup>76</sup> *Austin v. Tennessee*, 179 U.S. 343, 344 (1900) (recognizing the exclusive power of Congress to regulate interstate commerce).

<sup>77</sup> *See, e.g., DuPree v. Alma Sch.* Dist. No. 30, 651 S.W.2d 90, 91 (Ark. 1983); *Sheff v. O'Neill*, 678 A.2d 1267, 1270-71 (Conn. 1996).

<sup>78</sup> *See Post & Siegel, supra* note 54, at 1945-48; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866) (statement of Sen. Howard) (stating that Section Five "imposes upon Congress this power and this duty" to enforce all sections of the Amendment). Significant debate, however, exists regarding the extent to which Congress can interpret the Fourteenth Amendment independent of the courts. *Post & Siegel, supra* note 54, at 2003.

<sup>79</sup> *Liu, supra* note 54, at 339.

<sup>80</sup> U.S. CONST. amend. XIV (indicating in Section One that the right to equal protection belongs "to any person within [a state's] jurisdiction").

<sup>81</sup> *Id.* § 5.

characterization of the power would be an intermediate duty that obligates Congress to act, but reserves to Congress the discretion as to how to act. More specifically, Congress can exercise discretion as to *how* best to enforce the rights in Section One of the Fourteenth Amendment, but it cannot exercise discretion as to *whether* to protect those rights. Thus, Congress does have a “duty” to enforce Section One, or as the Court in *Katzenbach* characterized it, a “responsibility.”<sup>82</sup>

Attempting to resolve the dichotomy here, Liu analogizes Congress’s Section Five duty to that of executive and judicial branch officers. Police officers, for instance, have been afforded wide discretion in providing police protection and, in most cases, are given immunity against individual suit when exercising this discretion.<sup>83</sup> The basis for this discretion, however, is not that the police have no duty to protect citizens, but that the police have a duty to protect society at large and need flexibility in determining how to provide this protection to the public given police departments’ limited resources.<sup>84</sup> Thus, to say that police have discretion in providing protection is not to say that the police can simply refuse to provide protection services, but rather that they have discretion in how they provide those services. Similarly, statutes and the Constitution grant the judiciary both jurisdiction over certain types of cases and discretion in determining whether a case actually falls within their grant of jurisdiction.<sup>85</sup> This discretion, however, is not intended to permit courts to reject cases that they find are within their jurisdiction; rather, they have a duty to accept these cases.<sup>86</sup> In short, the judicial “discretion exists against a presumption that courts must exercise the jurisdiction they are given, as

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<sup>82</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 648 (1966).

<sup>83</sup> Liu, *supra* note 54, at 363-64; *see also, e.g.*, *Beltran v. City of El Paso*, 367 F.3d 299, 302-03 (5th Cir. 2004) (“The doctrine of qualified immunity serves to shield a government official from liability based on the performance of discretionary functions.” (citing *Thompson v. Upshur County*, 245 F.3d 447, 456 (5th Cir. 2001))).

<sup>84</sup> *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-61 (2005) (finding that there is no individual right to police protection, but that the police owe a legal duty of protection to the public in general); *Riss v. City of New York*, 240 N.E.2d 860, 866 (N.Y. 1968).

<sup>85</sup> *See, e.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (indicating that the “court generally retains discretion to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over pendent state-law claims”).

<sup>86</sup> *See, e.g.*, *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (discussing the “virtually unflagging obligation of the federal courts to exercise the jurisdiction given them”); *England v. La. Bd. of Med. Exam’rs*, 375 U.S. 411, 415 (1964) (“When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . .” (quoting *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 40 (1909))); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (stating that federal courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not”).

'[a]uthority to act necessarily implies a correlative responsibility.'"<sup>87</sup> Similarly, Section Five of the Fourteenth Amendment grants Congress the discretion as to what type of legislation is appropriate, but that discretion comes with a duty to enforce equal protection.

C. *The Duty to Act Consistent with Equal Protection*

Although Congress might have a duty under Section Five, Congress is largely responsible for policing itself in fulfilling this duty. Its discretion as to how to act, even in the face of a duty to act, could easily amount to an empty promise of equal protection enforcement. As a practical matter, Congress could use its discretion to eviscerate the effect of its duty. Liu argues, however, that the concept of good faith still operates as a limitation on Congress's discretion in carrying out its Section Five duty.<sup>88</sup> Just as the President is charged to "take Care that the Laws be faithfully executed,"<sup>89</sup> so too is Congress expected to act in good faith in exercising its discretion in enforcing the Fourteenth Amendment.<sup>90</sup> A good faith standard would be consistent with the lines that courts have drawn when police officers and governmental agencies are liable for their actions.<sup>91</sup> Such a standard, however, only acts as a check on institutional actors that are clearly outside of their power or entirely derelict in their duty. All other congressional actions would largely be beyond challenge.

Any number of situations might arise where Congress makes choices of how to enforce equal protection, and those choices can lead to deleterious or ineffective results. Conversely, Congress might simply choose to refrain from acting, assuming that a state actor or the judicial system would resolve the matter. To the extent any of these choices were arguably rational and were undertaken with the purpose of protecting Fourteenth Amendment rights, most of these situations would likely fall within the category of good faith efforts.<sup>92</sup> Thus, as a practical matter, forcing Congress to affirmatively enforce equal protection in a situation where it has chosen otherwise might be impossible.

Although not helpful in regard to the vast majority of contested congressional actions, a good faith standard does create a narrow but definitive

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<sup>87</sup> Liu, *supra* note 54, at 364 (alteration in original) (quoting David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 575 (1985)).

<sup>88</sup> *Id.* at 363-66, 408-09.

<sup>89</sup> U.S. CONST. art. II, § 3.

<sup>90</sup> Liu, *supra* note 54, at 408-09.

<sup>91</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (recognizing immunity for officers who act in good faith); see also *Davis v. Scherer*, 468 U.S. 183, 190 (1984) (extending the qualified immunity defense to officials that violate state regulations or federal constitutional provisions).

<sup>92</sup> See *Wood v. Strickland*, 420 U.S. 308, 320-21 (1975) (writing that actions taken within the bounds of reason based on the circumstances would be in good faith and, thus, not subject the state actor to liability).



limit on some actions. Upon choosing to act, Congress, at the very least, cannot act in ways that are antithetical to its duty or good faith efforts to execute that duty. In areas other than equal protection, this point is clear. For instance, Congress has the constitutional power to establish uniform rules of naturalization, which means that Congress would be prohibited from establishing inconsistent naturalization laws that operate differently from person to person or state to state.<sup>93</sup> The meaning of equal protection and the duty to enforce it are not nearly as simple to define, but the principle still operates.

In particular, when congressional action is not just a failed effort at furthering equality, but rather is an act that actually sanctions and furthers inequality, Congress would violate its Section Five duty. Of course, some of these actions might be direct violations of equal protection,<sup>94</sup> making Section Five irrelevant. For instance, during the 1960s, Congress could have attempted to continue the segregation of public schools by conditioning the receipt of federal funds on schools offering education in single-race buildings. This action would have been a violation of equal protection itself because its intent and effect would have been to discriminate.<sup>95</sup> Other actions, however, might be inconsistent with Section Five without amounting to a direct violation of equal protection. For instance, suppose that Congress was agnostic toward school segregation and placed no conditions on the receipt of federal funds. If Congress created a general school construction fund, schools might have applied for and used these funds to construct single-race schools. As a practical matter, it is possible that in the south all of these funds could have gone toward building new white-only schools. Could anyone seriously argue that Congress's funding of the building of new white schools, regardless of intent, was not a violation of its duty to enforce the Fourteenth Amendment?<sup>96</sup> If segregated schools were unconstitutional per *Brown v. Board of Education*,<sup>97</sup>

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<sup>93</sup> See *Graham v. Richardson*, 403 U.S. 365, 382 (1971) ("Congress' power is to 'establish an uniform Rule of Naturalization.' A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity." (quoting U.S. CONST. art. I, § 8, cl. 4)).

<sup>94</sup> If Congress directly denied citizens equal protection, that denial would be a violation of the Fifth Amendment rather than Section One of the Fourteenth Amendment, as the Fourteenth Amendment prohibits states from denying equal protection and the Fifth Amendment prohibits Congress from denying citizens equal protection. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>95</sup> See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (setting discriminatory intent, in addition to disparate effect, as the basis for a constitutional violation).

<sup>96</sup> The Court poses a similar question in *Shapiro v. Thompson*, 394 US 618, 641 (1969), and indicates the answer is no.

<sup>97</sup> 347 U.S. 483, 495 (1954).

then the expenditure of federal funds to continue those schools is nothing less than antithetical to Congress's Section Five duty.

The Court in *Katzenbach*, likewise, furthered the notion that Congress is prohibited from acting antithetical to, or inconsistent with, equal protection. Relying on basic constitutional interpretation principles from *M'Culloch v. Maryland*,<sup>98</sup> the Court in *Katzenbach* wrote that the line between constitutional and unconstitutional action is "whether [an act] may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with the 'letter and spirit of the constitution.'"<sup>99</sup> The Court further added that:

[Section] 5 [of the Fourteenth Amendment] does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be — as required by § 5 — a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.<sup>100</sup>

More recently, the Court in *Saenz v. Roe*<sup>101</sup> reinforced this concept of Congress's Section Five power, writing that Congress is "prohibited from passing legislation that purports to validate" or sanction violations of the Fourteenth Amendment.<sup>102</sup>

In sum, although Congress has discretion as to how to act, Congress has a duty to enforce the Fourteenth Amendment. Moreover, even the discretion in deciding how to act is not without limits. Congress must act in good faith in executing its duty and is prohibited from acting in a manner that is antithetical to equal protection. It cannot undermine or dilute equal protection, but rather must act to enhance it. Thus, the issue that the remainder of this Article must address is whether Congress's funding of public schools undermines equal protection or is, at least, arguably an attempt to further equal protection. Of course, Congress has latitude in regard to the latter, but none as to the former.

#### D. *The Limitation on Private Causes of Action to Enforce Congress's Duty*

Before proceeding, however, it is important to emphasize that the question of whether Congress's action is unconstitutional under Section Five of the

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<sup>98</sup> 17 U.S. (4 Wheat.) 316, 421 (1819).

<sup>99</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (quoting *M'Culloch*, 17 U.S. (4 Wheat.) at 421).

<sup>100</sup> *Id.* at 651-52 n.10.

<sup>101</sup> 526 U.S. 489 (1999).

<sup>102</sup> *Id.* at 508.

Fourteenth Amendment is distinct from the question of whether an individual can challenge Congress's action in court. The above analysis speaks solely to the constitutionality of Congress's actions under Section Five, regardless of an individual's standing to sue under Section Five or any other basis. To have a cause of action, a plaintiff must suffer an individual injury and have standing to sue in regard to that injury.<sup>103</sup> Direct violations of Section One of the Fourteenth Amendment often create such an injury. Individuals who do not suffer a direct injury might instead attempt to pursue a generalized grievance as a taxpayer, but this strategy would likewise require proof that the challenged action violates Section One of the Fourteenth Amendment.<sup>104</sup>

Congress could, however, violate or fail to carry out its Section Five duty to enforce the Fourteenth Amendment without actually engaging in a direct violation of equal protection. A mere congressional dereliction in protecting racial minorities from discrimination, for instance, would not necessarily amount to a denial of equal protection to an individual because the Supreme Court has held that intentional discrimination is necessary to establish a claim.<sup>105</sup> Of course, if congressional action amounted to intentional discrimination, an individual suffering injury from that discrimination could sue directly under the prohibition against the denial of equal protection and Section Five of the Fourteenth Amendment would be largely irrelevant.<sup>106</sup> But whether an individual might have the right to sue for congressional derelictions of duty is not central to this Article's thesis. Rather, the point of this Article is that some congressional action that undermines equal protection or fails to enforce equal protection is unconstitutional, and thus demands correction, even if an individual could not force this correction in court.

With that said, it is still worth recognizing that when Congress attempts to further equal protection or any other end through financial incentives, the courts have placed some limits on Congress's spending power, and have

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<sup>103</sup> See CHEMERINSKY, *supra* note 60, at 62-63 (detailing the need for concrete harm).

<sup>104</sup> See *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 600 (2007) (Alito, J., plurality opinion) (placing further limitations on individual challenges to spending legislation). The cases discussed above involve plaintiffs who suffered individual harm from the legislation in question, whereas *Hein* involves a citizen challenging spending legislation based primarily on First Amendment principles. *Id.* at 592. In short, the plaintiff does not suffer an individual harm and, thus, is proceeding based on taxpayer standing. *Id.* at 593. In such a situation, the plaintiff faces not only the challenge of proving unconstitutional action but also a link between their taxpayer status and the challenged legislation. *Id.* at 602. The Court in *Hein* narrows plaintiffs' ability to establish that link, primarily based on the Court's own concern with overstepping its separation of powers limitation. *Id.* at 611-12. In contrast, the cases above involve plaintiffs with live injuries rather than general taxpayer grievances.

<sup>105</sup> *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

<sup>106</sup> Of course, the individual's claim under these circumstances would be under the Fifth rather than Fourteenth Amendment, as the Fourteenth operates against state actors while the Fifth operates against federal actors. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

recognized a cause of action when Congress transgresses those limits.<sup>107</sup> Individual standing to sue under the Spending Clause is relatively narrow because Congress's spending powers are themselves so broad.<sup>108</sup> The Court, however, has held that Congress is not free to spend money in any way it sees fit.<sup>109</sup> The Court in *South Dakota v. Dole* identified four basic parameters for congressional spending.<sup>110</sup> First, the spending must be in pursuit of the general welfare.<sup>111</sup> Second, any conditions that Congress places on the receipt of funds must be unambiguous.<sup>112</sup> Third, any conditions that "are unrelated 'to the federal interest in particular national projects or programs'" may be illegitimate.<sup>113</sup> Finally and of more importance to equal protection, all congressional spending must comply with "other constitutional provisions[, which] may provide an independent bar to the conditional grant of federal funds."<sup>114</sup>

The independent bar restriction on congressional spending means that Congress cannot use its spending power "to induce the States to engage in activities that would themselves be unconstitutional."<sup>115</sup> To establish that congressional spending is unconstitutional based on an independent bar, a plaintiff must demonstrate that the underlying activity of the federal funding recipient is itself unconstitutional.<sup>116</sup> In the context of the Fourteenth Amendment, the independent bar prong would simply ask whether the underlying activity of the funding recipient violates Section One of the Fourteenth Amendment. If the funding recipient were a private rather than state actor, the question would be whether the activity would be unconstitutional if a state rather than private actor were carrying it out. Thus, the law of the relevant independent constitutional clause at issue controls the inquiry under this prong.

The second prong, however, is unique to the Spending Clause and tends to be the determinative and more complicated inquiry in these cases. The question under the second prong is whether the condition that Congress places on the funds simply coerces or actually compels the funding recipient to engage in the unconstitutional action.<sup>117</sup> If the congressional funds merely

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<sup>107</sup> *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (asserting that Congress's exercise of its spending power must be in pursuit of "the general welfare").

<sup>108</sup> *Id.* at 210-11.

<sup>109</sup> *Id.* at 207.

<sup>110</sup> *Id.* at 207-08.

<sup>111</sup> *Id.* at 207.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 207-08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

<sup>114</sup> *Id.* at 208.

<sup>115</sup> *Id.* at 210.

<sup>116</sup> *Id.* at 210-11.

