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Abandoning the Federal Role in Education: The Every Student Succeeds Act

Derek W. Black*

In December 2015, Congress passed the Every Student Succeeds Act (ESSA), which redefined the role of the federal government in education. The ESSA attempted to appease popular sentiment against the No Child Left Behind Act's (NCLB) overreliance on standardized testing and punitive sanctions. But in overturning those aspects of the NCLB, Congress failed to devise a system that was any better. Congress simply stripped the federal government of regulatory power and vastly expanded state discretion. For the first time in fifty years, the federal government lacks the ability to prompt improvements in student achievement and to demand equal resources for low-income students. Thus, the ESSA boldly presumes that states will voluntarily improve educational opportunities for low-income students despite their historical tendency to do the contrary.

This Article is the first to offer a comprehensive analysis and critique of the ESSA. It demonstrates that although the ESSA commits to equality on its face, it does the opposite in practice. First, the ESSA affords states wide latitude on student performance, accountability, and school reform. Broad state discretion opens the door to fifty disparate state systems, none of which ensure equality. Second, the ESSA directly weakens two existing equity standards and ignores a loophole that exempts 80 percent of school expenditures from equity analysis. Third, the ESSA leaves federal funding flat, eliminating the possibility that additional resources will offset the inequalities that the foregoing provisions permit. These changes to federal education law are so out of character that they beg the question of why the federal government is even involved in education.

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Although Congress is unlikely to repeal the ESSA, the Act is set to expire by its own terms in an unusually short time period. Thus, preparations to either reauthorize or alter the Act will start soon. By then, the inequalities that the ESSA permits will be evident. This Article proposes that Congress cure the ESSA's flaws by increasing the federal investment in education to: (1) create the leverage needed for states to accept federal prohibitions on unequal funding practices; (2) meet the outstanding needs of low-income students; and (3) expand preschool education, which would close achievement gaps and, through cost savings, make state compliance with equity provisions more feasible.

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INTRODUCTION

For half of a century, the Elementary and Secondary Education Act has defined the federal role in public education. Through substantial statutory revisions and periodic reauthorizations,¹ Congress has consistently expanded the federal role with an aim toward improving low-income students’ academic achievement and ensuring equal access to resources.² On the day the Elementary and Secondary Education Act became law in 1965, President Lyndon B. Johnson remarked, “[N]o law I have signed or will ever sign means more to the future of America.”³ He believed it would “bridge the gap between helplessness and hope for more than five million educationally deprived children.”⁴

On December 10, 2015, the Elementary and Secondary Education Act underwent drastic changes. Congress reauthorized the Act under the popularly titled bill, the Every Student Succeeds Act (ESSA).⁵ To the delight of states and

1. For both constitutional and practical reasons, spending legislation must be revisited and reauthorized periodically. *See generally* Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343 (1988); *see also* ANDREA BOYLE & KATELYN LEE, TITLE I AT 50: A RETROSPECTIVE 3 (2015) (charting prior reauthorizations of the Education Act); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937 (2004) (discussing the periodic reauthorization of the Education Act and its more recent iterations). Notable reauthorizations in recent decades include the Improving America’s Schools Act of 1994, the No Child Left Behind Act of 2001, and now the Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified at 20 U.S.C. §§ 6301 *et seq.*).

2. *See generally* Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 336–40 (2010) (discussing the history of the Elementary and Secondary Education Act); Phyllis McClure, *The History of Educational Comparability in Title I of the Elementary and Secondary Education Act of 1965*, in CTR. FOR AM. PROGRESS, ENSURING EQUAL OPPORTUNITY IN PUBLIC EDUCATION: HOW LOCAL SCHOOL DISTRICT FUNDING PRACTICES HURT DISADVANTAGED STUDENTS AND WHAT FEDERAL POLICY CAN DO ABOUT IT 9, 13 (2008).

3. Lyndon B. Johnson, President of the United States, Remarks on Signing the Elementary and Secondary Education Bill (Apr. 11, 1965), <http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/johnsons-remarks-on-signing-the-elementary-and-secondary-education-act> [https://perma.cc/3W6K-93ZS].

4. *Id.*

5. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802 (2015).

school districts, the ESSA eliminated the punitive testing and accountability measures of the No Child Left Behind Act (NCLB).⁶ But in the fervor to end the NCLB, few stopped to seriously consider the wisdom of what replaced it.⁷ The new Act, the ESSA, moves education in a direction that was unthinkable just a few short years ago: no definite equity provisions, no demands for specific student achievement, and no enforcement mechanism to prompt states to consistently pursue equity or achievement.

The ESSA reverses the federal role in education and returns nearly full discretion to the states.⁸ Although state discretion in some contexts can ensure an appropriate balance of state and federal power,⁹ state discretion on issues of educational equality for disadvantaged students has proven particularly corrosive in the past. Most prominently, states and local districts vigorously resisted school integration for at least two decades following *Brown v. Board of Education*.¹⁰ In fact, this very resistance made the Elementary and Secondary Education Act of 1965 necessary.¹¹ State resistance to equality, however, extends well beyond

6. See, e.g., NAT'L EDUC. ASS'N, WHY EDUCATORS SUPPORT THE EVERY STUDENT SUCCEEDS ACT (S. 1177) (2015) (urging teachers to support ESSA as a means of ending NCLB's flaws); NAT'L SCH. BDS. ASS'N, NSBA HAILS NEW EDUCATION LAW AS HISTORIC WIN FOR RESTORING LOCAL GOVERNANCE IN PUBLIC EDUCATION (2015) (applauding "lawmakers for restoring local governance and working with our public education stakeholders to end the prescriptive requirements under the No Child Left Behind Act"); Andrew Spitzer, Note, *School Reconstitution Under No Child Left Behind: Why School Officials Should Think Twice*, 54 UCLA L. REV. 1339, 1364 (2007) (discussing the negative effects of NCLB sanctions). As one astute observer noted, "What most conservatives seem to be rejoicing about the Every Student Succeeds Act is that it's replacing Obama's waiver system." Alia Wong, *The Bloated Rhetoric of No Child Left Behind's Demise*, ATLANTIC (Dec. 9, 2015), <https://www.theatlantic.com/education/archive/2015/12/the-bloated-rhetoric-of-no-child-left-behinds-demise/419688> [<https://perma.cc/2WHX-8J5H>].

7. Gary Orfield, *A Great Federal Retreat: The 2015 Every Student Succeeds Act*, 3 EDUC. L. & POL'Y REV. 273, 284 (2016) ("The result was a legislative process in which all consideration came down not to a great debate in the House and Senate, but instead a 'take it or leave it' proposition that was enacted within days.").

8. Alyson Klein, *ESSA Architect Q&A: Sen. Lamar Alexander, R-Tenn.*, EDUC. WK. (June 13, 2016, 8:40 AM), http://blogs.edweek.org/edweek/campaign-k-12/2016/06/essa_architect_q_a_sen_lamar_a.html [<https://perma.cc/95T2-7KZT>] (quoting Senator Alexander as saying, "the law is the most significant devolution of power to the states in a quarter century, certainly on education"); Orfield, *supra* note 7, at 276–77.

9. See *New York v. United States*, 505 U.S. 144, 157 (1992) (discussing the benefits of our federal structure); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988) (same).

10. 347 U.S. 483 (1954); see, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. Sch. Bd. of New Kent Cty.*, 391 U.S. 430 (1968); *Montgomery v. Starkville Sch. Dist.*, No. 1:83-CV-00293-MPM (N.D. Miss. Mar. 3, 2016) (desegregation order for the Starkville-Oktibbeha Consolidated School District in Mississippi).

11. Neal Devins & James B. Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1246 (1984) ("The primary purpose of [the Elementary and Secondary Education Act] was no longer to help schools do better what they were already doing; rather, it was to remedy their failure to provide equal educational opportunity to black children."); see also David A. Gamson, Kathryn A. McDermott & Douglas S. Reed, *The Elementary and Secondary Education Act at Fifty: Aspirations, Effects, and Limitations*, 1 RUSSELL SAGE FOUND. J. SOC. SCI. 1, 3 (2015) (discussing the importance of the Elementary and Secondary Education Act).

desegregation. Over the last decade, states have significantly cut education funding and have refused to reinstate funding even as their economies improved.¹² The effects of these cuts often have hit low-income and minority school districts hardest.¹³ This regression marks a troubling new era in which states are willing to actively disregard their duty under state constitutions to deliver equal educational opportunities.¹⁴

Although complete discretion allows states to adapt solutions to local needs, it also allows states to ignore the Elementary and Secondary Education Act's historical mission of equal opportunity and supplemental resources for low-income students. The ESSA's framework will, in effect, make equal educational opportunity a random occurrence rather than a legal guarantee. First, the ESSA grants states nearly unfettered discretion to create school performance systems and set goals. States are largely free to weight test results and soft variables however they see fit.¹⁵ With this discretion, as many as fifty disparate state systems could follow. Second, even assuming states adopt reasonable performance systems, the ESSA does not specify the remedies or interventions that states must implement when schools underperform.¹⁶ Third, the ESSA undermines principles that have long stood at the center of the Elementary and Secondary Education Act's mission to ensure equal access to resources.¹⁷ In particular, the ESSA weakens two equity standards¹⁸ and leaves a significant loophole in a third one that, in effect, exempts 80 percent of school expenditures from equity analyses.¹⁹ To make matters worse, Congress did not include any

12. Michael Leachman et al., *Most States Have Cut School Funding, and Some Continue Cutting*, CTR. ON BUDGET AND POL'Y PRIORITIES 1 (2015), <http://www.cbpp.org/sites/default/files/atoms/files/12-10-15sfp.pdf> [<https://perma.cc/HR3X-3G42>].

13. Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 433–34 (2016).

14. All fifty state constitutions obligate their state to deliver education. See Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 7 (2016). States, however, have recently begun to resist court efforts to enforce those duties. The Washington Supreme Court, for instance, struggled to secure state compliance with its orders. See, e.g., *Gannon v. State*, 319 P.3d 1196, 1251 (Kan. 2014) (directing state to cure funding failures); Order at 2, *McCleary v. State*, No. 84362-7 (Wash. Aug. 13, 2015) (fining state for refusal to comply with school funding order).

15. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1111(c)(4), 129 Stat. 1802 (2015).

16. *Id.* at § 1111(d)(1)(B)(ii) (specifying that the intervention is “evidence-based”).

17. For instance, the Elementary and Secondary Education Act has long included a resource comparability standard, a maintenance of effort standard, and a prohibition on supplanting local funds with federal funds. See, e.g., 20 U.S.C. §§ 3807(a)–(c) (1982). For an explanation of how those standards originally worked, see Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 336–40 (2010); McClure, *supra* note 2.

18. See ESSA § 1012 (striking and replacing portions of 20 U.S.C. § 6321).

19. Black, *supra* note 2, at 315–16 (characterizing the comparability standard as pointless because it excludes teacher salaries from review). The former Secretary of Education drew congressional hostility in response. See *infra* notes 302–18 and accompanying text; see also Cory Turner, *The ‘Intolerable’ Fight over School Money*, NPR (May 18, 2016, 4:52 AM), <http://www.npr.org/sections/ed/2016/05/18/478358412/the-intolerable-fight-over-school-money> [<https://perma.cc/35CX-U23Y>].

significant increases in federal funding and instead afforded states more discretion in spending existing funds.²⁰

This random and uncertain approach to equality ultimately will render the ESSA an incoherent extension of the Elementary and Secondary Education Act. During the past half century, the Elementary and Secondary Education Act has embraced differing theories of how best to achieve equal educational opportunity. The early decades focused most heavily on educational inputs, whereas recent decades focused more on educational outcomes.²¹ But no reauthorization of the Elementary and Secondary Education Act has ever fundamentally abandoned both inputs and outputs as levers for equality—until the ESSA. Without one of those commitments, the ESSA undermines its own *raison d'être*: improving education for low-income students by providing federal resources where states fall short.²² In place of this historical premise, the ESSA provides that states should decide the level of resources students receive and the standards to which they aspire. It removes the federal government from education at the cost of equal education for low-income students.

The ESSA thus raises a fundamental question: What role should the federal government play in education? Traditionally, the federal government is involved in education because education is in our national interest, the Constitution commits the nation to equality, and educational shortfalls by states remain rampant.²³ According to national assessments of student achievement, only one-third of students are proficient in math and reading, and low-income and minority students' achievement lags three years behind their peers by the eighth grade.²⁴ Substantial portions of this gap owe in no small part to the poor educational opportunities that states provide to many students.²⁵ In real dollar terms, thirty-one states funded education at a lower level in 2014 than they did in 2008.²⁶

20. Compare ESSA § 1002, with BOYLE & LEE, *supra* note 1, at 10 (charting Title I funding prior to ESSA); see also Orfield, *supra* note 7, at 285 (indicating that ESSA consolidated numerous small programs into a \$1.6 billion block grant).

21. See generally BOYLE & LEE, *supra* note 1.

22. JULIE ROY JEFFREY, EDUCATION FOR CHILDREN OF THE POOR: A STUDY OF THE ORIGINS AND IMPLEMENTATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 at 57–76 (1978) (detailing the motivations for and debates about providing additional resources to students living in concentrated poverty so that they might receive compensatory education).

23. See generally Johnson, *supra* note 3 (discussing the importance of the Elementary and Secondary Education Act and describing it as “a major new commitment of the federal government to quality and equality in the schooling that we offer our young people”).

24. 2015 Mathematics—National Results Overview, NAT'L ASSESSMENT OF EDUC. PROGRESS, https://www.nationsreportcard.gov/reading_math_2015/#mathematics?grade=4 [https://perma.cc/5YYY-937D]; 2015 Reading—National Results Overview, NAT'L ASSESSMENT OF EDUC. PROGRESS, https://www.nationsreportcard.gov/reading_math_2015/#reading?grade=4 [https://perma.cc/PM9B-JF9H].

25. See generally C. Kirabo Jackson, Rucker C. Johnson & Claudia Persico, *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, 131 Q. J. ECON. 157 (2016) (reviewing decades of school finance and achievement data and finding that a substantial portion of achievement gaps are the result of funding inequality).

26. Leachman et al., *supra* note 12, at 1.

Likewise, recent data show that half of the states fund districts serving predominantly poor students at lower levels than they do districts serving predominantly middle-income and wealthy students.²⁷ To achieve their potential, low-income students require more resources than their peers—not less.²⁸

As a practical matter, Congress is unlikely to repeal or substantially alter the ESSA as states begin to implement it, but new legislation is possible sooner rather than later. By its own terms, the ESSA is set to expire in four years.²⁹ Debates regarding whether to extend the ESSA by simple resolution or to fully rewrite it should precede that date. By then—if this Article’s critique is accurate—the random and uncertain equality that the ESSA facilitates will be evident. Equally important, there will be an opportunity to consider meaningful legislation because the pre-ESSA emphasis on repealing the NCLB will be gone.

This Article proposes three steps to cure the ESSA’s flaws and further the Elementary and Secondary Education Act’s original mission. First, the Elementary and Secondary Education Act, in the short term, must mandate that states fund schools serving predominantly low-income students at a level equal to or higher than other schools and, in the long term, must mandate that they fund such schools at proportionately higher levels. One of the most consistent findings of the past fifty years is that attending a school serving high concentrations of low-income students negatively affects educational outcomes—regardless of a student’s individual race or socioeconomic status.³⁰ An equity mandate would also incentivize states to deconcentrate poverty and thereby minimize the number of instances they would need to afford schools proportionately more funds. Curing funding inequalities between schools, however, may be out of immediate reach for most states. Therefore, Congress should afford states a transition period to incrementally progress toward those goals or, in the alternative, allow states to demonstrate that their low-income students are achieving at appropriate levels notwithstanding unequal resource allocations.

Because states are unlikely to accept ambitious equity standards in exchange for the currently low federal funding, the second step is for the federal government to substantially increase its own funding for low-income students. A substantial additional investment would strongly incentivize states to accept the first proposal and allow the federal government to directly ensure that low-income students receive the additional resources necessary to close achievement

27. See BRUCE D. BAKER, DAVID G. SCIARRA & DANIELLE FARRIE, EDUC. LAW CTR., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 9 (2015) (comparing states with progressive and regressive funding practices).

28. See Education Finance Incentive Grant Program, Pub. L. No. 107-110, § 1125(A), 115 Stat. 1425, 1525 (codified at 20 U.S.C. § 6337(b)(3)(A)(ii)(III)) (using a 1.4 multiplier as the standard for assessing fair funding in low-income schools).

29. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1002, 129 Stat. 1802 (2015).

30. See, e.g., RICHARD D. KAHLBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 6 (2001); Laura B. Perry & Andrew McConney, *Does the SES of the School Matter? An Examination of Socioeconomic Status and Student Achievement Using PISA 2003*, 112 TCHRS. C. REC. 1137, 1137–38 (2010).

gaps. Researchers and the federal government indicate that low-income students require 40 percent more resources than other students.³¹ By increasing annual federal funding for low-income students from the current \$15 billion to \$45 billion, the federal government could cover half of the cost of low-income students' additional needs (although a lesser number could still create the leverage necessary for states to act).³² Compared to other expenditures, including recent temporary federal funds for education, this increase would still be a modest expenditure.

Third, this Article proposes a large short-term investment in preschool education. While the ESSA included \$250 million for preschool education,³³ this amount is far too small to make a dent in current preschool needs. Data show that fewer than one-third of four-year-olds and only 5 percent of three-year-olds have access to public preschool education.³⁴ Social science widely supports the necessity of preschool education for closing achievement gaps.³⁵ Preschool education is also the most cost-effective means of reducing other long-term costs associated with special education, juvenile justice, incarceration, and social services.³⁶ Thus, federal investment in preschool education would have positive reciprocal effects on this Article's first two proposals. The savings that preschool education produces would reinforce states' abilities to meet the Elementary and Secondary Education Act's equal resource standards and offset the need for federal investment in preschool education in the first instance.

This Article develops its critique and proposed solution in four parts. Part I describes the history of the Elementary and Secondary Education Act, including its longstanding commitments to equal educational resources for disadvantaged students and academic achievement improvements. Part I also includes a detailed discussion of the NCLB and its flaws, which form the political and practical backdrop for the ESSA's enactment. Part II describes the overall requirements of the ESSA, and how those requirements interact with each other and compare to the NCLB. Part III evaluates the ESSA's provisions through the lens of equality and the Elementary and Secondary Education Act's historical premises, concluding that the ESSA is conceptually and practically flawed. Part IV offers solutions to address those flaws.

31. Education Finance Incentive Grant Program § 1125(A); Ross Wiener & Eli Pristoop, *How States Shortchange the Districts that Need the Most Help*, in FUNDING GAPS 2006 at 5, 6 (2006) (applying a 40 percent adjustment in additional funding for low-income students); see also U.S. GEN. ACCOUNTING OFFICE, GAO-03-234, SCHOOL FINANCE: PER-PUPIL SPENDING DIFFERENCES BETWEEN SELECTED INNER CITY AND SUBURBAN SCHOOLS VARIED BY METROPOLITAN AREA 5-6 (2002), <http://www.gao.gov/new.items/d03234.pdf> [<https://perma.cc/EP4E-T3PA>] (discussing various funding weights for disadvantaged demographic groups).

32. See *infra*, note 350.

33. ESSA § 9212.

34. NAT'L INST. FOR EARLY EDUC. RES., THE STATE OF PRESCHOOL 2015 at 6 (2016).

35. James E. Ryan, *A Constitutional Right to Preschool?*, 94 CALIF. L. REV. 49, 52 (2006) (“[R]esearchers have uniformly demonstrated [that] the benefits of preschool . . . seem easily to outweigh the costs.”).

36. *Id.*

I.

HISTORY OF THE ELEMENTARY AND SECONDARY EDUCATION ACT

A. *Equity Mission of the Early Decades*

At its inception in 1965, the Elementary and Secondary Education Act was a tool to ensure equal educational opportunities for poor and disadvantaged students. The Elementary and Secondary Education Act sought to achieve this, first, by providing additional resources for disadvantaged students and, second, by creating financial leverage to force recalcitrant school districts to desegregate. In other words, the Act was both part of President Johnson's War on Poverty³⁷ and the federal government's effort to make good on *Brown v. Board of Education's* desegregation mandate.³⁸

The agenda to effectuate anti-poverty through education was obvious. President Johnson characterized the Elementary and Secondary Education Act as

the most sweeping educational bill ever to come before Congress. It represents a major new commitment of the federal government to quality and equality in the schooling that we offer our young people. I predict that all of those of both parties of Congress who supported the enactment of this legislation will be remembered in history as men and women who began a new day of greatness in American society. . . . As a son of a tenant farmer, I know that education is the only valid passport from poverty.³⁹

The Act drastically expanded federal funding for schools, which previously was almost nonexistent.⁴⁰ Specifically, it drove those funds toward schools serving large percentages of poor students.⁴¹ As a result, the impact on each student and school was more significant than it would have been through a general education aid package.⁴² This focused approach on concentrated poverty

37. See, e.g., Gamson et al., *supra* note 11, at 1, 3; Julia Hanna, *The Elementary and Secondary Education Act*, HARV. GRADUATE SCH. OF EDUC. (Aug. 18, 2005), <http://www.gse.harvard.edu/news/05/08/elementary-and-secondary-education-act> [<https://perma.cc/W253-E86C>].

38. Gamson et al., *supra* note 11, at 1, 11 (“ESEA’s commitment to spend federal funds was a forceful lever to induce compliance with the federal government’s nondiscrimination policies, a lever possibly more powerful than federal district court rulings.”).

39. Johnson, *supra* note 3, at 1–2.

40. See Emily Hodge, Kendra Taylor & Erica Frankenberg, *Lessons from the Past, Model for the Future: A Return to Promoting Integration Through a Reauthorized ESEA*, 3 EDUC. L. & POL’Y REV. 58, 70 (2016) (reporting that “southern and border states were receiving \$176 million in federal education funding, but by 1966, almost \$566 million was allocated to these states”).

41. See OFFICE OF EDUC., U.S. DEP’T OF HEALTH, EDUC., AND WELFARE, HISTORY OF TITLE I ESEA at 17 (1969); Goodwin Liu, *Improving Title I Funding Equity Across States, Districts, and Schools*, 93 IOWA L. REV. 973, 975 (2008); Orfield, *supra* note 7, at 276–77.

42. See, e.g., *Elementary and Secondary Education Act of 1965 (ESEA)*, ASS’N FOR EDUC. COMM’NS & TECH., http://aect.site-ym.com/?page=elementary_and_secon [<https://perma.cc/6T9N-FPM6>] (explaining that the Elementary and Secondary Education Act “was not meant as a general package of aid to all schools; the allocation formulas directed assistance to the local education agencies

also meant that, as a practical matter, federal dollars went to the locus of segregation—the South and the North’s larger cities.⁴³ Given the existing education funding practices of states, those funds were sorely needed in poor and predominantly minority communities.⁴⁴

The law initially said little about what schools should do with or in exchange for the money.⁴⁵ The Elementary and Secondary Education Act was not an attempt to change the teaching profession, reform education standards, or update curricula. In its most raw form, the Act was about providing additional money for those who needed it the most. The hope was that through additional money, low-income students might receive both the fundamental and supplemental programs and opportunities they needed to close the achievement gap.⁴⁶ Thus, the Act’s only significant requirements during its early years were regarding the money itself.⁴⁷

After the first few years revealed that some districts had been wasting federal dollars or reducing the local resources devoted to education, the Elementary and Secondary Education Act required that federal money be spent on programs and services that were truly “supplemental.”⁴⁸ Federal dollars could only “supplement” the money that states and local districts were already spending on education; federal funds could not “supplant” local money.⁴⁹ Likewise, states and districts had to maintain their financial outlays for education from year to year, rather than slowly reducing them over time and incrementally supplanting local money with federal funds.⁵⁰ Finally, the Act eventually required that the resources available in schools receiving money through Title I of the Act be “comparable” or equal to those in schools that did not receive Title I money.⁵¹ In other words, a school district would violate the Act if it spent only \$1,500 per student at a Title I school while spending \$2,000 per student at a non-

(LEAs) with the greatest proportions of poor children. The funds were purposely distributed through state education agencies (SEAs) to avoid the perception that the federal government was intervening in the rights and obligations of states to provide public education and also to use the funds as leverage to upgrade the capabilities of SEAs themselves”).

