CAUGHT IN THE CROSSFIRE: THE RIGHT OF FEDERAL LAND RESIDENTS TO A STATE EDUCATION

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INTRODUCTION

> Federally-connected children and their parents in the military . . . have been caught in a political and fiscal crossfire between the federal, state, and local governments, a battle not of their own making. The federal Constitution will not abide [attempts] by the [school board] to balance its school budgets at the expense of those who have undertaken to serve our country in arms.[1]

In 1996, Congress created the Military Housing Privatization Initiative to improve the poor condition of housing for military families in the United States.[2] The housing initiative allowed the Department of Defense to enter contracts with private developers to build and improve housing on military installations, rather than directly constructing housing.[3] Private developers

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[1] United States v. Onslow Cnty. Bd. of Educ., 728 F.2d 628, 642 (4th Cir. 1984).

[2] Military Construction Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 523 (codified at 10 U.S.C. §§ 2871-2885 (2006)).

[3] *Id.*; *see also Welcome*, OFFICE OF THE DEPUTY UNDERSECRETARY OF DEFENSE,

have improved and created housing more efficiently,[4] solving military housing problems in several years instead of decades.[5] Because the privatization initiative relies heavily on private-sector funding, it has also saved the Department of Defense hundreds of millions of dollars.[6]

As military housing improved across the country, military families moved to privatized housing in greater numbers.[7] As of June 2009, the housing initiative privatized over 186,000 units, with over 80,000 remaining.[8] However, not all housing projects attracted or maintained adequate numbers of military occupants to financially maintain the projects.[9] Thus, in 2006, the Department of Defense implemented the "tenant waterfall" plan, which allows non-military families to rent privatized housing where military families occupy less than the desired percentage of the housing project.[10] The "waterfall" list gives military members first priority, followed by active National Guard and Reserve members, military retirees, federally-employed civilians, and the general

MILITARY HOUSING PRIVATIZATION, http://www.acq.osd.mil/housing/mhpi.htm (last visited Aug. 1, 2010).

[4] *See* U.S. GENERAL ACCOUNTING OFFICE, MILITARY HOUSING: CONTINUED CONCERNS IN IMPLEMENTING THE PRIVATIZATION INITIATIVE 6 (2004), *available at* http://www.gao.gov/archive/2000/ns00071.pdf; *Welcome*, *supra* note 3.

[5] *See* Philip D. Morrison, *State Property Tax Implications for Military Privatized Family Housing Program*, 56 A.F. L. REV. 261, 263-64 (2005).

[6] *See* Dep't of Defense, Military Housing Privatization Initiative (MHPI) – 101, presentation at slide 27 (Sep. 2006), http://www.acq.osd.mil/housing/docs/mhpi101.ppt; Bob Elwig, The Future of Military Housing Privatization, presentation at slide 5 (Jan. 22, 2007), http://www.acq.osd.mil/housing/docs/Helwig-PHMA-2007.ppt (projecting private sector funding over time as many millions of dollars greater than government funding).

[7] [The Department of Defense's] long-standing policy is to rely first on the private sector for its housing, paying housing allowances to its Service members, where roughly 63 percent of military families live. However, as of [Fiscal Year] 2007, [the Department of Defense] currently houses about 10 percent of its families on-base, owning and operating about 134,000 housing units worldwide. In addition, privatized housing is where roughly 24 percent of members live and this number is increasing.

Overview: Military Housing, OFFICE OF THE DEPUTY UNDERSECRETARY OF DEFENSE, MILITARY HOUSING PRIVATIZATION, http://www.acq.osd.mil/housing/housing101.htm (last visited Aug. 1, 2010).

[8] DEP'T OF DEFENSE OFFICE OF THE DEPUTY UNDERSECRETARY OF DEFENSE, MILITARY HOUSING PRIVATIZATION INITIATIVE PROGRAM EVALUATION PLAN 1 tbl.1 (June 30, 2009), http://www.acq.osd.mil/housing/docs/pepDocs/PEP%20Exec%20Report%20-June%202009.pdf.

[9] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-352, MILITARY HOUSING PRIVATIZATION: DOD FACES NEW CHALLENGES DUE TO SIGNIFICANT GROWTH AT SOME INSTALLATIONS AND RECENT TURMOIL IN THE FINANCIAL MARKETS 24-25 (May 2009), *available at* http://www.navyenterprise.navy.mil/docs/pdf/GAO_Housing.pdf.

[10] *See* Memorandum from Kathleen I. Ferguson, Deputy Civil Eng'r for DCS/Logistics, Installations & Mission Support to the Dep't of the Air Force (July 12, 2006), http://www.afcee.af.mil/shared/media/document/AFD-080523-038.pdf.

public.[11] As a result, many such projects house hundreds of non-military residents, and over thirty projects house civilians with no military connection at all.[12]

With nearly 200,000 housing units privatized, almost a million military children now attend local public schools.[13] Because the housing units are on land under federal jurisdiction, a great deal of the land is property-tax exempt.[14] Thus, neither the private developers nor the military or civilian parents in these newly developed units pay property taxes.[15] A typical housing project can cost taxing authorities $1-2 million or more annually due to these exemptions,[16] while educating one child costs states over $10,500 per year on average, and over $16,000 in some states.[17] This imbalance creates millions of dollars in financial shortages for local school districts, whose residents' property taxes provide an average of 30% and up to 60% of public school funding within a state.[18]

Impact Aid, the traditional form of federal funding for the education of children on federal land, has for decades failed to compensate school districts in the amount the districts would have received had federal land residents been subject to property taxes.[19] Impact Aid covers a maximum of 60% of the

[11] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 25 n.11; Memorandum from Kathleen I. Ferguson, *supra* note 10.

[12] DEP'T OF DEFENSE OFFICE OF THE DEPUTY UNDERSECRETARY OF DEFENSE, *supra* note 8, at 15-16, app. at 31-32.

[13] *See* Nat'l Military Family Ass'n, *Impact Aid*, MILITARYFAMILY.COM, http://www.militaryfamily.org/get-info/support-children/education/impact-aid.html (last visited Oct. 21, 2010) ("[O]ver 90 percent of military children [attend] civilian schools . . . ."); *Special Report: Month of the Military Child*, DEFENSE.GOV (Apr. 1, 2010), http://www.defense.gov/home/features/2010/0410_militarychild/ ("There are 1.7 million American children and youth under 18 with a parent serving in the military . . . .").

[14] *See* Morrison, *supra* note 5, at 270-75 (concluding that state and local property taxes rarely apply and that "no state has yet challenged the tax-exempt status of privatized housing in federal enclaves").

[15] *Id.*

[16] *Id*. at 262, 267-68.

[17] Educ. Counts Research Ctr., *Select Indicators*, EDWEEK.ORG (2007), http://www.edcounts.org/createtable/step1.php?letter=E&mode=Alphabetical (last visited Oct. 21, 2010) (select "Education spending per student" and follow prompts to select data from 2007 for all states).

[18] DAPHNE A. KENYON, THE PROPERTY TAX-SCHOOL FUNDING DILEMMA 13 tbl.3 (2007), *available at* https://www.lincolninst.edu/pubs/dl/1308_Kenyon%20PFR%20Final.pdf; *see also* United States v. Onslow Cnty. Bd. of Educ., 728 F.2d 628, 635 (4th Cir. 1984) (citing the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. § 501-514 (2006)) (indicating that military personnel are immunized from "taxation of income or personal property where such persons are not residents or domiciliaries"); Morrison, *supra* note 5, at 267-68.

[19] *See Onslow Cnty. Bd. of Educ.*, 728 F.2d at 631 (citing Impact Aid Program, Pub. L. No. 81-874, 64 Stat. 1100 (1950) (codified as amended at 20 U.S.C. §§ 236-244 (1952)

education costs of eligible children.[20] Impact Aid not only falls short of compensating school districts in the amount they would receive on property taxes, but provides less funding per child where the child's family has no federal connection.[21] Local school districts have resisted responsibility for covering the cost of educating these children,[22] and will likely continue to do so, especially where the newly privatized housing has brought an influx of civilian children. Overburdened school districts have in the past charged federal land residents tuition or refused to educate them.[23] Charging tuition remains a plausible option to compensate for lost funding where school districts find they have no legal responsibility to educate federal land residents.[24] A state may jeopardize its receipt of Impact Aid by refusing to provide a free education to any of its federal land residents, but the federal government would likely not withhold aid as a solution to state violations of Impact Aid laws. Charging tuition would, however, put school districts at risk for litigation. Thus, the Military Housing Privatization Initiative, by ensuring that the financial burden on local and state tax-payers would increase, creates discord between federal land residents, school districts, and states.[25]

(repealed 1994))); Patrick Ball, *Bill Seeks More Funds For Hanscom Students*, WICKED LOCAL LINCOLN (Nov. 1, 2007, 11:43 AM), http://www.wickedlocal.com/lincoln/news/education/x1819881107; Military Impacted Sch. Ass'n, Impact Aid PowerPoint, presentation at slides 3-4, http://www.militaryimpactedschoolsassociation.org/misa/documents/Impact_Aid_powerpoint.ppt (last visited Sept. 28, 2010).

[20] Military Impacted Sch. Ass'n, *supra* note 19, presentation at slide 4 ("Impact Aid was fully funded until 1970 when funding was cut in the middle of the school year. Since 1970 the program has faced severe cuts and is currently funded at 60% of need, as defined by law."); *see also* 20 U.S.C. §§ 7701-7714 (2006) (allocating impact aid).

[21] *See* discussion *infra* Part II.A.

[22] *See, e.g.*, *Onslow Cnty. Bd. of Educ.*, 728 F.2d at 628; Triplett v. Tiemann, 302 F. Supp. 1244, 1245 (D. Neb. 1969); Carlsbad Union Sch. Dist. v. Rafferty, 300 F. Supp. 434, 434-35 (S.D. Cal. 1969); Douglas Indep. Sch. Dist. No. 3 v. Jorgenson, 293 F. Supp. 849, 850 (D.S.D. 1968); Hergenreter v. Hayden, 295 F. Supp. 251, 252 (D. Kan. 1968); Shepheard v. Godwin, 280 F. Supp. 869, 872 (E.D. Va. 1968).

[23] *See* State *ex rel.* Moore v. Bd. of Educ. of Euclid City Sch. Dist., 57 N.E.2d 118, 124 (Ohio App. 1944); Schwartz v. O'Hara Twp. Sch. Dist., 100 A.2d 621, 624-25 (Pa. 1953); Rockwell v. Indep. Sch. Dist., 202 N.W. 478, 478-79 (S.D. 1925); 67 Ma. Op. Atty. Gen. 109, 109-10 (Dec. 20, 1966); 24 Or. Op. Atty. Gen. 458, 459-60 (June 27, 1950); Charging Tuition to Residents of Military Bases, 1984-85 Va. Op. Atty. Gen. 280, 281-82 (Nov. 23, 1984); *see also Onslow Cnty. Bd. of Educ.*, 728 F.2d at 631.

[24] School districts have also chosen the option of requesting increased state funding. For instance, Massachusetts legislators recently filed for legislation that would allow an impacted school district to receive state funding for the education of its federal land resident children. *See* H.R. 464, 186th Gen. Court, Reg. Sess. (Mass. 2009), *available at* http://www.malegislature.gov/Bills/BillText/3770.