<sup>117</sup> *Id.* at 211 (recognizing that there are times when congressional financial inducements to states are so coercive that they are in fact compulsive).

coerce, the spending legislation is permissible, as the Court has deemed the violation to be a result of the funding recipient's own decision.<sup>118</sup> But when Congress places conditions on federal funds that require the recipient to act in a manner that violates the Constitution, the spending legislation is unconstitutional.<sup>119</sup>

These issues are often addressed when state actors attempt to defend themselves against suits by private citizens. When sued for some constitutional violation, state actors sometimes argue that, although the conditions on federal funds did not require their action, Congress authorized their unconstitutional action.<sup>120</sup> The Court has rejected this notion, indicating that Congress has no power to authorize states to engage in unconstitutional action.<sup>121</sup> In these cases, the Court has not necessarily invalidated the congressional spending, but more narrowly held that the underlying state activity is unconstitutional and Congress's implicit approval of it is irrelevant.<sup>122</sup> Because Congress did not require the unconstitutional action, the state could have spent the federal funds in a way that did not violate the Constitution. This is distinct from instances where Congress effectively requires the unconstitutional action. In the latter situation, it would be Congress that has acted unconstitutionally.<sup>123</sup> In the former, the state acted unconstitutionally and Congress cannot turn unconstitutional action into constitutional action.<sup>124</sup> In related cases, the Court has also held that Congress is prohibited from enlisting state cooperation in a joint federal-state program that would violate the Constitution.<sup>125</sup>

Nonetheless, the purpose of this Article is not to validate a private cause of action to challenge Congress's equal protection enforcement. The purpose is to establish that Congress has a duty to further equal protection. That individuals may not always be able to force Congress to fulfill this duty, however, does not negate the existence of its duty, nor does it suggest that Congress is free to take its duty lightly. Congress always has a duty to act in accordance with and to carry out the Constitution.

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<sup>118</sup> *Id.*

<sup>119</sup> See *United States v. Am. Library Ass'n*, 539 U.S. 194, 203, 214 (2003) (finding that Congress, through passage of the Children's Internet Protection Act, did not induce libraries to violate the First Amendment); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991).

<sup>120</sup> See, e.g., *Saenz v. Roe*, 526 U.S. 489, 506-08 (1999); *Graham v. Richardson*, 403 U.S. 365, 380-83 (1971).

<sup>121</sup> See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) ("Congress may not authorize the States to violate the Equal Protection Clause.").

<sup>122</sup> The Court in *Saenz*, however, indicated that "Congress . . . is implicitly prohibited from passing legislation that purports to validate [unconstitutional action]." *Saenz*, 526 U.S. at 508.

<sup>123</sup> *Shapiro*, 394 U.S. at 641.

<sup>124</sup> See, e.g., *Graham*, 403 U.S. at 380-83.

<sup>125</sup> *Townsend v. Swank*, 404 U.S. 282, 291 (1971) (quoting *Shapiro*, 394 U.S. at 641).

## II. EQUAL PROTECTION FAILURES AND VIOLATIONS IN TITLE I

Congress currently spends fifteen billion dollars per year on primary and secondary schools.<sup>126</sup> The purpose of these funds is to supplement the local money available to meet the special needs of poor children and also to obligate schools to comply with various non-discrimination and equality statutes.<sup>127</sup> The primary legislation through which Congress allocates these funds is Title I of the Elementary and Secondary Education Act.<sup>128</sup> Because the Act is merely spending legislation, Congress must reauthorize the Act periodically, captioning it with a different title each time. The most recent version of the Act was the No Child Left Behind Act.<sup>129</sup> Unfortunately, these reauthorizations have caused Title I to undergo various changes over the past decades, some of which have diluted the impact of its funds and reduced the requirement for equity between schools.

The initial version of Title I was narrowly focused on a relatively small group of schools and students,<sup>130</sup> but over time its funds have been spread across a majority of the nation's schools.<sup>131</sup> As a result, the funds' impact on individual schools and students is far less significant.<sup>132</sup> In addition, these funds are now distributed in ways that actually exacerbate inequalities among many school districts. Likewise, although Congress imposed certain conditions on these funds early in Title I's history, today these conditions do

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<sup>126</sup> BUDGET SUMMARY, *supra* note 1, app. (Summary of Discretionary Funds, Fiscal Years 2008-2010).

<sup>127</sup> See 20 U.S.C. § 6301 (2006) (listing "meeting the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance" as one of the statute's goals).

<sup>128</sup> Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

<sup>129</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

<sup>130</sup> JEFFREY, *supra* note 2, at 60-61.

<sup>131</sup> INST. OF EDUC. SCIS., NAT'L CTR. FOR EDUC. STATISTICS, NUMBERS AND TYPES OF PUBLIC ELEMENTARY AND SECONDARY SCHOOLS FROM THE COMMON CORE OF DATA: SCHOOL YEAR 2006-07 tbl.2 [hereinafter NUMBERS AND TYPES], *available at* <http://nces.ed.gov/pubs2009/2009304.pdf> (indicating that 58,021 of the nation's total 98,793 schools are Title I schools).

<sup>132</sup> The Office of Education saw this problem coming long before it finally came to fruition. In 1969, the Office of Education concluded that, although Title I funds had produced significant new resources and opportunities for poor children, these programs could not be sustained over the long term given current trends. OFFICE OF EDUC., U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, HISTORY OF TITLE I ESEA 35 (1969) [hereinafter HISTORY OF TITLE I] ("The trend . . . has been to serve more and more children but with less and less money . . . . [I]t will not be possible to enhance or even to maintain the quality of local Title I programs unless those programs are concentrated more effectively on the most educationally deprived children.").

little if anything to address inequity. The original intent of many of the conditions was to ensure that the funds were actually providing additional resources to needy students and that the schools receiving these funds were equivalent to other schools. But these conditions have been relaxed and amended in ways that actually allow inequity rather than constrain it.

The relaxation of equity standards and the inequitable distribution of federal funds raise constitutional concerns. Ignoring or sanctioning certain inequities might be rational if supplemental federal funds remedied the inequities, but they do not. In fairness to Congress, because states and local school districts are the ones that create the inequities in the first instance and Congress does not mandate these inequities, the current structure of Title I may not amount to a denial of equal protection itself. However, insofar as Congress sanctions or permits these known inequities, Congress breaches its duty under Section Five of the Fourteenth Amendment to enforce equal protection. Congress then compounds its breach of duty by not only sanctioning these inequities, but expanding them through the way in which it distributes Title I funds.

Of course, the mere existence of inequities in schools does not necessarily amount to a violation of equal protection that Congress must address, but as demonstrated in a recent article, many of the inequities that states create do violate equal protection.<sup>133</sup> All fifty states have constitutional clauses that guarantee students a public education,<sup>134</sup> and many state courts have held that this constitutional right to education includes a qualitative component.<sup>135</sup> The various state legislatures have also enacted statutes that further expand and define the meaning of this right.<sup>136</sup> When the United States Supreme Court first addressed funding inequities in *San Antonio Independent School District v. Rodriguez*,<sup>137</sup> educational rights had not yet developed into qualitative and constitutional rights. Rather, education was akin to a basic public benefit that the state could distribute whimsically amongst its citizens. In contrast, today the right to education is an affirmative state constitutional right and would require a more stringent equal protection scrutiny than what the Court previously applied.<sup>138</sup> Thus, when educational inequities rise to the level of violating their respective state constitutions and statutes, they are often also denials of equal protection under Section One of the Fourteenth Amendment.<sup>139</sup>

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<sup>133</sup> Black, *supra* note 17 (manuscript at 5).

<sup>134</sup> Hubsch, *supra* note 18, at 96-97.

<sup>135</sup> Rebell, *supra* note 19, at 1502.

<sup>136</sup> See, e.g., N.C. GEN. STAT. §§ 115C-1 to -583 (2007 & Supp. 2008); VA. CODE ANN. § 22.1-253.13:1 (Supp. 2009).

<sup>137</sup> 411 U.S. 1, 36-37 (1973) (refusing to recognize any requirements beyond providing children with “the opportunity to acquire . . . basic minimal skills”).

<sup>138</sup> Black, *supra* note 17 (manuscript at 5).

<sup>139</sup> *Id.*

Based on Part I's discussion of Congress's power and responsibility under Section Five of the Fourteenth Amendment, one might argue that Congress could, in a good faith exercise of discretion, choose not to act to remedy these inequities. In effect, Congress might conclude that no legislation is appropriate at this time, or until the federal courts further address these issues. However, once Congress chooses to act in this field, its power is limited to those actions that are consistent with enforcing equal protection. More particularly, although Congress might refrain from acting, it is unconstitutional for Congress to enact legislation that is antithetical to equal protection in education. When Congress sanctions, funds, and sometimes exacerbates denials of equal protection by the states, it does exactly that: it directly undermines, rather than enforces, equal protection.

A. *The History and Purpose of Title I*

That a program whose original purpose is to provide additional funding to poor children would violate the Constitution seems counterintuitive, particularly given that Congress's duty to enforce equal protection is relatively broad and includes a level of discretion. Were Congress to have maintained the structure and substance of the earlier iterations of Title I, this Article would concede that Congress appropriately furthers equal protection through Title I. The current version of Title I, however, is significantly different from earlier versions in some of the most important areas, and its interest in assisting poor children and remedying inequity is no longer clear. Rather, its purposes have strayed more towards general educational reform at best, and simple entitlement funding at worst. Although improving education generally is a laudable goal, that goal cannot come at the expense of, or be indifferent to, equal protection.

Significant federal funding for primary and secondary schools did not begin until 1965, when Congress first enacted the Elementary and Secondary Education Act.<sup>140</sup> Extending federal funds to public schools served two purposes: furthering the War on Poverty and desegregating schools with a carrot rather than a stick.<sup>141</sup> The money was not directed to all schools, but rather to schools serving a specific group of children: poor children living in areas of concentrated poverty.<sup>142</sup> By accepting federal funds, the schools became subject to various conditions embodied in federal statutes. Most important among these conditions was compliance with Title VI of the Civil Rights Act of 1964, which prohibited discrimination in federally funded

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<sup>140</sup> JEFFREY, *supra* note 2, at 89.

<sup>141</sup> Julia Hanna, *The Elementary and Secondary Education Act 40 Years Later*, ED. MAGAZINE, Summer 2005, available at [http://www.gse.harvard.edu/news/2005/0819\\_esea.html](http://www.gse.harvard.edu/news/2005/0819_esea.html).

<sup>142</sup> See HISTORY OF TITLE I, *supra* note 132, at 17; Goodwin Liu, *Improving Title I Funding Equity Across States, Districts and Schools*, 93 IOWA L. REV. 973, 975 (2008).



programs and directed federal agencies to implement regulations to further enforce Title VI.<sup>143</sup>

Of course, school districts were already subject to the Fourteenth Amendment and the Supreme Court's prohibition of school segregation in *Brown v. Board of Education*.<sup>144</sup> The Supreme Court's decision, however, accomplished very little by itself. A decade after *Brown*, desegregation had not even begun in most school districts.<sup>145</sup> The hope was that by extending federal dollars to school districts and attaching conditions to those funds, federal agencies could desegregate schools more effectively and consistently than could federal courts alone.<sup>146</sup> In fact, once financial consequences attached to desegregation, many schools finally began to implement *Brown*'s requirements in earnest.<sup>147</sup> The results, however, were far from uniform. Although desegregating, some school districts spent the funds in less than responsible ways. In particular, some states simply used federal dollars to replace state dollars.<sup>148</sup> The obvious result was to undermine Congress's other purpose of providing extra resources for the education of low-income students.

In response, Congress imposed additional conditions and restrictions to ensure that school districts used the funds to improve educational services for poor students. In particular, Congress conditioned the receipt of Title I funds on the concepts of comparability and supplemental funding.<sup>149</sup> Comparability required that the state and local funding at Title I schools be comparable to that at non-Title I schools.<sup>150</sup> Thus, a school district would violate Title I if it spent \$2000 per pupil at a non-Title I school while only spending \$1500 per student

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<sup>143</sup> 42 U.S.C. § 2000d (2006).

<sup>144</sup> 347 U.S. 483, 495 (1954).

<sup>145</sup> GARY ORFIELD & CHUNGMEI LEE, CIVIL RIGHTS PROJECT AT HARVARD UNIV., *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?* 19 (2004), available at <http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf>.

<sup>146</sup> See ORFIELD, *supra* note 3, at 46, 77.

<sup>147</sup> *Id.* at 77. But see Vincent James Strickler, *Green-Lighting Brown: A Cumulative-Process Conception of Judicial Impact*, 43 GA. L. REV. 785, 854-55 (2009) (finding that neither the courts, nor federal funding, produced much desegregation in their early stages).

<sup>148</sup> Phyllis McClure, CTR. FOR AM. PROGRESS, *The History of Educational Comparability in Title I of the Elementary and Secondary Education Act of 1965*, in ENSURING EQUAL OPPORTUNITY IN PUBLIC EDUCATION: HOW LOCAL SCHOOL DISTRICT FUNDING PRACTICES HURT DISADVANTAGED STUDENTS AND WHAT FEDERAL POLICY CAN DO ABOUT IT 9, 13 (2008) [hereinafter ENSURING EQUAL OPPORTUNITY], available at <http://www.americanprogress.org/issues/2008/06/pdf/comparability.pdf>; see also HISTORY OF TITLE I, *supra* note 132, at 23-25 (discussing the lack of real reporting and monitoring of the funds during the first few years following the Elementary and Education Act's enactment).

<sup>149</sup> Pub. L. No. 91-230, sec. 105(a)(3), § 109, 84 Stat. 121, 124 (1970).

<sup>150</sup> *Id.*

at a Title I school.<sup>151</sup> In effect, school districts that did not treat their schools equally would not be eligible for additional Title I dollars to make up the difference of the inequality. The concept of supplemental funding required that school districts use federal dollars to supplement those funds that they were already spending, rather than using federal dollars to supplant existing state or local funds.<sup>152</sup> In short, states could not reduce their own spending on schools in a single year or over time and replace it with federal dollars.

This early version of Title I, both in design and function, is a quintessential example of Congress carrying out its duty to enforce equal protection. First, to the extent states were financially and qualitatively shortchanging poor students and districts, Congress remedied inequality both by providing more funds for poor students and prohibiting districts from treating them unequally. Prior to Title I, states and local school districts paid little attention to providing special services for at-risk, needy, or disabled children.<sup>153</sup> For instance, many school districts excluded disabled students altogether because they refused to incur the cost of educating them.<sup>154</sup> As for poor, at-risk, or needy students, the best schools simply expected them to succeed with the same resources as the general student population, with no additional attention given to their special needs. More frequently, however, poor students were in schools where they received substantially less resources than students at other schools.<sup>155</sup> Title I's purpose was to end this disadvantageous treatment. Second, Congress used funding and antidiscrimination statutes to achieve desegregation in ways the courts could not.<sup>156</sup> Likewise, Title I funds created the means by which to implement other antidiscrimination norms in the future. Thus Title I, in

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<sup>151</sup> The specific requirement after the 1970 amendments to the ESEA were that school expenditures at Title I schools be within five percent of non-Title I schools. McClure, *supra* note 148, at 17-18. This specific requirement, however, was detailed in federal regulations rather than the statute itself. *Id.* at 17.

<sup>152</sup> Pub. L. No. 91-230, sec. 105(a)(3), § 109, 84 Stat. 121, 124.

<sup>153</sup> See, e.g., *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866, 868 (D.D.C. 1972) (adjudicating the District of Columbia's refusal to provide education to special needs students).

<sup>154</sup> *Id.*; see also Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, §§ 3(b)(3), 601, 89 Stat. 773, 774 (codified as amended at 20 U.S.C. § 1400 (2006)) ("[M]ore than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity.").

<sup>155</sup> McClure, *supra* note 148, at 14 (indicating that many of the schools receiving Title I funds were black schools that had been the victims of unequal funding under de jure segregation); see also WAYNE FLYNT, ALABAMA IN THE TWENTIETH CENTURY 223-25 (Glenn Feldman & Kari Frederickson eds., 2004) (discussing the historical absence of high schools for blacks in Alabama and the drastically unequal spending in other respects).

<sup>156</sup> See ORFIELD, *supra* note 3, at 46 (considering that the strategy of withholding federal aid was Congress's response to the lack of progress made by the civil rights movement in the judicial system).

conjunction with other statutes, was a remedy to past, present, and future discriminatory violations of equal protection.