43. Orfield, *supra* note 7, at 276–77.

44. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 8–10 (1973) (finding funding disparities in local schools).

45. *See, e.g.*, McClure, *supra* note 2, at 13; *see also* OFFICE OF EDUC., *supra* note 41, at 23–25 (discussing the lack of real reporting and monitoring of the funds during the first few years following the Elementary and Secondary Education Act’s enactment).

46. *See* Black, *supra* note 2, at 338.

47. *See, e.g.*, Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified in scattered sections of 20 U.S.C.).

48. Amendments to the Elementary and Secondary Education Act of 1965, Pub. L. 91-230, § 613, 84 Stat. 179 (1970) (instituting the “supplement not supplant” requirement to ensure that Title I funding was used in addition to, not in place of, state and local revenues).

49. *Id.*

50. Elementary and Secondary Education Amendment of 1969, Pub. L. 91-230, 84 Stat. 121-170, §109, April 13, 1970.

51. *Id.*; *see, e.g.*, 45 C.F.R. § 116.26 (1972) (requiring comparability at a 5 percent variance between Title I and non-Title I schools); 45 C.F.R. § 116a.26 (1977) (same).

Title I school. In theory, school districts that did not treat predominantly poor schools equally would be ineligible for additional Title I dollars and thereby unable to use federal funds to close funding gaps that districts themselves had created. Beyond those measures, states and districts were largely free to pursue and deliver education as they saw fit.⁵² In fact, the Act specifically prohibited the federal government from exercising any authority over “the curriculum or internal educational processes of the schools.”⁵³

While the Elementary and Secondary Education Act did not explicitly address desegregation, Congress intended to use the Act to further desegregation. Driving funds to the high-poverty schools not only created the opportunity for resource equality, but also gave the federal government the ability to financially coerce schools to stop discriminatory practices. One year before Congress passed the Elementary and Secondary Education Act, it passed the Civil Rights Act of 1964.⁵⁴ Title VI of the Civil Rights Act prohibits discrimination in all federally funded programs and authorizes federal agencies to enforce the prohibition.⁵⁵ Thus, by accepting education money, states and districts also agreed to comply with Title VI’s antidiscrimination mandate and administrative enforcement scheme.

Although the Supreme Court in *Brown v. Board of Education* declared state-sponsored school segregation unconstitutional, that declaration alone accomplished very little. Save a few outliers, schools were just as segregated in 1964 as they had been when the Court decided *Brown* in 1954.⁵⁶ The federal government hoped that, by extending federal dollars to school districts and attaching Title VI’s prohibitions to them, federal agencies could desegregate schools more effectively than federal courts could alone.⁵⁷ That hope proved true: once financial consequences attached to segregation, many schools began implementing *Brown*’s requirements in earnest.⁵⁸ According to scholars, “[w]ithout the newly available federal funds from ESEA, it is unlikely that the impacts of Title VI of the CRA would have acted as an effective incentive to

52. Gary Orfield writes: “This agenda was far more oriented on equity issues than the policies in most states, a number of which were conducting bitter-end battles against civil rights. So it combined a generous increase in resources with a stern warning about fairness. Outside of channeling dollars and enforcing Constitutional rights, however, the federal government was to respect the tradition of state and local control of the schools.” Orfield, *supra* note 7, at 276–77.

53. *Id.* at 276.

54. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

55. *Id.*

56. U.S. COMM’N ON CIVIL RIGHTS, FULFILLING THE LETTER AND SPIRIT OF THE LAW: DESEGREGATION OF THE NATION’S PUBLIC SCHOOLS 6 (1976) (“Ten years after *Brown*, only 1.2 percent of the nearly 3 million black students in the 11 Southern States attended school with white students.”), <https://www.law.umaryland.edu/marshall/usccr/documents/cr121412.pdf> [<https://perma.cc/3HHZ-8D75>].

57. GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT 46, 77 (1969).

58. DEREK W. BLACK, EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM 28 (2013).

change local practices that maintained school segregation.”⁵⁹ In the following decade, the Elementary and Secondary Education Act worked in conjunction with both other anti-discrimination statutes covering gender, disability, and language and other equal education opportunity funding programs for disadvantaged student groups.⁶⁰

This early approach to the federal role in education—both in design and function—was a quintessential effort to ensure equality. When states shortchanged poor students and districts, Congress intervened to provide more funds and prohibit the underlying unequal distribution of resources itself. States and districts had long funded the education of African American students at levels far below that of whites.⁶¹ Likewise, states left poor school districts—regardless of their racial demographics—to fend for themselves, which in turn could yield per-pupil expenditures well below those in wealthier districts.⁶² But even where general education funding was equal, schools did little—if anything—to meet the special needs of poor, at-risk, or needy students.⁶³ Even the best schools simply expected these students to succeed with the same resources as the general student population and no additional attention to their special needs. The Elementary and Secondary Education Act’s stated purpose was to end this disadvantageous treatment:

In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.⁶⁴

59. Hodge et al., *supra* note 40, at 69.

60. The Elementary and Secondary School Act of 1965 was amended in 1968 to include the Bilingual Education Act, which offered federal aid to local school districts to help address the needs of children with limited English-speaking ability. *Elementary and Secondary Education Act of 1965*, SOC. WELFARE HIST. PROJECT, <http://socialwelfare.library.vcu.edu/programs/education/elementary-and-secondary-education-act-of-1965> [https://perma.cc/4T92-EEGV]; see also Harvey Kantor & Robert Lowe, *Educationalizing the Welfare State and Privatizing Education: The Evolution of Social Policy Since the New Deal*, in *CLOSING THE OPPORTUNITY GAP* 25, 32 (Prudence Carter & Kevin Welner eds., 2013) (“In the 1970s, Title VI of the 1964 Civil Rights Act provided the rationale for the extension of civil rights protections to English language learners and disabled children, and Title I of ESEA remained the programmatic foundation on which future federal education policies would be built.”).

61. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 7–8, 332, 349 (2011).

62. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 8–10 (1973) (discussing wide funding disparities between Texas school districts).

63. See, e.g., *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972).

64. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 § 201 (1965).

Elementary and Secondary Education Act funds created the means to expand the federal government's equality mission beyond just poverty. Those funds became the leverage to demand all of the equality norms and federal affirmative educational obligations—from disability, sex, and gender to language, homelessness, and sexual orientation—that we have today.⁶⁵

B. Evolution in Later Decades

The Elementary and Secondary Education Act's focus on equity began to drift in the late 1970s and early 1980s. This drift stemmed from a confluence of events: the growing disillusionment with desegregation, the disappointment in the academic results that federal funding produced, and the resurgence of states' rights.⁶⁶ While desegregation rapidly progressed during the 1970s,⁶⁷ the U.S. Supreme Court issued two key decisions limiting the scope of desegregation, suggesting a weakened resolve.⁶⁸ Congress also passed troubling legislation prohibiting the use of federal funds for desegregation busing.⁶⁹ Similarly, while the Elementary and Secondary Education Act had helped improve access to the most basic and rudimentary education resources,⁷⁰ many began to question the efficacy of the Act's approach because research still had not proven that the funding helped close achievement gaps.⁷¹ Finally, Ronald Reagan premised his presidency on returning control and resources to the states.⁷² Consolidating

65. See, e.g., MARTHA MINOW, IN *BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK 5-6* (2010) (“[*Brown*] inspired social movements to pursue equal schooling beyond racial differences, and it yielded successful legal and policy changes addressing the treatment of students’ language, gender, disability, immigration status, socioeconomic status, religion, and sexual orientation.”).

66. See Kara S. Finnigan, Jennifer Jellison Holme & Joanna Sánchez, *Regional Equity as an Educational Policy Goal: Tackling the Root Cause of Educational “Failure,”* 3 EDUC. L. & POL’Y REV. 166, 171 (2016) (discussing “a growing dissatisfaction with and disillusionment around desegregation on the ground”); Jack Jennings, *Fifty Years of Federal Aid to School: Back into the Future?*, 3 EDUC. L. & POL’Y REV. 1, 10 (2016) (describing President Obama’s critiques of the effects of federal school aid, and President Clinton’s move to shift the development of academic standards to states); *Republican Party Platform of 1984*, AM. PRESIDENCY PROJECT (Aug. 20, 1984), <http://www.presidency.ucsb.edu/ws/?pid=25845> [<https://perma.cc/JR29-A33B>] (summarizing Ronald Reagan’s general campaign platform to return control to the states).

67. GARY ORFIELD & CHUNGMEI LEE, *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE?* 19 (2004) (charting increases and declines in integration).

68. *Milliken v. Bradley*, 433 U.S. 267 (1977); *Keyes v. Sch. Dist. No 1*, 413 U.S. 189 (1973).

69. 20 U.S.C. § 1652 (1972).

70. See, e.g., *Every Student Succeeds Act (ESSA)*, U.S. DEP’T OF EDUC., <https://www.ed.gov/essa?src=m> [<https://perma.cc/ARD7-YGA6>] (“ESEA offered new grants to districts serving low-income students, federal grants for textbooks and library books, [and] funding for special education centers . . .”).

71. Jennings, *supra* note 66, at 11–12 (2016) (finding that Title I was inefficient because it only indirectly provided additional funds for extra services and did not change “American schools broadly and positively enough to bring a good education to all students”).

72. See AM. PRESIDENCY PROJECT, *supra* note 66 (summarizing Ronald Reagan’s general campaign platform to return control to the states).

federal programs into block grants to states was one way to shrink federal dictates and oversight.⁷³

The foregoing concerns eventually led to changes in the Elementary and Secondary Education Act. Funding for Title I of the Elementary and Secondary Education Act stopped growing.⁷⁴ And rather than targeting existing funds to the neediest students, the Act began to more closely resemble general education aid,⁷⁵ with far more schools and districts receiving Title I funds and far more funds being issued through consolidated or block grants.⁷⁶ The Act also placed less emphasis on prodding resource equity with those funds. For instance, Congress loosened the Elementary and Secondary Education Act's comparability requirements in Title I. Title I and its regulations originally permitted no more than a 5 percent variance in spending between Title I and non-Title I schools.⁷⁷ In the late 1970s, the regulations doubled the permissible variance to 10 percent,⁷⁸ thereby allowing the gap between disadvantaged schools and privileged schools to expand. Later, the Reagan administration eliminated quantifiable measures of comparability altogether.⁷⁹ Overall, a heavier focus on academic standards, accountability, and school reform replaced the Elementary and Secondary Education Act's focus on resources as the means to achieve equity.⁸⁰

The 1990s and 2000s saw some efforts at redirecting the law back toward equity. The 1994 reauthorization, Improving America's School Act (IASA), added two funding formulas to Title I. The first formula was designed to drive more funds toward those districts serving the largest number of poor students

73. See, e.g., Education Consolidation and Improvement Act of 1981, Pub. L. 97-35, tit. V, subdiv. D, 95 Stat. 463 (1981).

74. See Orfield, *supra* note 7, at 278-79.

75. See, e.g., Kenneth K. Wong & Anna C. Nicotera, *Educational Quality and Policy Redesign: Reconsidering the NAR and Federal Title I Policy*, 79 PEABODY J. EDUC., 87, 90 (2004) (indicating the Reagan administration "created an educational block grant, Chapter 2 of the Education Consolidation and Improvement Act (ECIA), which consolidated 28 categorical programs and shifted authority for allocation from local agencies to the states," under which "17 of the 26 largest urban districts received less federal revenue than they had in the immediate pre-block grant year"); Benjamin Michael Superfine & Craig De Voto, *The ESEA and Teacher Workforce Management Systems*, 3 EDUC. L. & POL'Y REV. 241, 253 (2016) ("Through the Education Consolidation and Improvement Act of 1981, many of the targeting and reporting requirements of Title I were eliminated, federal education funding was cut, and categorical programs were consolidated into a single block grant. Such moves were ultimately undone as the political climate shifted.")

76. CHERYL D. HAYES, RETHINKING BLOCK GRANTS: TOWARD IMPROVED INTERGOVERNMENTAL FINANCING FOR EDUCATION AND OTHER CHILDREN'S SERVICES 11 (1995), <http://files.eric.ed.gov/fulltext/ED394193.pdf> [<https://perma.cc/L9QG-TPNP>] ("In the education block grant, states retreated from targeting funds to big-city schools with large minority populations.")

77. See 45 C.F.R. § 116a.26 (1977) (requiring comparability at a 5 percent variance); 45 C.F.R. § 116.26 (1972) (same).

78. McClure, *supra* note 2, at 18; see also 45 C.F.R. § 116 (1978) (making no reference to numerical comparability).

79. See Education Consolidation and Improvement Act of 1981 § 558(c)(2), 95 Stat. at 468.

80. Finnigan et al., *supra* note 66, at 170-71.

and those serving higher percentages of poor students.⁸¹ The second formula was designed to incentivize states to equalize their own school funding formulas.⁸² The IASA also took steps to hold states accountable for the quality of education they provided poor students, requiring states to establish academic standards for math and language arts and then to test students every few years in those subjects. In Goals 2000, a separate bill passed a few months later, states were also encouraged to develop “opportunity-to-learn” standards. As Michael Rebell explained:

Congress articulated the concept of “opportunity to learn standards” (“OTL”), voluntary national school delivery standards that states could choose to adopt, or state OTL standards that states could develop in conjunction with their own content and student performance standards. The statute defined the OTL concept as “the criteria for, and the basis of, assessing the sufficiency or quality of the resources, practices, and conditions necessary at each level of the education system . . . to provide all students with the opportunity to learn the material in voluntary national content standards or State content standards.”⁸³

Congress hoped it could demand equal academic outputs through the IASA and prod equal academic inputs through Goals 2000. However, a new Republican majority revoked the voluntary OTL standards later that year.⁸⁴

The largest expansion of the Elementary and Secondary Education Act occurred in 2002 through the No Child Left Behind Act (NCLB). To be clear, the NCLB did nothing to strengthen comparability or other resource equality requirements. Rather, it demanded strict output equality and infused schools with the largest increase in federal funding since the 1960s. Pre-NCLB appropriations for Title I were approximately \$7 billion.⁸⁵ In its first five years, the NCLB nearly doubled Title I funding⁸⁶ and increased it each year thereafter, although actual appropriations never matched the authorization levels.⁸⁷

81. Black, *supra* note 2, at 344–46.

82. *Id.*

83. Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1517 (2007).

84. *Id.*

85. U.S. DEP’T OF EDUC., 10 FACTS ABOUT K-12 EDUCATION FUNDING 4 (2005), <https://www2.ed.gov/about/overview/fed/10facts/10facts.pdf> [<https://perma.cc/9EL3-BUZ3>].

86. *Id.* Unfortunately, actual funding appropriations have consistently fallen short of authorizations since 2002. In 2003, for instance, Congress appropriated only \$12 billion of the authorized \$16 billion. PAUL M. IRWIN, CONG. RESEARCH SERV., RL 33058, K-12 EDUCATION PROGRAMS: RECENT APPROPRIATIONS 6–8 (2005) http://www.oswego.edu/~ruddy/Educational_Policy/CRS_Reports/K-12_Education-Appropriations.pdf [<https://perma.cc/43LG-VPQZ>].

87. The authorization for 2008 was \$25 billion while the appropriation was \$14 billion. *See, e.g.*, NEW AMERICA, NCLB FUNDING OVERVIEW (2015). As Rebell emphasizes, a central flaw of the Act was its failure to ensure students had access to the resources they needed to achieve. Rebell, *supra* note 83, at 72–76; *see also* Regina R. Umpstead, *The No Child Left Behind Act: Is It an Unfunded Mandate or a Promotion of Federal Educational Ideals?*, 37 J.L. & EDUC. 193, 227 (2008) (finding that the Act covered states’ administrative costs, but not the cost of getting students to proficiency).

C. No Child Left Behind Act as the Backdrop for Current Policy

1. NCLB's Structure

The NCLB imposed far more requirements and accountability than any prior version of Title I. In exchange for an influx of resources, it required states to meet several absolute benchmarks. First, it required states to adopt “challenging” academic standards for English, math, and science.⁸⁸ The goal was to ensure that students received high-quality curricula and learning opportunities.⁸⁹ However, states remained free to craft the substance of those standards and curricula as they saw fit.⁹⁰

Second, the NCLB required states to administer tests to assess student proficiency in those subjects.⁹¹ The math and English assessments occurred annually in grades three through eight and at least once more in high school.⁹² The science assessment occurred at least three times between grades three and twelve.⁹³

Third, the NCLB required states to ensure that students met certain benchmarks, which it termed “adequate yearly progress” (AYP).⁹⁴ The Act required that all students achieve proficiency in English, math, and science by 2014, with states setting their own interim targets along the way.⁹⁵ For instance, a state might set a target of 50 percent proficiency for 2003, with 5 percent increases in proficiency in each subsequent year to meet full proficiency by 2014. Then each individual school in the state would have to meet those targets.

Fourth, these proficiency standards and goals applied not only to individual schools but also to subgroups within those schools.⁹⁶ Schools had to disaggregate their test scores by gender, race, ethnicity, disability, language status, and socioeconomic status to ensure that each subgroup met the same benchmarks.⁹⁷ The failure of the school or any of its subgroups to meet these benchmarks would result in a failure to make AYP under the NCLB.⁹⁸

88. No Child Left Behind Act (NCLB) of 2001, Pub. L. 107-100, § 1111(b)(1), 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 6311); *see also* Ryan, *supra* note 1, at 932–33 (providing a brief summary of the Act’s requirements).

89. *See, e.g.*, NCLB § 1111(b)(1)(D). NCLB requirements were thought to further a high-quality curriculum and learning opportunity. *See generally* Ryan, *supra* note 1, at 939 (“The federal government hoped to ensure that states would hold all students to the same high expectations and hold all schools, regardless of their student population, accountable for failure.”).

90. NCLB § 1111(a)(1) (stating that to receive funding, each state educational agency “shall submit to the Secretary a plan, developed by the State educational agency”).

91. *Id.* § 1111(a)(3)(A).

92. *Id.* §§ 1111(a)(3)(C)(v)(I), (vii).

93. *Id.* § 1111(a)(3)(C)(v)(II).

94. *Id.* § 1111(b)(2)(B).

95. *Id.* § 1111(b)(2)(F).

96. *Id.* § 1431(a) (codified at 20 U.S.C. § 6471).

97. *Id.* § 1111(b)(3)(C)(xiii).

98. *Id.* § 1111(b)(2)(C)(v) (codified at 20 U.S.C. § 6311).

Fifth, the failure to make AYP triggered specific consequences for schools receiving Title I funds. The second year a school failed to make AYP, it was labeled “in need of improvement.”⁹⁹ With each subsequent consecutive year it failed to make AYP, the consequences ratcheted upward. In the second year, the school had to develop an improvement plan and receive technical assistance from the local education agency.¹⁰⁰ The second year of failure also triggered students’ right to transfer to another public school in the district that had made AYP.¹⁰¹ The third year triggered tutoring services at the district’s expense.¹⁰² The fourth year, schools had to replace school staff or implement a new curriculum.¹⁰³ The fifth year of failure effectively resulted in closing the school, which could later be reopened under new management, typically as a state-run school or charter school.¹⁰⁴

Finally, the NCLB required that all teachers in “core academic subjects” be “highly qualified.”¹⁰⁵ This requirement was stricter than the aforementioned standards and assessments requirements. It immediately prohibited Title I schools from hiring any new teachers who were not “highly qualified” and, within just a few years, required states to demonstrate that teachers in all schools were “highly qualified.”¹⁰⁶

2. Solving NCLB’s Problems Through Reauthorization

Educators and scholars argued that the NCLB was flawed at its inception. Over time, the validity of many of those critiques became obvious. The first set of critiques argued that the Act’s academic standards were too low and its expectations for student performance were too high. While the Act mandated that states adopt “challenging” academic standards, the Act afforded states discretion in setting those standards and developing the tests to assess them.

99. *Id.* § 1117(a)(2)(B) (codified at 20 U.S.C. § 6317).

100. *Id.* § 1116 (b)(3)(A)(v) (codified at 20 U.S.C. § 6316).

101. If there was no such school in the district, the student theoretically could transfer to another school district, but the receiving school district was not obligated to accept the student. *See* Jane Dimyan-Ehrenfeld, *Making Lemonade: Restructuring the Transfer Provisions of the No Child Left Behind Act*, 16 GEO. J. ON POVERTY L. & POL’Y 217–18 (2009). While civil rights advocates hoped that these provisions would facilitate both intra- and inter-district integration, for a variety of reasons, very few students were able to exercise their transfer options. *See* MEREDITH P. RICHARDS, KORI J. STROUB & JENNIFER JELLISON HOLME, CENTURY FOUND., CAN CHOICE WORK? MODELING THE EFFECTS OF INTERDISTRICT CHOICE ON STUDENT ACCESS TO HIGHER-PERFORMING SCHOOLS 3 (2011) (fewer than 1 percent of eligible African American and Hispanic students transfer); Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 795 (2005) (criticizing the lack of a mandate in the transfer provision).

102. NCLB § 1116(b)(5) (codified at 20 U.S.C. § 6316).

103. *Id.* § 1116(b)(7).

104. *See id.* § 1116(b)(8).

105. *Id.* §§ 1119(a)(1)–(2), 9101(11), 9101(23) (codified at 20 U.S.C. § 7801). States, however, had significant flexibility in determining whether a teacher was highly qualified, which later became a source of contention. *See, e.g.,* *Renee v. Duncan*, 623 F.3d 787, 795–96 (9th Cir. 2010) (invalidating a Department of Education regulation permitting alternative teacher certification programs in California).

106. NCLB §§ 1119(a)(1)–(2) (codified at 20 U.S.C. § 6319).

Rather than ensuring a core base of knowledge and quality, the Act permitted substantial variation among states.¹⁰⁷ Some states seemingly strived to improve education, but as James Ryan immediately pointed out, the flexibility incentivized most states to lower their academic standards and self-determined cutoff scores to inflate proficiency scores.¹⁰⁸ Later studies confirmed this suspicion.¹⁰⁹

The mandate that 100 percent of students reach proficiency was unrealistic under any circumstances. Statistically speaking, a certain percentage of students will inevitably fail to achieve any reasonable concept of proficiency each year due to random events, differences in ability, and background inequalities.¹¹⁰ The NCLB made no allowance for these factors. Thus, it was no surprise that a substantial percentage of schools immediately began missing AYP targets.¹¹¹ By 2012, 80 percent of the nation's public schools were not making AYP and had almost no hope of achieving full proficiency by the Act's deadline.¹¹²

Oversight and quality concerns aside, others saw a more fundamental problem with the NCLB's testing regime. They argued that the emphasis on standardized testing itself would have a corrosive effect on education. Struggling schools would "teach to the test," "drill and kill," and focus on the mechanics of test taking, thereby restricting teaching methods and narrowing curricula.¹¹³ Thus, focusing heavily on testing would widen the academic gap between advantaged and disadvantaged groups. The high-achieving schools would continue to focus on deeper and more enriching learning experiences, while the low-performing schools would spend excessive time on test preparation. This concern proved true in many instances.¹¹⁴ Moreover, the overriding focus on test

107. See EDUC. COMM'N OF THE STATES, ECS REPORT TO THE NATION: STATE IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT 18 (2004) (illustrating the differences among the state standards allowed under NCLB).