[25] *See* Don Soifer, *New Educational Choices Would Help Military Families*, STATES NEWS SERVICE (Feb. 2, 2010), http://www.lexingtoninstitute.org/new-educational-choices-would-help-military-families?a=1&c=1136. Some school districts have filed legislation in

Determining who, if anyone, is legally responsible for the education of federal land residents requires an analysis of the interaction between state and federal law. Many state constitutions guarantee a free education to all state residents.[26] Because the Supreme Court held in *Evans v. Cornman* that residents of federal land are residents of the state in which the land is located,[27] states that must educate all residents must educate children residing on federal land within their boundaries. Yet states that do not guarantee an education to all residents, but rather mandate, for instance, that the state "cherish . . . public schools,"[28] have attempted to deny federally-connected children a free public school education.[29] Although some courts have held that a state must provide an education to all state children regardless of such ambiguous language in their constitutions,[30] several states have denied any duty to educate federally-connected children,[31] and could continue to deny this obligation.[32]

While states have historically withheld certain rights from federal land residents, and restrictions continue to apply to the power of states within

order to receive supplemental funding from the state government. *See* Mass. H.R. 464; discussion *infra* Part II.A.

[26] *See, e.g.*, FLA. CONST. art. IX, § 1 ("It is . . . a paramount duty of the state to make adequate provision for the education of all children residing within its borders."); GA. CONST. art. VIII, § 1 ("The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation."); ILL. CONST. art. X, § 1 ("Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation.").

[27] Evans v. Cornman, 398 U.S. 419, 421-22 (1970).

[28] MASS. CONST. pt. 2, ch. V, § II.

[29] *See, e.g.*, 67 Ma. Op. Atty. Gen. 109, 109-10 (Dec. 20, 1966).

[30] *See, e.g.*, McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 522, 555 (Mass. 1993) (finding the Massachusetts Constitution's requirement that state "cherish" schools meant Massachusetts must "provide education in the public schools for the children there enrolled"); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 150-52 (Tenn. 1993) (interpreting the Tennessee Constitution's provision for the maintenance of public schools as a mandate that "school children of this state" receive free state education); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va., 1979) (interpreting the West Virginia Constitution's requirement of a "thorough and efficient system of free schools" as a guarantee to a fundamental constitutional right to education within the State).

[31] *See supra* note 23 and accompanying text.

[32] *See* Charging Tuition to Residents of Military Bases, 1984-85 Va. Op. Atty. Gen. 280, 281-82 (Nov. 23, 1984). For example, almost fifteen years after *Evans*, the school district of Onslow County in North Carolina fought – albeit unsuccessfully – to preserve its tuition charge on federal land residents, despite a North Carolina law requiring that all "children of the State" receive a free public school education. United States v. Onslow Cnty. Bd. of Educ., 728 F.2d 628, 631 (4th Cir. 1984) (citing General and Uniform System of Schools, N.C. GEN. STAT. § 115C-1 (Supp. 1981)). Federally impacted school districts have sued both the state and the federal government for funding. See Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., 550 U.S. 81, 88-90 (2007).

federal enclaves,[33] recent Supreme Court cases suggest that states may no longer deprive federal land residents of state residents' rights.[34] Under federal law, there is no fundamental right to education, but the Supreme Court's decision in *Plyler v. Doe*[35] suggests that school districts may not charge students tuition based on residency status. Furthermore, *Evans v. Cornman* and the relatively recent trend toward granting federal land residents state rights suggest that federal land residents must receive state public school education.[36] Thus, despite some states' success in evading the responsibility of educating residents of federal land throughout the early- and mid-twentieth century, modern courts would likely strike down state attempts to charge these students tuition.

But while states may have a legal obligation to educate all children within their bounds, this obligation should not release the federal government from its own responsibility to educate children living on federal land. Impacted school districts have turned to state governments to supplement school funding.[37] The federal government thus allows the Department of Defense to profit from its privatization initiative at the expense of the states. While the need for improved military housing is evident,[38] the cost should not fall to local school districts alone. The federal government should provide federally impacted areas with greater financial assistance where it burdens these areas with the cost of educating children whose parents do not pay property taxes.[39] Otherwise, the federal government risks disadvantaging the schools it depends upon to educate more than a million federally-connected children.[40]

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[33] *See* discussion *infra* Part II.

[34] *See* discussion *infra* Parts I.A and II.B-C.

[35] Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that school districts may not charge illegal alien children tuition to attend public schools).

[36] *See Onslow Cnty. Bd. of Educ.*, 728 F.2d at 642 (4th Cir. 1984); Triplett v. Tiemann, 302 F. Supp. 1244, 1245-46 (D. Neb. 1969); Carlsbad Union Sch. Dist. v. Rafferty, 300 F. Supp. 434, 440 (S.D. Cal. 1969); Douglas Indep. Sch. Dist. No. 3 v. Jorgenson, 293 F. Supp. 849, 850 (D.S.D. 1968); Hergenreter v. Hayden, 295 F. Supp. 251, 256 (D. Kan. 1968); Shepheard v. Godwin, 280 F. Supp. 869, 874-76 (E.D. Va. 1968).

[37] *See, e.g.*, H.R. 464, 186th Gen. Court, Reg. Sess. (Mass. 2009), *available at* http://www.malegislature.gov/Bills/BillText/3770 ("[T]he state shall pay through the mechanisms of target aid as phased in over time one hundred percent of the foundation budget associated with children who reside on Massachusetts Military Reservation, net of federal impact aid.").

[38] Morrison, *supra* note 5, at 261.

[39] *See Rep. Hall Announces $800,000 in New Federal Funding*, U.S. FED. NEWS, Jan. 12, 2010, *available at* 2010 WLNR 591041; Don Soifer, *supra* note 25.

[40] *Impact Aid (84.014)*, FEDERAL GRANTS WIRE, http://www.federalgrantswire.com /impact-aid.html (last visited Sept. 28, 2010) ("Fiscal Year 2010: 1,264 grants [awarded to Local Education Agencies] on behalf of over 1 million children."). Although this figure includes a small number of Native American children, the number of schools actually educating military children is likely higher since only schools whose total attendance

This Note addresses the historical rights of federal land residents to a state education, and why the obligation of educating federal land residents now legally falls to the states.[41] Part I explains that although there is no fundamental right to education under the Constitution, state-imposed tuition fees on federal land residents might be unconstitutional. Part I further explains that nonetheless, because state constitutions impose different obligations on each state to provide public school education, states whose laws do not mandate a free education to all students may yet dispute such responsibility. Part II discusses the history of federal land residents' rights, and illustrates how trends in cases on voting rights and other state benefits indicate that states cannot deny public education to federal land residents. While these decisions may rest on faulty bases, Part II points out that states nonetheless will likely be unable to escape the burden of educating all children within their bounds. Part III analyzes cases that directly bear upon federal land residents' educational rights and indicate, albeit not without ambiguity, that states must legally undertake this obligation. Part IV offers potential solutions to funding difficulties based on shared responsibility between the states and the federal government.

I. CONSTITUTIONAL RIGHTS TO EDUCATION

Whether federal land residents have a right to a state education remains unresolved. No federal statute directly imposes upon states the obligation to fund education for federal land residents. Thus, Impact Aid laws aside,[42] a right to a state education must derive from either federal constitutional law or an individual state's laws. Supreme Court cases dealing directly with the right to an education have determined that there is no fundamental right to an education under the Constitution. Although the Supreme Court held that a state may not deny illegal alien children an education based on their legal status,[43] federal land residents can be distinguished from illegal aliens based on the traditional role the federal government has played in providing for their education, and the historical exemption from state laws that federal land residents have been granted. Thus, based on Supreme Court decisions that specifically address educational rights, federal land residents might not have a constitutional right to a state education. Whether state law gives federal land residents a right to a state education varies based on the state's constitution and

consisted of at least 400 or 3% of eligible federally-connected children in the previous year are eligible for Impact Aid. *See* 34 C.F.R. § 222.36 (2010).

[41] Although the majority of children who live on federal land affected by the Military Housing Privatization Initiative are children of military parents or those otherwise connected to the military, *see* DEP'T OF DEFENSE OFFICE OF THE DEPUTY UNDERSECRETARY OF DEFENSE, *supra* note 8, at 1 tbl.1, this Note often refers to federal land residents rather than military children only because civilian children may also occupy federal land.

[42] See *infra* Part II.A for a discussion of Impact Aid and its effect on state obligations.

[43] Plyler v. Doe, 457 U.S. 202, 230 (1982).

its courts' interpretations of its constitution. Thus, because the Constitution may not guarantee a right to education, where state laws do not mandate that the state educate all students, federal land residents arguably have no right to a state education.

A. *Federal Constitutional Rights*

The United States Supreme Court has yet to officially recognize a constitutional right to education. Thus, whether states must educate federal land residents due to their constitutional rights remains unresolved. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court held that there is no fundamental right to education under the Constitution.[44] The Court did not challenge the contention that education is "essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote,"[45] but asserted that "we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."[46] Therefore, *Rodriguez* found "judicial intrusion into otherwise legitimate state activities" unjustified,[47] and refrained from giving education status as a fundamental right.[48] *Rodriguez* suggested, however, that the outright denial of a state education might not be constitutional under the Equal Protection Clause.[49] The Court noted that if public education were only made available to those paying tuition, thus precluding a certain class of people from receiving an education, "judicial assistance" might be appropriate.[50]

In *Plyler v. Doe*, the Court came closer to recognizing a fundamental right to education, but nonetheless declined to do so.[51] *Plyler* held in a 5-4 decision that public schools charging tuition to undocumented aliens violated the Equal

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[44] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). *Rodriguez* stated: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *Id.*

[45] *Id.* at 35-36.

[46] *Id.* at 36.

[47] *Id.*

[48] *Id.* at 37.

[49] *Id.* at 23 ("[In this case,] lack of personal resources has not occasioned an absolute deprivation of [education]. The argument here is not that the children . . . are receiving no public education; rather, it is that they are receiving a poorer quality education . . . .").

[50] *Id.* at 25 n.60, 37. Significantly, the Court stated:

> If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of 'poor' people – definable in terms of their inability to pay the prescribed sum – who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today.

Id. at 25 n.60.

[51] Plyler v. Doe, 457 U.S. 202, 221 (1982).

Protection Clause.[52] The Court determined that while public education is not a fundamental right, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[53] Furthermore, the Court found the tuition law to be particularly unfair because the law discriminated against children, and did so "on the basis of a legal characteristic over which children can have little control."[54] Therefore, the Court applied a higher level of scrutiny than it usually applied to laws implicating non-fundamental rights, and held that a law mandating tuition must "[further] some substantial goal of the State."[55] By requiring that the challenged law meet a higher standard than rational basis, which *Rodriguez* had explicitly refused to do,[56] *Plyler* raised the constitutional status of the right to education and made it easier for courts to strike laws imposing tuition for public school.