Unfortunately, this initial mission to secure educational equality has been diluted, lost, and undermined. The first major redirections of Title I occurred during the late 1970s and early 1980s. Congress altered the standards that ensured equity among schools for a decade of Title I's history.<sup>157</sup> Most important among these changes were those to Title I's comparability requirements. As indicated above, comparability standards were designed to ensure that the state and local funds available for Title I schools were equivalent to those at non-Title I schools. Title I and its regulations originally permitted no more than a five percent variance in spending between Title I and non-Title I schools.<sup>158</sup> In the late 1970s, the regulations loosened this requirement, doubling the permissible variance to ten percent and thereby permitting the gap between disadvantaged schools and privileged schools to expand.<sup>159</sup> During the Reagan Administration, quantifiable measures of comparability were simply eliminated altogether.<sup>160</sup>

Title I's role in furthering equal protection through anti-discrimination policies, particularly in regard to segregation, has likewise shifted. This shift, unlike that of comparability, has occurred over time rather than in a single reauthorization of the statute. This shift, nonetheless, is nearly complete. Federal regulatory efforts to desegregate have been slowly curtailed for decades.<sup>161</sup> Yet, the long curtailment has accumulated to the point where active desegregation is almost entirely non-existent today.<sup>162</sup> Thus, the

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<sup>157</sup> See Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, § 558(c)(2), 95 Stat. 357, 468 (permitting districts to demonstrate comparability with a mere district wide salary schedule, and the existence of policies of equivalence for instruction and curriculum).

<sup>158</sup> 45 C.F.R. § 116.26 (1972) (requiring comparability at a five percent variance between Title I and non-Title I schools); 45 C.F.R. § 116a.26 (1977) (requiring the same five percent comparability between Title I and non-Title I schools); see also McClure, *supra* note 148, at 17.

<sup>159</sup> 45 C.F.R. § 116 (1978) (making no reference to numerical comparability at all); see also McClure, *supra* note 148, at 18.

<sup>160</sup> McClure, *supra* note 148, at 21; see also Education Consolidation and Improvement Act of 1981 § 558(c)(2), 85 Stat. at 468.

<sup>161</sup> U.S. COMM'N ON CIVIL RIGHTS, BECOMING LESS SEPARATE? SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS 22-23 (2007), available at [http://www.usccr.gov/pubs/092707\\_BecomingLessSeparateReport.pdf](http://www.usccr.gov/pubs/092707_BecomingLessSeparateReport.pdf) (discussing Department of Justice data that shows the United States was a party to roughly half as many desegregation lawsuits in 2007 as in 1984).

<sup>162</sup> *Id.* at 25 ("Since [fiscal year] 1991, [the Educational Opportunities Section ("EOS") of the Department of Justice] has not initiated any new traditional desegregation lawsuits and has indicated that they are not aware of any such federal suits being instituted by other

funding structure that was initiated to desegregate schools can no longer be characterized as a concerted effort to ensure racial equity in education. Of course, Congress still requires schools that receive federal funds to comply with Title VI's prohibition on racial discrimination,<sup>163</sup> but this prohibition is largely redundant today. In contrast to prior years,<sup>164</sup> courts no longer interpret Title VI as placing any higher burden on schools than does the Constitution,<sup>165</sup> and the Department of Education no longer seeks to enforce high standards of equality vigorously through its regulatory power.<sup>166</sup> Instead of using these funds to desegregate schools or ensure racial equity, Congress now uses these funds to further its general educational reform efforts, such as improving general educational quality or encouraging standards-based teaching and testing.<sup>167</sup> While such ends may have independent merit, goals of this sort do not amount to remedial action under the Fourteenth Amendment. Rather, they are simply policy initiatives.<sup>168</sup> In short, Title I no longer serves as a mechanism of equal protection enforcement.

B. *The Deconcentration and Limited Impact of Title I Funds*

Like the overall mission of Title I, the disbursement of Title I funds has also shifted over time, undermining its very ability, regardless of intent, to serve as a remedial tool. Congress initially directed Title I funds primarily to areas of

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parties. Moreover, EOS has not intervened in any ongoing desegregation lawsuits during this time period.”).

<sup>163</sup> 42 U.S.C. § 2000d (2006).

<sup>164</sup> See, e.g., *Powell v. Ridge*, 189 F.3d 387, 399-400 (3d Cir. 1999); *N.Y. Urban League, Inc., v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993); *United States v. City of Yonkers*, No. 80 Civ. 6761, 1995 WL 358746, at \*5 (S.D.N.Y. June 14, 1995).

<sup>165</sup> See *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001) (holding that a cause of action under Title VI exists only for intentional discrimination).

<sup>166</sup> The Department of Education maintains a disparate impact regulation. 34 C.F.R. § 100.3(b)(2) (2008). But the enforcement of that regulation is not mentioned in any respect in the Office for Civil Rights's most recent report to Congress. 2007-2008 OFFICE FOR CIVIL RIGHTS ANN. REP., available at <http://www.ed.gov/about/reports/annual/ocr/annrpt2007-08/annrpt2007-08.pdf>.

<sup>167</sup> U.S. Dep't of Educ., *Four Pillars of NCLB*, *supra* note 6 (discussing the four pillars of No Child Left Behind and its exclusion of the traditional mission of equity for poor children or racial minorities); see also *Liu*, *supra* note 142, at 975 (highlighting that original education legislation intended to direct “federal aid to poor children living in concentrated poverty,” not provide for general education reform); *McClure*, *supra* note 148, at 23 (pronouncing that Title I no longer focuses on servicing disadvantaged students in poor areas).

<sup>168</sup> In all fairness, the Act does require schools to report student achievement by race and ensure students in all subgroups are achieving sufficiently. 20 U.S.C. § 6311 (2006). However, this goal is but a portion of the Act and its overall attempt to reform schools.

concentrated poverty and racial segregation.<sup>169</sup> Thus, to create maximum incentives for desegregation and significantly increase the resources in the neediest schools, a relatively small number of schools received Title I funds.<sup>170</sup> Congress, however, no longer appropriately focuses its funding on these schools. The lack of focus may actually have little impact on desegregation because the will to further serious desegregation is missing even if funds were available.<sup>171</sup> However, the lack of focus does have a large impact on the capacity of Title I to improve educational opportunities for poor students and schools because the funds are now diluted across so many schools.

Today, over ninety percent of school districts receive Title I funds.<sup>172</sup> The threshold for eligibility is the existence of a mere two percent of a school district's children living below the poverty level.<sup>173</sup> With this low threshold, fifty-eight percent of public schools receive Title I funds.<sup>174</sup> Thus, the available funds are diluted across a wide cross-section of schools, but not all of these schools are predominantly poor schools.<sup>175</sup> The effect is to take needed funds away from the poorest schools and give it to schools that have relatively small numbers of poor students.

By deconcentrating Title I funds, the per-pupil allotment drops to a level that makes it difficult for federal funds to make an appreciable difference in the educational opportunities that poor children receive.<sup>176</sup> Experts estimate that

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<sup>169</sup> Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 201, 79 Stat. 27, 27 (indicating the purpose and policy was to fund school districts "serving areas with concentrations of children from low-income families to expand and improve their educational programs").

<sup>170</sup> *Id.* § 205(a)(1), 79 Stat. at 30 (limiting grants under the statute to those areas of concentrated poverty with school programs that were of "sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting" the needs of poor children); HISTORY OF TITLE I, *supra* note 132, at 5-6.

<sup>171</sup> See Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. REV. 1597, 1599-1600 (2003) (discussing the failures of past administrations, courts, and political will to desegregate schools).

<sup>172</sup> C. Joy Farmer, Note, *The No Child Left Behind Act: Will it Produce a New Breed of School Financing Litigation?*, 38 COLUM. J.L. & SOC. PROBS. 443, 456 (2005).

<sup>173</sup> 34 C.F.R. § 200.71 (2008).

<sup>174</sup> NUMBERS AND TYPES, *supra* note 131, (indicating that 58,021 of the nation's total 98,793 schools are Title I schools).

<sup>175</sup> James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 942 (2004) (explaining how the eligibility standards can result in high-poverty schools in some school districts not receiving funds, while lower poverty schools in other districts would receive funds).

<sup>176</sup> HISTORY OF TITLE I, *supra* note 132, at 35 ("[The trend] has been to serve more and more children but with less and less money. . . . [I]t will not be possible to enhance or even to maintain the quality of local Title I programs unless those programs are concentrated more effectively on the most educationally deprived children."); Ryan, *supra* note 175, at 942; Farmer, *supra* note 172, at 456.

special needs students require thirty to sixty percent more funding than the general student.<sup>177</sup> Congress and the Department of Education have estimated the additional need at forty percent.<sup>178</sup> The total federal allotment for public schools, however, is modest, making up less than ten percent of school budgets nationally.<sup>179</sup> After spreading the funds across so many schools, they fall far short of a thirty to sixty percent supplement. For instance, in Arkansas where the state spent \$5929 per pupil in 2006, the Title I supplement was \$1009 per poor student, a mere seventeen percent increase in funding.<sup>180</sup> The percentage is even lower in states like South Carolina and Nevada.<sup>181</sup> However, the dilution of funds can be even greater at the individual school level. Because of the various weights built into the funding formulas, the poorest schools are forced to stretch their Title I dollars further than wealthier schools. As Liu notes, the average Title I aid per student in schools that have low levels of poor students is \$773, while that number is only \$475 in schools with the highest levels of poor students.<sup>182</sup> Thus, not only are Title I funds diluted as a general matter, they are the lowest in the schools where they are needed the most.

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<sup>177</sup> No Child Left Behind Act, Pub. L. No. 107-110, §§ 1124, 1125A, 115 Stat. 1425, 1516, 1525-26 (codified at 20 U.S.C. §§ 6333, 6337 (2006)) (setting the standard for whether low-income schools are fairly funded as whether they receive a forty percent funding increase adjustment); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *INEQUALITIES IN PUBLIC SCHOOL DISTRICT REVENUES* 62 (1998) (identifying forty percent as the appropriate adjustment for low-income students); U.S. GEN. ACCOUNTING OFFICE, *SCHOOL FINANCE: PER PUPIL DIFFERENCES BETWEEN SELECTED INNER CITY AND SUBURBAN SCHOOLS VARIED BY METROPOLITAN AREA* 30 (2002); Ross Wiener & Eli Pristoop, *THE EDUCATION TRUST, How States Shortchange the Districts That Need the Most Help*, in *FUNDING GAPS* 2006, *supra* note 12, at 5, 6 (stating that Goodwin Liu uses a sixty percent adjustment for poor children, while authors Wiener and Pristoop use a forty percent adjustment); *see also* THOMAS B. FORDHAM INST., *FUND THE CHILD: TACKLING INEQUITY & ANTIQUITY IN SCHOOL FINANCE* 21-30 (2006), *available at* <http://www.edexcellence.net/doc/FundtheChild062706.pdf> (advocating student weighting funding that would drive additional resources to needy children).

<sup>178</sup> Education Finance Incentive Grant Program, Pub. L. No. 107-110, § 1125(A), 115 Stat. 1425, 1525 (codified at 20 U.S.C. § 6337) (setting the standard for whether low-income schools are fairly funded as whether they receive a forty percent funding increase adjustment); NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 177, at 62 (identifying forty percent as the appropriate adjustment for low-income students); *see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 177, at 30 (using forty percent as a mark of low income).

<sup>179</sup> THE EDUCATION TRUST, *supra* note 12, at 14 app. tbl.8.

<sup>180</sup> *Id.* at 3 tbl.1, 4 tbl.2.

<sup>181</sup> For instance, the percentage falls to sixteen in South Carolina and fourteen in Nevada. *Id.* The calculations are based on data in the source, which lists \$6746 in South Carolina state expenses per pupil and \$1140 as Title I allocation, and \$6362 in Nevada state expenses per pupil and \$897 as Title I allocation. *Id.*

<sup>182</sup> Liu, *supra* note 142, at 1010 (citing STEPHANIE STULLICH ET AL., U.S. DEP'T OF EDUC., *TARGETING SCHOOLS: STUDY OF TITLE I ALLOCATIONS WITHIN SCHOOL DISTRICTS* 10 (1999)).

Of course, were states themselves already providing a large portion of the necessary supplement, the modest federal allotment would be sufficient. However, this is not the case. Relying on the federal standard of a forty percent increase, a recent study finds that even with federal dollars, students who attend schools with high levels of poor students are shortchanged by \$1307 per pupil on average.<sup>183</sup> Of course, some states are below that average and, thus, Title I funds come close to meeting student needs, but other states like New York shortchange poor students at an astounding rate of \$2927 per pupil.<sup>184</sup> Thus, in an average elementary school of four hundred students, New York would be shortchanging the school by approximately one million dollars. Of course, the states themselves are primarily responsible for these shortcomings,<sup>185</sup> but if Congress's aim is to remedy these problems, its dilution of funds across ninety percent of the nation's school districts currently stands in the way.

C. *The Irrational Distribution of Title I Funds*

As the above discussion implies, not only does Congress overly dilute Title I funds, it distributes them in various irrational ways that undermine the ability of Title I to remedy inequities. Goodwin Liu finds that, rather than directing resources to the neediest students and remedying inequality, the current funding formulas serve political ends and administrative convenience.<sup>186</sup> In the absence of a duty to enforce equal protection, Congress might be free to pursue political ends, but given the continuing prevalence of inequitable educational opportunities, Congress has no such luxury. Moreover, as the following demonstrates, not only is Congress shirking its Fourteenth Amendment duty, it is directly funding inequality and oftentimes increasing it.

Congress distributes Title I funds through no less than four different funding formulas and grants.<sup>187</sup> Two of the current formulas are simply remnants of

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<sup>183</sup> THE EDUCATION TRUST, *supra* note 12, at 7 tbl.3.

<sup>184</sup> *Id.*

<sup>185</sup> *See, e.g.*, N.C. CONST. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."); R.I. CONST. art. XII, § 1 ("The diffusion of knowledge . . . being essential to the preservation of [the people's] rights and liberties, it shall be the duty of the general [state] assembly to promote public schools . . . , and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education . . .").

<sup>186</sup> Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2064-66 (2006).

<sup>187</sup> 20 U.S.C. § 6333 (2006) (setting forth amounts of Basic Grants to local educational agencies); § 6334 (setting forth amounts of Concentration Grants to local educational agencies); § 6335 (setting forth amounts of Targeted Grants to local educational agencies); § 6337 (appropriating funds for Education Finance Incentive Grants to local educational agencies).

prior versions of Title I.<sup>188</sup> Rather than revising the old formulas, Congress added new formulas in 1994.<sup>189</sup> The failure to coordinate and evaluate these different formulas creates irrational fund distributions and also the potential for the formulas to work at cross-purposes. The first flaw in the formulas is that they all include statutory minimums that provide a base level of funding to all states, regardless of their need, poverty, or other relevant factors.<sup>190</sup> As a result, states with small populations, such as South Dakota or Rhode Island, receive a disproportionately large amount of money that bears no relation to the number of poor students they serve.<sup>191</sup> In fact, because they have so few poor students, their Title I funding per student exceeds the amount that two-thirds of the other states receive.<sup>192</sup> The windfall for students in these states serves no rational purpose. Instead, it is likely more directly related to gaining or keeping the support of Senators in those states for Title I in general.

The second flaw in Title I is that its funding formulas do not fully account for the negative effects of concentrated poverty. Research on the issue uniformly indicates that as the concentration of poverty increases, the negative educational effects of poverty are compounded.<sup>193</sup> Thus, it would cost more per pupil to counteract the disadvantage of poverty in a school that is fifty percent low-income than it would in a school that is fifteen percent low-income. Two of Title I's funding formulas explicitly recognize this principle, but do not fully account for it.<sup>194</sup> These two formulas actually exponentially increase the per-pupil expenditure as the percentage of poor students in a district increases, but stop the exponential increase at roughly thirty percent (twenty-nine percent poverty if measured at the county level and thirty-eight percent if measured at the school district level).<sup>195</sup> Thus, while the formulas recognize that it costs more per pupil to educate poor students in a school with thirty percent poverty than, for instance, a school with twenty percent poverty, it treats all students above the thirty percent poverty level as equivalent to one another. Flattening the funding increase at thirty percent poverty is facially

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<sup>188</sup> See Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 101, 108 Stat. 3518, 3519 (codified at 20 U.S.C. § 6301); *id.* § 1125, 108 Stat. at 3571 (codified at 20 U.S.C. § 6335).