108. Ryan, *supra* note 1, at 934.

109. See, e.g., Paul E. Peterson & Frederick M. Hess, *Few States Set World-Class Standards*, 8 EDUC. NEXT 70, 71–73 (2008) (finding many states had lowered their standards); BANDIERA DE MELLO, U.S. DEP'T OF EDUC., INSTITUTE OF EDUCATION SCIENCES, MAPPING STATE PROFICIENCY STANDARDS ONTO THE NAEP SCALES: VARIATION AND CHANGE IN STATE STANDARDS FOR READING AND MATHEMATICS, 2005–2009 at 2 (2011).

110. See generally Derek W. Black, *Civil Rights, Charter Schools, and Lessons to Be Learned*, 64 FLA. L. REV. 1723, 1752–56 (2012) (describing perceptions of the goal).

111. EDUC. COMM'N OF THE STATES, *supra* note 107, at 18 (showing that in March 2003, only 55 percent of schools appeared on track to meet proficiency goals).

112. See Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607, 612 (2015).

113. See, e.g., Linda Darling-Hammond, *Evaluating "No Child Left Behind": The Problems and Promises of Bush's Education Policy*, NATION (May 2, 2007), <https://www.thenation.com/article/evaluating-no-child-left-behind> [<https://perma.cc/T7A3-EDSW>]; Peter Schrag, *High Stakes Are for Tomatoes*, ATLANTIC (Aug. 2000), <http://www.theatlantic.com/magazine/archive/2000/08/high-stakes-are-for-tomatoes/378306> [<https://perma.cc/C8TA-VW96>].

114. Schools began to cut programs such as physical education and the arts to allow for more time spent in the classroom on courses tested under the NCLB. Two weeks each year would be spent on testing alone. See, e.g., Tina Beveridge, *No Child Left Behind and Fine Arts Classes*, 111 ARTS EDUC.

results and meeting AYP standards motivated some teachers and school districts to cheat.¹¹⁵ In some areas, parents concerned with such corrosive effects eventually formed a concerted movement to keep their kids out of school on testing days.¹¹⁶

Yet another group argued that the NCLB's testing and accountability regime ignored the structural inequalities generally pervading education. Schools were separate and unequal prior to the NCLB and remained separate and unequal after its enactment. The NCLB simply attached labels and consequences to that separation and inequality without taking steps to remedy them. Instead, the NCLB seemed to make matters worse. The NCLB, in effect, punished the predominantly poor and minority schools that it purportedly was designed to help.¹¹⁷

With its stringent demands for increased test results, the NCLB also mischaracterized otherwise adequate schools as "failing."¹¹⁸ This created a new and purportedly objective narrative that characterized America's schools as failing.¹¹⁹ This perception intensified dissatisfaction with public education and motivated those with the means to exit traditional public schools in general and poor and minority schools in particular. Many parents increasingly advocated for federal funding of charter schools and voucher programs to help facilitate that

POL'Y REV. 4, 4–5 (2010); Ken Reed, *Physical Education Trend Must Be Reversed*, HUFFINGTON POST (Aug. 31, 2013), http://www.huffingtonpost.com/ken-reed/physical-education-trend-_b_3845922.html [<https://perma.cc/N3D8-4U2Y>] ("Due to No Child Left Behind mandates and the pressures of standardized state assessment tests, many schools are cutting back on physical education and recess under the mistaken belief that kids need more desk time to improve test scores.").

115. See, e.g., Alan Blinder, *Atlanta Educators Convicted in School Cheating Scandal*, N.Y. TIMES (Apr. 1, 2015), <https://nyti.ms/2jOlmPD> [<https://perma.cc/7ECM-AQYC>]; Valerie Strauss, *Why Not Subpoena Everyone in D.C. Cheating Scandal—Rhee Included?*, WASH. POST (Apr. 12, 2013), https://www.washingtonpost.com/news/answer-sheet/wp/2013/04/12/why-not-subpoena-everyone-in-d-c-cheating-scandal-rhee-included/?utm_term=.b2ff6f03b031 [<https://perma.cc/B25Q-AK23>] (describing investigations into widespread cheating on standardized tests by teachers in Washington, D.C. schools).

116. See Michelle Croft, *Opt-Outs: What Is Lost When Students Do Not Test*, ACT RES. & POL'Y 1, 1 (2015) (citing substantial decreases in test participation in several states). This created problems for the schools because the NCLB required that 95 percent of students take the tests. No Child Left Behind Act (NCLB) of 2001, Pub. L. 107-100, § 1111(b)(2)(I)(ii), 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 6311); see also U.S. Dep't of Educ., Officer of Elementary and Secondary Educ., Opinion Letter on Requirements Under Elementary and Secondary Educ. Act of 1965, as Amended by the No Child Left Behind Act of 2001 (Dec. 22, 2015) (letter to states addressing the 95 percent assessment requirement in response to the failure of several states to comply during academic year 2014–2015).

117. Darling-Hammond, *supra* note 113; James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1228 (2008).

118. See generally *Seventy Percent of Schools to "Fail," FAIRTEST*, <http://www.fairtest.org/seventy-percent-schools-fail> [<https://perma.cc/C2GW-7E5A>] (indicating that it is "counterintuitive" that North Carolina would have to label 60 to 70 percent of its schools in need of improvement because the state "has made some of the best academic progress in the nation").

119. See generally DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 99–111 (2010) (discussing the punitive nature of NCLB, its impossible goals, and, thus, the inevitable failure of schools).

exit.¹²⁰ Even where flight from public schools did not occur, the NCLB incentivized families with means to avoid schools with low or even average test scores. Data suggest that this has intensified racial and socioeconomic stratification among schools.¹²¹

Finally, while the NCLB appropriately focused on the most important education input—“highly qualified teachers”—it did very little to increase state and local capacity to achieve that goal. As one of the most resource-dependent and substantively challenging aspects of improving education, securing high-quality teachers was also the NCLB requirement that states most quickly and clearly failed.¹²² As such, it was the one aspect of the law that Congress altered (and watered down) well in advance of the NCLB’s final timelines.¹²³

3. *Supplanting NCLB’s Requirements Through Waivers*

These failures, coupled with Congress’s lack of a legislative fix, set the stage for Secretary of Education Arne Duncan to exert an unprecedented level of influence on education policy between 2008 and 2011. The NCLB was set to expire by its own terms in 2007.¹²⁴ But the political demands and fallout of the

120. See generally Black, *supra* note 13; see also Preston C. Green III et al., *Are We Heading Toward a Charter School “Bubble”?: Lessons from the Subprime Mortgage Crisis*, 50 U. RICH. L. REV. 783, 783–86 (2016) (examining the rapid expansion of the charter school sector and the possibility that a “bubble” that risks market collapse may have developed).

121. Seungbok Choi, *A Study on Charter School Effects on Student Achievement and on Segregation in Florida Public Schools* 22 (Mar. 20, 2012) (unpublished Ph.D. dissertation, Florida State University) (on file with the Florida State University Libraries) (discussing various studies that found increased racial and socioeconomic stratification due to migration to charter schools); see generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-345, K-12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION 10 (2016) (“Over time, there has been a large increase in schools that are the most isolated by poverty and race.”).

122. See EDUC. COMM’N OF THE STATES, *supra* note 107, at 63 (“In March 2004, 23 states appeared to be on track to meet the Highly Qualified Teachers Definition requirement, compared with 10 in March 2003.”); see also CAL. STATE BD. OF EDUC., CALIFORNIA’S REVISED STATE PLAN FOR NO CHILD LEFT BEHIND: HIGHLY QUALIFIED TEACHER 6–7 (revealing substantial percentages of core academic classes in the state were not taught by highly qualified teachers) (2006). The numbers would have been even worse if not for the U.S. Department of Education’s permissive interpretation of “highly qualified.” See 34 C.F.R. § 200.56 (2003), *invalidated by* *Renee v. Duncan*, 623 F.3d 787 (9th Cir. 2010).

123. California initially attempted to hide its failure to meet the teacher quality requirements; plaintiffs sued and succeeded in their initial challenge. See *Renee v. Duncan*, 623 F.3d 787, 794–95, 800 (9th Cir. 2010). Congress, however, later watered down the requirements in a way that allowed California to meet them. That decision, however, was rendered moot when Congress passed a fix that codified the Department’s watered-down definition of what it means to comply with the highly qualified teacher requirement. See Pub. L. No. 111-322, § 163(a), 124 Stat. 3521 (2010); see also *Renee v. Duncan*, 686 F.3d 1002, 1008 (9th Cir. 2012) (discussing the congressional amendment to the statute “expanding the statutory definition of ‘highly qualified teacher’” subsequent to the court’s decision in 2010).

124. See Valerie Strauss, *Major Groups Beg Congress to Rewrite NCLB*, WASH. POST (May 6, 2012), https://www.washingtonpost.com/blogs/answer-sheet/post/major-groups-beg-congress-to-do-its-job-and-rewrite-nclb/2012/05/06/gIQA4k4x5T_blog.html?utm_term=.40809cc3573c [<https://perma.cc/27TV-TC8J>].

Great Recession preempted any serious attempt at reauthorization. As a result, Congress left the NCLB in place and funded it through continuing resolutions.

As an interim measure, Congress included temporary additional education funds in an economic stimulus bill.¹²⁵ The Department of Education used those funds to create the Race to the Top (RTT) competitive grant program.¹²⁶ Through RTT, the Department prompted a majority of states to move toward a common national curriculum; to begin hiring, evaluating, and firing teachers based on their students' standardized test performance; and to expand the number of charter schools.¹²⁷

To be clear, however, the NCLB requirements remained in place and two years later, the Secretary of Education announced that 80 percent of the nation's schools would fail to meet those requirements in the coming months,¹²⁸ triggering NCLB's sanctions. To avoid this problematic scenario, the Department of Education agreed to waive state and local violations of the statute on the condition that states and districts adopt the exact policies that the Department promoted in RTT.¹²⁹ First, states had to adopt "college- and career-ready expectations for all students in . . . at least reading/language arts and mathematics" and develop assessments of that curriculum that "measure student growth."¹³⁰ Second, states had to "develop and implement a system of differentiated recognition, accountability, and support for all [schools]," which meant setting achievable annual measurable goals and focusing turnaround

125. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 3, 123 Stat. 115, 181 (2009). Moreover, \$97 billion were allocated to cover states' and local districts' education budget shortfalls and to prevent massive teacher layoffs. U.S. DEP'T OF EDUC., AMERICAN RECOVERY AND REINVESTMENT ACT: SPENDING REPORT BY PROGRAM 1 (2011); U.S. DEP'T OF EDUC., AMERICAN RECOVERY AND REINVESTMENT ACT REPORT: SUMMARY OF PROGRAMS AND STATE-BY-STATE DATA 3-4 (2009), <http://www2.ed.gov/policy/gen/leg/recovery/spending/arra-program-summary.pdf> [<https://perma.cc/N3DS-9SDX>]. A small but significant slice of those education funds were reserved for competitive grants. The Secretary of Education was authorized to use the funds to foster educational innovation and improvement. American Recovery and Reinvestment Act of 2009 § 14006.

126. 74 Fed. Reg. 59,836 (Nov. 18, 2009); U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY 2 (2009), <https://www2.ed.gov/programs/racetothetop/executive-summary.pdf> [<https://perma.cc/T37T-PQ4D>].

127. See Patrick McGuinn, *Stimulating Reform: Race to the Top, Competitive Grants and the Obama Education Agenda*, 26 EDUC. POL'Y 136, 143 (2012) (thirty-four of the forty states applying for an RTT grant adopted new reforms to improve their chances of receiving a grant); see also CTR. ON EDUC. POL'Y, AN EARLY LOOK AT THE ECONOMIC STIMULUS PACKAGE AND THE PUBLIC SCHOOLS 2 (2009) (reporting that forty-one states planned to apply for RTT grants even though the requirements were strict). Secretary Duncan cautioned that states that "put artificial caps on the growth of charter schools will jeopardize their applications under the Race to the Top Fund." David Nagel, *Charter School Support Is a Prerequisite for Race to the Top Funds*, THEJOURNAL.COM (June 9, 2009), <https://thejournal.com/articles/2009/06/09/charter-school-support-is-a-prerequisite-for-race-to-the-top-funds.aspx> [<https://perma.cc/2ZRP-J2PA>].

128. Sam Dillon, *Overriding a Key Education Law*, N.Y. TIMES (Aug. 8, 2011), <http://www.nytimes.com/2011/08/08/education/08educ.html> [<https://perma.cc/2RCQ-WXJC>].

129. See Letter from Anthony Miller, U.S. Deputy Sec'y of Educ., to Chief State School Officers (Sept. 23, 2011).

130. U.S. DEP'T OF EDUC., ESEA FLEXIBILITY 1 (2012).

strategies on the lowest-performing schools and those with the highest achievement gaps.¹³¹ Third, states and local districts had to adopt “teacher and principal evaluation and support systems” that “meaningfully differentiate [teacher] performance” into at least three levels based on “student growth” data and other factors.¹³² States and districts were to use that data to “evaluate teachers and principals on a regular basis” and to “inform personnel decisions.”¹³³ Fourth, states had to “remove duplicative and burdensome reporting requirements that have little or no impact on student outcomes.”¹³⁴ Most states had little choice but to accept these conditions. By the end of 2012, those NCLB waivers and conditions displaced the NCLB’s statutory policies in forty-five states and moved education policy in an entirely distinct direction.¹³⁵

The NCLB waiver conditions substantively changed the federal education policies under which state and local education agencies operate. Whereas the NCLB had afforded states almost complete autonomy in setting curricular standards, the waiver conditions narrowed that autonomy by demanding career- and college-ready standards, which effectively meant adopting the Common Core or comparable standards.¹³⁶ Similarly, whereas the NCLB had afforded states broad discretion to differentiate highly-qualified teachers from others—through what one might term a certification process—the waiver conditions required regular statistical assessment of teachers based on their students’ standardized exam performance. The NCLB did not even remotely suggest such an approach to teacher evaluation. Together, the shifts in regard to curriculum and teachers also represented a global shift in substantive education policymaking from states to the federal government. Finally, the waivers simply eliminated the core pillars of the NCLB, most notably the goal of full proficiency for the overall student body and its subgroups, and the accountability measures designed to achieve full proficiency.¹³⁷

Initially, most states were so happy to escape the NCLB’s requirements that they expressed relatively little concern with the conditions and quickly adopted them.¹³⁸ But over time, both grassroots and national political opposition arose

131. *Id.* at 1–2.

132. *Id.* at 3.

133. *Id.*

134. *Id.*

135. *Id.*

136. The Common Core refers to a set of standards that specify what students should learn at each grade level. The goal was for all states to adopt the Common Core so that education would be more uniform across the states and presumably of a higher quality. *See generally* Catherine Gewertz, *The Common Core Explained*, EDUC. WK. (Sept. 28, 2015), <http://www.edweek.org/ew/issues/common-core-state-standards> [https://perma.cc/3JBZ-6WQ4].

137. Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607, 673–74 (2015).

138. Those states that had applied for RTT grants had already taken many of the necessary steps to meet these conditions. Others resisted the waivers. *See, e.g.*, Miker Wiser, *Feds Deny Iowa No Child Left Behind Waiver*, WATERLOO-CEDAR FALLS COURIER (June 21, 2012),

against the substance of the waiver conditions and their imposition through administrative rather than legislative action. Many, including education committee chairs in the U.S Senate and House, questioned whether Secretary Duncan had the power to impose these conditions through administrative action.¹³⁹ One state brought a lawsuit against the Department.¹⁴⁰ Another state sought an administrative hearing, and others openly defied or challenged the Secretary's position.¹⁴¹ As to the substance of the waivers, teachers across the country filed lawsuits against their states challenging the validity of the new teacher evaluation systems.¹⁴² Likewise, both educators and families began actively campaigning and litigating against the Common Core, which states had adopted to comply with the waiver conditions.¹⁴³

II.

THE EVERY STUDENT SUCCEEDS ACT

As Part I suggested, the ESSA largely was a short-term reaction to current realities, not a thoughtful legislative effort to advance the federal role in education. The NCLB had run its course and failed. As an interim measure, NCLB waivers had implemented a new regulatory regime that had never been

http://wfcourier.com/news/local/govt-and-politics/feds-deny-iowa-no-child-left-behind-waiver/article_e035d3a-bc09-11e1-9db6-0019bb2963f4.html [https://perma.cc/W93T-ES52].

139. See, e.g., Alyson Klein, *Waivers and ESEA Renewal Get Hard Look from Senators*, EDUC. WK., (Feb. 7, 2013), http://blogs.edweek.org/edweek/campaign-k-12/2013/02/senators_take_a_hard_look_at_w.html [https://perma.cc/4GYA-DEFB] (describing multiple senators' opinions about waivers); Benjamin Wood, *State School Board Divided on Extending No Child Left Behind Waiver*, DESERET NEWS (June 6, 2014), <http://www.deseretnews.com/article/865604704/State-School-Board-divided-on-extending-No-Child-Left-Behind-waiver.html> [https://perma.cc/HZ54-2TL9] (describing how state officials questioned the Department's authority one year after having received a waiver); see also EMILY BARBOUR, JODY FEDER & REBECCA SKINNER, CONG. RESEARCH SERV., 7-5700, SECRETARY OF EDUCATION'S WAIVER AUTHORITY WITH RESPECT TO TITLE I-A PROVISIONS INCLUDED IN THE ELEMENTARY AND SECONDARY EDUCATION ACT 1 (2011) (responding to 2010 request by the House Committee on Education and the Workforce for analysis from the Congressional Research Service on the Secretary's overall waiver power).

140. *Jindal v. U.S. Dep't of Educ.*, No. 14-CV-534, 2015 WL 854132 (M.D. La. Feb. 26, 2015).

141. See, e.g., Rick Scott, Governor of Florida, Request to Designate Jurisdiction to the Office of Administrative Law Judges (Oct. 17, 2014); Sean D. Reyes, Attorney General, State of Utah, Common Core Standards Legal Analysis (Oct. 7, 2014); see also Barbour et al., *supra* note 139, at 6–7 (“[I]f the Secretary did, as a condition of granting a waiver, require a grantee to take another action not currently required under the ESEA, the likelihood of a successful legal challenge might increase, particularly if ED failed to sufficiently justify its rationale for imposing such conditions.”).

142. See, e.g., *Cook v. Bennett*, 792 F.3d 1294 (11th Cir. 2015); Decision, Order and Judgment, *Lederman v. King*, No. 5443-14 (N.Y. Sup. Ct. May 10, 2016); Findings and Conclusions and Memorandum Order Granting Plaintiff's Motion for Preliminary Injunction, *New Mexico v. New Mexico Pub. Educ. Dep't*, No. D-101-DV-2015-00409 (D. Nev. Dec. 2, 2015); Stephen Sawchuk, *Teacher Evaluation Heads to the Courts*, EDUC. WK. (Oct. 6, 2015), <http://www.edweek.org/ew/section/multimedia/teacher-evaluation-heads-to-the-courts.html> [https://perma.cc/L7CB-WRL9].

143. See, e.g., Complaint for Declaratory and Injunctive Relief, *Cates v. Baesler*, No. 14AC-CC00477 (N.D. Dist. Ct. June 17, 2015).

sanctioned by the legislative process. This shortcut to ending the NCLB was creating substantial legal and political turmoil. To its credit, the ESSA solved the immediate problems that the NCLB and its waivers were creating. The more important question remains whether it solved any of the problems that necessitate a federal role in education in the first instance. The following sections outline the major requirements of the ESSA and the new federal role in education, particularly in academic standards, testing and accountability, teacher quality, and funding.

A. Academic Standards

The ESSA continues the NCLB's requirement of "challenging" state academic standards.¹⁴⁴ The ESSA, however, goes one step further and defines "challenging" standards as those designed to prepare students for college and careers.¹⁴⁵ This definition represents a compromise between the NCLB's initially hands-off approach and the subsequently rigid approach under the waivers. By leaving "challenging" undefined, the NCLB afforded states too much leeway to manipulate educational quality,¹⁴⁶ and some appeared to take advantage.¹⁴⁷ In contrast, the rigid demand for career- and college-ready standards under the NCLB waivers, in effect, compelled states to adopt the Common Core.¹⁴⁸ This rigidity eventually produced an enormous backlash.¹⁴⁹

The ESSA attempts to manage a middle ground between these extremes. It explicitly indicates that states that previously adopted the Common Core are free to withdraw from it¹⁵⁰ and that the Department is prohibited from compelling or even indirectly encouraging its adoption in the future.¹⁵¹ But the ESSA's willingness to define "challenging" suggests states' discretion in adopting

144. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1111(b), 129 Stat. 1802 (2015).

145. *Id.* § 1111(b)(1)(D) ("Each State shall demonstrate that the challenging State academic standards are aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards.").

146. See Ryan, *supra* note 1, at 934 (concluding that the Act would incentivize states to dumb down their academic standards and manipulate passing rates on standardized tests).

147. Peterson & Hess, *supra* note 109, at 71–73 (finding many states had lowered their standards).

148. See Black, *supra* note 137, at 657–59, 663–67.

149. Valerie Strauss, *Two More States Pull Out of Common Core*, WASH. POST: ANSWER SHEET (June 5, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/06/05/two-more-states-pull-out-of-common-core> [<https://perma.cc/ZJ6T-XZSU>]; Joseph P. Williams, *Who Is Fighting Against Common Core?*, U.S. NEWS (Feb. 27, 2014), <https://www.usnews.com/news/special-reports/a-guide-to-common-core/articles/2014/02/27/who-is-fighting-against-common-core> [<https://perma.cc/8KQD-45TC>]; Wong, *supra* note 6.

150. ESSA § 8544.

151. *Id.* § 1111(j) ("[T]he Secretary shall not attempt to influence, incentivize, or coerce State— (1) adoption of the Common Core State Standards developed under the Common Core State Standards Initiative or any other academic standards common to a significant number of States, or assessments tied to such standards; or (2) participation in such partnerships."). Were that provision unclear, the Act also included sections reiterating the point. *Id.* §§ 8526, 8544.

standards is not without limits: standards must be tied to the high-level goals of college and careers.

One final provision reveals that the ESSA's academic standards may tilt closer to the discretion of the NCLB than the rigidity of the waivers. Presumably wary of the heavy-handed NCLB waiver process, the ESSA provides that states need only provide the Department with a written assurance that their standards are challenging.¹⁵² States do not have to submit their academic standards to the Department for review.¹⁵³ In this respect, states' willingness to police themselves is the only real quality check on academic standards.