Plyler's prohibition against charging tuition for public education would likely extend to children living on federal land. Despite earlier state decisions to the contrary,[57] the Equal Protection Clause might bar school districts from charging federal land residents tuition under *Plyler*. Yet while *Plyler* implied that children's status as minors factored into the illegality of charging them tuition for a public school education,[58] *Plyler* did not entirely eliminate the possibility that children in certain circumstances may be charged tuition. *Plyler* did not address the unique situation of children who reside on federal land, which could be distinguished based on the division of responsibility between the federal and state government for the benefits federal land residents receive.[59] Furthermore, *Plyler* rejected the state's argument that children

[52] *Id.* at 211.

[53] *Id.* at 221.

[54] *Id.* at 220.

[55] *Id.* at 224.

[56] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).

[57] *See, e.g.*, State *ex rel.* Moore v. Bd. of Educ. of Euclid City Sch. Dist., 57 N.E.2d 118, 124 (Ohio App. 1944); Schwartz v. O'Hara Twp. Sch. Dist., 100 A.2d 621, 624-25 (Pa. 1953); Sch. Dist. No. 20 v. Steele, 195 N.W. 448, 450 (S.D. 1923); 24 Or. Op. Atty. Gen. 458, 459-60 (June 27, 1950); Charging Tuition to Residents of Military Bases, 1984-85 Va. Op. Atty. Gen. 280, 281-82 (Nov. 23, 1984).

[58] *Plyler*, 457 U.S. at 220 (explaining that the law mandating tuition payments by illegal aliens "is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control" thus making it "difficult to conceive of a rational justification for penalizing these children for their presence within the United States").

[59] The Department of Defense has always assumed responsibility for the provision of electric, water, waste management, and natural gas utilities on military bases. *See* Memorandum from John J. Hamre, Deputy Sec'y of Def., Dep't of Def. (Dec. 23, 1998), *available at* http://www.defense.gov/dodreform/drids/drid49.html (directing military departments to privatize all utility systems). See *infra* Parts II.B and IV for further discussion of the federal government's role in providing education and other benefits to

illegally present in a state are not within the state's jurisdiction and thus not guaranteed equal protection, emphasizing that these children remain subject to state laws.[60] Federal land residents, on the other hand, are not subject to all state laws, but rather are specifically exempt from paying the property tax which would otherwise fund their children's education. Moreover, certain federal land falls within the exclusive jurisdiction of the federal government, and historically has been explicitly precluded from state jurisdiction.[61] One might therefore argue that *Plyler*'s rationale for guaranteeing illegal alien children an education based on equal protection would not apply to federal land residents. The possibility remains that federal constitutional law does not impose an obligation on states to educate federal land residents. Whether a state would attempt to raise this possibility depends on the obligations imposed on the state by its own constitution.

B. *State Constitutional Rights*

Every state constitution mandates that the state implement a public school system.[62] The obligations imposed on the state to provide this education vary.[63] Some states explicitly provide for the right to a public school education for all state residents,[64] while others establish a level of adequacy the state's schools must maintain without explicitly mandating that the state educate all of its of residents.[65] Twenty-one state constitutions mandate only the establishment of a public school system without specifying the level of adequacy the schools must maintain.[66] Some of these states' courts have interpreted such clauses as mandating a certain level of adequacy regardless of the clause's specific wording,[67] but differences in state constitutional

federal land residents.

[60] *Plyler*, 457 U.S. at 211-12.

[61] *See* discussion *infra* Parts II.A and II.C.

[62] *See* William E. Thro, *An Essay: The School Finance Paradox: How the Constitutional Values of Decentralization and Judicial Restraint Inhibit the Achievement of Quality Education*, 197 EDUC. L. REP. 477, 477 (2005).

[63] *Id.* at 482.

[64] *See, e.g.*, FLA. CONST. art. IX, § 1 ("It is . . . a paramount duty of the state to make adequate provision for the education of all children residing within its borders."); GA. CONST. art. VIII, § 1; ILL. CONST. art. X, § 1.

[65] *See, e.g.*, ARK. CONST. art. XIV, § 1 ("[T]he state shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education."); COLO. CONST. art. IX, § 2; DEL. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1.

[66] Thro, *supra* note 62, at 482; *see, e.g.*, MASS. CONST. pt. 2, ch. V, § II; N.Y. CONST. art. XI, § 1.

[67] *See, e.g.*, McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 551 (Mass. 1993); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 150-52 (Tenn. 1993); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va., 1979).

provisions' wording continues to impact the determination of educational rights.[68]

For instance, the Massachusetts Constitution states only that "it shall be the duty of [state] legislatures and magistrates to cherish . . . public schools and grammar schools in the towns."[69] While this provision may be read to impose a minimal obligation on the Commonwealth,[70] the Massachusetts Supreme Judicial Court determined in *McDuffy v. Secretary of the Executive Office of Education* that the Commonwealth has a duty "to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live."[71] The decision relied on a lengthy discussion of the proper definition of "cherish"in the Massachusetts Constitution,[72] and concluded that the provision as a whole "obligates the Commonwealth to educate *all* its children . . . in every city and town of the Commonwealth at the public school level."[73]

Yet while state constitutional provisions explicitly imposing only minimal duties on the state have been interpreted expansively, as in Massachusetts, these provisions have not necessarily been interpreted to guarantee a fundamental right to education,[74] and thus have allowed for the denial of education where a rational basis exists.[75] Such allowances impact the right of federal land residents to a state education. Where state constitutional provisions do not explicitly guarantee state residents an education, and where state court interpretations of these provisions do not require that states educate all their residents, states have stronger grounds for denying the obligation of educating federal land residents.

Some states have explicitly denied children residing on federal land the right to a state education.[76] A 1966 Massachusetts Attorney General opinion affirmed the state's 1841 holding that Massachusetts need not educate children

[68] *McDuffy*, 615 N.E.2d at 523-48.

[69] MASS. CONST. pt. 2, ch. V, § II.

[70] Thro, *supra* note 62, at 482 (classifying the Massachusetts provision among those imposing the least obligation on the state to provide a public school education).

[71] *McDuffy*, 615 N.E.2d at 555.

[72] *Id.* at 523-28.

[73] *Id.* at 548.

[74] Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1156 (Mass. 2005) (plurality opinion) (finding no violation of state constitutional educational obligations and indicating that school financing decisions should be left to legislators, not courts); Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088, 1095 (Mass. 1995) ("*McDuffy* should not be construed as holding that the Massachusetts Constitution guarantees each individual student the fundamental right to an education.").

[75] *See Superintendent of Sch. of Worcester*, 653 N.E.2d at 1097 (finding that expulsion of student for bringing lipstick knife to school was rationally related to school's interest in safety and did not warrant strict scrutiny because right to education is not fundamental).

[76] *See supra* note 57 and accompanying text.

residing on federal land.[77] Ohio, Oregon, Pennsylvania, South Dakota, and Virginia have also denied federal land residents educational rights.[78] These decisions generally precede *Plyler* and other Supreme Court cases that could change their results. Yet while these states currently educate federal land residents,[79] whether they *must* do so has not been determined. When school districts absorb large numbers of children residing on federal land, especially when these children bring in minimal or no additional Impact Aid funds due to their parents' non-military status,[80] school districts may turn to precedent that frees states from the obligation of educating federal land residents.[81]

II. RIGHTS OF FEDERAL LAND RESIDENTS

The history of federal land jurisdiction and federal land residents' rights to state benefits inform the question of who, if anyone, must educate federal land residents. As with the analysis of constitutional and state rights to an education, these precedents provide an unsatisfying answer. Federal jurisdiction over much federal land is still "exclusive,"[82] suggesting that the federal government bears responsibility for providing federal land residents with benefits the state would otherwise provide. Indeed, the Department of Defense has traditionally provided military bases with utilities, including electricity, water, and telecommunications,[83] and with police and fire-fighting services.[84] Within the United States, the Department of Defense runs over sixty schools for military dependents on its own,[85] and the federal government

[77] 67 Ma. Op. Atty. Gen. 109, 109-10 (Dec. 20, 1966) (citing Opinion of the Justices, 42 Mass. 580, 583 (1841)).

[78] *See supra* note 57 and accompanying text.

[79] *See* DEP'T OF EDUC., FISCAL YEAR 2009-FY 2011 PRESIDENT'S BUDGET STATE TABLES FOR THE U.S. DEPARTMENT OF EDUCATION 6 (Oct. 14, 2010), *available at* http://www2.ed.gov/about/overview/budget/statetables/11stbyprogram.pdf (listing Impact Aid payments made to all states).

[80] *See* discussion *infra* Part II.A.

[81] *See* Charging Tuition to Residents of Military Bases, 1984-85 Va. Op. Atty. Gen. 280, 281-82 (Nov. 23, 1984).

[82] *See* Evans v. Cornman, 398 U.S. 419, 423-24 (1970).

[83] *See* GENERAL ACCOUNTING OFFICE, DEFENSE INFRASTRUCTURE: MANAGEMENT ISSUES REQUIRING ATTENTION IN UTILITY PRIVATIZATION 7 (2005), *available at* http://www.gao.gov/new.items/d05433.pdf (discussing shift to privatization of military base utilities previously operated directly by Department of Defense); Memorandum from John J. Hamre, *supra* note 59.

[84] *See, e.g.*, *Careers & Jobs: Firefighter*, GOARMY.COM, http://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories/legal-and-law enforcement/firefighter.html (last visited Oct. 24, 2010); MARINE CORPS CIVILIAN POLICE PROGRAM, http://www.usmccle.com (last visited Oct. 24, 2010).

[85] *See DDESS Districts*, U.S. DEPARTMENT OF DEFENSE EDUCATION ACTIVITY (Jan. 20, 2010), http://www.am.dodea.edu/ddessasc/districts/districts.html [hereinafter *DDESS Districts*]; *DoDEA Fact: An Overview*, U.S. DEPARTMENT OF DEFENSE EDUCATION ACTIVITY

provides Impact Aid funding to state school districts that educate military dependents.[86]

Nonetheless, state courts have ordered states to provide federal land residents with other benefits traditionally reserved for state residents, such as welfare and the protection of certain state criminal laws.[87] In *Evans v. Cornman*, the Supreme Court ruled that federal land residents exercise the same voting rights as state residents.[88] *Evans* held that federal land residents are state residents for voting purposes, suggesting that they also have a right to a state education. The rationale behind *Evans* could, however, limit its holding. Unlike the right to vote, education is not a constitutionally guaranteed right, and its provision relies heavily on property taxes that federal land residents do not pay.[89] Moreover, older laws of federal jurisdiction, which *Evans* ignored,[90] as well as the government's role in providing other benefits to military bases, suggest that the responsibility to educate federal land residents should not fall solely to the states.

A. *Jurisdiction, Taxation, and Impact Aid*

The United States Constitution gives the federal government power over United States property under the Article I Property Clause[91] and under the Article IV Property Clause.[92] Article I states that Congress has the power to "exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be."[93] Article IV gives Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[94] Areas where the federal government has "exclusive Legislation" under Article I are called federal enclaves, and fall within the exclusive jurisdiction[95] or "complete sovereignty" of the federal government.[96] Such areas are generally property-tax exempt.[97] Land where

(Sept. 13, 2010), http://www.dodea.edu/home/about.cfm?cId=facts [hereinafter *DoDEA Fact: An Overview*].