<sup>189</sup> *Id.* § 1125A, 108 Stat. at 3575 (codified at 20 U.S.C. § 6336) (adding Targeted Grants and Education Finance Incentive Grants to the Elementary and Secondary Education Act).

<sup>190</sup> 20 U.S.C. §§ 6333(d), 6334(b), 6335(e), 6337(b)(1)(B).

<sup>191</sup> THE EDUCATION TRUST, *supra* note 12, at 3 tbl.1.

<sup>192</sup> *Id.*

<sup>193</sup> See COLEMAN ET AL., *supra* note 30, at 20-23; KAHLENBERG, ALL TOGETHER NOW, *supra* note 30, at 39-40; McUsic, *supra* note 30, at 1355; see also GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 53 (1996) (indicating that research has consistently found a "powerful relationship between concentrated poverty and virtually every measure of school-level academic results").

<sup>194</sup> 20 U.S.C. §§ 6335(c)(1)(B), 6335(c)(2)(B), 6337(d)(1)(A), 6337(d)(1)(B).

<sup>195</sup> *Id.*



irrational, as the effects of poverty do not flatten at thirty percent. In fact, the need for exponentially greater funding based on concentrated poverty likely starts, rather than ends, somewhere between thirty and fifty percent.<sup>196</sup> Research on student achievement generally indicates that, so long as the percentage of students in poverty remains below fifty percent, the overall achievement of the student body can remain steady.<sup>197</sup> But once poverty approaches fifty percent, the effects become deleterious for both poor and middle-class students.<sup>198</sup> The funding formulas seemingly acknowledge this research, but nonetheless act contrary to it by limiting the increase for concentrated poverty at the arbitrary level of thirty percent.<sup>199</sup> The practical

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<sup>196</sup> See KAHLBERG, ALL TOGETHER NOW, *supra* note 30, at 39-40 (explaining that researchers have defined high-poverty as the point where fifty percent of students or more are eligible for free or reduced-price meals because students in these schools have far lower test scores than similar students in schools with lesser concentrations of poor students); MICHAEL J. PUMA ET AL., U.S. DEP'T OF EDUC., PROSPECTS: THE CONGRESSIONALLY MANDATED STUDY OF EDUCATIONAL GROWTH AND OPPORTUNITY: THE INTERIM REPORT 77 tbl.1.51 (1993) [hereinafter THE INTERIM REPORT], available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/13/10/cc.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/13/10/cc.pdf) (demonstrating a precipitous decline in student performance once the percentage of poor students reaches fifty percent); MICHAEL J. PUMA ET AL., U.S. DEP'T OF EDUC., PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES 12 (1997), available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/15/0a/e8.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/15/0a/e8.pdf) ("School poverty depresses the scores of all students in schools where at least half of the students are eligible for subsidized lunch, and seriously depresses the scores when over 75 percent of students live in low-income households.").

<sup>197</sup> KAHLBERG, ALL TOGETHER NOW, *supra* note 30, at 39-40; THE INTERIM REPORT, *supra* note 196, at 77 tbl.1.51.

<sup>198</sup> KAHLBERG, ALL TOGETHER NOW, *supra* note 30, at 39-40. Consistent with this research, Wake County, North Carolina caps the percentage of poor students assigned to a single school at forty percent. KAHLBERG, THE CENTURY FOUND, *supra* note 30, at 4, 9-11.

<sup>199</sup> The current weightings for concentrated poverty suggest a viewpoint that assumes poverty is primarily an individual problem rather than a structural institutional problem. The formulas allocate money to school districts (and consequently the schools within them) even when they have very low levels of poor students. Such funding is consistent with an individualized view of poverty, as individual students in schools with low levels of poverty surely have individual needs of their own. But if one views student poverty in education as an institutional problem, allocating funds to schools with very low levels of poverty is questionable. In all fairness, while the formulas recognize that student needs increase as the poverty level approaches thirty percent, they still suggest an individualized concept of poverty whereby the individual needs of students peak regardless of the school they attend. Thus, even if an entire school is poor, each student's need is equivalent to the needs of students in a school with lesser poverty. Schools, however, do not deliver education to individuals or in a vacuum. They deliver education to communities or groups of students and within the context that those groups create. Thus, although individual poor students certainly have individual needs even if the overall school has only a small number of poor students, these students' poverty has essentially no effect on the school's ability to deliver

effect is to deny the additional funds to the most disadvantaged students, those for whom Title I was primarily designed to aid.

Interestingly, while Title I places insufficient weight on poverty concentration, it inexplicably places significant weight on district size, creating the third major flaw in the funding formulas. The funding formula for Title I's Targeted Grants significantly increases the per-pupil funds as the size of the school district increases.<sup>200</sup> If school district size corresponded with geographic location, this weighting might be rational, as the cost of education tends to be higher in more densely populated states and localities. For instance, the cost of education tends to be higher in cities than in rural areas.<sup>201</sup> However, school district size does not necessarily correspond with population density or with city versus rural school districts. Rather, the size of a school district is random in most respects.

Some cities and localities have metropolitan school districts while others are divided up into multiple small school districts. For instance, Charlotte, North Carolina has a single school district that includes both the city of Charlotte and the county of Mecklenberg.<sup>202</sup> It serves over 133,000 students.<sup>203</sup> The total population of the county is approximately one million and the entire metropolitan area around 1.5 million.<sup>204</sup> In contrast, Detroit has a single city school district that is surrounded by fifty-three suburban school districts.<sup>205</sup> The city school district serves just fewer than 90,000 students.<sup>206</sup> The total metropolitan area is over four million.<sup>207</sup> In short, while Detroit is twice the size of Charlotte, its school district is one-third smaller. Under the Title I

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education. In contrast, when the percentage of poor students in a school is, for example, fifty percent, these students have significant impacts on the ability of the school to deliver education to all of its students, regardless of their individual socioeconomic class. In short, although Title I attempts to address concentrated poverty, its approach does not fully account for the effect that concentrated poverty has on educational institutions.

<sup>200</sup> 20 U.S.C. § 6335(c)(1)(b) (weighting the formula based on the total number of children in a school district).

<sup>201</sup> See, e.g., *Abbott v. Burke* (*Abbott II*), 575 A.2d 359, 393-94 (N.J. 1990) (discussing the unique administrative burdens that cities confront based on the various services they must offer citizens outside of education); *id.* at 400-04 (discussing the special and additional needs of poor students in urban districts).

<sup>202</sup> See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6 (1971).

<sup>203</sup> Charlotte-Mecklenburg Schools, <http://www.cms.k12.nc.us/mediaroom/aboutus/Pages/FastFacts.aspx> (last visited Oct. 18, 2009).

<sup>204</sup> Charlotte Chamber, [http://www.charlottechamber.com/index.php?submenu=DemographicsEconomicProfile&src=gendocs&ref=DemographicsEconomicProfile&category=eco\\_dev](http://www.charlottechamber.com/index.php?submenu=DemographicsEconomicProfile&src=gendocs&ref=DemographicsEconomicProfile&category=eco_dev) (last visited Oct. 18, 2009).

<sup>205</sup> See *Milliken v. Bradley*, 418 U.S. 717, 740 (1974).

<sup>206</sup> Detroit Public Schools, <http://www.detroitk12.org> (last visited Oct. 18, 2009).

<sup>207</sup> U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION OF METROPOLITAN AND MICROPOLITAN STATISTICAL AREAS: APRIL 1, 2000 TO JULY 1, 2008 tbl.1 (2009), available at <http://www.census.gov/popest/metro/tables/2008/CBSA-EST2008-01.xls>.

formula that relies on district size as a factor, however, Charlotte would receive a larger per-pupil Title I grant than Detroit.<sup>208</sup>

When looking at small districts, which could be located anywhere in the country, the problem is even more obvious. Pelham Union Free School District, which borders New York City School District and is one of the most expensive and dense localities in the country, services just over 2500 students.<sup>209</sup> Alabama, in contrast, is one of the relatively least expensive areas of the country to live and largely rural. However, out of Alabama's 132 school districts, almost sixty percent are equal to or larger than Pelham.<sup>210</sup> Thus, these Alabama districts would receive the same amount of funding, or greater, per pupil as those in Pelham under the district size funding weights even though Pelham is located in a far more expensive locality.

Notwithstanding the randomness of school district size, Title I places significant weight on it. In fact, district size carries more weight than the concentration of poverty.<sup>211</sup> Thus, a medium-sized school district with over ninety percent poor students would be disadvantaged in relation to a larger school district with a lower percentage of poor students. Goodwin Liu notes that this heavy weighting for large school districts might be rational if these large school districts happened to educate a majority of the nation's poor children.<sup>212</sup> However, just as school district size does not correlate with cost or geography, neither does it closely correlate with the number of poor children that a district serves.<sup>213</sup> Poor children are spread throughout the country's school districts. In fact, over half of the nation's poor children attend school districts that are smaller than 50,000 students.<sup>214</sup> Thus, favoring large school districts does not serve to direct additional funds to poor students. Instead, it actually does them a disservice by creating arbitrary inequities.

By favoring large school districts, the formula creates an inequity between rural and urban districts, even though the percentage of poor students in many rural school districts is just as high as in urban districts. In some areas, rural districts collectively may serve just as many poor students as urban districts.

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<sup>208</sup> 20 U.S.C. § 6335(c)(1)(C) (2006) (providing a different funding weight for districts above 93,811 students).

<sup>209</sup> NAT'L CTR. FOR EDUC. STATISTICS, COMMON CORE OF DATA, LOCAL EDUCATION AGENCY UNIVERSE SURVEY (2006-2007) (data on file with author) (listing Pelham Union Free School District student population as 2681 in 2006-2007).

<sup>210</sup> *Id.* (listing 54 out of 132 districts as having a student population lower than 2681 in 2006-2007).

<sup>211</sup> Liu, *supra* note 142, at 991. Compare 20 U.S.C. § 6335(c)(2)(C), with *id.* § 6335(c)(1)(C) (giving roughly the same weight in the funding formula to district size of approximately 94,000 and to thirty percent poverty).

<sup>212</sup> Liu, *supra* note 142, at 1003.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* (stating that within the school districts that as a whole enroll seventy-three percent of the nation's poor children, "[s]ixty-two percent of . . . poor children were enrolled in districts with 50,000 or fewer students").

Furthermore, the formula creates inequity between mid-sized and large school districts, even though their costs and needs are often similar. Goodwin Liu points to the example of Los Angeles Unified School District, one of the nation's largest school districts, which is abutted by Inglewood and Kings Canyon school districts. Although smaller in size, Inglewood and Kings Canyon are urban districts with costs very similar to Los Angeles.<sup>215</sup> Inglewood and Kings County both have high proportions of poor students, but because of the weighting for district size, Inglewood receives only sixty-three cents, and Kings Canyon only fifty-four cents, for every dollar Los Angeles receives.<sup>216</sup> In short, not only does Congress minimize the impact of Title I funds by diluting them, those funds that it does distribute are irrationally allocated based heavily on factors such as district size, rather than on the most important factor: poverty concentration.

D. *Title I's Exacerbation of Funding Inequalities*

Not only has Congress diluted the effectiveness of Title I funds in remedying inequality, Congress creates or exacerbates additional inequality in some respects. Most notably, rather than closing the resource gap between states, Congress actually increases the gap or creates new ones. First, as noted above, the funding formulas in Title I have minimum allotments for small states, regardless of how few poor students they educate.<sup>217</sup> Consequently, states with small populations receive a disproportionate share of Title I funds and, thus, more funds per student.<sup>218</sup> In fact, states like Wyoming and Vermont receive the highest per-pupil allotments of Title I funds in the country at nearly \$3000 per pupil, but have the fewest number of poor children in the country.<sup>219</sup> Moreover, their state and local spending levels already rank among the top four most well-funded in the country.<sup>220</sup> In short, in some instances, the state minimums act to give the highest per-pupil allotments to the richest states with the fewest poor students. The effect is not just irrational; it expands the gap between these states and needier states.

Second, Congress further perpetuates funding discrepancies by basing the amount of Title I funds on the amount the state itself spends on education.<sup>221</sup>

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<sup>215</sup> *Id.* at 1000 tbl.5.

<sup>216</sup> *Id.* at 1001.

<sup>217</sup> 20 U.S.C. §§ 6333(d), 6334(b), 6335(e), 6337(b)(1)(B) (2006); *see also supra* notes 190-91 and accompanying text.

<sup>218</sup> Liu, *supra* note 142, at 981-82 (indicating that Alaska, New Hampshire, North Dakota, Vermont, and Wyoming receive relatively high amounts of aid even though they have low levels of poverty).

<sup>219</sup> THE EDUCATION TRUST, *supra* note 12, at 3 tbl.1.

<sup>220</sup> *Id.* at 4 tbl.2.

<sup>221</sup> 20 U.S.C. § 6333(a)(1)(B) (basing grant amount on the "average per-pupil expenditure in the State"); §§ 6334(a)(2)(B), § 6335(b)(1)(B), § 6337(b)(1)(A)(i). *But see* §

Two apparent premises motivate this practice: that the state expenditures reflect the varying cost of education among states<sup>222</sup> and that basing Title I funds on state expenditures will create an incentive for states to increase their own expenditures.<sup>223</sup> Although well intentioned, both premises prove incorrect in reality. The variances in state contributions to education do not closely correlate with the varying geographic costs.<sup>224</sup> Thus, some states are over-compensated and others are under-compensated in terms of their cost. In fact, because of the disconnect between local costs and state expenditures, the United States General Accounting Office (“GAO”) has recommended eliminating state expenditures as a weighting factor in Title I funding formulas.<sup>225</sup> Nevertheless, if basing federal funds on state expenditures created an incentive for states to increase their educational expenditures, this weight might be warranted. Unfortunately, they create very little, if any, incentive because federal funds are such a small part of education budgets.<sup>226</sup> As Goodwin Liu points out, a state like Mississippi would have to increase its funding by fifty-four million dollars to get a mere three million dollar increase in Title I funds.<sup>227</sup> More simply, for every extra dollar that Mississippi might spend on education, it would receive less than six cents from Title I.

Several commentators conclude that basing Title I grants on the amount that states spend simply penalizes poor states.<sup>228</sup> Rather than rewarding effort, it rewards wealth.<sup>229</sup> States that have lower per-pupil expenditures often are

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6333(a)(1)(B) (establishing minimums and maximums for this per-pupil expenditure, which would prevent over-punishing poor states or over-rewarding rich states).

<sup>222</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 28, at 33.

<sup>223</sup> See Education Finance Incentive Grant Program, 20 U.S.C. § 6337.

<sup>224</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 28, at 33 (explaining that factors other than cost, such as the high incomes of taxpayers in some states and the increased willingness of some states to spend on education, affect the amount of local expenditures on education).

<sup>225</sup> *Id.*

<sup>226</sup> U.S. DEP’T. OF EDUC., *supra* note 35 (indicating federal funds are only eight percent of local education agency budgets); see also U.S. GEN. ACCOUNTING OFFICE, *supra* note 28, at 25 (stating that not only do Title I funds fail to push states to spend on low-income students, “the amount of money that could be provided through an incentive grant is not likely to be sufficient to create changes in states’ behaviors”).

<sup>227</sup> Liu, *supra* note 142, at 985.

<sup>228</sup> *Id.*; see also Goodwin Liu, THE EDUCATION TRUST, *How the Federal Government Makes Rich States Richer*, in FUNDING GAPS 2006, at 2, 2 [hereinafter Liu, THE EDUCATION TRUST]; John Podesta & Cynthia Brown, CTR. FOR AM. PROGRESS, *Introduction*, in ENSURING EQUAL OPPORTUNITY, *supra* note 148, at 1, 3. But see Schoolfinance101’s Blog, <http://schoolfinance101.wordpress.com/page/2> (Nov. 27, 2009).