B. Testing and Accountability

The ESSA retains the NCLB's basic testing regime, including almost the same exact testing development, schedule, demographic disaggregation, subject matter, and alignment.¹⁵⁴ While the basic mechanics of testing development and administration remain the same, the ESSA dramatically changes states' accountability for its test results. If "[t]est scores [we]re the fuel that ma[de] the NCLBA run,"¹⁵⁵ test scores are the weight that causes the ESSA to limp. The ESSA reduces test scores to one factor among many that a state must consider in the context of pursuing the state's self-defined goals for student progress. As a result, test results remain a mandatory factor, but one a state can minimize.

Appreciating this change involves parsing out the mechanics of the ESSA. In devising a statewide accountability program, the ESSA requires that states consider student proficiency as measured by test results in all schools, graduation rates in high school, student growth in elementary and middle school, and progress in achieving English language proficiency.¹⁵⁶ States must assign each of these factors "substantial weight."¹⁵⁷ If it stopped there, the ESSA might not represent a significant break from the past. However, the ESSA goes on to permit states to consider a host of other "school quality or student success" factors, including student engagement, educator engagement, student access to and completion of advanced coursework, postsecondary readiness, school climate and safety, and "any other indicator the State chooses that meets the requirements of this clause."¹⁵⁸ To be clear, the mandatory test and academic progress factors must count for "much greater weight" than the long list of optional factors.¹⁵⁹ But given the flexibility within the testing and academic progress factors, a state

152. *Id.* § 1111(b)(1)(A) ("Each State . . . shall provide an assurance that the State has adopted challenging academic content standards and aligned academic achievement standards . . .").

153. *Id.* (noting that states "shall not be required to submit such challenging State academic standards to the Secretary").

154. *Id.* § 1111(b)(2).

155. Ryan, *supra* note 1, at 940.

156. ESSA §§ 1111(c)(4)(B)(i)-(iv).

157. *Id.* § 1111(c)(4)(C)(ii)(I).

158. *Id.* §§ 1111(c)(4)(B)(v)(II)-(VIII).

159. *Id.* § 1111(c)(4)(C)(ii)(II).

could theoretically comply with the ESSA by assigning a 20 percent weight each to graduation rates, test scores, and English language acquisition. Collectively, these three factors' weight would substantially exceed that of the other factors, but test scores alone would no longer play a singular role in accountability.

Perhaps more significant than the ESSA's de-emphasis on test results is its lack of accountability for those results, regardless of their state-assigned weight. Under the ESSA, state and local accountability for testing and other measures of school quality is flexible and permissive. States now have the ability to largely self-define the mechanics of their accountability system both in terms of the goals states set and the consequences schools face for failing to meet them.

This shift manifests in three key ways. First, whereas the NCLB required full proficiency for all students and all schools,¹⁶⁰ the ESSA only requires that states assess student proficiency. States remain free to set their own short- and long-term goals regarding the percentage of students who must reach proficiency.¹⁶¹ Moreover, those proficiency goals will be measured in conjunction with—not independent of—other factors for which the state may also set its own goals.¹⁶²

Second, whereas the NCLB specified interventions that states and districts must take when they fail to meet accountability goals, the ESSA leaves those decisions to state and local authorities. Rather than specify interventions, the ESSA requires that states and schools develop their own improvement plans.¹⁶³ Based on what the ESSA does not say, those improvement plans might be as broad or narrow as a state deems appropriate, so long as they involve “comprehensive support and improvement.”¹⁶⁴ The ESSA does indicate that states must intervene in schools that fail to meet the locally developed improvement plan for four years.¹⁶⁵ But again, the nature of the intervention is left to the states' discretion.¹⁶⁶

Third, setting the forgoing limitations aside, the ESSA includes an explicit loophole nonexistent in the NCLB and its predecessors. No matter how rigorous or permissive the states' goals and intervention strategies, the ESSA requires state intervention only in a small subset of schools: any school performing in the

160. No Child Left Behind Act (NCLB) of 2001, Pub. L. 107-100, § 1111(b)(2)(H), 115 Stat. 1425 (2002).

161. ESSA § 1111(b)(4)(A).

162. *Id.* § 1111(c)(4).

163. Compare NCLB § 1116(b) (listing specific interventions), with ESSA § 1111(d) (leaving states to select interventions that are evidence-based).

164. ESSA § 1111(d)(1).

165. The state must review and approve “exit criteria” for these schools and intervene if schools fail to meet the criteria within four years. *Id.* § 1111(d)(3)(A)(i)(I).

166. The ESSA also specifies schools for targeted support and additional targeted support, but these designations do not amount to escalating sanctions. *Id.* §§ 1111(d)(2)–(3). The final step in the accountability regime merely indicates that a state “shall” take “more rigorous State-determined action.” *Id.* § 1111(d)(3)(A)(i)(I).

bottom 5 percent and high schools with graduation rates below 66 percent.¹⁶⁷ In effect, while the NCLB's interventions applied to everyone,¹⁶⁸ the ESSA's apply to almost no one.

This shift does come with one obvious silver lining. For the schools in the bottom 5 percent of performance or with low graduation rates, the ESSA requires "evidence-based" improvement plans and interventions, assessment of school-level needs, and identification of any resource inequities that may be contributing to poor performance.¹⁶⁹ A major critique of the NCLB was that its preordained policy agendas were not grounded in evidence or equity.¹⁷⁰ In contrast, ESSA interventions theoretically are well informed, evolve over time, and respond to localized needs and problems.¹⁷¹ This silver lining, unfortunately, is relatively minor given the overall trend of vast flexibility and discretion in the ESSA's accountability system.

In sum, on its face, the ESSA maintains continuity with the NCLB's testing regime and seeks to correct some of the NCLB's most glaring flaws. Yet, through its mechanics, the ESSA repeats the NCLB's flaws, just through different means. The NCLB permitted states to manipulate academic standards and test scores, but mandated absolute sanctions—a tradeoff that ultimately proved insufficient to save the Act. In response, the ESSA slightly tightens academic standards but vastly reduces federal oversight of those standards and federal expectations for the accountability system. The net result is an opening for states to manipulate the system—from the standards they adopt to the schools they target.

C. Teacher Quality

Although the ESSA provisions on teachers are extensive, they are framed as a long list of activities on which schools might spend their federal teacher funds. Neither the NCLB's requirement of "highly qualified"¹⁷² teachers nor the

167. *Id.* §§ 1111(c)(4)(D)(i)(I)–(II).

168. NCLB § 1116(b); *see also* Ryan, *supra* note 1, at 942 ("The [NCLB] requires all schools within a state, regardless of whether they receive Title I funding, to make adequate yearly progress."); Dillon, *supra* note 128 (noting Secretary of Education predicted that 80 percent of schools would fail to meet the NCLB's proficiency requirements in 2011).

169. ESSA §§ 1111(d)(1)(B)(i)–(vi).

170. *See* Beverly Cross, *Teacher Quality*, in APPLIED RES. CTR., REPORTING ON RACE, EDUCATION & NO CHILD LEFT BEHIND 41, 46–48 (2003) (citing the assumptions underlying NCLB and why these assumptions hinder school reform instead of helping it); Benjamin Superfine, *New Direction in School Funding and Governance: Moving from Politics to Evidence*, 98 KY. L.J. 653, 693 (2010) (noting that most education reform has been politically motivated rather than evidence based); *Failing Our Children Calls for NCLB Alternative*, FAIRTEST, <http://www.fairtest.org/failing-our-children-calls-nclb-alternative> [<https://perma.cc/FSA8-G4ZQ>] (finding "educational quality and equity have been damaged because of the law's incorrect assumptions and arbitrary requirements").

171. *See generally* Superfine, *supra* note 170, at 693 (finding that most education reform has been politically influenced rather than evidence based and calling for "a nuanced and deliberative examination of evidence" and governmental decisions "reasonable in light of the strengths and weaknesses of the evidence that is actually available").

172. NCLB § 1119(a)(1).

NCLB waivers’ “effective”¹⁷³ teachers language can be found in the ESSA. To the contrary, the ESSA now prohibits the Department from “mandat[ing], direct[ing], or control[ing]” any state’s teacher “evaluation system,” “definition” of teacher “effectiveness,” and “professional standards, certification, or licensing.”¹⁷⁴

The ESSA’s only substantive teacher requirement is that states ensure teachers are certified.¹⁷⁵ However, that certification is the equivalent of the bare minimum to enter a classroom, not an aspirational quality standard. In this respect, the ESSA does no more than require states to follow the same types of certification processes they have followed for decades—processes that have yet to effectively ensure equal access to quality teaching.¹⁷⁶ The ESSA arguably takes a step backward on this score. By sanctioning “alternative certification” and fast-track “educator preparation programs,”¹⁷⁷ the Act, in effect, authorizes and encourages states to dip below traditional certification and qualification processes. In short, under the ESSA, a certified teacher is anyone the state certifies to teach.

D. Federal Power

From the ESSA’s testing, accountability, and teaching requirements to its specific limitations on the Department of Education, the ESSA represents a significant reduction in federal power over education. This reduction is most evident in regard to the Secretary of Education’s powers. The NCLB made few references to secretarial power; the Secretary’s power was implied in most instances and explicit in a few others.¹⁷⁸ The ESSA reacts to that broad power and its exercise through the waiver process by specifically listing the circumstances—big and small—in which the Secretary has absolutely no

173. See U.S. DEP’T OF EDUC., ESEA FLEXIBILITY 5 (2012), <http://www.ed.gov/policy/elsec/guid/esea-flexibility/index.html> [<https://perma.cc/36Z4-UBWU>].

174. ESSA §§ 2101(e)(1)–(3). At most, the Act says that states are free to submit, when “available, the annual retention rates of effective and ineffective teachers, principals, or other school leaders, using any methods or criteria the State has or develops under section 1111(g)(2)(A).” *Id.* § 2104(a)(4).

175. See *id.* § 1111(h)(1)(C)(ix)(III) (requiring reports on percentage of certified teachers in high-poverty versus low-poverty schools).

176. *Id.* § 2101(c)(4)(B)(i) (allowing states to create a system for certifying teachers, but placing no qualitative requirements on teachers); see also *id.* § 9214 (providing that the term “highly qualified” now “mean[s] that the teacher meets applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification”).

177. *Id.* § 2101(c)(4)(B)(xii)(II); see also Valerie Strauss, *The Disturbing Provisions About Teacher Preparation in No Child Left Behind Rewrite*, WASH. POST: ANSWER SHEET (Dec. 5, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/12/05/the-disturbing-provisions-about-teacher-preparation-in-no-child-left-behind-rewrite> [<https://perma.cc/T2Y8-NYLX>].

178. See, e.g., 20 U.S.C. § 7861(a) (2006) (granting the Secretary the authority to waive statutory requirements).

power.¹⁷⁹ The result is a statutory framework that suggests the Secretary has no power unless the Act expressly provides otherwise.

The most obvious limitations on secretarial power are regarding the plans states must submit to the Department describing their standards, testing, and accountability schemes. First, the Secretary is prohibited from reviewing or requesting changes to a state's academic standards.¹⁸⁰ As noted above, the Secretary's only recourse is to require states to supply written assurances that their standards are challenging.¹⁸¹ Second, the ESSA expressly and narrowly limits the bases upon which the Secretary can reject a state's plan.¹⁸² Third, even if the Secretary identifies one of the limited bases upon which he or she can reject a state plan, the Secretary must afford the state extensive processes before the rejection becomes effective, and the presumption is that the rejection will be reversed. The Secretary must: affirmatively justify the judgment that the state's plan does not comply with the ESSA; allow the state a chance to respond to the Secretary's assessment; if the state does not concede, offer the state a hearing to contest the Secretary's judgment; and even if the Secretary prevails, the Secretary must still assist the state in resubmitting a new plan compliant with the ESSA.¹⁸³ Fourth, a state plan is automatically accepted unless the Secretary specifically rejects it within a short time frame.¹⁸⁴

Finally, the ESSA emphasizes that even when the Secretary has power to act, the Secretary cannot place conditions on states, consider criteria outside the

179. As Senator Lamar Alexander, the key architect of the Act, remarked, "I didn't trust the department to follow the law. . . . Since the consensus for this bill was pretty simple—we'll keep the tests, but we'll give states flexibility on the accountability system—I wanted several very specific provisions in there that [limited secretarial authority]. That shouldn't be necessary, and it's an extraordinary thing to do. But for example, on Common Core, probably a half a dozen times, [ESSA says] . . . you cannot make a state adopt the Common Core standards. And I'm sure that if we hadn't put that in there, they'd try to do it." Klein, *supra* note 8.

180. ESSA § 1111(b)(1)(A) ("A State shall not be required to submit such challenging State academic standards to the Secretary."); *id.* § 1111(b)(1)(G)(ii) ("The Secretary shall not have the authority to mandate, direct, control, coerce, or exercise any direction or supervision over any of the challenging State academic standards adopted or implemented by a State.").

181. *Id.* § 1111(b)(1)(A).

182. *Id.* § 1111(a)(4)(A)(vi)(I) (indicating the Secretary can only disapprove a plan if the Secretary "(aa) determines how the State plan fails to meet the requirements of this section; (bb) immediately provides to the State, in writing, notice of such determination, and the supporting information and rationale to substantiate such determination; (cc) offers the State an opportunity to revise and resubmit its State plan, and provides the State—(AA) technical assistance to assist the State in meeting the requirements of this section; (BB) in writing, all peer-review comments, suggestions, recommendations, or concerns relating to its State plan; and (CC) a hearing, unless the State declines the opportunity for such hearing").

183. *Id.*

184. *Id.* § 1111(a)(4)(A)(v) (providing that the Secretary shall "approve a State plan not later than 120 days after its submission . . ."); *id.* § 8451 ("A plan submitted by a State pursuant to section 2101(d), 4103(c), 4203, or 8302 shall be approved by the Secretary unless the Secretary makes a written determination (which shall include the supporting information and rationale supporting such determination), prior to the expiration of the 120-day period beginning on the date on which the Secretary received the plan, that the plan is not in compliance with section 2101(d), 4103(c), or 4203, or part C, respectively.").

scope of the ESSA, or indirectly attempt to achieve any of these prohibited ends through policy guidance.¹⁸⁵ The practical import here is that after limiting the Secretary's front-end power to control state's compliance plans, the ESSA just as carefully ensures that the Secretary does not use the typical back-end powers of a federal agency—statutory interpretation, waiver, and enforcement—to recapture the power initially withheld. Arguably adding injury to insult, the ESSA then directs the Secretary to take steps to reduce the size of the Department once it completes the initial tasks required to implement the ESSA.¹⁸⁶

E. Funding

Since 1965, the Elementary and Secondary Education Act has operated under the assumption that states will not accept federal dictates without additional funding. Even with additional funding, some states have questioned whether the financial benefit of the Elementary and Secondary Education Act was worth the burden.¹⁸⁷ The fact that the overall federal financial stake in education remains flat in the ESSA belies the fact that the ESSA reduces the substantive expectations for states.¹⁸⁸ Without additional funding, the federal government may have found it hard to demand much from states.

Instead of additional funding, the ESSA gives states more discretion in spending existing funds. For instance, the ESSA consolidates dozens of smaller programs into a single block grant,¹⁸⁹ which entails fewer restrictions than other programmatic and formula funds.¹⁹⁰ Similarly, the ESSA makes it easier for schools to use their Title I funds for “school wide programs,” eliminating many of the restrictions that ensure federal funds are spent only on low-income students.¹⁹¹

The one notable exception to these funding trends is preschool education. Beginning in 2013, the administration began using residual Race to the Top

185. 20 U.S.C. § 7861 (2012) (prohibiting the Secretary from placing conditions beyond the scope of the ESSA on waivers); ESSA § 1111(e)(1)(C) (prohibiting the Secretary from using “new non-regulatory guidance” to limit state options).

186. ESSA § 8205.

187. See, e.g., *Utah Set to Reject No Child Left Behind*, WASH. TIMES (Feb. 22, 2005), <http://www.washingtontimes.com/news/2005/feb/22/20050222-111910-7518r> [<https://perma.cc/EMR5-FMSG>].

188. See, e.g., *Senate Appropriations Committee Approves Education Funding Bill*, AFSA BLOG (June 10, 2016), <http://www.afsaadmin.org/senate-appropriations-committee-approves-education-funding-bill> [<https://perma.cc/996D-UQVW>] (“Title I of ESSA only received a \$500 million increase bringing the program total to \$15.4 billion, which advocates say is not really an increase given that \$450 million for School Improvement Grants were eliminated under ESSA and lumped into the Title I program.”).

189. Orfield, *supra* note 7, at 285.

190. See generally Jason Miller, *Telling Schools What to Do, Not How to Do It: Reimagining the Federal Government's Role in Public Education*, 46 MCGEORGE L. REV. 605, 610 (2014) (explaining the prior use of block grants in education).

191. ESSA § 1008.

funds to assist states in expanding preschool education.¹⁹² That same year, Secretary Duncan began pressing Congress to support universal preschool as a national agenda.¹⁹³ Although that proposal never gained traction, the ESSA took a symbolic step in that direction by reserving a modest, yet secure \$250 million funding stream for preschool education grants.¹⁹⁴

Congress, however, forewent the opportunity to finally fix the Elementary and Secondary Education Act's funding formulas and ensure that the neediest schools and students receive the most money. For at least the past two decades, the Elementary and Secondary Education Act's funding formulas have failed to distribute federal funds fairly.¹⁹⁵ They are so flawed that they are, in effect, irrational.¹⁹⁶ Congress seemingly acknowledged the problem when it included a small pilot study in the ESSA to analyze Title I's funding formulas¹⁹⁷ but nonetheless retained the deeply flawed formulas of the past.¹⁹⁸ While the pilot study calls for reform proposals, it includes no mechanism for incorporating the study's findings or suggestions into law; it merely requires public dissemination of the findings.¹⁹⁹ The flaws and potential solutions are already widely known.²⁰⁰ The missing key is the political will to act. The ESSA offers no indication of such will, nor initiatives likely to spur it during a future reauthorization.

Similarly, notwithstanding longstanding critiques of gross regulatory loopholes, the Elementary and Secondary Education Act's requirement of comparability of resources between Title I and non-Title I schools remains the same in the ESSA²⁰¹: in effect, funding need not be comparable at all. Rather than address comparability, the ESSA slightly altered the maintenance of effort standard and the prohibition on supplanting local funds, both of which may actually undermine equality.²⁰² The only notable exception from the ESSA's overall ambivalence or negativity toward resource equality is its provision requiring that states examine resource inequities in the poorest performing

192. U.S. DEP'T OF EDUC., RACE TO THE TOP—EARLY LEARNING CHALLENGE, FY 2013 COMPETITION, GUIDANCE AND FREQUENTLY ASKED QUESTIONS FOR APPLICANTS 3 (2013).

193. Arne Duncan, *High-Quality Preschool Is a Sure Path to the Middle Class*, WASH. POST (Apr. 18, 2013), https://www.washingtonpost.com/opinions/arne-duncan-high-quality-preschool-is-a-sure-path-to-the-middle-class/2013/04/18/9fa194ee-a629-11e2-a8e2-5b98cb59187f_story.html [<https://perma.cc/8TQ9-TSNZ>].

194. ESSA § 9212(k).

195. Black, *supra* note 2, at 317–18.

196. *Id.*

197. ESSA § 9211.

198. Senator Burr introduced a last-minute amendment to the ESSA in the attempt to bring some immediate reform, but it did not make the final bill. This pilot study is presumably a consolation prize or concession.

199. ESSA § 9211(b)(3).

200. *See, e.g.*, Superfine, *supra* note 170, at 693–97.

201. 20 U.S.C. § 6321(c)(1)(B) (2017).

202. Turner, *supra* note 19.

schools in the state.²⁰³ But again, this provision applies only to a small subset of schools and in narrow circumstances.²⁰⁴

III.

RANDOMIZING EQUALITY THROUGH STATE POWER

The ESSA's regulatory structure includes four fatal flaws that minimize the federal role in education and leave hollow the historic guarantee of equal and adequate educational opportunities for low-income students. First, contrary to the lessons of the past and current regressions in educational opportunity, the ESSA returns power to the states and minimizes the federal authority to demand progress. Second, the ESSA fails to set student performance benchmarks and local accountability measures, allowing states to develop fifty different schemes. The extent to which these schemes further equal educational opportunities depends on the goodwill of states and chance. Third, the ESSA fails to limit current patterns of gross inequality in access to resources. Fourth, the ESSA takes no steps—through either direct funding or regulation—to ensure that the outstanding needs of low-income students are met. In these respects, the ESSA is a self-contradictory attempt to improve low-income students' achievement with no indication of the level of that achievement or provision of the resources for its attainment. The following Sections explore each of these points in turn.

A. *Limiting the Federal Role in Education*

1. *Massive Power Shift to States*

The ESSA's new structure amounts to an enormous devolution of power to states and a complete rebalancing of the federal role in education. The NCLB enacted a significant increase of the federal role in education, but one that scholars characterized as a model of cooperative federalism.²⁰⁵ If one were to assign any success to the NCLB, it might be to the ascension of the federal government to a leadership position the states were comfortable enough to accept.²⁰⁶ But whatever federal leadership and leverage the NCLB provided, the

203. ESSA § 1111(d)(1)(B)(iv) (directing local education agencies with schools that have been designated for improvement to “identif[y] resource inequities, which may include a review of local educational agency and school-level budgeting, to be addressed through implementation of such comprehensive support and improvement plan”).

204. ESSA § 1111(d)(1)(A) (cross-referencing earlier section that specified the 5 percent lowest-performing schools and high schools with low graduation rates).

205. See, e.g., Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J.L. & EDUC. 1, 2 (2010) (noting that NCLB followed the classic paradigm of cooperative federalism); Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 292–93 (2013) (analyzing the cooperative federalism approach to education in recent decades).

206. See, e.g., James E. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1729 (2003) (highlighting the advantage of federal oversight in allowing for greater uniform monitoring).

ESSA largely eliminates it. For disadvantaged students and schools, the federal government's ability to press states for equal and adequate educational opportunities is largely gone.

In rejecting federal leadership, the ESSA creates a new federal-state relationship with states as the dominant partner. The federal government is left to ask for minimal assurances in exchange for substantial sums of money. The ESSA's architect, Senator Lamar Alexander, states it best: short of "abolish[ing] the Department of Education," the ESSA could not have done much more to return power to the states.²⁰⁷ By his estimation, the ESSA is "the most significant devolution of power to the states in a quarter century, certainly on education."²⁰⁸

In nearly every important aspect of the Act, federal power and discretion are significantly diminished and state power and discretion are extended. From setting academic and testing standards to assigning them weight, state decision-making is largely beyond the purview of the Department.²⁰⁹ The only clear requirement is that states intervene in the worst-performing schools,²¹⁰ but even then the nature and extent of that intervention is left to state discretion.²¹¹ At each step, the ESSA emphasizes that only under the rarest of circumstances will the Secretary have the authority to offer input on or reject a state's policy on standards, testing, or accountability.²¹² The ESSA prohibits anything more than this as federal intrusion.²¹³

If the federal government has any legitimate interest in education, it is in the money that the federal government spends on education. Yet, even the ESSA's funding policies exemplify state ascendancy. For roughly the same federal investment as the NCLB, the ESSA asks even less of states and offers even more state discretion. The ESSA does not even maintain the status quo in funding; it moves the Elementary and Secondary Education Act backward, transforming more of the existing funds into block grants.²¹⁴ As a result, states have more freedom to use federal funds to pursue their own agendas.