[86] *See* discussion *infra* Part II.A.

[87] *See* discussion *infra* Part II.C.

[88] Evans v. Cornman, 398 U.S. 419, 421-22 (1970).

[89] *See* Plyler v. Doe, 457 U.S. 202, 221 (1982).

[90] *See, e.g.*, Howard v. Comm'rs of Sinking Fund, 344 U.S. 624, 627 (1953).

[91] U.S. CONST. art. I, § 8, cl. 17.

[92] U.S. CONST. art. IV, § 3, cl. 2.

[93] U.S. CONST. art. I, § 8, cl. 17.

[94] U.S. CONST. art. IV, § 3, cl. 2.

[95] Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 804 (1993) (citing United States v. Bevans, 16 U.S. 336, 387 (1818)).

[96] David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283, 290 (1976) (citing S.R.A., Inc. v. Minnesota, 327 U.S. 558, 562 (1946)).

[97] Morrison, *supra* note 5, at 270-71. Federal land residents, traditionally consisting

federal jurisdiction is not solely exclusive, but rather a mixture of concurrent and exclusive jurisdiction, may also be property-tax exempt.[98] This Note primarily discusses land under exclusive federal jurisdiction, but as the state's power to tax federal land residents is often unclear regardless of jurisdiction,[99] the educational rights of all types of federal land residents may be equally implicated.

Because school districts rely heavily on local property taxes for funding,[100] property tax exemptions on federal land create funding shortages for neighboring school districts.[101] The financial burden or "impact" created on local school districts by children residing on federal land, especially military dependents, prompted the federal government to provide these school districts with Impact Aid.[102] For decades, Impact Aid has not provided school districts with nearly as much funding as property taxes would, and recent privatization of federal land has heightened the loss.[103] When Congress passed the Military

chiefly of military personnel, are exempt from property tax so that they need not pay taxes to a state in which they reside "solely in compliance with military orders." United States v. Onslow Cnty. Bd. of Educ., 728 F.2d 628, 636 (4th Cir. 1984) (citing California v. Buzard, 382 U.S. 386, 393 (1966)).

[98] See Morrison, *supra* note 5, at 271-72 for further discussion of the four types of legislative jurisdiction: proprietary, partial state/federal, concurrent, and exclusive jurisdiction.

[99] *See id*. at 270-71.

[100] KENYON, *supra* note 18, at 4 (indicating that for the 2004-2005 school year, local sources, consisting primarily of property tax, comprised slightly less than half of all public school funding).

[101] *See* Morrison, *supra* note 5, at 277.

[102] *See, e.g.*, 20 U.S.C. §§ 236-241 (1952) (repealed 1994); 20 U.S.C. §§ 7701-7714 (2006).

[103] 20 U.S.C. §§ 7701-7714; 34 C.F.R. §§ 222.30-.31 (2010); *see also* Military Impacted Sch. Ass'n, *supra* note 19, presentation at slide 4 ("Impact Aid was fully funded until 1970 when funding was cut in the middle of the school year. Since 1970 the program has faced severe cuts and is currently funded at 60% of need, as defined by law."). Some school districts have created arrangements with the Department of Defense under 10 U.S.C. § 2164 allowing for more federal funding than Impact Aid would provide, but as the law makes clear, these arrangements are discretionary. *See* 10 U.S.C. § 2164 (2006). Bedford and Lincoln, for instance, each encompass part of the Hanscom Air Force Base, and split the responsibility of providing for the children residing at Hanscom. COMMUNITY OPPORTUNITIES GROUP, INC., TOWN OF LINCOLN, MASSACHUSETTS: COMPREHENSIVE PLAN 218 (2010), http://www.lincolntown.org/CLRP%20Master%20Page/Master%20Plan/Lincoln%20Comprehensive%20Plan_Chapter%2010_Community%20Services.pdf. Lincoln has an arrangement with the Department of Defense that covers the entire cost of educating residents of the Hanscom Air Force Base through eighth grade. *See* 10 U.S.C. § 2164; BUCKNER CREEL, TOWN OF LINCOLN ADMINISTRATOR FOR BUSINESS AND FINANCE, SUPERINTENDENT'S PRELIMINARY BUDGET, FISCAL YEAR 2011: COMMENTARY & ANALYSIS 12 (Nov. 1 2009), http://www.lincnet.org/20491074111528800/lib/20491074111528800/_files/03_FY11BudgetCommentaryandAnalysis.pdf. Bedford, however, receives funding

Housing Privatization Initiative in 1996, allowing private contractors to construct housing on federal land,[104] more families moved to these new housing units and the number of federal land residents in local school districts increased.[105]

In areas under exclusive federal jurisdiction, such as the Hanscom Air Force Base in Massachusetts,[106] both military and non-military families living on the base enjoy property-tax exemptions.[107] Thirty-six percent of public school funding for Massachusetts public school districts comes from local property taxes.[108] Therefore, when families move into newly built military housing, the school districts must educate increased numbers of children without any increase in funding from local taxes.[109] Massachusetts State Representatives have proposed legislation to compensate affected school districts for the federal funding shortfalls thus created.[110]

Although no federal statute directly imposes upon states the obligation of educating federal land residents, Impact Aid "contemplates that state and local agencies will educate children on federal land."[111] Federal regulations require that school districts receiving Impact Aid provide an education to military dependents and other dependents residing on federal land on the same basis as state residents.[112] Impact Aid thus imposes contractual obligations on school

through Impact Aid. *See Section 8003 Blue Book*, NATIONAL ASSOCIATION OF FEDERALLY IMPACTED SCHOOLS, 15 (2010), http://nafisdc.org/2010BlueBook8003.pdf (listing Bedford among Massachusetts schools receiving federal funding).

[104] *See* Military Construction Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat 523 (codified at 10 U.S.C. §§ 2871-2885 (2006)).

[105] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 5 ("Occupancy rates for most military family housing privatization projects are exceeding DOD's generally expected rate of 90 percent, although each service had some projects below the expected rate."); OFFICE OF THE DEPUTY UNDERSECRETARY OF DEFENSE, MILITARY HOUSING PRIVATIZATION, *supra* note 7.

[106] An Act Granting the Consent of the Commonwealth to the Acquisition by the United States of Certain Land for Use in Connection with a Military Reservation Known as Hanscom Air Force Base and Granting and Ceding Jurisdiction over Such Land, 1985 Mass. Acts 701, 701-02 (1985) (granting exclusive jurisdiction to the federal government).

[107] Morrison, *supra* note 5, at 273-75.

[108] KENYON, *supra* note 18, at 13 tbl.3 (citing 2005 statistics).

[109] *See* Regular Session Minutes – Selectmen's Meeting (Feb. 2, 2009), ftp://dpw.town.bedford.ma.us/selectmen/2_2_09_selectment_minutes.pdf.

[110] *See* H.R. 464, 186th Gen. Court, Reg. Sess. (Mass. 2009), *available at* http://www.malegislature.gov/Bills/BillText/3770 (last visited Aug. 1, 2010).

[111] Meyers v. Bd. of Educ. of San Juan Sch. Dist., 905 F. Supp. 1544, 1576 n.39 (D. Utah 1995).

[112] 34 C.F.R. §§ 222.30-.31 (2010) (allowing a local educational agency to receive financial assistance on the condition that it provides a free public education to children claimed for the Impact Aid and that the state "provides funds for the education of those children [claimed for Impact Aid] on the same basis as all other public school children in the

districts to educate federal land residents, and these districts risk losing funding if they do not comply.

The "tenant waterfall" plan, which lets non-military families rent privatized military housing when the percentage of military inhabitants falls short, can bring hundreds of civilians to a housing project.[113] Yet while Impact Aid laws require equal treatment of all federal land residents regardless of rank on the waterfall list, Impact Aid provides for much less funding per non-military dependent than per military dependent, and less still per child whose parents are not federally employed at all.[114] Consequently, by privatizing military housing, the federal government burdens impacted school districts with the educational expenses of students for whom the districts receive little or no funding,[115] but who cost on average $10,500 each to educate per year.[116] This immense financial burden requires school districts to either find other means of funding or deny federal land residents a free education.[117] Because the Supreme Court has yet to declare education a fundamental right, thus leaving open the possibility that federal land residents have no right to a free state education, school districts may find the latter option viable.

B. *Voting Rights*

A state looking to escape the financial burden of educating federal land residents would find legal support in the history of federal land residents' state voting rights. The relatively recent shift toward treating federal land residents as state residents and granting them state voting rights may, however, extend to educational rights. Federal land residents' rights have traditionally been tied to the nature of federal jurisdiction.[118] Exclusive federal jurisdiction eliminated both the duties and the privileges of state citizenship.[119] Federal enclave residents in the nineteenth century were thus denied state voting rights.[120]

State").

[113] *See* discussion *supra*, Introduction; *see also* DEP'T OF DEFENSE OFFICE OF THE DEPUTY UNDERSECRETARY OF DEFENSE, *supra* note 8, at 15-16, app. at 31-32; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 24-25; Memorandum from Kathleen I. Ferguson, *supra* note 10.

[114] *See* 20 U.S.C. §§ 7701-7714 (2006); 34 C.F.R. §§ 222.30-.31; Memorandum from Kathleen I. Ferguson, *supra* note 10.

[115] *See* 10 U.S.C. § 2164(a) (2006) (allowing school districts to receive funds for "dependents of members of the armed forces and dependents of civilian employees of the Federal Government residing on a military installation in the United States").

[116] Educ. Counts Research Ctr., *supra* note 17.

[117] See *infra* Part III for further discussion of Impact Aid and funding difficulties.

[118] *See* Evans v. Cornman, 398 U.S. 419, 423 (1970).

[119] *See, e.g.*, Herken v. Glynn, 101 P.2d 946, 955 (Kan. 1940); Opinion of the Justices, 42 Mass. (1 Met.) 580, 583 (1841); Arledge v. Mabry, 197 P.2d 884, 895 (N.M. 1948); McMahon v. Polk, 73 N.W. 77, 78-79 (S.D. 1897); State *ex rel.* Lyle v. Willett, 97 S.W. 299, 302-03 (Tenn. 1906).

[120] *Evans*, 398 U.S. at 423 (citing *Opinion of the Justices*, 42 Mass. (1 Met.) at 583;

Opinion of the Justices,[121] an 1841 Massachusetts decision, held that state laws for crimes or offenses committed within the enclave did not bind those residing on federal enclaves, and thus enclave residents "do not acquire the civil and political privileges, nor do they become subject to the civil duties and obligations of inhabitants of the towns within which such territory is situated."[122] Therefore, enclave residents were exempted from state and local taxes, but also denied the right to vote as town inhabitants, to benefit from state laws granting "relief of the poor," and to send their children to local schools.[123]

Subsequent nineteenth-century decisions followed the line of reasoning of *Opinion of the Justices*, denying federal enclave residents the right to vote.[124] An 1897 South Dakota case found votes cast in state elections by federal enclave residents to be illegal,[125] stating: "[I]nhabitants of [federal enclaves] cease to be inhabitants of the state, and can no longer exercise any civil or political rights under the laws of the state."[126] Courts continued to deny federal enclave residents the right to vote as state residents well into the twentieth century.[127] In 1948, *Arledge v. Mabry*[128] marked the beginning of a shift in rationale. *Arledge* observed that enclave residents in New Mexico paid state income tax, sales tax, and gasoline tax, obtained driving and hunting licenses from the state, and were included in New Mexico's Bureau of Vital Statistics' birth and death reports.[129] Although *Arledge* implied that, due to these factors, the land in question formed a part of New Mexico for voting purposes, it concluded that "[c]ontrolling precedents, affording unanimity of judicial opinion seldom encountered," forced it to deny enclave residents the right to vote as state residents.[130]

Arapajolu v. McMenamin, a 1952 California case, reached the opposite conclusion.[131] The court held that while states lose all jurisdiction over federal enclaves and enclaves no longer form a part of the state,[132] these jurisdictional concerns did not determine whether enclave residents could vote as state

Sinks v. Reese, 19 Ohio St. 306, 316-17 (1870)).