<sup>229</sup> Liu, *supra* note 142, at 983-84; see also Liu, THE EDUCATION TRUST, *supra* note 228, at 2.

taxing themselves at higher levels than states that spend far more per pupil.<sup>230</sup> Most states with low per-pupil expenditures simply lack the capacity to raise the amount of funds that the higher spending states raise. For instance, Mississippi taxes itself at a rate that exceeds the national average, but because its taxable resources are well below the national average, it only generates funds that amount to seventy-seven percent of the national average.<sup>231</sup> Thus, even if Title I provided a significantly larger amount of funds in the attempt to create an incentive for states to increase their local expenditures, many poor states like Mississippi still would be unable to take advantage of the incentive. In contrast, some states that are already spending the most per pupil could easily generate more funds because their current rate of taxation is relatively low.<sup>232</sup> Although the current funding levels are insufficient to create this incentive, the effect of tying Title I funding to state funding continues to penalize poor states for being poor. Moreover, it does so even if a poor state distributes its available funds among its school districts equitably while a high-spending state distributes its largess unequally.<sup>233</sup>

In all fairness, some of the states that spend the most on education also have the highest costs and those that spend the least sometimes have the lowest costs.<sup>234</sup> In addition, because the federal poverty threshold is a single national standard that does not account for the varying cost of living between states, it understates the amount of poverty in some richer states and overstates it in some poor states.<sup>235</sup> If Title I moved entirely away from relying on state expenditures without also correctly measuring poverty, it might simply work new injustices by ignoring the high cost of educating students who are not counted as poor, but as a practical matter are poor, in rich states.<sup>236</sup> Thus, the foregoing inequities that the state expenditure factor creates are neither unique, nor easily resolved. Rather, inequity is inherent in any method of distributing Title I funds that is not based on actual cost, actual poverty, or actual funding effort. The challenge is developing a metric that accurately reflects these factors.

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<sup>230</sup> Liu, THE EDUCATION TRUST, *supra* note 228, at 2; Podesta & Brown, *supra* note 228, at 3 (noting that the current formula “penalizes states with low-tax bases even if they tax themselves relatively heavily for education”).

<sup>231</sup> THE EDUCATION TRUST, *supra* note 12, at 4 tbl.2.

<sup>232</sup> *Id.* (listing several states, such as Connecticut, Delaware, Massachusetts, and Maryland, that tax below the national average for education and yet have higher state revenue per student).

<sup>233</sup> Liu, *supra* note 142, at 985.

<sup>234</sup> See generally Schoolfinance101’s Blog, *supra* note 228.

<sup>235</sup> U.S. Census Bureau, Poverty: How the Census Bureau Measures Poverty, <http://www.census.gov/hhes/www/poverty/povdef.html> (indicating the poverty thresholds do not vary geographically).

<sup>236</sup> See Schoolfinance101’s Blog, *supra* note 228.

Finally, it is worth noting that by penalizing poor school districts, Congress perpetuates the same type of intractable inequity that has been at the center of constitutional litigation for decades. In fact, the system of disadvantage in Texas in *San Antonio Independent School District v. Rodriguez*<sup>237</sup> is structurally the same as the one Title I facilitates.<sup>238</sup> The Court's decision in *Rodriguez* was the first major federal challenge to funding inequities. Texas placed the overwhelming burden of educational funding on local school districts. The poor school districts taxed themselves at high levels, but still could not generate adequate educational funds.<sup>239</sup> In fact, if the poor school districts raised their tax rate any further, they likely would have generated even fewer total revenues, as a higher rate would have discouraged ownership and development in those communities.<sup>240</sup> In contrast, Alamo Heights, a district with far more wealth, taxed local property at a low rate but generated nearly twice as many funds as the poorer districts.<sup>241</sup> Although the Court refused to intervene because it held that education was not a fundamental right under the Federal Constitution,<sup>242</sup> the existence of the inequity was not in dispute and later became the basis for successful lawsuits arising under the Texas Constitution.<sup>243</sup> States with similar inequities have also followed suit under their own state constitutions.<sup>244</sup>

The point here is that, by penalizing poor states, Congress operates a funding system that is not entirely dissimilar from the ones that state supreme courts have struck down as unconstitutional under state law when perpetrated by the state. While Texas created inequity by forcing districts to fend for themselves, Congress assumes that all states can fend for themselves. At both the district and state level, some educational agencies simply lack the resources to fend for themselves or take advantage of the incentives that the system purports to offer. Of course, the basic constitutional responsibility for education rests with the states, not Congress, but as a practical matter, Congress's system is even more pernicious than the one in Texas in some respects. Congress increases the inequity that already exists between some

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<sup>237</sup> 411 U.S. 1 (1973).

<sup>238</sup> *Id.* at 9-10 (describing Texas school funding system in which the state funds each school district in proportion to its local tax contributions).

<sup>239</sup> *Id.* at 12-13 (indicating that the Edgewood District taxed itself at a rate of \$1.05 per \$100 of property wealth, while Alamo Heights, which taxed itself at only \$.85 per \$100 of property wealth, raised almost twice as much money per pupil as Edgewood).

<sup>240</sup> *See id.* at 73-74, 128-29 (Marshall, J., dissenting).

<sup>241</sup> *Id.* at 12-13 (majority opinion).

<sup>242</sup> *Id.* at 35.

<sup>243</sup> *See, e.g.,* Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 797 (Tex. 2005); Carrollton Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (*Edgewood III*), 826 S.W.2d 489, 503 (Tex. 1992); Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood II*), 804 S.W.2d 491, 492-93 (Tex. 1991); Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood I*), 777 S.W.2d 391, 398 (Tex. 1989).

<sup>244</sup> *See* Rebell, *supra* note 19, at 1526-29.

wealthy and poor states by providing the largest supplemental funds to the richest states. Texas, at least, attempted to abate some of the funding inequities that relying on local tax contributions created by supplementing the poorest districts with some funds from the richer districts.<sup>245</sup> Congress does no such thing. In this respect, Congress's actions are, at best, irrational and, at worst, a direct facilitator of inequality.

E. *Counterproductive Equity Standards*

During Title I's early years, Congress was acutely concerned that states and local school districts might use federal funds in ways that exacerbated inequities between schools. Both to prevent new inequalities and to encourage the elimination of existing inequalities, Congress imposed two major conditions on the receipt of Title I funds. First, school districts could not use federal funds to supplant local funds. Second, the resources offered at Title I schools had to be comparable to the resources at other schools in the district. Both of these conditions initially included strict compliance measures and operated as serious attempts to ensure equality, but Congress has relaxed each of these conditions in subsequent reauthorizations of Title I. In fact, these conditions have been relaxed so much that they are, at best, meaningless and at worst, an excuse or sanction for school districts to maintain rather than eliminate existing inequity.

1. *The Prohibition on Supplanting Local Dollars*

The prohibition on supplanting local dollars requires that school districts use federal dollars only to supplement local funds.<sup>246</sup> The point is to ensure that Title I funds actually raise the total amount of resources available for low-income students. Without a prohibition on supplanting funds, school districts could simply fund a larger portion of their budget from federal resources and a smaller portion from local resources, leaving the total combined expenditure for schools flat. Toward this end, Title I requires that school districts maintain their fiscal effort from one year to the next.<sup>247</sup> The standard attempts to project what the local contribution for education should be in a given year and determine whether that contribution is ever drawn down and inappropriately supplanted with federal dollars.

Although well meaning, the prohibition on supplanting has not met its goal. In fact, in a recent report, the GAO recommended eliminating the supplement-not-supplant standard altogether.<sup>248</sup> The GAO concluded that the standard has

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<sup>245</sup> *Rodriguez*, 411 U.S. at 7-10 (discussing the state fund that provides supplemental resources to poor districts).

<sup>246</sup> 20 U.S.C. § 6321(b)(1) (2006).

<sup>247</sup> *Id.* §§ 6321(a), 7901.

<sup>248</sup> U.S. GEN. ACCOUNTING OFFICE, DISADVANTAGED STUDENTS: FISCAL OVERSIGHT OF TITLE I COULD BE IMPROVED 24-26 (2003), available at <http://www.gao.gov/new.items/d03377.pdf>.



become almost impossible to enforce.<sup>249</sup> Enforcing the standard requires too much speculation about what a school district would have spent on education and also requires extremely detailed tracking of spending in thousands of school districts.<sup>250</sup> In short, the prohibition on supplanting funds relies on unreliable projections and unusually labor-intensive work. Possibly for these reasons, the Department of Education has effectively stopped attempting to enforce the standard, treating it as a non-priority.<sup>251</sup> The standard, however, remains the law and a measure that well-intentioned schools may expend effort attempting to meet.

Ensuring that federal dollars actually add to state educational budgets rather than replace existing funds can be achieved more easily through the maintenance-of-effort standard.<sup>252</sup> Congress, however, has failed to utilize this more effective measure. Instead, Congress has maintained a relatively loose maintenance-of-effort standard that provides no real check on school budgets. The current maintenance-of-effort standard only requires that school districts maintain their funding at ninety percent of the previous year,<sup>253</sup> and further allows districts to petition for a waiver of this standard.<sup>254</sup> The number of school districts that have requested a waiver is so small that it demonstrates how little the ninety percent standard requires of districts. Between 1995 and 2003, only twenty-five school districts out of the nation's fourteen thousand requested a waiver.<sup>255</sup> In addition, the ninety percent standard provides enough flexibility to theoretically permit schools to draw down their spending from year to year and replace it with federal dollars, the very thing it is supposed to prevent. Since school districts can reduce their local funding by ten percent in a single year, and the federal government provides less than ten percent of educational funds, a school could swap its own funds for federal funds without violating the maintenance-of-effort requirement.<sup>256</sup> Of course, the prohibition on supplanting local funds is supposed to prevent this, but as indicated above, identifying supplanted funds is very difficult, particularly if a school district drew down its funds over a period of years rather than in just one year.

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<sup>249</sup> *Id.* at 25.

<sup>250</sup> *See id.* at 19-20 (indicating that the standard actually confuses those responsible for monitoring and following it).

<sup>251</sup> *Id.* at 20-21.

<sup>252</sup> *Id.* at 24-25 (“[E]nsuring compliance with [a maintenance of effort] provision presents few challenges and requires few additional audit resources.”).

<sup>253</sup> Compare 20 U.S.C. §§ 6321(a), 7901 (2006), with 45 C.F.R. § 116.19 (1977) (requiring schools to maintain their fiscal effort within five percent of the preceding year).

<sup>254</sup> *Id.* § 7901(c) (stating that requirements of this section may be waived due to “exceptional or uncontrollable circumstances” or “a precipitous decline in the financial resources of the local educational agency”).

<sup>255</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 248, at 10 n.8; School Data Direct, <http://www.schooldatadirect.org/app/location/q/stid=1036196/llid=162/stllid=676/locid=1036195/site=pes> (last visited Nov. 2, 2009).

<sup>256</sup> *See supra* notes 34-35 and accompanying text.

Moreover, the prohibition on supplanting funds is not fully enforced. Thus, the maintenance-of-effort standard, although a potentially effective measure, currently provides so much flexibility that it permits the very evils it is meant to prevent.

The number of school districts or state legislatures that consciously take advantage of this flexibility is hopefully small in number, but that some do gradually draw down local funds or simply fail to maintain their own fair share is almost certain. School finance cases have demonstrated that the educational funding is inadequate in many school districts,<sup>257</sup> indicating that the state and some local districts are not raising the educational funds required by their constitutions. Federal funds are not the cause of this inadequacy, but federal funds mask a portion of the inadequacy in various districts. For instance, if a court determined that school districts spending ten thousand dollars per pupil were providing adequate resources, around one thousand dollars per pupil might be coming from Title I funds. Under these circumstances, the school district would not be delivering the state-mandated adequate education on its own, but only with the assistance of federal money. To be precise, if Congress decided to withhold federal money from such school districts tomorrow, the districts, absent making up the shortfall, would soon deliver inadequate educational opportunities.

The current purpose of federal money is not to cure a state's own deficiency, but to provide supplemental resources for disadvantaged children. However, given the findings and outcomes in numerous state finance cases, Title I funds are likely simply filling the funding gaps and shortfalls that the states and school districts themselves create. By doing so, Title I funds mask the unconstitutional action of these school districts and states. As Ross Weiner concludes in an examination of Texas and Colorado schools, "federal and other categorical funds, which were intended to provide additional opportunities, are used to fill in for inequitable distribution of foundational funds."<sup>258</sup> Federal funds are indirectly subsidizing middle-class schools rather than elevating funding at high-poverty schools; without federal funds filling the gap, the states would be underfunding poor schools while adequately funding others.<sup>259</sup>

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<sup>257</sup> See, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 189-90 (Ky. 1989) (finding that Kentucky General Assembly violated Kentucky constitutional provision that the state educate its students through an efficient school system); *Abbott v. Burke* (*Abbott V*), 710 A.2d 450, 455-57 (N.J. 1998) (recounting the long history of the educational litigation under the state constitution and the affirmation of various rights); *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 328 (N.Y. 2003) (holding that state funding system violated New York constitution because it did not allow for a "sound basic education" as provided in state constitution); *Pauley v. Kelly*, 255 S.E.2d 859, 883 (W. Va. 1979) (remanding to lower court for determination by educational experts of whether school district "is being operated in reasonably efficient manner").

<sup>258</sup> ROSS WIENER, CTR. FOR AM. PROGRESS, *Strengthening Comparability: Advancing Equity in Public Education*, in ENSURING EQUAL OPPORTUNITY, *supra* note 148, at 40.

<sup>259</sup> *Id.*

In such a case, many state constitutions would force states like Texas and Colorado to allocate more money to poor districts and less to the other districts. It is only the existence of federal funds that allows states to avoid this change in their funding practices. In effect, Title I funds are doing the states' job for them and allowing them to engage in otherwise unconstitutional action. Rather than address or stop these potential state constitutional violations, Title I permits and becomes complicit in them.

## 2. Comparability Standards

Title I's comparability standards fare even worse than its non-supplanting and maintenance-of-effort standards in enforcing equity. Although the comparability standards are far easier to enforce, Congress has consciously chosen to dilute the standards. As a result, the comparability standards disregard obvious school inequity and even sanction it. Both at the state and local level, Congress knowingly provides Title I funds to school systems that distribute funds and resources inequitably.<sup>260</sup> At the state level, Title I does not even purport to require equitable resource distribution among school districts. Thus, one school district could spend five thousand dollars per student while a neighboring district spends ten thousand dollars per student without violating any aspect of Title I. In fact, this occurs every day in school districts that receive Title I funds.<sup>261</sup> To make matters worse, such disproportionate spending occurs in states that actually receive more Title I money per pupil than states that do a better job of ensuring equity among districts. Most notably, New York and Pennsylvania are among the top fifteen states in terms of their Title I per-pupil allotments, yet New York maintains a funding gap between its high-poverty and low-poverty schools districts of \$2319 per pupil and Pennsylvania maintains a \$1001 per pupil gap.<sup>262</sup> Again, Title I in no way prevents this inequity.

In all fairness, Title I does include a Finance Incentive Grant program.<sup>263</sup> To be eligible for the program, however, a state need only ensure that, after discarding the school districts with the top and bottom five percent per-pupil expenditures, the remaining schools' per-pupil expenditures are within twenty-five percent of one another.<sup>264</sup> The program would still allow unlimited

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<sup>260</sup> The accuracy of this statement is demonstrated by cases where there has been state liability, but no change or action regarding the availability of federal funds. *See, e.g., Rose*, 790 S.W.2d at 189-90 (finding liability but not addressing the relevance of federal funds); *Campaign for Fiscal Equity*, 801 N.E.2d at 328.

<sup>261</sup> *See generally* THE EDUCATION TRUST, *supra* note 12 (discussing how disparate state spending among school districts shortchanges highest poverty districts).

<sup>262</sup> *Id.* at 3 tbl.1, 7 tbl.3.

<sup>263</sup> 20 U.S.C. § 6337 (2006).