This might be defensible if the federal tradeoff was a demand for more equity in the areas states chose to spend the money. But the ESSA does not include safeguards to ensure the basic principle of equal resources for low-

207. Klein, *supra* note 8.

208. *Id.*

209. ESSA § 1111(b)(1)(G); Andy Smarick, *Accountability and the Every Student Succeeds Act*, THOMAS B. FORDHAM INST. (Dec. 1, 2015), <https://edexcellence.net/articles/accountability-and-the-every-student-succeeds-act> [<https://perma.cc/66WA-JDJ9>] (characterizing the wide discretion left to the states).

210. ESSA § 1111(c)(4)(D).

211. *Id.* §§ 1111(d)(2)–(3).

212. *Id.* § 1111(a)(4)(A)(vi).

213. *Id.*

214. Paula Love, *Every Student Succeeds Unleashes School Funding Flexibility: States and Districts Can Direct Block Grants to Where They Are Most Needed*, DIST. ADMIN. (July 23, 2016), <http://www.districtadministration.com/article/every-student-succeeds-unleashes-school-funding-flexibility> [<https://perma.cc/B7ZZ-A3AA>] (ESSA allows for "the consolidation of 49 programs under Title IV into a new block grant, the Student Support and Academic Enrichment Grant program").

income students and schools.²¹⁵ In short, the ESSA gives states something for nothing. It orchestrates a massive shift in substantive education policy back to states—a dangerous move based on states’ historical record on equal and adequate education.²¹⁶

2. *Reasons to Be Suspicious of the New Balance of Power*

The balance of power between state and federal government has been a point of central concern from our country’s founding debates to recent elections and court decisions.²¹⁷ General education policy deeply implicates this debate, and this Article does not purport to resolve it.²¹⁸ Instead, this Article focuses on the narrower issue of equal educational opportunities, on which states’ track records are remarkably clear. States have consistently failed to offer equal educational opportunities. State successes are almost entirely attributable to federal intervention, and states have resisted that intervention at nearly every turn. Thus, as a matter of history, state educational power poses a threat to equality and, by extension, to adequacy.²¹⁹

a. *States’ Historical Resistance to Racial Equality and Integration*

The most notable examples come from states’ and local districts’ long histories of resisting racial equality in education. The pre-*Brown v. Board of Education* era of de jure segregation speaks for itself. But for an entire decade following *Brown*, state and local school officials did next to nothing to end racial segregation and the unequal distribution of resources.²²⁰ Only the combination of the Civil Rights Act of 1964, the Elementary and Secondary Education Act of 1965, and later Supreme Court decisions prompted states to begin desegregation and to limit other forms of discrimination.²²¹

215. Secretary King’s attempt to do so through regulatory measures generated furious complaints that he was acting beyond the statute. See, e.g., Nora Gordon, *Why the Education Department’s New Equity Rule Might Not Be So Equal*, ATLANTIC (June 1, 2016), <https://www.theatlantic.com/education/archive/2016/06/why-the-education-departments-new-equity-rule-might-not-be-so-equal/485012> [<https://perma.cc/DH2R-D4WR>]; Paul Hill, *What’s at Stake in the Ongoing Fight About School Comparability?*, CRPE (June 6, 2016), <http://www.crpe.org/thelens/whats-stake-ongoing-fight-about-school-spending-comparability> [<https://perma.cc/UYQ3-YEL8>]; Turner, *supra* note 19.

216. See, e.g., Hodge et al., *supra* note 40, at 59–60 (discussing states’ poor record on integration and positing that no integration would have occurred without federal intervention).

217. See, e.g., U.S. CONST. amend. X; THE FEDERALIST NO. 45 (James Madison); Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); United States v. Lopez, 514 U.S. 549 (1995).

218. For a detailed discussion of federalism issues in education, see Robinson, *supra* note 205.

219. See, e.g., Leachman et al., *supra* note 12 (detailing states’ massive funding cuts in education); Black, *supra* note 13, at 431–39 (detailing new state-level policies that undermine the commitment to traditional public education); Hodge et al., *supra* note 40, at 59–60 (discussing states’ poor record on integration and positing that integration would not have occurred without federal intervention).

220. ORFIELD & LEE, *supra* note 67, at 19.

221. See, e.g., Swann v. Mecklenberg Bd. of Educ., 402 U.S. 1 (1971); Green v. New Kent Cty., 391 U.S. 430 (1968); Keyes v. Sch. Dist. No. 1, 895 F.2d 659 (10th Cir. 1990).

Those state efforts were rarely overwhelming and, in many instances, nonexistent. Breaking state and local resistance took years—even decades—in many locations.²²² Moreover, state and local predisposition for segregation and inequality remained strong. When judicial and federal enforcement waned in the late 1980s and 1990s, schools quickly reverted to old patterns, particularly in regard to segregation, which has risen ever since.²²³

b. States' Failure to Meet the Needs of Disadvantaged Students

Some contend that once de jure school segregation ended, the primary focus should have been equal opportunity and achievement, not racial integration.²²⁴ But on this score, states have likewise demonstrated little commitment. Prior to the NCLB, the vast majority of states entirely ignored achievement gaps between disadvantaged students and their peers.²²⁵ Because states' expectations for disadvantaged students were relatively low, states saw little efficacy in exerting effort to boost disadvantaged students' academic outcomes.²²⁶ According to President George W. Bush, the NCLB sought to counter this attitude.²²⁷ Yet, notwithstanding the NCLB's demand of full proficiency for all students, many states still demonstrated little capacity or commitment to take the steps necessary to significantly improve disadvantaged students' achievement. The more common response was to manipulate test scores and academic standards so as to

222. See, e.g., NAACP v. Duval Cty. Sch. Bd., 273 F.3d 960 (11th Cir. 2001) (ending a case initially brought in 1960); Nikole H. Jones, *Hundreds of School Districts Have Been Ignoring Desegregation Orders for Decades*, PAC. STANDARD (May 2, 2014), <https://psmag.com/education/hundreds-school-districts-ignoring-desegregation-orders-decades-80589> [<https://perma.cc/5ZTJ-9PAS>]; Sharon Lerner, *A School District That Was Never Desegregated*, ATLANTIC (Feb. 5, 2015), <https://www.theatlantic.com/education/archive/2015/02/a-school-district-that-was-never-desegregated/385184> [<https://perma.cc/PQ2G-4HB7>].

223. ORFIELD & LEE, *supra* note 67, at 18 (“During the period when executive agencies and the courts actively enforced desegregation (1964–1970), the percent of black students in white schools increased more than 14-fold in six years Since 1988, the share of black students in such schools fell from 44 percent to 30 percent, substantially below the level achieved by 1970.”).

224. See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 751–52, 761–65 (2007) (Thomas, J., concurring) (arguing that schools lack compelling interest in remedying de facto segregation and focusing on predominantly minority schools where minority students achieve at high levels).

225. Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of No Child Left Behind Act's Race-Conscious Accountability*, 47 HOW. L.J. 243, 245 (2004) (explaining that, in passing the NCLB, a bipartisan Congress sought to close the disparate achievement gap by “add[ing] explicitly race-conscious accountability requirements to Title I in order to redress severe racial disparities in educational achievement. The Act's Statement of Purpose includes the following, “[c]losing the achievement gap between high and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged and their more advantaged peers”); Margaret Spellings, *Don't Ignore Gains Under No Child Left Behind*, TEX. TRIBUNE (Feb. 26, 2015), <https://www.tribtalk.org/2015/02/26/dont-ignore-gains-under-no-child-left-behind> [<https://perma.cc/WT8M-VKU6>] (“Before No Child Left Behind was enacted, too many schools had minimal expectations for students of color and students from disadvantaged families.”).

226. Spellings, *supra* note 225.

227. *Id.*

manufacture gains on paper without actually improving educational opportunity.²²⁸

c. *States' Unequal and Inadequate Distribution of Resources*

Past and current state and local funding of schools exemplifies a disregard for disadvantaged students. Save a few rare exceptions, states have failed to voluntarily commit appropriate resources to the education of disadvantaged students. The plaintiffs in *San Antonio v. Rodriguez* highlighted gross unequal funding practices across Texas, but the Supreme Court refused to intervene, reasoning that the problem was beyond the authority of federal courts.²²⁹ With its holding, the Court left the issue to state politics and courts. Fortunately, over half of state courts have been receptive to claims implicating school funding,²³⁰ but the typical response of state government has ranged from outright recalcitrance to malfeasance and begrudging compliance.²³¹ In this environment, equal and adequate educational resources can take decades to secure²³² and regression toward inequality and inadequacy remains a constant reality.²³³

This past decade, in particular, offers numerous painful reminders. Between 2008 and 2012, nearly every state in the country imposed large budget cuts on

228. See, e.g., Carly Berwick, *No Child Left Behind's One Big Achievement?*, ATLANTIC (July 23, 2015), <http://www.theatlantic.com/education/archive/2015/07/no-child-left-behind-one-big-achievement/399455> [<https://perma.cc/YM7Z-KBQP>] (“Pre-No Child Left Behind, some advocates argue, special-needs students were often asked to stay home or sit the test out, because it didn’t matter what percentage of them participated in the assessment.”); DE MELLO, *supra* note 109, at 2; Peterson & Hess, *supra* note 109, at 71–73.

229. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4 (1973).

230. Derek W. Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1396–97 (2010) (“Beginning in the late 1980s, however, an explosion of successful litigation regarding state education clauses and rights occurred In total, over half of the state supreme courts have now ruled in favor of plaintiffs in these cases.”).

231. See, e.g., *Gannon v. State*, 319 P.3d 1196, 1251 (Kan. 2014) (issuing fifth decision in five years and directing state to cure funding failures); *Order, McCleary v. State*, No. 84362-7 (Wash. Aug. 13, 2015) (fining state for refusal to comply with school funding order).

232. New Jersey, for instance, has been going through school finance reform for roughly four decades and its supreme court has issued nearly thirty opinions. See generally Paul Tractenberg, *A Tale of Two Deeply Divided NJ Public School Systems*, NJSPOTLIGHT (Dec. 31, 2013), <http://www.njspotlight.com/stories/13/12/30/a-tale-of-two-deeply-divided-new-jersey-public-school-systems/?p=all> [<https://perma.cc/K8VG-ANBX>] (describing the history of education litigation in NJ).

233. See generally Christopher Berry, *The Impact of School Finance Judgments on State Fiscal Policy*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATION ADEQUACY* 233 (Martin R. West & Paul E. Peterson eds., 2007). As a result of past judicial intervention, New Jersey has long had the most adequate and equitable funding system in the nation, but just this past summer, the state’s governor called for legislation that would make the state’s system one of the most inequitable and inadequate. See Valerie Strauss, *Gov. Chris Christie Smacks New Jersey Public Schools—Right Where It Hurts*, WASH. POST (July 1, 2016), <https://www.washingtonpost.com/news/answer-sheet/wp/2016/07/01/gov-chris-christie-smacks-new-jersey-public-schools-right-where-it-hurts> [<https://perma.cc/YC3V-VSVW>].

education.²³⁴ Some states cut more than \$1,000 per pupil and in multiple years.²³⁵ The most obvious results were teacher layoffs and pay cuts, increases to class size, and downgrades of teacher quality among new hires.²³⁶ The highest-need districts often suffered disproportionately as a result of these cuts.²³⁷

These budget cuts cannot simply be written off as a product of the recession. To the contrary, states regularly enacted cuts in excess of what was necessary and maintained most of them after tax revenues returned to pre-recession levels.²³⁸ States also cut traditional public school budgets at the same time that they were doubling funding for charters and sometimes tripling and quadrupling funding for vouchers.²³⁹ As of 2014, two-thirds of states were still

234. NOELLE M. ELLERSON, AM. ASS'N OF SCH. ADM'RS, A CLIFF HANGER: HOW AMERICA'S PUBLIC SCHOOLS CONTINUE TO FEEL THE IMPACT OF THE ECONOMIC DOWNTURN 8 (2010) (66 percent of districts reported cuts to state and local revenues between 2008 and 2009, and 80 percent reported cuts between 2009 and 2010).

235. See, e.g., BAKER ET AL., *supra* note 27, at 8 (finding that per-pupil funding fell from over \$10,000 to the \$7,000 range in just a few years in North Carolina and Florida).

236. EXEC. OFFICE OF THE PRESIDENT, INVESTING IN OUR FUTURE: RETURNING TEACHERS TO THE CLASSROOM 1 (2012) [hereinafter INVESTING IN OUR FUTURE] (reporting a loss of three hundred thousand teachers); MARJORIE A. SUCKOW & ROXANN L. PURDUE, CAL. COMM'N ON TEACHER CREDENTIALING, TEACHER SUPPLY IN CALIFORNIA: A REPORT TO THE LEGISLATURE ANNUAL REPORT 2013–2014, at 16 (2015) (finding a 55 percent drop in the number of persons pursuing and completing education degrees in California); Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75, 1 (2016) (describing new teacher evaluation systems and changes to hiring, firing, and tenure policies).

237. See, e.g., NICHOLAS JOHNSON, PHIL OLIFF & ERICA WILLIAMS, AN UPDATE ON STATE BUDGET CUTS 11 (2010); Memorandum from Jeffery C. Welch et al. to Donna Hinton on the Consortium for Adequate School Funding in Georgia (Jan. 29, 2009), <https://eboard.eboardsolutions.com/Meetings/Attachment.aspx?S=4172&AID=170553> [<https://perma.cc/S3QM-LPKH>]; EDUC. TR., FUNDING GAPS 2015: TOO MANY STATES STILL SPEND LESS ON EDUCATION STUDENTS WHO NEED THE MOST 5 (2015) (after accounting for student need); BAKER ET AL., *supra* note 27, at 9 (showing the wide funding gaps between high poverty districts and others).

238. See, e.g., Black, *supra* note 13, at 432–34; Patrick Gleason, *North Carolina Lawmakers Build upon Historic Tax Reform*, FORBES (June 10, 2015), <https://www.forbes.com/sites/patrickgleason/2015/06/10/nc-taxreform/#704c342b5239> [<https://perma.cc/N7VA-MNTY>]; Valerie Strauss, *North Carolina's Step-by-Step War on Public Education*, WASH. POST (Aug. 7, 2015), https://www.washingtonpost.com/news/answer-sheet/wp/2015/08/07/north-carolinas-step-by-step-war-on-public-education/?utm_term=.616cc0024651 [<https://perma.cc/DP4S-F6ML>]; see also Michael Leachman & Michael Mazerov, *State Personal Income Tax Cuts: Still a Poor Strategy for Economic Growth*, CTR. ON BUDGET & POL'Y PRIORITIES (May 14, 2015), <http://www.cbpp.org/sites/default/files/atoms/files/3-21-13sfp.pdf> [<https://perma.cc/FVP9-XW8G>] (characterizing North Carolina as one of the biggest tax-cutting states in the nation during the past five years).

239. See, e.g., FLA. DEP'T OF EDUC., FLORIDA TAX CREDIT SCHOLARSHIP PROGRAM FACT SHEET (Nov. 2015), http://www.fldoe.org/core/fileparse.php/5606/urlt/FTC_Nov_2015.pdf [<https://perma.cc/A6D2-D5PD>]; N.C. DEP'T OF PUB. INSTRUCTION, HIGHLIGHTS OF THE NORTH CAROLINA PUBLIC SCHOOL BUDGET 30 (Feb. 2015) (doubling charter school funding); Press Release, Educ. Law Ctr., Final NJ Budget: Charter and Private Schools Get More, No Increase for District Schools (July 6, 2015); Timothy J. Shrom, Solanco Sch. Dist. (PA), Presentation at the National Education Finance Conference (Louisville, KY): Pennsylvania Spending Patterns: A Comparison of Charter Schools and School District Spending by Share of Selected Functions (Apr. 2014), <http://www.solancosd.org/wp-content/uploads/2014/04/Spending-Patterns-Charter-and-School->

funding education at a lower level than they did in 2008.²⁴⁰ Some states were a full 20 percent or more below the pre-recession levels.²⁴¹ In short, states' willingness to enact deep cuts to education and maintain them over several years is troubling evidence of what, at best, is ambivalence and, at worst, hostility to equality and adequacy.

In sum, returning massive educational discretion to states through the ESSA is inconsistent with the goals of educational equality and adequacy. States have historically served as an impediment to attaining racial equality and meeting the needs of disadvantaged students. The federal government and the Elementary and Secondary Education Act have served as important counterweights. In the absence of that counterbalance, history offers no basis to believe states will improve educational opportunities for those in need. Moreover, historical trends aside, the return of power to the states occurs at the same time states are regressing in their commitment to adequate and equal educational opportunities. In this context, the fact that states have welcomed the ESSA should be cause for alarm.

B. *Randomized Equality*

Equality concepts have remained embedded in the Elementary and Secondary Education Act since its inception. The ESSA retains some of those concepts, but its current regulatory scheme drastically narrows the ways in which equality principles apply. The result is a regulatory regime that promotes, at best, random equality that really cannot be properly deemed equality at all.

The ESSA's random equality manifests itself in several respects: the states' weighting of tests, accountability standards, and consequences for failure. These facets will vary from state to state, and even from district to district within a state. The resources that students have to meet testing, graduation, and other expectations will also vary considerably, with almost no limit on gross inequalities. The ESSA, similarly, will do almost nothing to ensure that students have access to adequate resources. By not demanding broad equality or adequacy

District-Comparison.pdf [https://perma.cc/PNB2-2KGG]; Tiara Beatty, *Indiana Increases Funding for Charter Schools, Creates New Loan Program*, EDUC. WK. (July 8, 2015), http://blogs.edweek.org/edweek/charterschoice/2015/07/indiana_increases_funding_for_charter_schools_despite_past_debt.html [https://perma.cc/3K99-VRDH]; Howard Fischer, *Arizona Panel Crafting Changes to School Funding System*, ARIZ. DAILY STAR (Sept. 22, 2015), http://tucson.com/news/local/education/arizona-panel-crafting-changes-to-school-funding-system/article_dc8abda4-1605-563f-8408-d16effdadc85.html [https://perma.cc/8SUZ-GS83]; Deanna Martin, *Indiana Lawmakers Approve Nation's Largest School Voucher Program*, HUFFINGTON POST (Apr. 27, 2012), http://www.huffingtonpost.com/2012/11/20/indiana-school-voucher-pr_n_2166293.html [https://perma.cc/5ZG3-4NC2]; *Confusing Formula for Ohio Charter School Funding*, IDEASTREAM (Nov. 25, 2015), <http://www.ideastream.org/stateimpact/2015/05/15/confusing-formula-for-ohio-charter-school-funding> [https://perma.cc/3GLM-PUPC].

240. Leachman et al., *supra* note 12, at 1.

241. *Id.*

(in outputs or inputs), the ESSA leaves the students' education and states' expectations for what students do with that education to random chance.

1. *The Random Weight of Tests*

On its face, the ESSA retains the NCLB's theory of standardized testing as a means to further equality.²⁴² However, the NCLB's theory of furthering equity and closing achievement gaps proved false, if not counterproductive.²⁴³ Ironically, the ESSA maintains a high-level symbolic commitment to NCLB-style testing, but puts forth an accountability scheme that makes the testing regime unpredictable. In other words, rather than tackle the flaws in the NCLB's premises, the ESSA obscures them through randomness.

As discussed above, under the ESSA, states have enormous flexibility in the amount of weight they assign to particular tests and to student achievement factors overall. Not only does this flexibility permit an individual state to minimize the weight it assigns, but it also allows every state to do something different.²⁴⁴ One state might make student proficiency tests the dominant measure of student achievement while another state uses student growth.²⁴⁵ And regardless of the approach a state takes, states can assign significantly different weights to tests and other student achievement measures. A state might, for instance, assign test results 95 percent in their accountability metric and any number of non-test factors 5 percent or less collectively.²⁴⁶ Another state might assign test results 60 percent in its accountability metric while assigning 40 percent to softer factors, such as student engagement, teacher engagement, and school climate.²⁴⁷ With a number of options, states will have the ability to manipulate their accountability systems so as to produce desired outcomes.²⁴⁸

242. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, §§ 1111(b)(2), (c), 129 Stat. 1802 (2015) (codified at 20 U.S.C. §§ 6311(b)(2), (c)).

243. See generally NAOMI CHUDOWSKY & VIV CHUDOWSKY, *CTR. ON EDUC. POL'Y, MANY STATES HAVE TAKEN A "BACKLOADED" APPROACH TO NO CHILD LEFT BEHIND GOAL OF ALL STUDENTS SCORING "PROFICIENT"* (2008) (explaining how states set low achievement goals for themselves in the early years of implementing the Act); SHELBY DIETZ & MALINI ROY, *CTR. ON EDUC. POL'Y, HOW MANY SCHOOLS HAVE NOT MADE ADEQUATE YEARLY PROGRESS UNDER THE NO CHILD LEFT BEHIND ACT?* (2010) (detailing the widespread failure to comply with the Act's mandates).

244. ESSA §§ 1111(c)(4)(B)(v), (4)(C)(ii)(II) (affording "in the aggregate, much greater weight [to the optional indicators] than is afforded to the [required] indicator or indicators utilized by the State").

245. To be clear, these are entirely different ways of measuring student learning. Proficiency asks whether a student possesses basic knowledge and skills, whereas growth asks how much progress a student makes over the course of a year, regardless of whether the student is proficient. See LISA LACHLAN-HACHÉ & MARINA CASTRO, *AM. INSTS. FOR RES., PROFICIENCY OR GROWTH? AN EXPLORATION OF TWO APPROACHES FOR WRITING STUDENT LEARNING TARGETS* (2015), <http://www.air.org/sites/default/files/Exploration-of-Two-Approaches-Student-Learning-Targets-April-2015.pdf> [<https://perma.cc/MNF4-9YEG>].

246. ESSA § 1111(c)(4)(B)(v).

247. See *id.* (permitting optional indicators); *id.* at § 1111(c)(4)(C)(ii)(II) (stating that the required indicators receive "much greater weight" than the optional indicators).

248. As an early analysis of California's new ESSA system found,

Nearly 80% of schools serving grades three through eight are ranked as medium- to high-

None of the foregoing is meant to suggest that testing is an effective means to promote equal education opportunity or that some optimum weight should be afforded to test results. The point here is that the ESSA maintains the NCLB's notion that there is merit to testing and accountability, but undermines its own premise. If testing and accountability are plausible tools for achieving equality, leaving states' testing regimes to random variability undermines equality. Rather than tracking a single proficiency standard as in the NCLB, the ESSA affords disadvantaged students educational opportunities that more closely track the approach of their home state rather than any mandate in statute. In this respect, the ESSA does little to continue the Elementary and Secondary Education Act's historic mission to promote improvements in academic achievement for disadvantaged students.

2. *Limited Accountability*

The ESSA compounds this testing flexibility problem with its permissive approach to states' obligation to assist struggling schools and students. The vast majority of low-performing schools and students will fly well under the ESSA's regulatory radar, and those who do not may believe they have been randomly targeted. State intervention pursuant to the ESSA will be more akin to a lightning strike than a predictable consequence of a well-designed accountability scheme.²⁴⁹

performing in the new ratings, earning them positive colors on report cards sent to parents. Last year in state testing at those same schools, the majority of students failed to reach English and math standards. More than 50 of those schools whose average math scores fell below proficiency receive the dashboard's highest rating for math.