[121] *Opinion of the Justices*, 42 Mass. (1 Met.) at 583.

[122] *Id.*

[123] *Id.* at 583-84.

[124] *See In re* Town of Highlands, 22 N.Y.S. 137, 139-40 (1892); *Sinks*,19 Ohio St. at 316-17; State *ex rel.* Lyle v. Willett, 97 S.W. 299, 302-03 (Tenn. 1906).

[125] McMahon v. Polk, 73 N.W. 77, 78-79 (S.D. 1897).

[126] *Id.* (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1227 (5th ed. 1994)).

[127] Herken v. Glynn, 101 P.2d 946, 955 (Kan. 1940) (indicating that no previous cases had given enclave residents the same voting rights as state residents).

[128] 197 P.2d 884 (N.M. 1948).

[129] *Id.* at 888-89.

[130] *Id.* at 889.

[131] Arapajolu v. McMenamin, 249 P.2d 318, 323 (Cal. 1952).

[132] *Id.* at 320.

residents.[133] *Arapajolu* found that Congress could implicitly return jurisdiction to a state,[134] and emphasized that Congress had extended workmen's compensation laws and state unemployment insurance acts over federal lands, and allowed the states to collect certain types of taxes.[135] Such tax allowances had led other courts to find that federal land formed "a part of" a city for certain tax purposes,[136] and that federal land was "in legal contemplation . . . no different from any other part of the state."[137] *Arapajolu* thus held that because California had "jurisdiction over the areas in question in . . . substantial particulars," residence in these areas constituted residence within the state, giving these individuals the right to vote under California's constitution.[138]

Not every subsequent case followed *Arapajolu*'s rationale,[139] but the trend toward granting federal land residents voting rights continued. *Adams v. Londeree* found that the rights of federal land residents to vote or run for mayor as state residents could not be denied because these rights did not conflict with the purpose for which the United States acquired the land.[140] *Rothfels v. Southworth* went beyond *Adams*, stating that "the only legitimate command or restraint [the federal government] may exercise over civilian employees [living in a military reservation] is that which is consistent with and necessary for . . . military purposes," but that such land is otherwise under state jurisdiction.[141] *Rothfels* used the state's right to serve criminal and civil process on the land, its control of schools in the area, its collection of certain taxes, and its requirement that federal land residents register their cars with the state as indications that the federal government in reality does not maintain exclusive jurisdiction, regardless of the land's status as a federal enclave.[142]

In 1970, the Supreme Court reversed precedent inconsistent with *Arapajolu*, *Adams*, and *Rothfels* in *Evans v. Cornman*.[143] *Evans* held, on equal protection grounds, that the right of residents of a non-military federal enclave in Maryland to vote as state residents could not be denied.[144] As in *Arapajolu*,

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[133] *Id.* at 323.

[134] *Id.* at 321 (citing James v. Dravo Contracting Co., 302 U.S. 134, 148-49 (1937)).

[135] *Id.*

[136] *Id.* at 322 (quoting Kiker v. City of Philadelphia, 31 A.2d 289, 295 (Pa. 1943), *cert. denied*, 320 U.S. 741 (1943)) (quotation marks and emphasis omitted).

[137] *Id.* (quoting Sanders v. Oklahoma Tax Comm'n, 169 P.2d 748, 751 (Okla. 1946), *cert. denied*, 329 U.S. 780 (1946)) (quotation marks and emphasis omitted).

[138] *Id.* at 323.

[139] *See* Royer v. Bd. of Election Supervisors for Cecil Cnty., 191 A.2d 446, 449 (Md. 1963); Langdon v. Jaramillo, 454 P.2d 269, 271 (N.M. 1969).

[140] Adams v. Londeree, 83 S.E.2d 127, 139-41 (W. Va. 1954).

[141] Rothfels v. Southworth, 356 P.2d 612, 614 (Utah 1960).

[142] *Id.* at 615-16.

[143] Evans v. Cornman, 398 U.S. 419, 421-22 (1970).

[144] *Id.*

Adams, and *Rothfels*, *Evans* pointed to the permission Congress granted the states to "extend important aspects of state powers over federal areas," such as allowing states to collect income and sales taxes from federal enclave residents, to subject them to state court process and jurisdiction, and to apply state unemployment laws, workmen's compensation laws, and drivers' license registration laws in federal enclaves.[145]

Evans did not use these factors, however, as indications that the federal government no longer maintained exclusive jurisdiction over the enclave in question,[146] but rather to illustrate that federal land residents "are just as interested in and connected with electoral decisions as . . . their neighbors who live off the enclave."[147] *Evans* thus grounded enclave residents' right to vote in their political interest rather than recognizing the inherent rights of federal land residents to all state benefits. The path traced by *Evans* and other voting rights cases toward treating enclave residents as state residents may well lead courts to extend to them the same educational rights as state residents. Yet while *Evans* granted rights to enclave residents, its rationale for doing so did not lay a particularly strong foundation for the extension of educational rights. An interest in the affairs of the state supports the right to vote, but does not likewise warrant the right to an education.

C. *Extension to Educational Rights*

Voting rights cases consistent with *Evans* could be read to support the right to education of federal land residents, but distinct differences remain in the right to vote itself and justifications for its denial. *Adams v. Londeree*, in granting federal land residents voting rights, described the right to vote as "one of the most prized privileges under our form of government, and . . . essential to the continuous and efficient operation of government."[148] *Rothfels v. Southworth* called it "the most precious of the privileges for which our democratic form of government was established."[149] *Evans* stated that "the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges,"[150] and thus cannot be restricted unless "the purpose of the restriction and the assertedly overriding interests served by

[145] *Id.* at 423-25; *see also* Howard v. Comm'rs of Sinking Fund, 344 U.S. 624, 626 (1953) (holding that Kentucky land ceded to the United States "did not cease to be a part of Kentucky").

[146] *Evans*, 398 U.S. at 423-24 (citing Offutt Housing Co. v. Sarpy Cnty., 351 U.S. 253, 256-57 (1956)) (conceding that "federal enclaves are still subject to exclusive federal jurisdiction and Congress could restrict as well as extend the powers of the States within their bounds").

[147] *Id.* at 426.

[148] Adams v. Londeree, 83 S.E.2d 127, 140 (W. Va. 1954).

[149] Rothfels v. Southworth, 356 P.2d 612, 617 (Utah 1960).

[150] *Evans*, 398 U.S. at 422

it [meet] close constitutional scrutiny."[151] The same has not been said of the right to education, which unlike the right to vote is not a fundamental right.[152] Although *Plyler* found education not to be "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation,"[153] less is required to justify a denial of education than a denial of the right to vote.[154]

Other factors, however, indicate that *Evans v. Cornman* should extend to educational rights. *Evans* disregarded early cases denying federal land residents the right to vote because "the relationship between federal enclaves and the States in which they are located has changed considerably since [these cases] were decided."[155] This change encompasses more than voting rights. As *Evans* describes, federal law has extended various state laws to federal enclaves and has generally given states a wider degree of jurisdiction and power over federal land residents.[156] *Evans* cites to *Howard v. Commissioners of the Sinking Fund*, which held that "[t]he fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government."[157]

Howard has subsequently been cited to uphold the application of state laws on federal land where such laws do not interfere with federal jurisdiction. In *State* ex rel. *Children, Youth, and Families Dep't v. Debbie F.*, the New Mexico Supreme Court relied on *Evans* and *Howard* in recognizing the extension of New Mexico's Children's Code[158] to children living on a federal enclave, thus allowing these children the same protection against abuse and neglect as other children in the state.[159] Other cases have recognized the right of federal land residents to receive welfare services under state law,[160] the right of mentally ill residents of federal land to be committed to state hospitals,[161]

[151] *Id.*

[152] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973); *see* discussion *supra* Part I.A.

[153] Plyler v. Doe, 457 U.S. 202, 221; *see* discussion *supra* Part I.A.

[154] *See* discussion *supra* Part I.B; *see also* Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088, 1095 (Mass. 1995).

[155] *Evans*, 398 U.S. at 423.

[156] *Id.* at 424.

[157] Howard v. Comm'rs of the Sinking Fund, 344 U.S. 624, 627 (1953).

[158] N.M. STAT. ANN. § 32A-1-1 to -20-1 (2010).

[159] State *ex rel.* Children, Youth, & Families Dep't v. Debbie F., 905 P.2d 205, 208 (N.M. 1995). A California court of appeal decision held likewise in *In re* Terry Y., 161 Cal. Rptr. 452, 453 (Ct. App. 1980) ("[T]here has been a trend in state courts to hold that the exclusive jurisdiction of Congress does not deprive enclave residents of benefits which would otherwise be theirs.").

[160] Bd. of Comm'rs v. Donoho, 356 P.2d 267, 273-74 (Colo. 1960); Bd. of Chosen Freeholders v. McCorkle, 237 A.2d 640, 643-44 (N.J. Super. 1968).

[161] *McCorkle*, 237 A.2d at 643-44.

and jurisdiction of state courts over custody of federal land resident children.[162] By this logic, the benefit of a public education could not be denied on the basis of exclusive federal jurisdiction.[163]

D. Evans *and* Howard*: Problematic Doctrine?*

Cases granting federal enclave residents the benefits of state laws often rely in part on Supreme Court decisions older than *Howard* that in fact suggest a different outcome. *Board of Commissioners v. Donoho*, which entitles federal land residents to state welfare services, relies on *Chicago, R.I. & P. Railway v. McGlinn* for the proposition that "state law in force at the time of cession or purchase continues in full force so as to determine private rights within the territory and thus fill the vacuum which would otherwise exist."[164] The application of *McGlinn* to federal enclaves, however, was erroneous, because *McGlinn* applied to land under concurrent, not exclusive, jurisdiction.[165] Both *Donoho* and *State* ex rel. *Children, Youth, and Families Dep't v. Debbie F.* cite to *James v. Dravo Contracting Company* when stating that the Constitution's grant of exclusive jurisdiction over federal land does not absolutely preclude state law application,[166] and to *Penn Dairies v. Milk Control Commission of Pennsylvania* when stating that the purpose of the enclave clause is to prevent state laws from conflicting with federal regulation.[167] *James*, however, formed one of "a long line of decisions [holding] that a state may not legislate for a federal enclave even if the legislation does *not* conflict with a regulation of Congress or interfere with a federal function,"[168] and *Penn Dairies* involved land under state jurisdiction.[169] Had *Donoho* and *Debbie F.* truly obeyed precedent and observed the distinction between exclusive and concurrent federal jurisdiction, they would not have extended state laws to federal enclaves.