<sup>264</sup> 34 C.F.R. § 222.162 (2008). The actual disparity, therefore, is larger than twenty-five percent, as the regulation exempts the top and bottom five percent spending districts from comparison. The amount of funds a state is eligible for under this particular grant does

disparities among school districts at the top and bottom of the state in per-pupil spending. Moreover, a twenty-five percent variance amongst those in the middle would permit gross disparities between the remaining schools as well. For instance, in a state that spent an average of \$7000 per pupil, this standard would allow a spending range from \$6125 per pupil to \$7875 per pupil among districts in the middle and unlimited spending gaps in the top and bottom districts, such as \$4000 per pupil in the poorest districts and \$10,000 per pupil in the richest. In effect, the eligibility standards do not promote equity at all, as states like New York and Pennsylvania have little problem meeting the standards, notwithstanding the gross disparities they maintain. Even if the eligibility requirements were more stringent, the finance incentive program is small and has no application to the general Title I formulas, which do not even address the issue of inter-district inequity.

Title I's comparability requirements apply only within school districts, not between them.<sup>265</sup> However, even within school districts, the comparability requirements do not ensure or promote equity. In fact, the language of the requirements is specifically watered down to limit their impact. Rather than requiring comparability of resources or funds, the comparability standards only require comparable "services,"<sup>266</sup> an inherently subjective and less quantifiable concept. To emphasize this point, Title I explicitly indicates that the Act should not be read to require equalized resources.<sup>267</sup> Moreover, Title I does not mandate absolute comparability, only that services be "substantially comparable" based on school services "as a whole."<sup>268</sup> As a practical matter, this indefinite requirement of comparability means that schools need not be comparable in any meaningful way.

First, Title I entirely exempts the largest expenditure in school budgets from comparability analysis. Teacher salaries regularly account for eighty to ninety percent of school budgets,<sup>269</sup> but Title I explicitly exempts them from scrutiny.<sup>270</sup> To demonstrate that schools are comparable in regard to teaching resources, school districts need only maintain a single salary schedule that

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increase as the spending gap between its districts decrease, but the reward is so meager that it provides no real incentive for equity. See Liu, *supra* note 142, at 985. Moreover, because of minimum and maximum weights in the formula, even if large amounts of money were distributed, most education agencies would receive a similar per pupil expenditure. *Id.* at 988 (analyzing the weighting factors in the Finance Incentive Grant).

<sup>265</sup> McClure, *supra* note 148, at 26 (recognizing that comparability has always been defined as equality within a district, not across districts).

<sup>266</sup> 20 U.S.C. § 6321(c)(1)(b).

<sup>267</sup> *Id.* § 6576.

<sup>268</sup> *Id.* § 6321(c)(1)(b).

<sup>269</sup> Press Release, Education Trust, No Accounting for Fairness: Additional Federal and State Funds Intended for Ohio's Low-Income Students Often Don't Reach the State's Highest Poverty Schools (Dec. 22, 2008), available at <http://www.edtrust.org/dc/press-room/press-release/no-accounting-for-fairness-additional-federal-and-state-funds-intended-f>.

<sup>270</sup> 20 U.S.C. § 6321(c)(2)(B).

applies to all schools in the district.<sup>271</sup> Thus, so long as all first-year teachers in a school district are paid the same and all fifth-year teachers are paid the same, schools' teaching resources are considered equivalent. However, a salary schedule is simply part of the compensation policy in school districts. Real inequities arise, not from variations in salary schedules, but from the unequal distribution of teachers among schools. Under Title I's comparability standard, all of the twenty-year teachers could be placed at a single school and all of the first-year teachers at another without violating comparability. Assuming there were twenty-five teachers at each school and the salary gap between the experienced teachers and the new teachers was \$30,000 each, the school with the experienced teachers would have \$750,000 more in its budget than the other school. Unfortunately, this scenario is not just a hypothetical, but the prevailing reality in many places. Poor and minority schools employ far more inexperienced teachers than other schools and also generally lose these same teachers to whiter and richer schools as soon as they gain experience.<sup>272</sup> Still, under Title I's comparability standards, these schools are nonetheless comparable.

Second, although it does not constitute as large a portion of school budgets as teacher salaries, the comparability standards do not apply to central administration expenditures, such as gifted and talented programs.<sup>273</sup> School districts generally fund these programs out of their central budgets rather than through individual school budgets.<sup>274</sup> Central administration may also fund tutoring services, pre-kindergarten, and other supplemental programs that do

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<sup>271</sup> *Id.* § 6321(c)(2)(A).

<sup>272</sup> See ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., THE SEGREGATION OF AMERICAN TEACHERS 34–39 (2006), available at [http://www.civilrightsproject.ucla.edu/research/deseg/segregation\\_american\\_teachers12-06.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/segregation_american_teachers12-06.pdf) (demonstrating that as the percentage of minority students in a school rises, the qualification and experience level of teachers therein tends to decrease); Catherine E. Freeman et al., *Racial Segregation in Georgia Public Schools, 1994–2001: Trends, Causes, and Impact on Teacher Quality*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 148, 157–59 (John Charles Boger & Gary Orfield eds., 2005) (discussing statistics from Georgia public schools which indicate that teachers serving higher proportions of minority students are more likely to move to schools with smaller proportions of minority students); Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 35–37 (2008) (evaluating research showing that white teachers tend to leave high-minority schools); Jay Mathews, *Top Teachers Rare in Poor Schools*, WASH. POST, Sept. 10, 2002, at A5 (discussing the dearth of high-quality teachers in low-income schools); Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: Why It Persists and What Can Be Done*, BROOKINGS INST. (Spring 1998), [http://www.brookings.edu/articles/1998/spring\\_education\\_jencks.aspx](http://www.brookings.edu/articles/1998/spring_education_jencks.aspx) (“Predominantly white schools seem to attract more skilled teachers than black schools . . .”).

<sup>273</sup> Marguerite Roza, THE EDUCATION TRUST, *How Districts Shortchange Low-Income and Minority Students*, in FUNDING GAPS 2006, *supra* note 12, at 9, 10–11.

<sup>274</sup> *Id.* at 11.

not show up in any schools' budgets even though they are offered at specific schools. Ironically, these supplemental programs are the same type of opportunities that Title I is designed to fund at high-poverty schools.<sup>275</sup> By exempting these programs, central administrations are free to distribute these funds and programs unequally between their schools. In the case of gifted and talented programs, the inequity is clear when one school has them and another does not. The result is far less obvious, but just as problematic, when supplemental programs at non-Title I schools mirror those at Title I schools. Rather than providing students at Title I schools supplemental services beyond what others receive, Title I funds become necessary just to provide services at high-poverty schools that are comparable with other schools. Thus, ironically, Title I creates the very means by which to undermine its purpose by failing to enforce comparability between schools.

Third, as to the remaining small portion of school budgets to which comparability standards do apply, Title I still refuses to require strict equality. The initial enactments of Title I and its regulations required that funding per pupil at Title I schools be within five percent of non-Title I schools within the school district.<sup>276</sup> The five percent variance, however, was later abandoned and today's version makes no reference to spending equity.<sup>277</sup> In fact, the statute now states the opposite: "Nothing in this subchapter shall be construed to mandate equalized spending per pupil for a state, local educational agency, or school."<sup>278</sup> The Department of Education's policy guidance on comparability is no better. Although the guidance suggests that dollar amounts are relevant, it indicates that a school district can demonstrate comparability if the per-pupil funding at each school in the district is within ten percent of the district average.<sup>279</sup> But to permit a twenty percent funding gap between schools in a single school district is essentially the same as not requiring equity at all, as this would allow for gaps in excess of one thousand dollars per student in the poorest states and gaps of approximately two thousand dollars per student in the richest states.<sup>280</sup> Moreover, this measure of comparability is only a suggested option. Title I permits school districts to adopt their own

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<sup>275</sup> *Id.*

<sup>276</sup> 45 C.F.R. § 116.26 (1972) (requiring comparability at a five percent variance between Title I and non-Title I schools); 45 C.F.R. § 116a.26 (1977) (requiring the same five percent comparability between title I and non-title I schools); *see also* McClure, *supra* note 148, at 18.

<sup>277</sup> 45 C.F.R. § 116 (1978); *see also* McClure, *supra* note 148, at 18-22.

<sup>278</sup> 20 U.S.C. § 6576 (2006).

<sup>279</sup> U.S. DEP'T OF EDUC., TITLE I FISCAL ISSUES 16, 34 (2008) [hereinafter TITLE I FISCAL ISSUES], available at <http://www.ed.gov/programs/titleiparta/fiscalguid.doc>.

<sup>280</sup> These calculations are based on states that spend the lowest per pupil, at five thousand dollars, and those that spend the highest, at nearly ten thousand. *See* THE EDUCATION TRUST, *supra* note 12, at 4 tbl.2.

means of demonstrating comparability.<sup>281</sup> An audit by the Office of Inspector General reveals that many schools and states have simply taken advantage of this flexibility, adopting inconsistent standards or failing to maintain the relevant data required under the standards.<sup>282</sup>

Finally, even if the comparability standards themselves were not flawed, the dilution of Title I funds across so many schools creates a practical problem in measuring comparability. The comparability standards measure Title I schools against non-Title I schools within a school district.<sup>283</sup> However, there are often few, if any, non-Title I schools against which to compare Title I schools because so many schools receive Title I funds.<sup>284</sup> In fact, in some school districts, every school is a Title I school.<sup>285</sup> Thus the ability to hold a district accountable for fairly funding its Title I schools is diminished, and comparability becomes largely irrelevant.<sup>286</sup> This flaw relates back to Title I's narrow focus on monitoring inequity only within school districts rather than between them on a statewide basis.

In summary, the various Title I standards that should promote equity among schools have little if any effect in this respect. Instead, in many instances they sanction inequity and provide the flexibility for such inequity to expand. The prohibition on supplanting local dollars with federal funds is practically unenforceable and, thus, under-enforced in reality. The maintenance-of-effort standard lacks the strictness necessary to prevent schools from drawing down their educational commitment and replacing it with federal dollars. And most disturbing, the comparability standards exempt the largest portion of schools' budgets from any scrutiny and, in the remaining areas of the budget, impose standards that allow for so much variance that the standards are meaningless. In short, although Title I includes concepts that one would expect to promote equity, the actual standards provide essentially no check on the inequities that states and school districts perpetrate on their students.

### 3. Disregard for Existing State Equity Obligations

Many of the inequities that Title I sanctions and furthers are primarily the result of lax standards and ill-fitting funding formulas that could be cured by relatively small adjustments to the statute. The most significant oversight in

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<sup>281</sup> OFFICE OF INSPECTOR GEN., U.S. DEP'T OF EDUC., FINAL MANAGEMENT INFORMATION REPORT: MONITORING OF THE TITLE I, PART A, COMPARABILITY OF SERVICES REQUIREMENT 2 (2007), available at <http://www.ed.gov/about/offices/list/oig/auditreports/fy2008/x05h0017.pdf>.

<sup>282</sup> *Id.* at 2-3.

<sup>283</sup> 20 U.S.C. § 6321(c).

<sup>284</sup> See NUMBERS AND TYPES, *supra* note 131, tbl.2; McClure, *supra* note 148, at 23.

<sup>285</sup> McClure, *supra* note 148, at 23.

<sup>286</sup> TITLE I FISCAL ISSUES, *supra* note 279, at 32-34 (proffering ways for districts with all Title I schools to establish comparability, such as using local and state funds to provide services that are comparable in each school).

Title I, however, is its failure to account for states' compliance with their state constitutional obligations. Moreover, this oversight is not as easily cured. Over the past twenty years in particular, state constitutions, supreme courts, and statutes have increasingly obligated states to deliver an equitable and/or a qualitative level of education (including the inputs necessary to do so),<sup>287</sup> but Congress has paid scant attention to these developments. Scores of court orders have mandated specific expenditures, specific improvements, and specific educational opportunities in public schools.<sup>288</sup> Unfortunately, states and school districts have too often failed to meet these obligations. Congress, however, has not inquired as to whether state educational agencies are complying with these orders or how state obligations might affect Title I's notions of comparability and its distribution of funds.<sup>289</sup> Title I simply ignores state and local educational agencies' responsibilities under state law.

Were state and local agencies' failures only violations of their respective state constitutions and laws, congressional disregard for these state obligations would be understandable. But in some instances, these state constitutional violations are also federal constitutional violations. Although the Supreme Court refused to find that education is a fundamental right in 1973 in *San Antonio v. Rodriguez*,<sup>290</sup> significant legal and factual developments in state courts have reduced the import of *Rodriguez*.<sup>291</sup> Because plaintiffs have almost exclusively brought educational quality and equity cases in state courts, the federal courts have yet to revisit the requirements of federal equal protection in light of these developments. These developments, however, are so fundamental that any court with intellectual honesty would be forced to evaluate education differently than did the Court in *Rodriguez*.

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<sup>287</sup> See Black, *supra* note 17 (manuscript at 15-20) (discussing issues that have resulted from state-based legislation, with regard to developing standards to ensure adequacy of education); Rebell, *supra* note 19, at 1527 (discussing the outcomes in school finance cases).

<sup>288</sup> See, e.g., *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1976) (mandating a strict scrutiny standard for assessing state public school financing systems); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 215-16 (Ky. 1989) (declaring Kentucky's entire system of common schools unconstitutional and placing a duty on the General Assembly to recreate a new system for the state); *Abbott v. Burke (Abbott V)*, 710 A.2d 450, 460-71 (N.J. 1998) (evaluating whether several programs and resources were necessary to provide an adequate education); *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232, 240-41 (Tenn. 2002) (mandating that the legislature must devise a way for teacher salary equalization to comport with the State's constitutional directive to provide equal educational opportunities); see also Black, *supra* note 17 (manuscript at 15-18).

<sup>289</sup> See Student Bill of Rights, H.R. 2451, 111th Cong. §§ 111-202 (1st Sess. 2009) (discussing the purpose of the bill as providing for equitable resources and congressional monitoring of equity, with no reference regarding previous attempts in this respect).

<sup>290</sup> 411 U.S. 1, 35 (1973).

<sup>291</sup> See Black, *supra* note 17 (manuscript at 5).



The full explanation and analysis of these changes and their effect on equal protection is the entire subject of a recent article.<sup>292</sup> Thus, for the purpose of this Article, it suffices only to make a few basic points. First, all states have constitutional clauses that obligate the state to provide education to its citizens.<sup>293</sup> Second, since *Rodriguez*, over half of the state supreme courts have interpreted those clauses to require either equity between schools and/or a certain qualitative level of education.<sup>294</sup> Third, in implementing these constitutional clauses and state supreme court decisions, state legislatures have enacted extensive statutory and regulatory regimes that provide substance and entitlement to education far beyond what was in place at the time of *Rodriguez*.<sup>295</sup> Fourth, these decisions and statutory changes have shifted responsibility for education from local education agencies to the state.<sup>296</sup> These major developments, along with some other minor ones, have undermined all the legal and factual predicates upon which the Supreme Court decided *Rodriguez*. Moreover, developments in the Supreme Court's equal protection and due process precedent suggest its analysis would be different were it to address educational inequities again.<sup>297</sup>

In short, the underlying educational right at issue in *Rodriguez* is entirely distinct from the evolved constitutional right that now exists under state law. Thus, *Rodriguez*'s deferential scrutiny of education, which was equivalent to scrutiny that the Court might exact regarding gratuitous state services such as transportation, is simply no longer appropriate.<sup>298</sup> Now that states have extended affirmative constitutional rights to education for their citizens, securing these rights for some, but not others, is not an option. Federal equal protection attaches to these state constitutional rights and requires the federal courts to scrutinize seriously inequalities that may arise in education. Moreover, because the underlying right in such a claim would be different than

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<sup>292</sup> See generally *id.*

<sup>293</sup> Hubsch, *supra* note 18, at 96-97.

<sup>294</sup> See Rebell, *supra* note 19, at 1527; NAT'L ACCESS NETWORK, "EQUITY" AND "ADEQUACY" SCHOOL FUNDING LIABILITY COURT DECISIONS (June 2009), [http://www.schoolfunding.info/litigation/New\\_Charts/06\\_2009eq\\_ad\\_schoolfundinliability.pdf](http://www.schoolfunding.info/litigation/New_Charts/06_2009eq_ad_schoolfundinliability.pdf) (last visited Nov. 2, 2009).