Joy Resmovits & Sandra Poindexter, *California's New Education Ratings Tool Paints a Far Rosier Picture Than in the Past*, L.A. TIMES (Mar. 16, 2017), <http://www.latimes.com/local/education/la-me-california-dashboard-ratings-20170316-story.html> [<https://perma.cc/2ZDN-MHPM>]. At the same time, Maryland was considering legislation that would severely restrict the weight the State Board of Education could place on student achievement. Maryland lawmakers suggested several restrictions, including:

limiting measures of actual school effectiveness (student achievement, student growth and graduation) to 55 percent of a school's accountability rating, in favor of factors such as teacher satisfaction; . . . and barring the state from taking significant actions to reform the worst-performing schools, even after districts have had years to set them straight.

Editorial Board, *Maryland Threatens to Reverse Its Progress in Education*, WASH. POST (Mar. 23, 2017), https://www.washingtonpost.com/opinions/maryland-threatens-to-reverse-its-progress-in-education/2017/03/23/15261718-0f66-11e7-9b0d-d27c98455440_story.html?utm_term=.3bc003ee8d28 [<https://perma.cc/CQT2-QQBG>].

249. This metaphor draws upon the Supreme Court's death penalty jurisprudence. In *Furman v. Georgia*, the Court struck down the penalty, reasoning that:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

The complex and multifactor achievement weighing systems that states adopt will make it hard to predict where any given school falls in the system from year to year. More importantly, only a very small fraction of schools—those in the bottom 5 percent in achievement or with graduations rates below 66 percent—will actually be subject to sanctions.²⁵⁰ Consistently poor performance in the bottom 25 percent of schools in the state would not make the odds of sanctions predictable or likely. Even a school that was in the bottom 5 percent one year could easily fall outside of it the next.

Some would argue that minimizing sanctions is the very point, as the NCLB foolishly punished too many schools.²⁵¹ That point has merit. The majority of our schools and students perform at levels as high as any others in the world.²⁵² The NCLB incorrectly labeled many of them as failures and targeted them for reform. The ESSA wildly overcorrects this problem, replacing a regulatory system that treated nearly all schools as failures with a system that treats almost all as *de facto* successes. In effect, the ESSA holds almost no schools accountable. Herein lies the problem.

Regardless of which schools ultimately fall into the group that receives intervention and support, the hard truth is that schools outside that group can continue their current practices, even if that means doing a poor job educating their students.²⁵³ Whether a student in a given state or school receives ESSA intervention and support depends not on whether the school is offering adequate or equal education, but on whether the student attends a school randomly identified by the state's performance weighting system. Moreover, a school randomly slated for improvement in one state's weighting system could just as easily receive no support if another state's system applied.

3. *Unchecked Resource Inequality*

The randomized guarantee of output equality might be mitigated or cured if instead the ESSA's goal was to ensure equal inputs and resources. Equal inputs are easier to achieve than equal outputs. Equal inputs, if implemented properly, may also be a better indicator of equal educational opportunity than raw outcomes.²⁵⁴ An initial premise of the Elementary and Secondary Education Act was exactly that—to provide supplemental resources to disadvantaged students

408 U.S. 238, 309–10 (1972). While it is possible that a state could create an education system with predictable results, the ESSA does not require it. Instead, it allows for a very complex and unpredictable system. See *infra* notes 250–53 and accompanying text.

250. ESSA § 1111(c)(4)(D).

251. See Dillon, *supra* note 128 (indicating that 80 percent of schools were set to be labeled as failing).

252. See LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA'S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 11–13 (2010) (revealing that whites, Asian-Americans, and multi-racial students, for instance, perform well above international levels).

253. See generally Smarick, *supra* note 209 (“If your primary interest is in getting Uncle Sam to back off of America's schools, you can start to prepare the Mission Accomplished banner.”).

254. See generally Rebell, *supra* note 83.

to bring their educational outcomes closer to that of their peers.²⁵⁵ The ESSA drifts further away from this focus on inputs. In conjunction with the prior Section, this means that the ESSA assures equality in neither inputs nor outputs.

Some of the fault lies with historical holdovers. The Elementary and Secondary Education Act has long contained a provision requiring comparable resources between Title I and non-Title I schools. In practice, however, nothing of the sort has been required in recent decades. During the early 1970s, the Elementary and Secondary Education Act and its implementing regulations required that expenditures at Title I schools be within 5 percent of the expenditures at other schools within their district.²⁵⁶ That number was later changed to 10 percent and eventually abandoned altogether.²⁵⁷

In place of numerical measures of equality, recent versions of the Elementary and Secondary Education Act have required that Title I schools merely be “substantially comparable” to other schools in the district, based on school services “as a whole.”²⁵⁸ This vague and forgiving standard has not required meaningful equity between schools for some time. In addition, the comparability requirement does not apply across district lines, even though the largest funding inequalities exist between school districts. The Elementary and Secondary Education Act has never purported to address interdistrict inequality and the ESSA does nothing to change this or any other significant equity demand. Instead, the ESSA retains the blunt statutory provision that “[n]othing in this subchapter shall be construed to mandate equalized spending per pupil for a State, local educational agency, or school.”²⁵⁹

Embedded in these weak equity standards is an even bigger and more troubling loophole for teacher salaries. Teacher salaries regularly comprise 80 to 90 percent of school budgets.²⁶⁰ In the past few iterations of the Elementary and Secondary Education Act, schools’ total expenditures for teacher salaries have been exempted from analysis. Rather than examine salary expenditures, the Elementary and Secondary Education Act has asked two questions: (1) whether there is a uniform salary schedule across the district, and (2) whether staffing ratios are roughly similar. In other words, so long as schools have similar student-teacher ratios and all first-year teachers, for instance, are equally compensated, the Elementary and Secondary Education Act treats the schools as substantially comparable.

This standard completely ignores the fact that the teaching staffs at schools often look entirely different in terms of quality. Under the Elementary and Secondary Education Act, a district could assign all first-year teachers to a high-poverty school and all teachers with advanced degrees, national certifications,

255. JEFFREY, *supra* note 22.

256. 45 C.F.R. § 116.26 (1972); 45 C.F.R. § 116a.26 (1977).

257. 45 C.F.R. § 116 (1978).

258. 20 U.S.C. § 6321(c)(1)(B) (2006).

259. *Id.* § 6576.

260. *Id.* § 6321(c)(2)(B).

and several years of experience to a school serving predominantly middle-income students. This alone would likely create not only a huge quality gap between schools but also a huge funding gap. A uniform salary schedule that dictates much higher salaries for highly credentialed teachers would net hundreds of thousands of dollars in additional expenditures at the middle-income school. Yet, under the Elementary and Secondary Education Act's weak equity standards and teacher loophole, this quality and funding gap is entirely permissible.

Data reveals that districts regularly exploit this loophole. Schools serving large percentages of low-income and minority students are wildly unequal in their ability to attract, compensate, and retain quality teachers.²⁶¹ On average, poor and minority students are exposed to inexperienced, uncredentialed, and unqualified teachers at twice the rate as other students.²⁶² The financial consequences of this unequal distribution follow automatically. The Department of Education indicates that in districts with twenty or more schools, 72 percent of school districts spend less on teacher salaries in Title I schools than in non-Title I schools in the district, with an average gap of over \$2,500 per teacher.²⁶³ A separate study found that states and local districts would need to allocate \$6.83 billion nationally to close the funding gap created by teacher salaries.²⁶⁴

That the ESSA continues these lax equity standards and loopholes is remarkable. Scholars, policy reports, the media, the U.S. Government Accountability Office, and even the Department of Education itself have emphasized how ineffectual the Elementary and Secondary Education Act has been in ensuring equal treatment in school expenditures in recent years.²⁶⁵ Secretary John King recently remarked, "The current system is not fair. . . . 'What we see, as we look around the country, is districts where they're actually spending significantly more in their non-Title I schools than they're spending in

261. Charles Clotfelter et al., *High-Poverty Schools and the Distribution of Teachers and Principals*, 85 N.C. L. REV. 1345, 1372–73 (2007); BARNETT BERRY & ERIC HIRSCH, *RECRUITING AND RETAINING TEACHERS FOR HARD-TO-STAFF SCHOOLS* (2005) (identifying recruitment and retention problems in high-poverty, low-performing schools); ERICA FRANKENBERG, *THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., THE SEGREGATION OF AMERICAN TEACHERS* 25–26 (2006) (revealing that teacher dissatisfaction tends to rise as the percentage of minority students in a school rises, increasing likelihood that teachers will leave).

262. See HEATHER G. PESKE & KATI HAYCOCK, *TEACHING INEQUALITY: HOW POOR AND MINORITY STUDENTS ARE SHORTCHANGED ON TEACHER QUALITY* 2–3 (2006).

263. Nat Malkus, *The Title I Funding Fight*, U.S. NEWS (Apr. 26, 2016), <https://www.usnews.com/opinion/articles/2016-04-26/obamas-education-department-overreach-wont-equalize-title-i-funding> [<https://perma.cc/6VLS-ETMC>] (discussing federal data).

264. ARY SPATIG-AMERIKANER, *CTR. FOR AM. PROGRESS, UNEQUAL EDUCATION: FEDERAL LOOPHOLE ENABLES LOWER SPENDING ON STUDENTS OF COLOR* 21 (2012).

265. See, e.g., OFFICE OF INSPECTOR GEN., U.S. DEP'T OF EDUC., *FINAL MANAGEMENT INFORMATION REPORT: MONITORING OF THE TITLE I, PART A, COMPARABILITY OF SERVICES REQUIREMENT 2* (2007); Black, *supra* note 2, at 355–59; Marguerite Roza, *The Education Trust, How Districts Shortchange Low-Income and Minority Students*, in *FUNDING GAPS 2006*, *supra* note 31, at 9–11 (2006); Ross Wiener, *Strengthening Comparability: Advancing Equity in Public Education*, in *ENSURING EQUAL OPPORTUNITY*, *supra* note 2, at 40.

their Title I schools.”²⁶⁶ A host of studies also demonstrate that access to quality teachers may have the largest impact on student achievement of any factor.²⁶⁷ For that reason, the Department of Education recently emphasized that unequal access to teachers may violate Title VI’s prohibition on racial discrimination.²⁶⁸ Yet, the ESSA ignored both issues of funding and teacher inequalities.

In some respects, the ESSA asks even less than the NCLB in regard to equity. The ESSA relaxes both the maintenance of effort standard and the prohibition on supplanting local funds.²⁶⁹ Weakening these standards makes it easier for districts to mask their unequal funding practices. With fewer limits on how federal dollars are spent, districts can use federal dollars to fill the local funding deficits that districts create through their own fiscal policies.²⁷⁰ Districts might even expand funding inequalities and deficits in local expenditures because they have more flexibility with federal funds. As Part III.C will detail, Secretary King sought to block this eventuality through regulation but faced congressional rebuke for doing so.²⁷¹

The one potential exception to the ESSA’s disregard for equity is its set of requirements for schools in the bottom 5 percent of a state’s performance metric. The ESSA requires that districts examine resource inequities in those schools to determine whether they contribute to the school’s poor performance.²⁷² While an improvement upon the NCLB, this measure is extremely limited. The provision only applies to inequities between schools in an individual district even though the most significant resource inequities exist between districts.²⁷³ For instance, a 2015 study found that half of the nation’s states funded education at a lower level in districts serving predominantly low-income students than in other districts—and the gap was often shocking.²⁷⁴ In Nevada, for example, expenditures in high-need districts were only 48 percent of those in low-need districts.²⁷⁵ The ESSA ignores this inequality, notwithstanding its well-documented prevalence.

266. Turner, *supra* note 19.

267. See DARLING-HAMMOND, *supra* note 252, at 43–45; James H. Stronge et al., *What Is the Relationship Between Teacher Quality and Student Achievement? An Exploratory Study*, 20 J. PERSONNEL EVALUATION EDUC. 165, 167 (2007).

268. Letter from Russlynn Ali, Assistant Secretary, Office for Civil Rights, U.S. Dep’t of Educ., to Colleagues on Resource Comparability (Apr. 20, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf> [<https://perma.cc/RTV5-2CT7>].

269. Turner, *supra* note 19.

270. See Wiener, *supra* note 265, at 40 (“[F]ederal and other categorical funds, which were intended to provide additional opportunities, are used to fill in for inequitable distribution of foundational funds.”).

271. Turner, *supra* note 19.

272. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1111(d)(1)(B)(iv), 129 Stat. 1802 (2015) (codified at 20 U.S.C. § 6311(d)(1)(B)(iv)).

273. See generally, BAKER ET AL., *supra* note 27 (charting inequities between districts); Black, *supra* note 2, at 319 (indicating that the equity provisions do not apply between districts, which is the locus of the most significant disparities).

274. BAKER ET AL., *supra* note 27, at 9.

275. *Id.*

Even if resource inequality were only a problem within districts, this new ESSA provision would do little to address it because it applies to such a small subset of schools. Equally problematic, the provision does not actually require that districts close the inequities they find; it only requires they assess them.²⁷⁶ Thus, the ESSA does not mandate a remedy for serious resource inequalities, even when districts find them. In short, this new provision ignores the most glaring problem of inter-district resource inequity and focuses instead on the smaller problem of intra-district inequity. But even then, it does no more than occasionally ask that a few districts consider the problem.

4. *Unaddressed Student Needs*

Certain levels of inequity might be tolerable if states guaranteed minimum resource levels that ensured all students still received a quality education. Arguably, the important question is whether districts serving predominantly low-income students have the resources they need, not whether suburban schools outspend them. Data suggests, however, that states' funding practices are just as problematic in terms of adequacy as they are in terms of equity. Yet, the ESSA neither prohibits these practices, nor supplies the federal resources necessary to meet student needs when states cannot or will not.

All relevant data points indicate that student need has risen and is not being met. The number and percentage of poor students and other special-need populations attending public school have increased in recent years.²⁷⁷ But over the past decade, states' ability or willingness to meet student need has declined. As detailed above, states are funding education at significantly lower levels than just a few years ago, and the districts hurt the most are often those with high concentrations of student poverty.²⁷⁸ Cuts were so deep and sustained over the past decade that social science suggests the result will be long-term achievement deficits for students who attended school during this period.²⁷⁹

NCLB waivers cut short any check the NCLB testing regime might have placed on this academic outcome,²⁸⁰ and no other aspect of the Elementary and Secondary Education Act placed any meaningful limit on resource adequacy

276. ESSA § 1111(d)(1)(B)(iv).

277. S. EDUC. FOUND., *A NEW MAJORITY: LOW INCOME STUDENTS NOW A MAJORITY IN THE NATION'S PUBLIC SCHOOLS 2* (2015).

278. Black, *supra* note 13, at 432–34; Leachman et al., *supra* note 12.

279. *See generally* Jackson et al., *supra* note 25 (quantifying the effects of funding shifts on student achievement); BRUCE D. BAKER, DANIELLE FARRIE & DAVID G. SCIARRA, *EDUC. TESTING SERV., MIND THE GAP: 20 YEARS OF PROGRESS AND RETRENCHMENT IN SCHOOL FUNDING AND ACHIEVEMENT GAPS* (2016) (reviewing the literature on the effect of funding on student achievement).

280. U.S. DEP'T OF EDUC., *ESEA FLEXIBILITY 4* (2012), <https://www2.ed.gov/policy/eseaflex/approved-requests/flexrequest.doc> [<https://perma.cc/GMV9-Z7GB>] (describing the waiver of testing and other requirements).

concerns.²⁸¹ Against this backdrop, Congress had every reason to include adequacy metrics in the ESSA, but it did nothing.²⁸² The other—and politically easier—option would have been for the ESSA to fund more basic resources. In fact, as part of the economic stimulus package, the federal government had done just that during the first years of the recession, giving the states funds to prevent massive teacher layoffs and budget shortfalls.²⁸³

The ESSA, however, did almost nothing to ensure adequacy moving forward. First, whereas the NCLB substantially increased federal funding for low-income students, the ESSA leaves funding flat. Second, the ESSA does nothing to improve the way existing funds target student need. Instead, the ESSA continues a pattern of distributing federal funds by happenstance. This happenstance distribution is a product of ill-conceived weights in the funding formula for district size, states with small student populations, and poverty concentrations.²⁸⁴ Some of these factors counteract one another and others are simply based on false assumptions.²⁸⁵ The overly broad distribution of federal funds is a product of the fact that a district only needs 2 percent poverty to receive Title I funds, a threshold that nearly every district in the nation meets.²⁸⁶

As a result of the formulas, federal funds that might otherwise meet the need of high-poverty districts go to predominantly middle-income and wealthy districts. A recent study found that “20 percent of all Title I money for poor students—\$2.6 billion—ends up in school districts with a higher proportion of wealthy families.”²⁸⁷ For instance, the “Montgomery County Schools in

281. The only provisions slightly aimed toward maintaining adequate local funds are maintenance of effort and supplement-not-supplant, but those provisions have proven historically problematic, see Black, *supra* note 2, at 352–55, and the ESSA appears to have weakened them further.

282. The National Education Association specifically advocated for Congress to include a set of basic opportunity metrics in the ESSA. NAT'L EDUC. ASSOC., ESEA REAUTHORIZATION GOALS: MORE OPPORTUNITY & LEARNING FOR STUDENTS (2015), https://www.nea.org/assets/docs/ESEA_Reauthorization_principles_1-15-15.pdf [<https://perma.cc/7J7R-TUFX>].

283. See U.S. DEP'T OF EDUC., AMERICAN RECOVERY AND REINVESTMENT ACT: SPENDING REPORT BY PROGRAM 1 (2011), <http://www2.ed.gov/policy/gen/leg/recovery/reports.html> [<https://perma.cc/EA3L-ES64>] (detailing the funding allocated under the ARRA to educational programs).

284. See, e.g., 20 U.S.C. §§ 6333(d), 6334(b) (2012). States with small populations, such as South Dakota and Rhode Island, receive per-pupil allotments that are larger than those of two-thirds of other states. EDUC. TR., *supra* note 237, at 3 tbl.1, 4 tbl.2. All of the formulas heavily weight school district size even though it does not correlate with actual cost or need. Liu, *supra* note 41, at 1003. Two formulas account for concentrated poverty but inexplicably treat concentrated poverty beyond 30 percent as fungible. See 20 U.S.C. §§ 6335(c)(1)(B) & (2)(B), 6337(d)(1)(A), 6337(d)(1)(B) (2012).

285. Black, *supra* note 2, at 343–52; Goodwin Liu, *Improving Title I Funding Equity Across States, Districts, and Schools*, 93 IOWA L. REV. 973, 981–93 (2008).

286. 34 C.F.R. § 200.71 (2008); C. Joy Farmer, *The No Child Left Behind Act: Will It Produce a New Breed of School Financing Litigation?*, 38 COLUM. J.L. & SOC. PROBS. 443, 456 (2005) (stating that more than 90 percent of school districts and 58 percent of schools receive Title I funds).

287. Lauren Camera & Lindsey Cook, *Title I: Rich School Districts Get Millions Meant for Poor Kids*, U.S. NEWS (June 1, 2016), <https://www.usnews.com/news/articles/2016-06-01/title-i-rich-school-districts-get-millions-in-federal-money-meant-for-poor-kids> [<https://perma.cc/8BVE-NCDK>].

Maryland, an[] elite suburb outside Washington, get nearly \$26 million [in Title I funding], despite a child poverty rate of 8.4 percent.”²⁸⁸ Moreover, the average per-pupil Title I allotment for wealthier districts is larger than that of schools with the highest poverty levels.²⁸⁹ A similar phenomenon occurs across state lines, with the wealthiest states receiving the largest per-pupil grants.²⁹⁰

5. *Incoherence of Retreating on Both Inputs and Outputs*

Underlying the ESSA’s flat and random funding, on the one hand, and its permissive accountability standards, on the other, is a deeply conflicted set of premises that reveal how unpredictable equality will be under the ESSA. The ESSA’s highest-level premise is that outcome equality can be achieved without input equality, which is problematic in itself. The ESSA pushes that premise to the extreme in several respects. First, the ESSA offers no clear definition of outcome equality.²⁹¹ Thus, if output equality is the goal, it is a goal without meaningful parameters. A more forgiving reading of the Act suggests that the ESSA offers a rough outline for states to define equal outcomes themselves, but such an outline would still be of little import given the next point.

Second, regardless of how the ESSA defines equality, it lacks mechanisms to achieve equality on a broad scale. The Act requires states to set academic standards and goals, but the Act’s accountability system reveals that most schools need not meet them. Save the exceptional few, schools that fail to meet these goals will not suffer any consequences and will not be expected to take any corrective action. Even among those that must act, the ESSA takes few positions on what that action should be.²⁹² In these respects, the ESSA’s accountability system is more akin to a monitoring system that, at best, picks out a small subset of schools for further scrutiny and assumes that monitoring outcomes alone will further equality. But given that the NCLB demonstrated that even strict accountability for all schools was insufficient to achieve equal outcomes,²⁹³ the ESSA’s premise of monitoring outcomes to further equality is wishful thinking.

Third, the ESSA’s willingness to largely ignore input equality and adequacy assumes that inputs are of limited relevance to student outcomes. The

288. *Id.*

289. Liu, *supra* note 41, at 1010 (noting that the average Title I aid per student is \$773 in schools that have low levels of poor students but only \$475 in schools with the highest levels of poor students).

290. This is a result of using existing state expenditures as the base multiplier in the formulas. 20 U.S.C. §§ 6333(a)(1)(B), 6334(a)(2)(B), 6335(b)(1)(B), 6337(b)(1)(A)(i). This base multiplier, however, has not proven to be an accurate measure of student need or local costs. In practice, it appears to punish poor states for being poor. In response, the GAO has recommended eliminating state expenditures as a factor in Title I funding formulas. *See* U.S. GEN. ACCOUNTING OFFICE, TITLE I FUNDING: POOR CHILDREN BENEFIT THROUGH FUNDING PER POOR CHILD DIFFERS 33 (2002).

291. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1111(c)(4), 129 Stat. 1802 (2015) (codified at 20 U.S.C. § 6311(c)(4)).

292. *Id.* § 1111(d)(1)(B)(iii) (specifying that the intervention be “evidence-based”).

293. *See generally* Dillon, *supra* note 128 (indicating that 80 percent of schools were predicted to fail under NCLB); *see also* Black, *supra* note 110, at 1754 (discussing the unsubstantiated premises of NCLB).

precise connection between inputs and outcomes is surely complex and subject to disagreement, but courts and scholars consistently agree that spending money wisely matters to education outcomes.²⁹⁴ A 1996 review of all relevant school funding studies found that per-pupil expenditures “show strong and consistent relations with achievement. . . . In addition, resource variables that attempt to describe the quality of teachers (teacher ability, teacher education, and teacher experience) show very strong relations with student achievement.”²⁹⁵ The precise effect of funding may differ based on how funds are allocated, but “a broad range of resources [are] positively related to student outcomes, with effect sizes large enough to suggest that moderate increases in spending may be associated with significant increases in achievement.”²⁹⁶ Recent studies have confirmed these findings.²⁹⁷ Most notably, based on three decades of data, a 2016 study found that a 20 percent increase in per-pupil funding, if maintained over time, results in low-income students completing almost a full additional year of education.²⁹⁸ That additional learning eliminates two-thirds of the gap in outcomes between low- and middle-income students.²⁹⁹

At worst, the ESSA’s failure to address resource inequity is a rejection of this body of research. At best, the ESSA concedes the importance of resources but unrealistically hopes that states will voluntarily address adequacy and equity problems. If the NCLB’s rigid accountability did not prompt states to address funding problems, there is little reason to believe the ESSA’s minimal accountability system will prompt a better result. In effect, leaving resource equity and adequacy to voluntary state action is to abandon resource equity and adequacy, even if the ESSA does not explicitly state as much.