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[162] *In re* Kernan, 288 N.Y.S. 329, 330-33 (App. Div. 1936), *aff'd sub nom. Ex parte* Kernan, 4 N.E.2d 737 (1936); State *ex rel.* Wilson v. Lawrence, 343 N.Y.S.2d 249, 252 (Fam. Ct. 1973).

[163] *But see* discussion *infra* Part II.E.

[164] *Donoho*, 356 P.2d at 271 (citing Chicago, R.I. & P. Ry. Co. v. McGlinn, 114 U.S. 542, 546-47 (1885)).

[165] Engdahl, *supra* note 96, at 332; *see also McGlinn*, 114 U.S. at 544.

[166] *Donoho*, 356 P.2d at 271 (quoting James v. Dravo Contracting Co., 302 U.S. 134, 142 (1937)); State *ex rel.* Children, Youth, & Families Dep't v. Debbie F., 905 P.2d 205, 207 (citing *Dravo Contracting Co.*, 302 U.S. at 142-49).

[167] *Donoho*, 356 P.2d at 272 (citing Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 270-71 (1943)); *Debbie F.*, 905 P.2d at 207 (citing *Penn Dairies*, 318 U.S. at 270-71).

[168] Miss. River Fuel Corp. v. Cocreham, 382 F.2d 929, 937 (5th Cir. 1967) (emphasis added).

[169] *Penn Dairies*, 318 U.S. at 267, 278-79.

It was *Howard*, whose full effect was not immediately felt,[170] followed by *Evans*, that marked the Supreme Court's definitive break from the "classic principles" that defined enclaves as distinct entities separate from the state in which they were located.[171] Although one view holds that *Howard* allowed taxation of federal land residents based only on a specific federal statute's grant of power,[172] *Howard* went beyond the federal statute, and therefore beyond precedent, in allowing a city to annex a federal enclave.[173] Thus, *Howard* represented "a repudiation of what had been the fundament of article I property clause doctrine since the beginning of the 18th century."[174]

Evans went further still in straying from traditional federal property principles. *Evans* emphasized that because a federal enclave could no longer be considered "a state within a state,"[175] the federal enclave in question remained a part of the state for purposes of residency.[176] While a state could still require that individuals "actually fulfill the requirements of bona fide residence,"[177] living on federal land did not preclude resident status if these individuals did fulfill residency requirements.[178] Although the grant of residence for state voting purposes may not extend to residence for the purpose of education, *Evans*' interpretation of residence has been applied to other state laws.[179] Under this analysis, children living on federal land would be considered residents of the state in which the land is located and thus entitled to a state education where state law provides for the education of all its residents. To deny federal land residents a state education, a state would have to argue that it need not provide a free education to all state residents, or that it need not provide educational funding to all residents on the same basis.[180]

Evans v. Cornman and *Howard v. Commissioners* may have "clouded . . . with doubt" the "principle of exclusive federal jurisdiction over article I federal

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[170] Engdahl, *supra* note 96, at 379-80 n.445.

[171] See Engdahl, *supra* note 96, at 332-35, 378-82, for a discussion of how the doctrinal breakthrough of *Howard* emerged slowly until reaffirmed in *Evans*.

[172] *Cocreham*, 382 F.2d at 937 n.17; Orlovetz v. Day & Zimmerman, Inc., 848 P.2d 463, 466 (Kan. App. Ct. 1993).

[173] Engdahl, *supra* note 96 at 334 ("There can be no doubt that this change, unlike many of the other changes in property clause doctrine, was consciously and deliberately made.").

[174] *Id.*

[175] *Evans*, 398 U.S. at 421-22 (citing Howard v. Comm'rs of the Sinking Fund, 344 U.S. 624, 627 (1953)).

[176] *Id.* at 421.

[177] *Id.* (quoting Carrington v. Rash, 380 U.S. 89, 96 (1965)) (quotation marks omitted).

[178] *Id.*

[179] State *ex rel.* Children, Youth, & Families Dep't v. Debbie F., 905 P.2d 205, 208 (N.M. 1995).

[180] See discussion *supra* Part I.A-B and *infra* Part III.A-B on why such arguments would be problematic.

property,"[181] but these decisions nonetheless "made the first judicial proclamations of what seems clearly to have been the original intent and meaning of the article I property clause."[182] As Professor David E. Engdahl argues, policy supports this original meaning because the federal government "was not created for the purpose of direct general governance of geographical units of territory," and the state was meant to govern people "in the bulk of their affairs."[183] But if the logic of *Evans* and *Howard* is pressed upon, it might produce incongruous results.[184] Professor Engdahl notes that if denying federal enclave residents the right to vote violates equal protection, then denying residents of Washington, D.C. the right to vote as Maryland residents could be held an equal protection violation because the federal government has a form of exclusive jurisdiction over Washington, D.C.[185] *Evans* and *Howard*, if taken at face value, could also simplify state and federal jurisdictional complications. Because these cases changed the constitutional rule that precluded state legislation over federal land, "the familiar proposition that states can exercise no jurisdiction over enclaves except pursuant to prior congressional authorization" might no longer hold.[186] If this were so, states could effectively legislate without the difficulties that otherwise arise from the confusion between state and federal governance, while the United States could continue to exercise its power of exclusive legislation whenever necessary.[187]

As Professor Engdahl points out, however, congressional statutes extending various state laws onto federal land would, under this view, continue to represent limitations to state power.[188] Federal statutes granting states the power to impose certain taxes would implicitly prohibit imposing other taxes.[189] Furthermore, while states could legislate as necessary and perhaps exercise greater revenue-raising power than before, explicit limitations on state power to tax property on federal enclaves would remain in place. Thus, a state's authority to educate federal land residents would have little financial support, and the federal government could relinquish entirely its responsibility to educate federal land residents. Although such an abolishment of the "familiar proposition that states can exercise no jurisdiction over enclaves"[190] makes sense in areas where states may desire a greater degree of control, such as in the enforcement of its criminal laws, it would hurt areas that rely significantly on a state's taxation power. State school systems responsible for

[181] Engdahl, *supra* note 96, at 290.

[182] *Id.* at 336.

[183] *Id.* at 336 n.228.

[184] *Id.* at 336 n.229.

[185] *Id.*

[186] *Id.* at 380.

[187] *Id.* at 381.

[188] *Id.*

[189] *See id.*

[190] *Id.* at 380.

federal land residents would continue to suffer if traditional federal jurisdiction were completely abolished. Unless states are simultaneously allowed to tax property on federal enclaves, or the federal government compensates school districts further for the costs it imposes, the federal government should retain jurisdiction over its land and take responsibility for educating military and civilian children on this land.

E. *Alternative Legal Routes*

There is, perhaps, an argument that *Howard* and *Evans* do not apply to the right to a public school education. Relatively recent cases have read *Howard* very narrowly and ignored or distinguished *Evans*.[191] As Professor Engdahl notes, *Howard* and *Evans* remained somewhat "[un]discovered," and subsequent Supreme Court cases continued to rely on earlier precedent to uphold the principle that a federal enclave did not form a part of the state.[192] *United States v. State Tax Commission*, for example,[193] approvingly quoted the lower court's holding that the federal enclaves in question "are to [the state] as the territory of one of her sister states or a foreign land."[194] Recent cases have relied on *United States v. State Tax Commission*,[195] and the Supreme Court has failed to conciliate these conflicting lines of reasoning.

Orlovetz v. Day & Zimmerman, Inc., a 1993 Kansas case, held that a state law granting a cause of action for wrongful termination did not apply where the employer's business was on a federal enclave.[196] *Orlovetz* determined that *Howard* did not warrant the extension of state law to federal land.[197] *Orlovetz* took the view that *Howard* was grounded only on a congressional act that specifically extended state laws to federal land, and no such act had likewise extended the Kansas employment law to the enclave.[198] *Orlovetz* relied on older cases denying the extension of state laws to federal enclaves, and made no mention of *Evans*.[199] A similar 2000 California case, *Taylor v. Lockheed Martin Corporation*, recognized the extension of certain benefits to federal enclaves, but distinguished the right to sue one's employer.[200] *Taylor* based

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[191] Taylor v. Lockheed Martin Corp., 92 Cal. Rptr. 2d 873, 879 (App. 2000); Orlovetz v. Day & Zimmerman, Inc., 848 P.2d 463, 466 (Kan. App. Ct. 1993).

[192] Engdahl, *supra* note 96, at 335-36 n.227.

[193] *See id.* (citing United States v. State Tax Comm'n, 412 U.S. 363, 378 (1973)).

[194] *State Tax Comm'n*, 412 U.S. at 378 (1973).

[195] North Dakota v. United States, 495 U.S. 423, 430-31 (1990); United States v. Texas, 695 F.2d 136, 140 (5th Cir. 1983); Lord v. Local Union No. 2088, 646 F.2d 1057, 1062 (5th Cir. 1981).

[196] *Orlovetz*, 848 P.2d at 466.

[197] *Id.* at 465-66.

[198] *Id.*

[199] *Id.* (citing Pac. Coast Dairy, Inc. v. Dep't of Agric., 318 U.S. 285, 291-95 (1943); James Stewart & Co. v. Sadrakula, 309 U.S. 94, 99-100 (1940)).

[200] Taylor v. Lockheed Martin Corp., 92 Cal. Rptr. 2d 873, 879 (App. 2000).

this distinction on the simple statement that this right "is not a 'benefit' in the same sense as voting, public school attendance, or eligibility for welfare payments,"[201] and cites to other cases denying state employment claims.[202]

Howard and *Evans* continue to be overlooked or distinguished as it pleases the courts determining which benefits may or may not be extended to federal land residents. While *Taylor* classified educational rights with voting rights, other courts might not see the firm line between denial of a right to an education and denial of a right to sue under state law. Thus, based on the historical rights of federal land residents and the confusion underlying the determination thereof, the right of federal land residents to a state education, while probable, is not concrete.

III. RIGHT TO EDUCATION FOR FEDERAL LAND RESIDENTS

Cases and opinions explicitly denying federal land residents an education generally precede Supreme Court cases that increase the constitutional value of the right to education.[203] Few cases in the past half-century touch upon the right of federal land residents to a state education. *United States v. Onslow County Board of Education*, a Fourth Circuit case which held that charging tuition to military dependents residing off-base would violate the Supremacy Clause,[204] likely provides the closest guidance to be had on the issue. Nonetheless, while *Onslow* and cases addressing Impact Aid[205] suggest that states must fund federal land residents' education, especially after *Plyler v. Doe* and *Evans v. Cornman*, none is precisely on point. *Onslow* does not discuss federal land residents, and other cases specifically address only the implications of states' receiving Impact Aid. Furthermore, a Virginia Attorney General Opinion that post-dates *Onslow* refutes the implication that *Onslow* extends to residents of land under exclusive federal jurisdiction.[206] Although *Evans v. Cornman*, finding federal land residents to be state residents for voting purposes, might prohibit the result reached by Virginia's Attorney General, enough doubt remains to warrant states risking litigation and denying federal land residents a free education.