<sup>295</sup> See, e.g., KY. REV. STAT. ANN. § 156.160-.210 (LexisNexis Supp. 2008); N.C. GEN. STAT. §§ 115C-1 to -583 (2007 & Supp. 2008); VA. CODE ANN. § 22.1-253.13:1 (Supp. 2009).

<sup>296</sup> E.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211-13, 216 (Ky. 1989) (indicating the responsibility for education rests with the state); *Robinson v. Cahill*, 303 A.2d 273, 291-92 (N.J. 1973); see also Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 131 (2006) (finding the notion of local control in education an illusion).

<sup>297</sup> See Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 563-96 (1992).

<sup>298</sup> Black, *supra* note 17 (manuscript at 47).

in *Rodriguez*, a court would not be asked to overturn *Rodriguez*, but rather simply apply basic equal protection principles in light of these new circumstances.<sup>299</sup>

The fact that courts have yet to entertain or recognize a claim consistent with the foregoing, however, does not obviate Congress's responsibility. Congress's duty is not dependent on judicial action, but rather coextensive with it. The important question is simply whether the states' actions are in some instances contrary to affording students equal protection. Given the factual and legal developments regarding the nature of education, the answer is yes. Thus, if Congress funds state education systems that are violating their state constitutional obligations, Congress is funding a violation of the Fourteenth Amendment. Moreover, Title I's inequitable distribution of funds and counterproductive equity standards not only fund these violations, in some instances, they further them. Furthering equal protection violations may not be Congress's purpose, and Title I does not affirmatively require states to violate their constitutions, but these arguments only protect Congress from lawsuits based on taxpayer standing.<sup>300</sup> They have no bearing on Congress's Fourteenth Amendment duty to further equal protection. Regardless of its intent, Congress could in no way be said to further equal protection by funding education agencies that are violating equal protection, particularly given that Title I goes out of its way to permit these inequities and expands them in some instances. In short, Congress is complicit in states' violations of Section One of the Fourteenth Amendment and engages in its own violation of Section Five of the Amendment.

Congress's action is analogous to that described in *Shapiro v. Thompson*,<sup>301</sup> where the Court, albeit in dicta, indicated Congress could not spend funds to assist a school district in building segregated schools, even if Congress's purpose was a broader one of simply building new schools.<sup>302</sup> Here, Congress is achieving the functional equivalent by giving states Title I money with which to mask or fund their equal protection violations. Even if Congress's purpose is to fund education generally, it is providing funds to states and local educational agencies that unequally distribute educational resources in ways that violate their state constitutions and, by extension, federal equal protection. Merely placing conditions on Title I funds that limited these inequities would cure the Act, but Congress has failed to do so. Moreover, as demonstrated by the earlier discussion of the funding formulas, Title I funds actually operate to widen the funding gap between some school districts. In essence, congressional actions make an unconstitutional situation worse.

Finally, putting aside Congress's duty to enforce equality, its willingness to ignore the existing legal obligations of states and local school districts is

<sup>299</sup> *Id.* (manuscript at 43-47).

<sup>300</sup> *See supra* notes 103-04 and accompanying text.

<sup>301</sup> 394 U.S. 618 (1969).

<sup>302</sup> *Id.* at 641.

contrary to the historic role Congress has played in education. Congress's initial purpose in extending federal funds to schools was to achieve what the courts had been unable to achieve: rapid and widespread desegregation.<sup>303</sup> Congress conditioned receipt of federal school funds on compliance with Title VI of the Civil Rights Act of 1964 and the federal courts' interpretation of *Brown v. Board* and its progeny.<sup>304</sup> Moreover, this requirement was aggressively monitored through compliance reports, enforcement actions, regulations, and the threat of fund termination.<sup>305</sup> That Congress does not similarly monitor compliance in regard to resource, quality, and finance equity (which are mandated under state laws) simply defies the entire purpose of federal intervention in schools and the stated purpose of Title I: to improve the educational opportunities of disadvantaged students.<sup>306</sup>

### III. REMEDIES FOR CONSTITUTIONAL VIOLATIONS AND TITLE I'S FLAWS

The foregoing Parts demonstrate that Congress, having entered the field of education, has a duty to act consistent with equal protection. In the initial years, Congress carried out this duty, but more recently it has not. The distribution of federal dollars now exacerbates inequalities between schools by arbitrarily rewarding some states, punishing poor ones, and allocating funds on factors that are irrelevant to students' needs and schools' expenses.<sup>307</sup> Even as to the most important factor in student need, the level of concentrated poverty, Title I formulas are ineffective.<sup>308</sup> Likewise, Title I ignores and explicitly exempts massive inequalities from scrutiny.<sup>309</sup> As to the few remaining areas where Title I purports to enforce equity, the standards are either so flexible that they are meaningless or so flawed that they are administratively unenforceable.<sup>310</sup>

When Congress reauthorizes Title I sometime this year, it has a constitutional responsibility to correct these deficiencies. Congress could rectify the deficiencies and drastically further equal protection in education by adopting four basic proposals. First, if Congress does nothing else, it must

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<sup>303</sup> See ORFIELD, *supra* note 3, at 312-40.

<sup>304</sup> 42 U.S.C. § 2000d (2006).

<sup>305</sup> See, e.g., *id.* § 2000d-1 (providing for termination of funds if a local education agency fails to comply with requirements of the section); JEFFREY A. RAFFEL, HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION: THE AMERICAN EXPERIENCE 188-90 (1998) (discussing the Office for Civil Rights's ("OCR") historical role in desegregation); David Barton Smith, *Addressing Racial Inequities in Health Care: Civil Rights Monitoring and Report Cards*, 23 J. HEALTH POL., POL'Y & L. 75, 87-88 (1998) (discussing OCR's absorption with school desegregation in the late 1970s).

<sup>306</sup> 20 U.S.C. § 6301 (2006).

<sup>307</sup> See *supra* Parts II.C, II.D.

<sup>308</sup> See *supra* notes 193-98 and accompanying text.

<sup>309</sup> See *supra* notes 269-70 and accompanying text.

<sup>310</sup> See *supra* notes 278-82 and accompanying text.

require compliance with all state constitutional and statutory orders and obligations in education as a condition on the receipt of federal funds. Second, Congress should require equitable per-pupil distribution of resources both between and within school districts, which would include eliminating the current exemptions for certain expenditures. Third, Congress should provide individuals with a federal cause of action should states fail to comply with either of the foregoing conditions. Fourth, Congress should use Title I to affirmatively promote equity through financial incentives and meet the needs of the most disadvantaged students by focusing those funds.

A. *Compliance with Existing State Constitutional and Statutory Requirements*

Insofar as some states violate both federal equal protection and their own state constitutions, Congress must not further, sanction, or participate in these violations. The only options that are consistent with Congress's Fourteenth Amendment duty are to simply stop funding public education altogether or condition the receipt of funds upon compliance with existing state constitutional and statutory obligations. As the former is not a realistic political option, Congress must choose the latter.

Including language that conditions receipt of federal funds on compliance with state requirements would be simple enough.<sup>311</sup> The more complicated task would be enforcing the condition. As the exact constitutional and statutory educational requirements vary from state to state,<sup>312</sup> federal legislation could not rely on a single standard that captured states' varying individual obligations. Moreover, simply mandating "compliance with state obligations" might exclude too many details and leave too much to interpretation. The more complicated, but better, option would be to define those categories of state obligations by which the federal government would evaluate states. At the very least, those categories should include: (1) any open court orders that relate to the quality or financing of education; (2) any standards or inputs that are included within those orders; (3) any state statutes that relate to educational quality or finance; and (4) any standards or inputs included within past court orders that would necessarily be relevant to future compliance should a court reopen the case.

Demonstrating that older court orders were closed would be simple. Open court orders, however, would involve more nuance, as states would be required to show that they were in compliance with the standards included within any order or that they were making good faith progress toward that end. In most instances, state court decisions in this area list the various measures of a

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<sup>311</sup> See, e.g., Student Bill of Rights, H.R. 2451, 111th Cong., § 123 (1st Sess. 2009) (proposing to require states to comply with existing court orders in education).

<sup>312</sup> William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19, 25-30 (1993) (discussing the unique history and language of state education clauses).

constitutional education.<sup>313</sup> These court orders and standards, however, would not only be the basis for evaluating past compliance, but also future compliance. Title I should require states to continue complying with relevant standards in the future. The inherent nature of court action is to resolve disputes over past events and bring litigation to an end.<sup>314</sup> Once a state demonstrates it has complied with an order or standard, the court closes the case, only revisiting the issues if a plaintiff brings a new claim.<sup>315</sup> But the failure of a plaintiff to raise a new claim in subsequent years does not mean that a state is continuing to meet its constitutional obligations. Thus, Title I should use court orders and standards as both a measure of past and future compliance. Title I should likewise require states to meet their own substantive statutory requirements. In many instances, state educational statutes are but extensions or implementations of a state's constitutional

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<sup>313</sup> See, e.g., *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 734-35 (Idaho 1993) (incorporating state educational standards into the meaning of constitutional adequacy); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989) (concluding that an efficient education requires “(i) sufficient oral and written communication skills to enable students to function in . . . civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her . . . nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient [art and cultural appreciation]; [and] (vi) . . . preparation for advanced training in either academic or vocational fields”); *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475, 484 (Sup. Ct. 2001) (finding that several of the Board of Regents's learning standards fell within the constitutional requirements for a “sound basic education”).

<sup>314</sup> See Richard B. Hoffman & Barry Mahoney, *Managing Caseflow in State Intermediate Appellate Courts: What Mechanisms, Practices, and Procedures Can Work to Reduce Delay?*, 35 IND. L. REV. 467, 475, 510-13 (2002) (discussing the appellate courts' role in bringing litigation to a quick and efficient resolution); see also ABA COMM'N ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE COURTS § 3.36 cmt., at 61 (1977).

<sup>315</sup> See, e.g., *Abbott v. Burke (Abbott VI)*, 748 A.2d 82, 84-85 (N.J. 2000) (discussing the court's expectation that its previous decision would have brought the case to an end and only revisiting the issues upon the plaintiff's motion); *id.* at 95-96 (rejecting “the appointment of a Judge of the Superior Court as a Standing Master” in the case and instead reaffirming that the disputes should be decided by others with the statutory responsibility to do so).

obligations.<sup>316</sup> In other instances, the statutes simply create independent rights.<sup>317</sup> Either way, Title I should require compliance with the statutes.

In regard to statutes or court standards relating to things such as certified teachers, facilities, finances, and other objective criteria, measuring compliance will often be a matter of comparing basic numbers. However, in regard to the quality of education, compliance is more difficult to determine. Courts have regularly relied on student achievement tests, graduation rates, and college preparedness to determine the quality of education in schools.<sup>318</sup> To the extent states have relied on these measures, the federal government should rely on them as well. When state courts have left this issue open, the only option may be for the Department of Education to enact guidelines that provide states with a series of means by which to demonstrate compliance in regard to curriculum.<sup>319</sup> Such guidelines, however, must not leave the choice entirely to the discretion of the state, as such an approach has proven ineffective in enforcing Title I standards elsewhere.<sup>320</sup>

#### B. *Equitable Per-Pupil Expenditures*

Title I must reassert its former stance regarding equitable per-pupil expenditures. Ensuring equity in expenditures today would require a series of small changes and a few new requirements. First, Congress should eliminate

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<sup>316</sup> See, e.g., KY. REV. STAT. ANN. § 157.010 (LexisNexis 2006) (indicating the school fund is dedicated for the purpose of carrying out the constitutional duty of common schools). See generally Charles J. Russo et al., *The Kentucky Education Reform Act and Gifted Education: Overlooked or Ignored?*, 3 KY. CHILD. RTS. J. 1 (1994) (discussing the Kentucky Education Reform Act as a response to the state's supreme court decision regarding the constitutionality of its education system).

<sup>317</sup> See, e.g., FLA. STAT. ANN. § 1002.20 (West 2009) (granting parents and students various rights, such as regular information regarding students' academic progress); GA. CODE ANN. § 20-2-143(d) (2009) (granting parents the right to opt their children out of sex education).

<sup>318</sup> See, e.g., *Abbott v. Burke (Abbott V)*, 710 A.2d 450, 525-26 (N.J. 1998) (directing the state to make particular provisions in regard to facilities); *Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 425-30 (N.J. 1997) (discussing achievement on standardized state tests and its relevance to the constitutionality of the school system); *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 372, 383 (N.C. Ct. App. 2004) (analyzing student performance on curriculum and standardized state tests); *id.* at 385-86 (evaluating whether students' courses of study prepare them for college); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 787 (Tex. 2005) (examining college-preparedness, dropout rates, and low passing rates on standardized tests); Findings of Fact and Conclusions of Law at 15, 106, 115, *W. Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, No. GV-100528 (250th Dist. Ct., Travis County, Tex. Sept. 30, 2004) (discussing graduation rates), available at <http://ritter.tea.state.tx.us/legal/FindingsofFactandConclusionsofLawWOC.pdf>.

<sup>319</sup> For a discussion of how the federal government might develop a set of qualitative educational standards, see Rebell, *supra* note 19, at 1517-26.

<sup>320</sup> See OFFICE OF INSPECTOR GEN., *supra* note 281, at 2-3.

the comparability exemptions for teacher salaries and central administration expenditures.<sup>321</sup> When comparing schools, all state and local dollars expended therein should be evaluated. Second, Congress should include an explicit measure of comparability, as opposed to “substantial comparability.”<sup>322</sup> As to non-quantitative measures, the substantial comparability standard could remain. But as to school finances in particular, Congress should require that state and local expenditures and resources at Title I schools are at least ninety-five percent of those at non-Title I schools.<sup>323</sup> Third, Congress should not place any caps on what may be spent at Title I schools. Researchers uniformly agree that low-income and at-risk children require additional educational resources to succeed; the only thing in question is the exact additional expenditure that is necessary.<sup>324</sup> Given this clear additional need, Congress should permit localities to spend as many additional funds as they see fit on the education of poor and at-risk children.

Fourth, Congress should apply comparability standards not just within school districts, but also between them.<sup>325</sup> Because the cost of education varies across districts and between categories of students,<sup>326</sup> the variance here would need to be larger than the five percent standard within school districts. This wider variance, however, would still require further nuance to prevent creating unreasonable inequities and hardships.<sup>327</sup> Congress should include cost factors in its comparability analysis. After accounting for cost factors, the actual expenditures of school districts in a state need not be exactly within a specific range of the state average because school districts in cities, for instance, would have a higher cost basis. Thus, one cost factor would be based on locality. The measure should also include a “need” factor because at-risk, poor, and special education students require more resources than general education students. In fact, some states are constitutionally obligated to provide

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<sup>321</sup> See 20 U.S.C. § 6321(c)(2)(B) (2006) (requiring only a uniform salary schedule and exempting pay difference related to longevity).

<sup>322</sup> See *id.* § 6321(c)(1)(B).

<sup>323</sup> See OFFICE OF INSPECTOR GEN., *supra* note 281, at 4-6 (providing multiple ways that schools can demonstrate compliance and allowing for a ten percent variance).

<sup>324</sup> See *supra* note 177 for sources estimating a cost increase of anywhere from thirty to sixty percent.

<sup>325</sup> See McClure, *supra* note 148, at 26 (discussing how the comparability requirements have previously only been applied within school districts).

<sup>326</sup> See, e.g., *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 393-94 (N.J. 1990) (discussing the unique administrative burdens that cities confront based on the various services they must offer citizens outside of education); *id.* at 400-04 (discussing the special and additional needs of poor students in urban districts).

<sup>327</sup> See, e.g., *id.* at 393-94 (factoring in the unique municipal overburden that urban districts face).

additional resources for these students.<sup>328</sup> By factoring in need, school districts with high percentages of these students might be permitted to spend far more than other districts. By widening the allowed variances and factoring in costs and need, the comparability analysis would not affect most school districts, but it would force states to account for wide variances that tend to seriously disadvantage districts with large numbers of needy children.