The abandonment of federal leadership on both inputs and outputs turns the Elementary and Secondary Education Act on its historical head. The Elementary and Secondary Education Act was originally enacted and, for decades, maintained on the notion that certain communities and states would not do what is necessary to provide appropriate educational opportunities for disadvantaged students.³⁰⁰ The ESSA contradicts this mission and premise by placing near-

294. BRUCE BAKER, REVISITING THAT AGE-OLD QUESTION: DOES MONEY MATTER IN EDUCATION? 3–6 (2012) (reporting that more recent studies “have invariably found a positive, statistically significant (though at times small) relationship between student achievement gains and financial inputs”); Rebell, *supra* note 83, at 1469, 1482–87 (discussing courts’ near uniformity on the question).

295. Rob Greenwald, Larry V. Hedges & Richard D. Laine, *The Effect of School Resources on Student Achievement*, 66 REV. EDUC. RES. 361, 384 (1996).

296. *Id.* at 361; *see also* CTR. FOR AM. PROGRESS, RETURN ON EDUCATIONAL INVESTMENT: 2014, at 25–30 (2014) (assessing the extent to which schools spend money in ways that improve achievement).

297. *See* BAKER, *supra* note 294, at 3–6 (reporting that more recent studies find a statistically significant connection between student achievement gains and school funding).

298. Jackson et al., *supra* note 25, at 36, 44.

299. *Id.* at 44.

300. *See generally* McClure, *supra* note 2 (tracing the history of Title I of the Elementary and Secondary Education Act); JEFFREY, *supra* note 22.

complete responsibility for equitable and adequate inputs and outputs in the hands of state and local actors. Either the initial premise or the ESSA's current implementation is incorrect. If the former, one must question whether a justification for continuing the Elementary and Secondary Education Act exists. If the latter, one must question whether the ESSA is a legitimate extension of the Elementary and Secondary Education Act and, if not, what independent justifications exist for the ESSA.

In sum, the ESSA rests on flawed premises regardless of how one conceives the Act. As a continuation of the NCLB's testing and accountability regime, the ESSA is flawed because its outcome expectations are far weaker than those in the NCLB. If the ESSA is an equity and adequacy input measure, it is flawed because it includes neither federal funding to further those ends, nor any obligation for states to do so themselves. Over its history, the Elementary and Secondary Education Act has vacillated between input- and output-based frameworks for equal educational opportunity for disadvantaged students,³⁰¹ but not until the ESSA has it effectively abandoned both.

C. Administrative Enforcement as a Safety Valve

1. Limits on Equity Enforcement

John King was the Secretary of Education when the ESSA became law. To his credit, Secretary King recognized some of the ESSA's equity gaps and quickly sought to close them. He primarily was concerned that states and local districts underfund their Title I schools and unequally distribute teachers. Because the ESSA's precise statutory text does little to cure these problems, Secretary King has proposed steps to leverage the regulatory process to close some of the ESSA's loopholes.³⁰² Under the ESSA, states must submit their testing and accountability plans to the Department of Education for approval.³⁰³ Secretary King indicated that he planned to require that those plans also address funding inequalities.³⁰⁴

More specifically, the Department proposed regulations that would use the statutory prohibition on supplanting local funds as a resource equity guarantee.³⁰⁵ To justify this bold move, the Department pointed to the contradiction between the Elementary and Secondary Education Act's historical mission and current

301. See generally Jennings, *supra* note 66, at 7–11 (offering a historical overview of the Act and its shifting focus).

302. U.S. DEP'T OF EDUC., ESSA NEGOTIATED RULEMAKING COMMITTEE ISSUE PAPER: SUPPLEMENT NOT SUPPLANT (2016), <https://www2.ed.gov/policy/elsec/leg/essa/session/nrmissuespapers32016.pdf> [<https://perma.cc/MG5B-GBU6>].

303. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1111(a)(1), 129 Stat. 1802 (2015) (codified at 20 U.S.C. § 6311(a)(1)).

304. Turner, *supra* note 19.

305. U.S. Dep't of Educ., *supra* note 302.

practices.³⁰⁶ In a notice of proposed rulemaking, the Department emphasized that the explicit “purpose of Title I of the ESSA is to ‘provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.’”³⁰⁷ It reasoned that the supplement-not-supplant provisions are an extension of this purpose, designed as a mechanism “to ensure that the Federal resources are spent to provide the additional educational resources and supports that at-risk students need to succeed, instead of being used to simply make up for unfair shortfalls in State and local funding.”³⁰⁸ Absent a limitation on states and localities distributing their own funds unequally, Title I cannot provide the extra help disadvantaged students need.³⁰⁹ In fact, “two-thirds of students attend school where fewer State and local dollars are spent per pupil in Title I schools than in non-Title I schools.”³¹⁰

The ESSA combined two separate, older “supplement, not supplant” statutory provisions into one new provision that requires states and districts to “demonstrate that the methodology used to allocate State and local funds to each [Title I school] ensures that such school receives all of the State and local funds it would otherwise receive if it were not receiving assistance under [Title I].”³¹¹ As part of the methodology review process, King proposed to require districts to show they are “spending an amount of state and local funds per pupil in each Title I-A school that is equal to or greater than the average amount spent per pupil in non-Title I-A schools.”³¹²

As a matter of general substance, King’s proposal is appealing. It would reasonably ensure that federal funds are not supplanting local funds and would address a number of this Article’s equity concerns. Nonetheless, King’s proposal appears inconsistent with the ESSA on several levels: the narrowed scope of the Secretary’s powers, the general disregard for meaningful equity, and the specific statutory language. Thus, it was no surprise that King’s proposed use of administrative power alarmed Congress.

Senator Lamar Alexander, the principal author of the ESSA, called a hearing to challenge Secretary King’s proposal. He called the proposal an “intolerable” attempt to backdoor a stringent comparability standard into the Act through the entirely distinct supplement-not-supplant standard.³¹³ According to Alexander, the ESSA is clear on comparability: “teacher salaries may not be

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1012(b)(2), 129 Stat. 1802 (2015) (codified at 20 U.S.C. § 6321).

312. Memorandum from Jody Feder & Rebecca Skinner, Congressional Research Service, on Proposed Regulations on the Supplement, Not Supplant Provision That Applies to the Title I-A Program Authorized by the Elementary and Secondary Education Act 5 (May 5, 2016).

313. Turner, *supra* note 19.

included in [the comparability] computation.”³¹⁴ Thus, he argued, King’s attempt to include teacher salaries and funding comparability in supplement-not-supplant regulations is so far out of line that states “should [not] follow them” and “[i]f the department persists, then the state should go to court to sue the department.”³¹⁵

A number of outside analysts and groups, including the nonpartisan Congressional Research Service (CRS), have reached the same conclusion.³¹⁶ The CRS’s detailed analysis pointed out that the proposed regulation goes beyond the “plain language” and requirements of the supplement-not-supplant provision, is inconsistent with current and past legislative history, and “directly conflict[s]” with other statutory provisions designed to limit funding comparability analysis.³¹⁷ Thus, the CRS concluded that the regulation was likely illegal.³¹⁸ Facing legal uncertainty and growing political opposition, Secretary King eventually withdrew his proposed regulation.

In sum, King’s proposal was well-intentioned but most likely beyond his power. While states’ funding for Title I schools is \$7 billion less than other schools, and federal dollars do no more than backfill this gap, the ESSA does nothing to stop it. To the contrary, the ESSA prohibits the Secretary from intervening. This stark reality best underscores the overall weaknesses and flaws of the ESSA: by its scope and precise provisions, the ESSA blocks the Secretary from using otherwise reasonable tools to further the Elementary and Secondary Education Act’s historical equity mission.

This point also reinforces just how little power the Secretary has to do anything of substance now. The ESSA is not a watered-down, ambiguous framework that this administration or subsequent ones can mold through the administrative process. States, not the Department, wield the ESSA’s flexibility. This means that the ESSA will produce the equality only that states randomly or voluntarily offer. The most likely result is a continuation of the current status quo of inequality, if not further retrenchment.

314. *Id.*

315. *Id.*

316. Letter from Am. Ass’n of Sch. Admins. to the Honorable John King, Sec’y of U.S. Dep’t of Educ. (Oct. 26, 2016), https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/files/AASA_State_Exec_SNS_letter_103116.pdf [<https://perma.cc/6WNW-LPLG>] (“The regulations represent new, far-reaching federal mandates dictating how local school districts spend their state and local funds and are in conflict with the spirit and intent of the underlying statute, which is premised on state and local control.”); Letter from Nat’l Conference of State Legislatures to the Honorable John B. King, Jr., Sec’y of U.S. Dep’t of Educ. (Nov. 7, 2016), http://www.ncsl.org/documents/statefed/NCSL_NGA_Supplement_Letter110716.pdf [<https://perma.cc/QY8D-AA6K>] (“[S]uch provisions do not change the fact that in creating formulas, the department is going beyond the statute’s explicit prohibition on prescribing a specific methodology for determining compliance.”).

317. Feder & Skinner, *supra* note 312, at 4, 7–8.

318. *Id.* at 9.

2. *Limits on Policy Positions in General*

Initial policy statements from the new Secretary of Education, Betsy DeVos, also demonstrate the precariousness of the federal role in education under the ESSA and the unlikelihood that enforcement measures will cure it. In the weeks preceding her confirmation, she articulated her major policy goals: return decision-making authority to the states, end the Common Core standards, and increase school choice in the form of charter schools and vouchers.³¹⁹ The ESSA, however, has already achieved her first goal, making Secretary DeVos's position on state authority largely irrelevant. And by returning authority to the states, the ESSA rendered DeVos's other goals beyond her power.³²⁰

The Secretary lacks the authority to promote or undermine the Common Core standards.³²¹ States are simply free to adopt or not adopt the standards as they see fit. Despite the controversy surrounding the Common Core standards,³²² roughly three-quarters of states have retained them.³²³ Likewise, states are entirely free to use charter schools and vouchers to improve educational quality in their low-performing schools, but they are equally free to adopt countless other evidence-based approaches.³²⁴ Thus, Secretary DeVos cannot pressure states to adopt any particular reform. In other words, the efficacy of the Secretary's agenda is beside the point. Even if the agenda included adequacy and equity, the ESSA would severely constrain that agenda because it constrains the federal role in education.

As soon as Secretary DeVos took office, these constrained powers posed serious problems for federal leadership. On February 10, 2017, DeVos sent a letter to states indicating that the timeline for submitting their ESSA accountability plans would remain in place, but that the Department was pausing implementation of regulations that the prior administration passed in November

319. Alyson Klein, *Trump, DeVos Call for Ending Common Core at Michigan Rally*, EDUC. WK. (Dec. 11, 2016), http://blogs.edweek.org/edweek/campaign-k-12/2016/12/trump_devos_call_for_ending_co.html?intc=main-mpsmcs [https://perma.cc/2JK3-YCFP].

320. The obvious exception would be if Congress passed new legislation.

321. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1111(j), 129 Stat. 1802 (2015) (codified at 20 U.S.C. § 6311(j)) (“[T]he Secretary shall not attempt to influence, incentivize, or coerce State—(1) adoption of the Common Core State Standards developed under the Common Core State Standards Initiative or any other academic standards common to a significant number of States, or assessments tied to such standards; or (2) participation in such partnerships.”).

322. Black, *supra* note 137, at 657–59, 663–67.

323. *Map: Tracking the Common Core State Standards*, EDUC. WK. (June 29, 2015), <http://www.edweek.org/ew/section/multimedia/map-states-academic-standards-common-core-or.html> [https://perma.cc/QQ5W-T7Q2]. More states, however, have opted to use different standardized tests. Catherine Gewertz, *National Testing Landscape Continues to Shift*, EDUC. WK. (Feb. 16, 2017), <http://www.edweek.org/ew/articles/2017/02/15/state-solidarity-still-eroding-on-common-core-tests.html> [https://perma.cc/8YZZ-GABX].

324. ESSA § 1111(d)(1)(B)(iii) (requiring evidence-based interventions).

2016.³²⁵ Putting aside the wisdom and legality of this pause,³²⁶ it would leave the ESSA with no implementing regulations.³²⁷ States would be left with no guidance other than the text of the ESSA and the immense discretion it affords them. In the absence of new regulation, almost any plan a state submits will be approved. The ESSA gives the Secretary only 120 days to accept or reject a state plan.³²⁸ After that time, the ESSA deems the plan automatically approved.³²⁹ In theory, this could include plans that do not even meet the text of the ESSA itself.³³⁰ In short, the ESSA strips the Secretary of important powers and, even when it does not, the ESSA defers entirely to the states unless the Secretary acts quickly and affirmatively.

IV.

ENSURING EQUALITY AND ADEQUACY THROUGH THE ELEMENTARY AND SECONDARY EDUCATION ACT

Simply repealing the ESSA is no more realistic than was repealing the NCLB. Unless Congress is willing to eliminate federal funding for schools altogether, some other federal structure must take its place. Given that the ESSA is so new, it is unlikely that Congress would substantially amend it in the next year.³³¹ But the ESSA, by its own terms, is set to expire in four years. At that point, the fervor to eliminate the NCLB at any cost will have subsided, making deliberations over meaningful legislation possible once again.

Congress can then realign the Elementary and Secondary Education Act with its historic mission of improving academic achievement and equity for low-income students, and also can enact better mechanisms to achieve those goals. First, Congress must increase the federal investment in education. This is

325. Letter from Betsy DeVos, Secretary of Education, to Chief State School Officer (Feb. 10, 2017), <https://www2.ed.gov/documents/press-releases/02102017-essa-letter.pdf> [<https://perma.cc/95WV-X5DL>].

326. See generally MAEVE P. CAREY, ALISSA M. DOLAN & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS (2016), <https://fas.org/sgp/crs/misc/R43992.pdf> [<https://perma.cc/9BMY-PPBB>] (providing an overview of the legality of pausing or repealing regulations).

327. Secretary DeVos sent the letter on the premise that Congress might repeal the prior administration's regulations pursuant to the Congressional Review Act. Congress did just that as this Article neared publication. Dana Goldstein, *Obama Education Rules Are Swept Aside*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/us/every-student-succeeds-act-essa-congress.html> [<https://perma.cc/65BR-AQGN>].

328. ESSA § 1111(a)(4)(A)(v) (stating the Secretary shall “approve a State plan not later than 120 days after its submission”); *id.* § 8451 (indicating a plan is approved after 120 days unless the Secretary affirmatively finds that it fails to meet statutory requirements).

329. *Id.* § 8451.

330. See, e.g., Derek Black, *It's a Terrible Time to Be Secretary of Education, Especially If You Don't Understand the Job*, EDUC. LAW PROF BLOG, Feb. 20, 2017, http://lawprofessors.typepad.com/education_law/2017/02/its-a-terrible-time-to-be-secretary-of-education-especially-if-you-dont-understand-the-job.html [<https://perma.cc/8PVD-AXZ6>].

331. The chance of minor improvements, however, is always possible. Congress quickly amended the teacher quality requirements of the NCLB once it became clear states could not meet them.

necessary to help states meet the full academic needs of disadvantaged students and to offset the proportionally higher costs of districts serving predominantly low-income students. An increase in federal investment is also necessary if states are to accept the second step: strict prohibitions on states' unequal distribution of educational resources. Strict prohibitions with no transition steps, however, would surely fail. Thus, Congress should require incremental steps toward equity, as well as alternative compliance measures for districts that might be high performing regardless of their resources. The final step is to expand preschool education to all low-income students—a goal that the Department of Education has pushed in recent years, but that states seemingly lack the capacity to reach alone. A short-term federal investment could immediately expand preschool and, in the long term, generate new savings that states could use to fund preschool and offset the costs of equity compliance in later grades. The following Sections explore each of these points in full.

A. *Increase the Federal Investment in Education*

The federal financial stake in education should substantially increase and move states toward delivering low-income students the full supplemental funding necessary to provide adequate educational opportunities. Estimates suggest that for low-income students to achieve at levels comparable to their peers, they require 30 to 60 percent more resources than those necessary for middle-income students.³³² The federal government has officially pegged 40 percent as the appropriate supplement.³³³ States are far from meeting this standard and, as Part III.A demonstrates, are regressing in many locations.

Skeptics primarily ask why the federal government should take on a larger financial commitment in an area traditionally of state concern and control. And relatedly, why not simply demand that states meet appropriate resource goals themselves? The answer to these concerns is threefold. First, some states appear to lack the resources to fund education adequately and equitably.³³⁴ Ironically, a few states fund education roughly equally across districts, but the actual funding level itself is relatively low.³³⁵ These states lag far behind the national average

332. Black, *supra* note 2, at 341–42; Wiener & Pristoop, *supra* note 31, at 6 (stating that Goodwin Liu uses a 60 percent adjustment for poor children, while the authors use a 40 percent adjustment).

333. No Child Left Behind Act (NCLB) of 2001, Pub. L. 107-100, §§ 1124, 1125A, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6333, 6337 (2006)) (setting the standard for whether low-income schools are fairly funded as whether they receive a 40 percent funding increase adjustment); NAT'L CTR. FOR EDUC. STATISTICS, PUBLIC SCHOOL REVENUE SOURCES (2016), https://nces.ed.gov/programs/coe/indicator_cma.asp [<https://perma.cc/YWY5-B5LQ>] (identifying 40 percent as the appropriate adjustment for low-income students); U.S. GEN. ACCOUNTING OFFICE, *supra* note 31, at 30 (defining “inner city” as an area with a poverty rate of 40 percent or higher).

334. See Liu, *supra* note 41, 983–84.

335. For instance, Tennessee has a progressive funding formula, but the actual amount of funds the state devotes to education and the effort it exerts to raise those funds are among the worst in the nation. BAKER ET AL., *supra* note 27, at 24–25.

in terms of fiscal capacity.³³⁶ They devote a greater percentage of their states' overall wealth to education, but because they are poor states, their extra effort still generates relatively low levels of education funding.³³⁷ As one study found, the greatest funding inequities are between poor and rich states, not within individual states.³³⁸

Second, many states with relatively high fiscal capacity have taken very little initiative in equalizing education.³³⁹ These states may fund education at relatively high levels, but funding can be wildly unequal across districts. In other words, many states fall into two different camps: one with a commitment to equity but no capacity for adequacy, and another with the capacity for adequacy but no commitment to equity. As Josh Weishart explained, adequacy and equity are interconnected, and one cannot realistically be achieved without the other.³⁴⁰

Third, helping low-capacity states necessarily requires federal assistance and motivating high-capacity states necessarily requires federal leverage. The federal government cannot get either for nothing. Both involve substantial additional money—enough to make the deal enticing for states. While Congress plausibly could demand more equity and adequacy from states pursuant to its congressional powers under the Fourteenth Amendment,³⁴¹ such authority has not been substantiated by courts or even remotely recognized by politicians. This leaves Congress's power under the Elementary and Secondary Education Act. As spending legislation, Congress can only secure states' consent to conditions in exchange for money.³⁴² Congress and President Bush clearly understood this relationship in passing the NCLB, as the NCLB drastically expanded the federal role in education but only in exchange for a major increase in federal funding.³⁴³

336. The effort Mississippi exerts to fund education is relatively high, but because of the state's poverty, its funding level is still one of the lowest in the nation. *Id.*

337. *Id.* at 6–8, 24–25.

338. Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2062–72 (2006).

339. Connecticut, Maryland, Illinois, and Pennsylvania are among the nation's wealthiest states and biggest spenders on education, but they distribute their funds unequally among districts. BAKER ET AL., *supra* note 27, at 25.

340. Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 532–42 (2014).

341. Black, *supra* note 2; Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006) (arguing that Congress can use its power under Section 5 of the Fourteenth Amendment to protect education as a right of national citizenship); Thomas A. Saenz, President and Gen. Counsel, Mex. Am. Legal Def. and Educ. Fund, Keynote Address at the Univ. of Richmond Sch. of Law (Mar. 8, 2013), <http://law.richmond.edu/about/events/rodriguez.html> [<https://perma.cc/M3P2-ZKQ2>].

342. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (holding that statutory provisions granting Secretary of Health and Human Services the authority to penalize states choosing not to participate in Patient Protection and Affordable Care Act's program expanding Medicaid exceeded Congress's Spending Clause power); *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding use of spending power where law directed Secretary of Transportation to withhold federal highway funds from states allowing persons under the age of twenty-one to lawfully purchase alcohol).

343. Benjamin Michael Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 CARDOZO L. REV. 779, 790 (2006).

If Congress is to further equity and adequacy through the Elementary and Secondary Education Act in the future, it must do the same again.

The federal government has the capacity to make this investment with relatively little effort. The current outlays for the Elementary and Secondary Education Act hover around \$25 billion a year³⁴⁴—a miniscule number compared to the \$938 billion in annual spending on health care.³⁴⁵ Federal spending on education altogether, which includes far more than just the Elementary and Secondary Education Act, is about 3 percent of the federal budget and is roughly equivalent to transportation or scientific research spending.³⁴⁶ In recent years, Congress has demonstrated the willingness to inject new funds into education to address short-term agendas. During the recession, Congress appropriated \$4.3 billion to fund education innovation grants to states.³⁴⁷ Congress made an even bigger appropriation of \$53.6 billion to cover the states' budget shortfalls during the recession and to prevent massive teacher layoffs.³⁴⁸ Toward that end, Congress appropriated \$53.6 billion with almost no strings attached.³⁴⁹

An annual federal investment of \$45 billion, rather than the current \$15 billion, would be enough to ensure that low-income students, particularly those attending schools with concentrated poverty, receive the additional funds they need.³⁵⁰ These federal funds alone, if properly targeted, would amount to a 20 percent supplement for low-income students and would put states halfway to the

344. NAT'L EDUC. ASS'N, HOUSE APPROPRIATIONS COMMITTEE ACTION COMPARED TO ESSA AUTHORIZATION OF APPROPRIATIONS, FY 2017 at 9 (2017), <http://qa.nea.org/assets/docs/FY2017-House-Appropriations-Committee-Bill-Compared-to-ESSA-Authorizations.pdf> [<https://perma.cc/C4UD-CBLM>] (totaling \$24.5 billion in funding appropriations for the ESSA).

345. *Policy Basics: Where Do Our Federal Tax Dollars Go?*, CTR. ON BUDGET AND POL'Y PRIORITIES (Mar. 4, 2016), <http://www.cbpp.org/research/federal-budget/policy-basics-where-do-our-federal-tax-dollars-go> [<https://perma.cc/2327-KPNC>].

346. *Id.*

347. Benjamin Michael Superfine, *Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 MO. L. REV. 81, 101 (2011).

348. *Id.* at 106 (stating the stimulus package's funds for education served "to plug budget holes and save jobs").

349. *Id.* at 99.

350. In theory, Congress probably could cover half of the cost of a 40 percent bump to all low-income students with \$25 billion, but as the percentage of low-income students in a school increases, so will the necessary per-pupil expenditures. See generally Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 344–46 (2010). This Article proposes a \$45 billion investment, which would account for the effects of concentrated poverty. The data for that estimate comes from U.S. CENSUS BUREAU, ANNUAL SURVEY OF SCHOOL SYSTEM FINANCES: PER PUPIL AMOUNTS FOR CURRENT SPENDING OF PUBLIC ELEMENTARY-SECONDARY SCHOOL SYSTEMS BY STATE: FISCAL YEAR 2014, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> [<https://perma.cc/D7TE-7DUT>]. The methodology and calculations were devised and performed by Professor Bruce D. Baker, Rutgers University Graduate School of Education. The data are on file with the author.

goal of a 40 percent supplement.³⁵¹ This investment would afford the federal government the leverage to demand that states appropriately weight their funding formulas to meet the needs of disadvantaged students.³⁵² At that point, existing and new Title I funds and state remediation could combine to provide a 40 percent supplement for low-income students. Equally important, these federal funds would create the leverage and capacity the federal government needs for states to comply with the equity provisions outlined in the following sections.