A. *Massachusetts: An Example*

Massachusetts, where a child's right to attend public school depends on his or her town of residence, illustrates the difficulty in establishing the right to a

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[201] *Id.*

[202] *Id.* (citing Kelly v. Lockheed Martin Servs. Grp., 25 F. Supp. 2d 1, 3 (D.P.R. 1998); Osburn v. Morrison Knudsen Corp., 962 F. Supp. 1206, 1208-09 (E.D. Mo. 1997); Snow v. Bechtel Constr. Inc., 647 F. Supp. 1514, 1521 (C.D. Cal. 1986)).

[203] *See supra* note 31 and accompanying text.

[204] United States v. Onslow Cnty. Bd. of Educ., 728 F.2d 628, 642 (4th Cir. 1984).

[205] *See supra* note 36 and accompanying text.

[206] Charging Tuition to Residents of Military Bases, 1984-85 Va. Op. Atty. Gen. 280, 281-82 (Nov. 23, 1984).

state education for residents of federal land. A student "shall have the right to attend the public schools of the town where he actually resides."[207] Residence is determined by the location of a student's home,[208] or the place that serves as the "center of [the student's] domestic, social and civil life."[209] When a student's home is not located in a certain town, the student is not entitled to a free public education in that town.[210] Under Massachusetts law, if a student resides "temporarily in a town other than the legal residence of his parent or guardian for the special purpose of their attending school," the town may charge tuition.[211] Therefore, if federal land under exclusive federal jurisdiction does not form a part of any town, children residing on such land in Massachusetts arguably have no right to a public school education.[212]

Based on such reasoning, the Massachusetts Supreme Judicial Court held in 1841 that the Commonwealth had no legal duty to educate children residing on federal land.[213] A 1966 Massachusetts Attorney General opinion confirmed this view.[214] Although a later Massachusetts case recognized that state law "may apply in a Federal reservation provided that the State does not interfere with the primary jurisdiction of the Federal government"[215] in extending an abuse protection order to federal land residents, no recent opinion has established the right of federal land residents to a state education in Massachusetts. This line of cases may give school districts in Massachusetts grounds for denying federal land residents the same education it provides to other state residents.

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[207] MASS. GEN. LAWS ch. 76, § 5 (2008).

[208] Teel v. Hamilton-Wenham Reg'l Sch. Dist., 433 N.E.2d 907, 909-10 (Mass. App. Ct. 1982).

[209] Watson v. Town of Lexington, 1 Mass. L. Rptr. 261, 261 (Super. Ct. 1993) (quoting Hershkoff v. Bd. of Registrars of Voters, 321 N.E.2d 656, 663 (1974)) (holding that a student who moved to a new district could continue to attend the same high school because her life remained centered in the former town).

[210] *See* MASS. GEN. LAWS ch. 76 § 6, 12 (explaining that a town may charge tuition if a student is not a resident); *Teel*, 433 N.E.2d at 907.

[211] MASS. GEN. LAWS ch. 76, § 6.

[212] *See* An Act Granting the Consent of the Commonwealth to the Acquisition by the United States of Certain Land for Use in Connection with a Military Reservation Known as Hanscom Air Force Base and Granting and Ceding Jurisdiction over Such Land, 1985 Mass. Acts 701, 701-02 (1985).

[213] Opinion of the Justices, 42 Mass. (1 Met.) 580, 583 (1841) (holding that where the federal government holds exclusive jurisdiction of land and state laws do not apply within it, residents of land do not have the right to a free public school education in the town in which the federal land is situated); *see also* Newcomb v. Inhabitants of Rockport, 66 N.E. 587, 589 (Mass. 1903).

[214] 67 Ma. Op. Atty. Gen. 109, 109-10 (Dec. 20, 1966).

[215] Cobb v. Cobb, 545 N.E.2d 1161, 1163 (Mass. 1989).

B. *The Supremacy Clause, Equal Protection, and* Onslow

A string of cases in the late 1960s, all dealing with federal Impact Aid, held that depriving equal state funding to children who attended schools in federally impacted areas violated the Supremacy Clause, or both the Supremacy Clause and the Equal Protection Clause.[216] In all five cases, state laws had decreased state funding to impacted areas by either some or all of the amount in which these areas received Impact Aid from the federal government.[217] Because Impact Aid funds did not compensate school districts for the entire cost of educating federal land resident children, state property owners, either in the same district or throughout the state, would have had to pay more to make up the difference.[218] Thus, to decrease the burden on property tax payers, the challenged state laws allowed decreased state funding of impacted districts on the theory that the Impact Aid funds substituted for the property taxes the districts would have collected but for federal land residents' tax exemptions.[219]

Each case found that such allocation of state funding directly contradicted congressional intent to supplement, rather than substitute, funding for federally impacted areas, and thus violated the Supremacy Clause.[220] Instead of using

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[216] Triplett v. Tiemann, 302 F. Supp. 1244, 1245-46 (D. Neb. 1969) (finding a Supremacy Clause violation); Carlsbad Union Sch. Dist. v. Rafferty, 300 F. Supp. 434, 440 (S.D. Cal. 1969) (finding a Supremacy Clause violation); Douglas Indep. Sch. Dist. No. 3 v. Jorgenson, 293 F. Supp. 849, 854 (D.S.D. 1968) (finding Supremacy and Equal Protection Clause violations); Hergenreter v. Hayden, 295 F. Supp. 251, 256 (D. Kan. 1968) (finding that "a corollary to [the] principle [set forth in the Supremacy Clause] is that the activities of the Federal Government are free from regulation by any state," and thus reduction in state funding to impacted districts contrary to federal legislative intent violated Supremacy Clause); Shepheard v. Godwin, 280 F. Supp. 869, 874-76 (E.D. Va. 1968) (finding Supremacy and Equal Protection Clause violations).

[217] *Triplett*, 302 F. Supp. at 1245; *Rafferty*, 300 F. Supp. at 435; *Jorgenson*, 293 F. Supp. at 850; *Hergenreter*, 295 F. Supp. at 252; *Shepheard*, 280 F. Supp. at 872.

[218] *See, e.g.*, *Shepheard*, 280 F. Supp. at 873 ("The grievance of the plaintiffs is obvious: any deduction whatsoever of the Federal supplement in apportioning State aid, pro tanto burdens them as taxpayers, for they and the other property owners in [the affected school districts] have to make up the unindemnified portion of the impact costs.").

[219] *See, e.g.*, *id.*

[220] *Triplett*, 302 F. Supp. at 1245 (finding that state use of federal funds "constituted in effect an absorption of the federal funds into the scheme of state aid; made these funds have the status or equivalence of the general aid payments which were being provided to all school districts; and hence deprived the funds of their federal purpose and significance as special local assistance payments for federal impact"); *Rafferty*, 300 F. Supp. at 440 ("[T]he statutes here questioned have violated the Supremacy Clause of the constitution."); *Jorgenson*, 293 F. Supp. at 854 ("[T]here can be little doubt that to permit States to alter the effect of Federal aid through State legislation would be in effect permitting the unconstitutional regulation of Federal legislation."); *Hergenreter*, 295 F. Supp. at 256 (finding that "a corollary to [the] principle [set forth in the Supremacy Clause] is that the activities of the Federal Government are free from regulation by any state," and thus reduction in state funding to impacted districts contrary to federal legislative intent violated

Impact Aid to assist impacted areas, the states "commandeer[ed]" and "thinned" the funds in a way that "lower[ed] the standard of education provided in an impacted district."[221] One case explained, "the State formula wrenches from the impacted localities the very benefaction the [Impact Aid] act was intended to bestow."[222] Moreover, failing to count these children for state funding purposes, which the state laws had attempted, violated the Equal Protection Clause as "discrimination without justification,"[223] two cases found.[224]

Although these cases did not directly address the issue of the right to education, their logic likely extends to tuition charges on federal land residents. The cases confirm that if Congress intends to assist school districts in financing the education of federal land residents by providing Impact Aid, it also intends for school districts to educate these children on an equal basis as other children.[225] School districts that accept Impact Aid payments would be unable to charge federal land residents tuition without violating congressional intent in providing the funding, thus violating the Supremacy Clause.[226]

But were a school district to refuse to educate federal land resident children, and also to refuse Impact Aid payments, the Impact Aid cases' Supremacy Clause argument might not hold. Whatever congressional intent might be in providing Impact Aid, the federal government would have more difficulty dictating that states provide a free education to those outside state jurisdiction for whom the state receives no federal funding.[227] Furthermore, the Impact Aid cases' contention that decreased total funding to impacted areas would

Supremacy Clause); *Shepheard*, 280 F. Supp. at 874 ("The State plan must fall as violative of the supremacy clause of the Constitution."). Current federal law forbids states from offsetting Impact Aid funding unless the state "equalizes" funding among state school districts. 20 U.S.C. § 7709(b) (2006).

[221] *Shepheard*, 280 F. Supp. at 874.

[222] *Id.*

[223] *Id.* at 876.

[224] *Jorgenson*, 293 F. Supp. at 851; *Shepheard*, 280 F. Supp. at 876 (finding that state funding reductions for children attending schools in federally impacted districts discriminated against these children and thus violated the Equal Protection Clause and Supremacy Clause). *But see Rafferty*, 300 F. Supp. at 442 (denying equal protection claim due to lack of showing that plaintiffs, state residents of impacted areas, paid greater taxes or suffered decreased quality of education).

[225] *See* 20 U.S.C. § 7709(b). As discussed *supra*, Part II.A, school districts may also violate contractual obligations were they to deny an equal education to federal land residents for whom they receive Impact Aid.

[226] *But see* Charging Tuition to Residents of Military Bases, 1984-85 Va. Op. Atty. Gen. 280, 281-82 (Nov. 23, 1984) (finding permissible tuition charges where Impact Aid funded below 50% of a non-resident student's cost of education), discussed *infra*, notes 240-249 and accompanying text.

[227] Federally impacted school districts in New Mexico recently challenged Impact Aid funding formulas, but did not dispute their obligation to educate federal land residents. Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., 550 U.S. 81, 88-90 (2007).

lower the quality of education to those whom Impact Aid seeks to assist would not apply. It is perhaps unlikely, however, that a school district would wish to give up or jeopardize receipt of such funding and potentially risk litigation on Equal Protection grounds. Moreover, the Equal Protection argument might be stronger than in the Impact Aid cases were school districts to charge federal land residents tuition in place of Impact Aid. Not only would school districts be leaving federal land residents out of the count when calculating state funding, they would be singling out federal land residents and denying them a free education altogether, which *Plyler* arguably prohibited.[228] Thus, realistically, refusing Impact Aid is not a viable solution for states seeking to address educational funding deficits. Nonetheless, if an influx of children brought by federal land privatization prompted school districts to deny these children a free education entirely and forego Impact Aid, no precedent could be relied upon to specifically forbid such measures.