Finally, per the GAO's recommendations, Congress should eliminate the supplement-not-supplant standard.<sup>329</sup> In conjunction with this elimination, Congress should narrow the maintenance-of-effort requirement from ninety percent of the previous year's expenditures to ninety-five percent.<sup>330</sup> This narrower standard would not only ensure that districts maintain their base of funding, but it would also effectively prevent a district from any major supplanting of local funds. Moreover, ensuring the maintenance of this base coincides with ensuring that states are meeting their constitutional and statutory requirements with their own funds, rather than allowing Congress to mask inequities.<sup>331</sup>

### C. *Private Federal Cause of Action*

Congress should not leave the enforcement of its equity standards or compliance with state obligations solely to federal agencies.<sup>332</sup> First, to do so would be inconsistent with other legislation that furthers equal protection. The conditions on federal funds regarding race, gender, disability, age, and language all include private causes of action.<sup>333</sup> Second, individuals and advocacy groups at the local level may often recognize inequities before a federal agency would. Alternatively, they might simply spot inequities that an agency overlooked or was unwilling to force a state or school district to remedy.<sup>334</sup> Third, when inequities exist, individuals should not be dependent

<sup>328</sup> See, e.g., *id.* at 390; *Leandro v. State*, 488 S.E.2d 249, 258 (N.C. 1997) (recognizing the state's responsibility to provide resources to certain districts in light of their students' special needs).

<sup>329</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 248, at 24-25.

<sup>330</sup> *Id.* at 26 (recommending that the current ninety percent maintenance-of-effort standard be increased); see also McClure, *supra* note 148, at 25-26 (demonstrating the problem with the current maintenance-of-effort and supplement-not-supplant standard).

<sup>331</sup> See *supra* Part II.E.1.

<sup>332</sup> The proposed Student Bill of Rights, H.R. 2451, 111th Cong. § 132 (1st Sess. 2009), would provide for such a right.

<sup>333</sup> See, e.g., 20 U.S.C. § 1415(b)(6) (2006) (creating a cause of action to enforce individual rights under the Individuals with Disabilities in Education Act); *id.* § 1706 (creating an individual cause of action under the Equal Educational Opportunities Act); *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001) (recognizing that a cause of action under Title VI exists for intentional discrimination); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690-94 (1979) (recognizing an implied private cause of action under Title IX).

<sup>334</sup> For instance, because the only real remedy that the Department of Education has is to terminate funding, which is drastic and could harm innocent students, the agency may



or forced to wait on federal agencies to vindicate their right to quality and equitable schools.<sup>335</sup> Finally, individual lawsuits would further encourage voluntary compliance and relieve some of the monitoring and enforcement pressures that would otherwise rest with agencies.

D. *Incentivize Equity and Meet Student Needs*

Because Congress has not enforced equity in Title I in any meaningful way for several years, states and school districts will likely perceive all of the foregoing as significant impositions that threaten their ability to provide education. As many have operated with and expanded inequity as a general practice for several years, immediately reversing these structures would exact significant costs on some school districts and schools, as the states and districts would be expected to redirect funds. Some school districts and schools would face the prospect of losing funds, which could cause undue hardships in some instances.<sup>336</sup> To offset this possibility and the political objections it would draw, Congress should incentivize equity through the funding formulas as well as provide a gradual transition to new funding patterns.

A gradual transition would mean flattening expenditures in the existing formulas immediately, and then gradually drawing them down over time. As for the new formulas, they should eliminate funding based on state expenditures, which penalizes poor states, and replace it with a metric that accurately reflects locality cost, student need, and state effort.<sup>337</sup> However, the primary weighting of funds should be based on the level of equity that states and school districts maintain. As the level of inequity between school districts decreases, the formula should provide more funds to the state. This weighting alone is unlikely to encourage states to reduce inequity and would simply reward those that have already done so of their own accord. To actually encourage states to close gaps, the formulas should reward states based on any increases in equity that they achieve. Thus, those states that make good-faith efforts toward achieving equity would receive additional assistance in meeting

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encounter situations where it is unwilling to enforce a statute fully. See Julia Lamber, *Private Causes of Action Under Federal Agency Nondiscrimination Statutes*, 10 CONN. L. REV. 859, 888 & n.150 (1978) (observing that the relevant agency had terminated funding for only three educational institutions in fourteen years).

<sup>335</sup> See *Cannon*, 441 U.S. at 704-08 (finding that “effective” protection of individual rights requires a private cause of action and that administrative enforcement of a statute does not necessarily include the vindication of individual rights); *Adams v. Richardson*, 480 F.2d 1159, 1164 (D.C. Cir. 1973) (holding that the D.C. District Court had jurisdiction over challenge to the U.S. Office of Civil Rights’s failure to enforce Title VII of the Civil Rights Act of 1964 and desegregate schools).

<sup>336</sup> Actually, terminating funds under Title I would be no less problematic than it has been for other forms of non-discrimination. Concerned with the practical effect that fund termination would have on students, the Department of Education is simply reluctant to use this measure. See Lamber, *supra* note 334, at 888 & n.150.

<sup>337</sup> THE EDUCATION TRUST, *supra* note 12, at 3 tbl.1, 4 tbl.2.

their goal. Moreover, to account for the limited capacity to raise or move funds in poorer states, the formula should provide a proportionally greater level of assistance to poorer states.

Finally, Title I should not only encourage states to achieve equity, it should return to its initial mission of meeting student needs. In particular, it should help those that need help the most. Those children are the ones attending schools with the highest concentrations of impoverished students. To appropriately meet those students' needs, the formula should increase the per-pupil allotments as the level of impoverished students increases. Currently, the increase flattens at levels of approximately thirty percent impoverished students.<sup>338</sup> Rather than flatten, the formula should exponentially increase the allotment with no cap.<sup>339</sup> The only caveat would be the possibility that, by providing additional funds for concentrated poverty, Title I might create a perverse incentive for states and districts to maintain or increase existing levels of socioeconomic and racial isolation between their school districts. Thus, while Title I must help meet student needs in high poverty schools and districts, it must also include provisions that withhold funding increases for school districts or states that enact new policies that increase the concentration of poor students in particular districts. Moreover, to encourage states and school districts to deconcentrate poverty, Title I should hold harmless any school districts or states that enact new policies that deconcentrate their poor students. For instance, some inner city school districts have enacted inter-district transfer programs that send poor and/or minority students to a suburban district with lower levels of poverty and racial isolation.<sup>340</sup> For at least a period of three years, school districts, such as the inner city ones transferring students out, should be eligible for the same level of funding that they received when their percentage of poor students was higher and the receiving school districts should receive additional Title I funds.

The foregoing alone, unfortunately, would have no effect on the segregation or desegregation of poor students between schools within a single school district. The current formulas base funding on districts' overall poverty levels rather than individual schools.<sup>341</sup> The poverty levels at particular schools only affect how the district divides the money among its schools.<sup>342</sup> Thus, districts

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<sup>338</sup> 20 U.S.C. §§ 6335(c)(1)(B), 6337(d)(1)(A).

<sup>339</sup> For a discussion of research demonstrating that the negative effects of poverty continue to grow as the percentage of poor students in a school grows, see *supra* note 193 and accompanying text.

<sup>340</sup> See generally Amy Stuart Wells et al., Charles Hamilton Houston Inst. for Race & Just., *Boundary Crossing for Diversity, Equity and Achievement: Inter-district School Desegregation and Educational Opportunity* (2009) (detailing the various inter-district desegregation programs currently in effect), available at [http://www.charleshamiltonhouston.org/assets/documents/publications/Wells\\_BoundaryCrossing.pdf](http://www.charleshamiltonhouston.org/assets/documents/publications/Wells_BoundaryCrossing.pdf).

<sup>341</sup> 20 U.S.C. §§ 6335(c)(1)(B), 6337(d)(1)(A).

<sup>342</sup> *Id.* § 6313.

can currently concentrate all their poor students within particular schools without gaining or losing any Title I funds. To encourage poverty deconcentration at the school level, Title I should begin examining the poverty concentration between schools within a school district, applying the same principles that it does at the district level. Title I should provide incentives for districts that deconcentrate poor students among their schools and penalize those districts that take actions to concentrate poor students in particular schools.<sup>343</sup> In short, these changes would fairly direct additional funds to the high-poverty school districts that need it the most, but also encourage the ultimate solution of simply deconcentrating poverty.

E. *Reconciling Equal Protection with Current Title I Trends*

On their face, these recommendations to monitor the inputs and resources of schools appear counter to the current political and regulatory trends at the federal level. The past two iterations of Title I – No Child Left Behind and The Goals 2000: Educate America Act – have focused primarily on outputs.<sup>344</sup> In particular, standardized student achievement scores have become the means by which the federal government measures schools' progress.<sup>345</sup> Title I currently deems schools successful or in need of reform or dissolution based on whether each of their student subgroups are scoring at particular levels on standardized tests.<sup>346</sup> Thus, measuring schools based on resources and other

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<sup>343</sup> Of course, when a district deconcentrates poverty in one school, it necessarily increases it in another. The prohibition against increasing poverty concentration discussed above the line refers to those instances where a district draws its school boundaries in a manner that sends most of its poor students to a single school or group of schools, while maintaining low levels of poverty elsewhere. For instance, a school district might have one school with seventy-five percent poverty with all of its other schools having only ten percent poverty. Such a school district should be penalized if it drives up the percentage of poverty at the one school above seventy-five percent, and it should not be rewarded when the percentage of poor students consequently drops below ten percent at other schools. However, if the district did the opposite and brought the poverty level below seventy-five percent at the one school, the poverty level would necessarily increase elsewhere. In this case, the district should be held harmless for the decrease at the one school and given increased support for deconcentrating poverty at other schools.

<sup>344</sup> No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. § 6316); Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125.

<sup>345</sup> 20 U.S.C. § 6316; see also Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1679 (2007) (criticizing No Child Left Behind for looking exclusively at statewide assessments and the achievement gaps therein).

<sup>346</sup> 20 U.S.C. §§ 6311, 6316. In fairness, No Child Left Behind does look at teacher quality, which is an input. *Id.* § 6319. However, in the first years after its enactment, this presented a significant concern for school districts, because so many were potentially out of compliance in regard to this input. See U.S. DEPT. OF EDUC., NEW NO CHILD LEFT BEHIND FLEXIBILITY: HIGHLY QUALIFIED TEACHERS (2004) (providing new alternative means to

inputs would appear to reverse the current trend and revert to traditional school evaluations. The Secretary of Education himself has credited the recent iterations of Title I with focusing on outcomes rather than inputs.<sup>347</sup>

Input and output measures, however, are not inherently competing tools, but rather are often complementary tools. In fact, in the effort to determine whether schools are meeting their constitutional obligations, state courts have regularly relied on both, treating inputs as a predicate to having fair expectations regarding outputs.<sup>348</sup> More specifically, when courts have found that students are entitled to a qualitative level of education, they have relied on outputs such as standardized test scores to determine whether students are receiving that education.<sup>349</sup> But when the outputs have revealed that students are not receiving a constitutionally adequate education, state courts have not simply responded by indicating that teachers should do a better job teaching students or administrators a better job allocating funds. Instead, courts have taken the second step of examining whether schools have sufficient resource inputs to allow teachers to improve their instruction or administrators to fund necessary instructional programs.<sup>350</sup> For these courts, outputs and inputs are inherently connected to, rather than disconnected from, one another. This approach suggests that holding schools accountable for outputs, without considering the inputs available to those schools, is inappropriate and unfair.

Unfortunately, Title I suffers from this fatal flaw. It demands output accountability notwithstanding the reality of input inadequacy. Congress may not be bound to address inadequacy and inequity in schools as a general

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demonstrate that teachers are highly qualified), *available at* <http://www.ed.gov/nclb/methods/teachers/hqtflexibility.pdf>. Regardless, No Child Left Behind's overall and primary focus is on outputs.

<sup>347</sup> Duncan, *supra* note 45.

<sup>348</sup> See, e.g., *Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 425-30 (N.J. 1997) (discussing achievement on standardized state tests and its relevance to the constitutionality of the school system, but also requiring the state to provide particular inputs); *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 336 (N.Y. 2003) (reinstating the trial court's mandate that the state provide sufficient input resources to permit students to receive a sound basic education); *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 381-84 (N.C. Ct. App. 2004) (analyzing student performance on curriculum and standardized state tests as part of the Court's inquiry into whether the state should provide additional resources for school districts).

<sup>349</sup> See, e.g., *Abbott IV*, 693 A.2d at 425-30 (discussing achievement on standardized state tests and its relevance to the constitutionality of the school system); *Hoke County*, 599 S.E.2d at 381-84 (analyzing student performance on curriculum and standardized state tests).

<sup>350</sup> See, e.g., *Campaign for Fiscal Equity*, 801 N.E.2d at 345 (requiring the state to provide foundational resources for schools); *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232, 240-41 (Tenn. 1998) (requiring the state to provide additional resources for teacher salaries); *State v. Campbell County Sch. Dist.*, 19 P.3d 518, 543 (Wyo. 2001) (analyzing the state finance system and indicating that it should be reviewed every five years to ensure its ability to meet student needs).

principle, but once it enters the field of education, it is prohibited from reinforcing inadequacy and inequity. It is likewise prohibited from funding the current constitutional violations in which some states engage. Accepting this responsibility, however, does not mean that Congress must abandon its concern with outputs; it need only account for the relevance of inputs in measuring outputs.

#### CONCLUSION

Title I once provided the hope of a nation to make good on the promise of education as the means of economic mobility for the disadvantaged. It pumped new funds into the poorest areas of the country and acknowledged that poor children needed more resources than the average student if they were realistically expected to succeed on a consistent basis. The financial leverage that Title I created also allowed the federal government to immediately achieve far more desegregation in a few years than courts had in a full decade. Yet today, one would struggle to recognize this rich history in the text and effect of Title I. If Congress's only fault was in abandoning a worthy mission, it might simply be criticized as losing its moral compass. But this abandonment of mission has been accompanied by measures that actually increase and sanction inequity. The Fourteenth Amendment does not afford Congress this liberty. It demands that Congress enforce equal protection, not undermine it. As Congress reauthorizes Title I this year, it must not let conversations of achievement tests, standards-based reforms, charter schools, and parental choice further drown out the role that Title I must play in equalizing schools and meeting the needs of our country's poorest children.<sup>351</sup> The means by which to cure Title I are well within Congress's reach. Poor children can only

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<sup>351</sup> Both Democrats and Republicans at the highest level have suggested that increasing the opportunities for parents to send their children to charter schools acts as a panacea to failing public schools. See David J. Hoff, *McCain Emphasizes School Choice, Accountability, but Lacks Specifics; Likely Republican Nominee Has Said Little on Trail About Education*, EDUC. WEEK, Feb. 20, 2008, at 1, 1-3 (discussing John McCain's position on education); Larry Rother, *Praise for a Rival*, N.Y. TIMES, July 17, 2008, at A16 (discussing McCain's support of charter schools); The White House, Education, <http://www.whitehouse.gov/issues/education> (last visited Oct. 23, 2009) (indicating President Obama's intent to invest in charter schools). Research, however, has indicated that charter schools have significant flaws, including increasing racial segregation. Erica Frankenberg & Chungmei Lee, *Charter Schools and Race: A Lost Opportunity for Integrated Education*, EDUC. POL'Y ANALYSIS ARCHIVES, Sept. 5, 2002, <http://epaa.asu.edu/epaa/v11n32> (revealing that giving parents vouchers or choice resulted in white flight that perpetuated racial stratification). Moreover, even when local laws require racial and socioeconomic equity in charter schools, these laws have too often been unenforced. Camille Wilson Cooper et al., *Charter Schools and Racial and Social Class Segregation: Yet Another Sorting Machine?*, in A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 169, 173 (Richard D. Kahlenberg ed., 2000), available at <http://www.tcf.org/publications/education/chpt6.pdf>.

hope that the will to cure Title I is within Congress's reach as well. No less than their future depends on it.