B. Adopt a Multi-Prong Approach to Achieving Equity

The Elementary and Secondary Education Act should set strict equity requirements but offer states the ability to transition to full equity and the progressive funding outlined above over time. To immediately require absolute resource equality in the context of widespread and deep inequality would create circumstances like those that produced the NCLB waivers. The NCLB set unrealistic student achievement requirements and included no contingency plan to keep schools on track when they failed to meet them.³⁵³ Restructuring school funding is more realistic than moving all students to full proficiency, but as school finance litigation has shown, restructuring funding is far more politically challenging at the state and local levels.³⁵⁴

Title IX of the Education Amendments of 1974 offers a compelling alternate model through which the federal government could consistently and progressively phase states toward equity. When Congress passed Title IX, females were formally excluded from certain educational institutions and systematically discriminated against in others.³⁵⁵ Over the past four decades, Title IX has eliminated most forms of sex-segregated education and has drastically closed opportunity gaps elsewhere.³⁵⁶ For example, in 1971, only 7

351. State and local funds currently amount to roughly \$550 billion. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 334. Half of the public school students are low-income. S. EDUC. FOUND., *supra* note 277.

352. By comparison, the Department of Education's offer of \$4.3 billion in Race to the Top funds was enough to motivate forty-six states to apply for the grants, and thirty-four to enact new laws to make them eligible to apply, including lifting caps on charter schools, moving toward the Common Core, and changing teacher evaluation systems. *Race to the Top*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/issues/education/k-12/race-to-the-top> [<https://perma.cc/4BBJ-ZQWV>]; see also William G. Howell, *Results of President Obama's Race to the Top*, 15 ED. NEXT 58, 62–66 (2015) (examining the causal nexus between the grant program and state policies).

353. The NCLB included a waiver provision, but that provision was not used to keep states and districts on course; it was used to leverage states into adopting an entirely new policy scheme. Black, *supra* note 137, at 613–16.

354. See generally Berry, *supra* note 233, at 213–15 (examining the actual effects, and lack thereof, of litigation on school funding).

355. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding that Virginia's categorical exclusion of women from Virginia Military Institute denied equal protection to women).

356. For an overview of Title IX's developments over the years, see Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325 (2012).

percent of females participated in high school athletics.³⁵⁷ By 2007, more than 40 percent were participating.³⁵⁸ This represents a 940 percent increase in the number of female athletes.³⁵⁹

Title IX did not achieve these results by simply demanding absolute equality at the outset. Instead, Title IX has prompted progress in athletics through an interesting three-part standard. A school can demonstrate compliance with Title IX's equal opportunity mandate by making one of three showings: (1) athletic opportunities for males and females are substantially proportionate to their enrollment numbers; (2) the school has a history and continuing practice of expanding opportunities for the underrepresented group, even though opportunities are not currently proportionate; or (3) "the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program."³⁶⁰ The first prong is obviously demanding and almost no institutions can meet it, but the second and third prongs provide realistic standards to continually move schools toward the ultimate goal of equality.³⁶¹

The Elementary and Secondary Education Act could adopt an analogous multi-prong standard that sets fixed requirements of varying difficulty. The first prong would set an absolute requirement that states provide schools serving higher percentages of low-income students with the proportionately larger supplemental resources they require. This standard would apply both within and between school districts. Based on current data, not a single state in the nation would have consistently met this standard in recent years. Since 2010, only three states—Minnesota, Utah, and Ohio—have hit this mark more than once.³⁶² At the other end of the spectrum, roughly half of the states fund high-need districts at lower levels than districts that are predominantly middle income and

357. WOMEN'S SPORTS FOUND., PLAY FAIR: A TITLE IX PLAYBOOK FOR VICTORY 4 (2009), https://www.womenssportsfoundation.org/wp-content/uploads/2016/09/play_fair_final.pdf [<https://perma.cc/5PAG-LYVC>].

358. *Id.*

359. *Id.*

360. U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter, Intercollegiate Athletics Pol'y Clarification: The Three-Part Test—Part Three at 3 (Apr. 20, 2010); *see also* Cohen v. Brown University, 991 F.2d 888, 897–98 (1st Cir. 1993) (applying the three-part standard).

361. This approach is not without its critics. Ross A. Jurewitz, *Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 AM. U. J. GENDER SOC. POL'Y & L. 283, 332–33 (2000); Michael Straubel, *Gender Equity, College Sports, Title IX and Group Rights: A Coach's View*, 62 BROOK. L. REV. 1039, 1041–42 (1996); Victoria Langton, Comment, *Stop the Bleeding: Title IX and the Disappearance of Men's Collegiate Athletic Teams*, 12 VANDERBILT J. ENT. & TECH. L. 181 (2009).

362. BAKER ET AL., *supra* note 27, at 25 tbl.B-2 (6th ed. Jan. 2017). Most scholars estimate that low-income students require 40 percent or more in additional funding than middle-income students. *See, e.g.,* Wiener & Pristoop, *supra* note 31, at 5, 6 (stating that Goodwin Liu uses a 60 percent adjustment for poor children, while authors Wiener and Pristoop use a 40 percent adjustment). No state—not even Minnesota, Ohio, or Utah—would have met that standard. Rather, they hit a more moderate benchmark of 25 percent additional funding for higher-need school districts. BAKER ET AL., *supra* note 363, at 25.

wealthy.³⁶³ A requirement that states fund schools serving larger percentages of low-income students at proportionately higher levels would set a goal that is within the immediate reach of only a few states.

The second equality prong could provide the remaining states interim relief while still pushing them to make progress. Like Title IX's progress standard, states and districts with a history and continuing practice of closing funding gaps and moving toward the required supplemental funding for high-need schools would be exempted from the absolute equality requirement. The exact amount of progress necessary to comply each year could be set at any number of levels but, at the very least, should demand that states currently funding low-income districts at levels lower than other districts eliminate those gaps within five years.³⁶⁴ Once a state eliminates this raw funding gap, prong two might require that states demonstrate at least a 2 percent increase in funding for high-need districts relative to other districts each year. Under this standard, a state doing the bare minimum would still have twenty years to meet the absolute requirement of prong one but like under Title IX, the state would have a clear and realistic path to reaching the equality goal.

The concept of resource equality, like that of proportional athletic participation by gender, will prove controversial. Some states, districts, and policymakers will contest money's relevance to educational opportunity and the precise goal of prong one.³⁶⁵ To address these concerns, a third prong could provide an entirely distinct metric of equality: one based on academic achievement. States and districts would be allowed to demonstrate that, regardless of the resources low-income students receive, their low-income students achieve at levels reasonably representative of equal educational opportunity. A state or district could make this showing if their low-income students meet one of two benchmarks: (1) achieve at a level equal to or above the national average for low-income students, or (2) make one year's worth of academic progress during the past school year. Both of these showings would be based on the National Assessment of Educational Progress (NAEP), the national benchmark for academic achievement.³⁶⁶

This third prong would serve several important ends without repeating the past mistakes of the NCLB and prior versions of the Elementary and Secondary Education Act. First, it concedes that while resources are the primary criterion of educational opportunity, resources are not an infallible measure. In some

363. BAKER ET AL., *supra* note 363, at 25.

364. Twenty-three states currently fall in this category. *Id.*

365. See, e.g., Eric Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423 (1991); Richard J. Murnane, *Interpreting the Evidence on "Does Money Matter,"* 28 HARV. J. ON LEGIS. 457 (1991); see also *Horne v. Flores*, 557 U.S. 433 (2009) (holding that the law in question focused on the quality of educational programming and not the amount of money spent).

366. See generally LYLE V. JONES & INGRAM OLKIN, *THE NATION'S REPORT CARD: EVOLUTIONS AND PERSPECTIVES* (2004) (explaining that NAEP is the "gold standard" in measuring student achievement).

circumstances, other measures may be more valid. Local variations and the numerous soft and hard variables that interact with resources may make resources less important than they otherwise would be.³⁶⁷ When states and districts can point to another relatively reliable indicator of equal educational opportunity, the Elementary and Secondary Education Act will respect it. This is analogous to Title IX's "accommodation of interest standard," which concedes that some women may be less interested than men in sports and that meeting students' interests can be sufficient.³⁶⁸

A prong directed at student achievement provides some level of continuity with prior federal policy but would work far differently than the NCLB's or the ESSA's. On the one hand, this third prong would maintain the relevance of tests, their potentially conclusive effect, and the important role they play in research and data analysis. On the other hand, relying on NAEP scores would eliminate the possibility of local variation and the incentive to manipulate state tests, both of which can render test results meaningless.³⁶⁹ Similarly, benchmarking low-income students' performance against a national average or a year's worth of progress would eliminate unrealistic achievement goals like those found in the NCLB. Instead, these benchmarks would take into account the fact that low-income students are not similarly situated to other students.³⁷⁰

However, a standard that compares low-income students to each other could be construed as setting low expectations for low-income students.³⁷¹ In practice, it would be quite the opposite. With the first two equality prongs driving up educational opportunity for low-income students nationally, those students' achievement should increase as well.³⁷² Thus, states and districts that seek to demonstrate compliance through student achievement will be comparing their students' test scores with those of low-income students whom we would expect to achieve at higher levels. Comparative analysis of this sort eliminates subjective judgments about proficiency³⁷³ and instead uses a real-world measure

367. See, e.g., Murnane, *supra* note 366.

368. See Jurewitz, *supra* note 362, at 332–33; Straubel, *supra* note 362, at 1041–42.

369. See generally Ryan, *supra* note 1 (pointing out the flaws of relying on state-based tests).

370. See generally U.S. Dep't of Educ., Press Release, More Than 40% of Low-Income Schools Don't Get a Fair Share of State and Local Funds, Department of Education Research Finds (Nov. 30, 2011) (Secretary of Education stating that "[e]ducators across the country understand that low-income students need extra support and resources to succeed"); Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1350–54 (2004) (examining the additional needs of low-income students).

371. One of the evils the NCLB sought to cure was low expectations for poor and minority students. Sam Dillon, *Democrats Make Bush School Act an Election Issue*, N.Y. TIMES (Dec. 23, 2007), <http://www.nytimes.com/2007/12/23/us/politics/23child.html> [https://perma.cc/6VTH-KQNE] (reporting President Bush's goal to eliminate the "soft bigotry of low expectations").

372. See generally Jackson et al., *supra* note 25 (finding that 10 and 20 percent increases in school funding, if maintained across time, close a substantial portion of the achievement gap).

373. Derek Neal, *Aiming for Efficiency Rather than Proficiency* 1 (Univ. of Chi., MFI Working Paper Series No. 2010-007, 2010), http://bfi.uchicago.edu/RePEc/bfi/wpaper/BFI_2010-007.pdf [https://perma.cc/4TH6-VX64] (characterizing the NCLB as flawed because its "requirement that all children be proficient is rather vague, and thus reports concerning the proficiency of students are obvious

of the achievement that results when low-income students are afforded appropriate supplemental resources.

More concerning is the possibility that too many states and districts would opt for third-prong compliance, thereby minimizing the aforementioned upward effects of comparative analysis across states. However, the states and districts that would find this prong most attractive are those whose low-income students are already performing above average.³⁷⁴ Those with below-average achievement would still be forced to improve either their achievement or their resource equity, and improvement on either metric would presumably drive up average national achievement. In turn, this would incentivize states to “race to the top” in student achievement or, when unsuccessful, strive toward resource equity under the first two prongs.

While aggressive, this three-prong approach would also minimize the perception that the federal government is treating states and local authorities unfairly. States and districts that fail to meet any of the prongs would not be sympathetic victims of federal intrusion.³⁷⁵ To the contrary, they would be prime examples of states and districts that warrant reprimand. They would have continued to underfinance their schools and produce poor student outcomes despite receiving significant federal funding. They could not claim that they distributed federal funds fairly and it simply did not work. Nor could they claim that their students were performing well notwithstanding resources.

In sum, this three-pronged approach to equity manages a careful balance among competing views and practical limitations. It keeps absolute resource equality at the forefront, but recognizes that achieving it requires a mutually reinforcing set of interim progress measures. Equally important, it labels states and districts—not the federal government—as the villain upon failure to comply with its standards.

targets for political manipulation. These concerns are heightened by the fact that NCLB delegates to the states the tasks of defining proficiency standards and measuring student performance relative to these standards”).

374. Massachusetts, for instance, has high per-pupil expenditures and its disadvantaged students are some of the highest achieving students in the nation. Nik DeCosta-Klipa, *When It Comes to Student Performance, Study Shows this Massachusetts Town Is a Notch Above*, BOSTON.COM (May 4, 2016), <https://www.boston.com/news/education/2016/05/04/comes-educational-attainment-study-shows-lexington> [https://perma.cc/2VT9-J5JF].

375. One of the most consistent objections to the Elementary and Secondary Education Act and other education legislation is that the federal government is intruding on an area reserved to state control. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act exceeded Congress’s Commerce Clause authority because possession of a gun in a local school zone was not an economic activity substantially affecting interstate commerce and noting that states retain general police power); Michael D. Barolsky, *High Schools Are Not Highways: How Dole Frees States from the Unconstitutional Coercion of No Child Left Behind*, 76 GEO. WASH. L. REV. 725 (2008).

C. *Set Aside Funds for Prekindergarten Education*

The federal government should make a short-term but substantial investment in prekindergarten education for disadvantaged students. If the purpose of the Elementary and Secondary Education Act is to ensure supplemental educational opportunities for disadvantaged students, social science uniformly indicates that there is no better supplemental opportunity than prekindergarten education.³⁷⁶ As James Ryan wrote:

In the short and medium term, researchers [have] found enhanced academic achievement, a reduction in special education placements, and reduced grade repetition. Over the long term, benefits [have] included a greater likelihood of graduating high school and attending college, better employment and higher wages, lower crime rates, and decreased welfare dependency.³⁷⁷

With findings so compelling, political support for prekindergarten education is widespread. Since 2013, the Department of Education has put its full support behind expanding prekindergarten.³⁷⁸ Congress itself included \$250 million in annual funding for prekindergarten in the ESSA.³⁷⁹ Law enforcement has also endorsed spending more money on prekindergarten, recognizing it as the most cost-effective way to reduce juvenile justice contacts, incarceration, and social services costs.³⁸⁰ Even hedge funds and money managers have invested in public prekindergarten education on the condition that they will share in the savings that public schools reap in subsequent years through reduced special education and support-service needs.³⁸¹

Notwithstanding this support, relatively few students have access to public preschool education. Nationally, only 29 percent of four-years-olds are enrolled

376. Ryan, *supra* note 35, at 52 (noting that “researchers have uniformly demonstrated [that] the benefits of preschool . . . easily . . . outweigh the costs”).

377. *Id.* at 66.

378. See, e.g., U.S. DEP’T OF EDUC., RACE TO THE TOP—EARLY LEARNING CHALLENGE, FY 2013 COMPETITION, GUIDANCE, AND FREQUENTLY ASKED QUESTIONS FOR APPLICANTS (2013); Duncan, *supra* note 193.

379. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 9212(k), 129 Stat. 1802 (2015).

380. FIGHT CRIME: INVEST IN KIDS, I’M THE GUY YOU PAY LATER 6 (2013) (noting that one analysis found that prekindergarten produces a net societal gain of \$15,000 per student due to lower social service costs and additional tax revenues later in life).

381. See, e.g., William Alden, *Goldman Sachs to Finance Early Education Program*, N.Y. TIMES (June 12, 2013), <https://dealbook.nytimes.com/2013/06/12/goldman-to-invest-in-utah-preschool-program> [<https://perma.cc/VMU5-CRAL>]; Sean Meehan, *Pre-K Program Attracts Investors Out for Returns*, EDUC. WK. (Aug. 6, 2013), http://www.edweek.org/ew/articles/2013/08/07/37preschool_ep.h32.html [<https://perma.cc/65GA-HG64>]; see also Art Rolnick & Rob Grunewald, *Early Childhood Development: Economic Development with a High Public Return*, FED. RESERVE BANK OF MINNEAPOLIS (Mar. 1, 2003), <https://www.minneapolisfed.org/publications/fedgazette/early-childhood-development-economic-development-with-a-high-public-return> [<https://perma.cc/35TA-UDRS>] (detailing the Minnesota Federal Reserve’s conclusion that preschool education was a better public investment than sports stadiums or business subsidies).

in public state preschool³⁸² and only 5 percent of three-year-olds have access.³⁸³ Those numbers have been essentially flat for the past five years.³⁸⁴ Only Vermont and the District of Columbia serve more than half of their three- and four-year-olds.³⁸⁵ Twenty-four states serve fewer than 10 percent; eight of those states serve none.³⁸⁶ This is to say nothing of the funding and quality problems in the preschool programs that exist. Per-pupil spending for preschool is regularly half of that for elementary and secondary education,³⁸⁷ which creates a number of problems with staff quality and training, curricula, and instruction.³⁸⁸

James Ryan estimated that the full cost of providing universal, high-quality preschool education would be approximately \$8,000 per child and \$60 billion in total.³⁸⁹ The cost of providing preschool to just low-income students would be closer to \$30 billion³⁹⁰—a number representing about 5 percent of the national expenditures in kindergarten through twelfth grade.³⁹¹ States, with the aid of various sources, currently spend approximately \$6 billion on preschool.³⁹²

The ESSA's \$250 million annual investment does not come close to creating the leverage necessary to close this gap,³⁹³ but an additional \$10 billion could. In comparison to the \$14 billion in current federal Title I outlays and the nearly \$12 billion in federal special education funding,³⁹⁴ this number is relatively small. Moreover, it is only 25 percent more than the \$7.7 billion

382. NAT'L INST. FOR EARLY EDUC. RES., *supra* note 34, at 6. To be clear, the above-the-line statements reference only state preschool education. States do enroll substantial numbers of students in special education preschool programs, and private institutions and the federal Head Start program serve a number of other students. *Id.* at 16 tbl.4.

383. *Id.* at 6.

384. *Id.* (revealing a 1 percent increase).

385. *Id.* at 14 tbl.2.

386. *Id.*

387. *Id.* at 10.

388. *Id.* at 17 tbl.5 (charting the benchmark standards that each state meets and does not meet); Dale C. Farran & Mark W. Lipsey, *Expectations of Sustained Effects from Scaled up Pre-K: Challenges from the Tennessee Study*, EVIDENCE SPEAKS REP., Oct. 8, 2015, at 1–3 (finding implementation and quality problems in Tennessee's new preschool program).

389. Ryan, *supra* note 35, at 67–68.

390. This estimate is based on recent data showing that as of 2013, 51 percent of public school students are low income. S. EDUC. FOUND., *supra* note 277.

391. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 334.

392. NAT'L INST. FOR EARLY EDUC. RES., *supra* note 34, at 6.

393. See, e.g., The Conversation, *Why Every Student Succeeds Act Still Leaves Most Vulnerable Kids Behind*, U.S. NEWS (Dec. 14, 2015), <https://www.usnews.com/news/articles/2015-12-14/why-every-student-succeeds-act-still-leaves-most-vulnerable-kids-behind> [<https://perma.cc/VM66-9CDH>].

394. CLAIRE MCCANN, NEW AM., FEDERAL FUNDING FOR STUDENTS WITH DISABILITIES: THE EVOLUTION OF FEDERAL SPECIAL EDUCATION FINANCE IN THE UNITED STATES 11 fig.8 (2014).

currently spent on federal Head Start programs³⁹⁵—some of which could be used to fund high-quality preschool instead.³⁹⁶

A temporary \$10 billion federal investment would put states halfway toward the full cost of quality preschool for low-income students and would also play a powerful role in serving the Elementary and Secondary Education Act's other long-term goals. The federal financial stake in preschool and education in general could easily shrink over time. While the initial costs of preschool are high, students who attend preschool cost society far less in later years. Even the most conservative studies find that the public savings derived from preschool are more than twice its cost.³⁹⁷ States could easily use those savings to fund a larger portion of preschool in future years and to ease the costs of meeting the equity requirements outlined above. In short, a major federal investment in preschool would have positive reciprocal effects on state education finances that make compliance with the Elementary and Secondary Education Act far easier than had the federal government done nothing.

CONCLUSION

After a decade and a half of incessant standardized testing, harsh punishments, and unexpected federal dictates, the education pendulum swung entirely in the opposite direction at the end of 2015. In the process, it eviscerated much of the good that the Elementary and Secondary Education Act had guaranteed for the past half century. Federal leadership on closing achievement gaps and ensuring equal and adequate resources is gone. Yet, despite all that was lost so quickly, there is reason to believe the setback may only be temporary.

A unique confluence of events led to this massive shift: the NCLB had become one of the most reviled pieces of education legislation in decades; its reauthorization or amendment was nearly a decade overdue; in that interim, the Secretary of Education Arne Duncan had far exceeded his authority in placing new conditions on states in exchange for NCLB waivers, making a new extension of the Department's power disconcerting to most; those waiver conditions included a nationalized Common Core curriculum and new teacher evaluation systems, both of which generated significant backlash; and finally, Congress was desperately in need of a legislative victory after six years of nearly

395. HEAD START, HEAD START PROGRAM FACTS FISCAL YEAR 2013 at 10 (2013), <https://eclkc.ohs.acf.hhs.gov/hslc/data/factsheets/docs/hs-program-fact-sheet-2013.pdf> [<https://perma.cc/2N2Y-AURP>] (indicating \$7,573,095,000 in federal Head Start funding in fiscal year 2013).

396. The competitive forces that Head Start creates in the labor market have presented problems for public preschool programs, which makes collapsing these funds even more compelling. *See* Abbott v. Burke, 790 A.2d 842, 852–54 (N.J. 2002) (holding that Department of Education must “supplement existing Head Start funding with state funding sufficient to allow Head Start to meet state standards and to retain certified teachers”).

397. LYNN A. KAROLY, RAND, INVESTING IN OUR CHILDREN 91–98 (1998); *see also* Ryan, *supra* note 35, at 65–69 (surveying the literature on the positive benefits of preschool education).

none. The ESSA was the lowest common denominator to solve all of these problems, even if it solved none for student achievement and equality.

Some in Congress surely recognized that the ESSA was a train that could not be stopped, but one that could be tolerated for a few years. From this perspective, the fact that the ESSA was authorized for only four years makes sense. Congress will necessarily have the opportunity to reconsider it more quickly than many Elementary and Secondary Education Act reauthorizations of the past. The vast discretion afforded to states in the interim also comes with an ironic silver lining. Insofar as the ESSA does not require states to implement an entirely new approach to education—as did the NCLB and its subsequent waiver conditions—scrapping it in a few years can be done with little cost. Thus, as flawed as the ESSA is, some in Congress could have intended it as a means to defer the political and practical turmoil of a new equality regime until meaningful change is practicable.

At that point, Congress must substantially increase federal funding for education to secure states' consent to strict new equity standards and to meet the outstanding needs of low-income students. Additional federal funding can also finally make preschool for low-income students a reality and close achievement gaps, generate cost savings, and make equalizing school funding feasible.