United States v. Onslow County Board of Education,[229] decided in 1984 by the Fourth Circuit, provides further guidance on the rights of federal land residents to a state education, but does not address the issue of land under federal jurisdiction. *Onslow* recognized the right of military dependents to a state public school education, finding illegal a school district's imposition of tuition costs on non-domiciled federal families.[230] *Onslow* did not base its holding on the historical rights of federal land residents, however, because the families in question lived off-base on land under state jurisdiction.[231] The Fourth Circuit found that the tuition North Carolina attempted to charge was "an ill-disguised replacement for those taxes that North Carolina cannot impose on military personnel who are nondomiciliaries," and "present[ed] the danger of multiple state taxation of military personnel that Congress aimed to prevent."[232] Therefore, the tuition costs imposed on these families were preempted by federal law and violated the Constitution's Supremacy Clause.[233] *Onslow* also found that North Carolina's law mandating tuition payments by nondomiciliaries discriminated against federally-connected individuals and thus against the federal government, constituting a further violation of the Supremacy Clause.[234] Although *Onslow* did not directly address the issue of federal land residents, the tuition charge on military families could be found

[228] *See* discussion *supra* Part I.A.

[229] 728 F.2d 628 (4th Cir. 1984).

[230] The Onslow County School District wished to charge tuition to both nondomiciliaries of North Carolina and domiciliaries residing outside the school district, *id.* at 632 n.5, but "inclusion of a handful of non-federally-connected persons in a class composed of 92% federally-connected individuals" did not eliminate the tuition requirement's "discriminatory taint." *Id.* at 642.

[231] *Id.* at 631-32.

[232] *Id.* at 636, 637.

[233] *Id.*

[234] *Id.* at 641.

equally in violation of the Supremacy Clause where the military families reside on land under federal jurisdiction. As with federal land residents, the families in *Onslow* did not pay the same taxes as state residents.[235]

Most likely because those affected in *Onslow* were not federal land residents, the case did not mention *Evans v. Cornman*, which provided that federal land residents must be granted the right to vote in state elections, or the Impact Aid cases.[236] As *Evans* pointed out, to be granted voting rights, federal land residents still had to otherwise "fulfill the requirements of bona fide residence,"[237] which the families in *Onslow* did not. Nonetheless, *Evans*'s dismissal of the argument that tax exemptions should exclude federal land residents from state rights[238] and the Supremacy Clause violations found in the Impact Aid cases could have lent *Onslow* support, and solidified the educational rights of military dependents on or off federal land. At present, the impact of cases addressing federal land residents' rights to state benefits on the right to an education remains undetermined.

Onslow and the 1960s Impact Aid cases increase the likelihood that states must educate all students, including federal land residents, on an equal basis. But the Supremacy Clause or Equal Protection arguments may not sway every court. Courts determining such dilemmas appear to pay little attention to precedent on the issue, but instead use whichever part of the history of exclusive federal jurisdiction they see fit to apply.[239] Indeed, while the majority of cases denying federal land residents an education precede *Plyler*, *Onslow* and the Impact Aid cases,[240] a Virginia Attorney General's Opinion released shortly after *Onslow* supports Virginia's right not to educate federal land residents, [241] despite *Shepheard v. Godwin*, a Virginia Impact Aid case.[242] A Virginia statute authorizes charging tuition for students for whom the district receives less than 55% of the per capita cost of education in federal funding.[243] Unlike the law struck down in *Onslow*, the Attorney General's Opinion stated, the Virginia statute affects only those living on land under exclusive federal

[235] The families who were charged tuition "contributed to local and state government revenues by paying sales taxes, and in many instances real property taxes," *id.* at 631, but that their lack of income tax payments, from which over half of the state's school funding derived, created the need for imposing tuition. *Id.* at 636.

[236] Because *Onslow* did not reach the equal protection issue at all, it did not touch upon *Plyler v. Doe* either, or any other Supreme Court cases concerning the right to an education. *Id.* at 642.

[237] *Evans v. Cornman*, 398 U.S. 419, 421 (1970).

[238] *Id.* at 424-26.

[239] *See, e.g.*, *id.*; Engdahl, *supra* note 96, at 290.

[240] *See supra* note 23-32 and accompanying text.

[241] Charging Tuition to Residents of Military Bases, 1984-85 Va. Op. Atty. Gen. 280, 281-82 (Nov. 23, 1984)

[242] Shepheard v. Godwin, 280 F. Supp 869, 874, 876 (E.D. Va. 1968).

[243] VA. CODE § 22.1-5(A)(5) (2010).

jurisdiction, not non-domiciled military families residing on state land.[244] Furthermore, the opinion found that the Virginia statute did not single out federally-connected individuals, but applied equally to any non-resident.[245] The opinion stressed that those for whom tuition could be charged included anyone "beyond the exclusive sovereignty and control of the local school division."[246] *Onslow* "did not hold that a local school division must provide a free public education to extrajudicial students."[247] Although potentially inconsistent with *Plyler v. Doe*, which forbade tuition charges based on illegal alien status, the opinion's rationale could extend to states with similar laws, such as Massachusetts.[248] *Plyler* did not, after all, explicitly forbid a state from charging non-residents tuition.[249]

IV. SOLUTIONS

In light of the Impact Aid laws' requirement that a state provide an education to federal land residents on an equal basis as state residents, modern courts will likely not deny children residing on federal land a state education where the state receives such aid. Faced with the risk of losing Impact Aid funding and possible litigation, states may be reluctant to deny federal land residents an education. The few cases to address related issues in the past half-century have, for the most part, implied that the states would lose this battle. Nonetheless, arguments made in the 1984 Virginia Attorney General Opinion, and state laws still in effect that allow tuition charges to non-resident students, may create a wide enough loophole for hard-pressed states to take the risk. But rather than simply determine that the state must provide these children with a public school education, or the less likely alternative, that a state need not do so, courts and legislators could attempt a third solution to this problem.

While a state may bear the responsibility of providing for the education of its federal land residents, this should not exempt the federal government from its duty to provide for the education of federal land residents as well, or to adequately assist the impacted school districts.[250] While Impact Aid is discretionary, its discontinuance would raise an outcry. Moreover, the Department of Defense assumes responsibility for utilities[251] and safety

[244] Charging Tuition to Residents of Military Bases, 1984-85 Va. Op. Atty. Gen. at 281.

[245] *Id.* The opinion used as an example a section of the statute authorizing tuition charges to residents of other school divisions, *id.* (citing VA. CODE § 22.1-5(A)(2)), which parallels a Massachusetts law allowing such charges on non-resident or out-of-district students. MASS. GEN. LAWS ch. 76, §§ 6, 12 (2008).

[246] Charging Tuition to Residents of Military Bases, 1984-85 Va. Op. Atty. Gen. at 281.

[247] *Id.*

[248] *See, e.g.*, MASS. GEN. LAWS ch. 76, §§ 6, 12.

[249] *See supra* Part I.A.

[250] *See* Meyers v. Bd. of Educ. of San Juan Sch. Dist., 905 F. Supp. 1544, 1559-62 (D. Utah 1995).

[251] *See* GENERAL ACCOUNTING OFFICE, *supra* note 83 (discussing shift to privatization of

services on its bases.[252] For the federal government to have no legal responsibility to help educate the children on land within its exclusive jurisdiction, especially military children, seems incongruous. Within the United States, the Department of Defense runs at least sixty-three schools for military children with no state support,[253] indicating an assumed responsibility toward these children. Yet educating some of its children while placing others in underfunded school districts creates an unfair inconsistency. The federal government should take a greater degree of responsibility for the children residing on land under its jurisdiction.

Meyers v. Board of Education of San Juan Sch. Dist. determined in 1995 that Native Americans living on a reservation had the same right to a public education as other state residents,[254] but also held that "the United States clearly has an obligation" to educate Native American children.[255] While cases on the rights of Native Americans on reservations may not apply to residents of other types of federal land,[256] they do suggest solutions to the problems faced by other federal land residents. *Meyers* did not determine whether the federal government had a legal obligation, or "a moral obligation that it has voluntarily assumed," but found that the government could not escape this responsibility regardless.[257] Similar logic should apply to residents of federal land, to whom the government certainly has both legal and moral obligations as well. Ultimately, finding that the responsibility of educating military children falls at least in part to the federal government would be consistent with *Plyler*, which sought to avoid an absolute deprivation of education, but did not face as compelling a case for federal responsibility.[258]

Moreover, Impact Aid cannot compensate school districts for the influx of tax-exempt residents moving to privatized land because not all tax-exempt residents qualify to bring in Impact Aid. Because of the funding problems created by property tax exemptions, the federal government should provide greater assistance to school districts impacted by the privatization of federal land. A mechanism could be established where property tax costs are included

military base utilities previously operated directly by the Department of Defense); Memorandum from John J. Hamre, *supra* note 59.

[252] *See* GOARMY.COM, *supra* note 84; MARINE CORPS CIVILIAN POLICE PROGRAM, *supra* note 84.

[253] *See DDESS Districts*, *supra* note 85; *DoDEA Fact: An Overview*, *supra* note 85.

[254] *Meyers*, 905 F. Supp. at 1558; *see also* Mescalero Apache Tribes v. Jones, 411 U.S. 145, 148 (1973) ("Even on [Native American] reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.").

[255] *Meyers*, 905 F. Supp. at 1562.

[256] Traditionally, due to the self-government of Native American reservations and the unique relationship between the federal government and Native American tribes, distinct laws have applied to such land. *See Mescalero Apache Tribes*, 411 U.S. at 148.

[257] *Meyers*, 905 F. Supp. at 1561-62.

[258] Plyler v. Doe, 457 U.S. 202, 235 (1982).

in the cost of renting privatized housing to non-military families. Private developers who build on federal land might also contribute to school districts. Absent greater funding, impacted school districts will fight increasing shortfalls in funding by charging tuition costs, refusing to educate these children, or turning to the state for assistance. Thus, overburdened states faced with such difficulties may be forced to take actions that give rise to litigation. Given the confused history of the law governing federal enclaves, new cases may yet reach a different conclusion than *Onslow*. To preempt such problems, the government should increase federal assistance to impacted areas by implementing a system whereby non-military federal land residents and private developers cover the costs they help school districts incur. Such assistance would create no Supremacy Clause or Equal Protection violations because it would only impose the equivalent of a property tax on non-military citizens, and would compensate for the increased expense school districts face in educating children who bring in neither property taxes nor Impact Aid.

CONCLUSION

School districts encompassing federal military bases, already overburdened and underfunded, become increasingly worse off as the federal government continues to privatize land under federal jurisdiction. School districts generally derive a third of their funding from local property taxes, but under federal law, residents of federal land do not pay these taxes. Impact Aid provided by the federal government does not come close to compensating local school districts for the almost one million military and otherwise federally-connected students the districts must provide for without receiving any accompanying funding from local taxes. After implementation of the Military Housing Privatization Initiative, not only military families but many families with no federal connection enjoy the benefit of state public schools without paying property taxes. While laws exempting military families from state taxes rightly preclude charging military families tuition, the federal government places an especially unfair burden on local school districts and states when it requires them to educate non-military, property tax-exempt families as well. Legal precedent points to the states' responsibility to educate students residing on federal land, but the issue remains unresolved. States have charged federal land residents tuition with the state's sanction, and have enough precedential support to potentially attempt doing so again. Rather than risking future litigation, legislators and courts should look to the federal government to accept greater responsibility in providing for the education of both military and non-military federal land residents.