

REVIEW

The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism

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Five Miles Away, a World Apart: One City, Two Schools, and the Story of Educational Opportunity in Modern America
James E. Ryan. Oxford, 2010. Pp viii, 384.

INTRODUCTION

Equal educational opportunity remains elusive within the United States. The nation's education landscape reveals that too often students' backgrounds and where they live determine the quality of educational opportunities that they receive.¹ Although most within the United States profess a strong commitment to equal opportunity and to providing everyone access to an excellent education, substantial and influential disparities in school quality are commonplace.² Our nation is home to many substandard schools attended disproportionately by poor and minority schoolchildren and these schools offer students inferior educational, career, and postsecondary opportunities when compared to the opportunities

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¹ See Janice Petrovich, *The Shifting Terrain of Educational Policy: Why We Must Bring Equity Back*, in Janice Petrovich and Amy Stuart Wells, eds, *Bringing Equity Back: Research for a New Era in American Educational Policy* 3, 12 (Teachers College 2005).

² See Clive R. Belfield and Henry M. Levin, *The Education Attainment Gap: Who's Affected, How Much, and Why It Matters*, in Clive R. Belfield and Henry M. Levin, eds, *The Price We Pay: Economic and Social Consequences of Inadequate Education* 1, 1 (Brookings 2007); Michael A. Rebell, *The Need for Comprehensive Educational Equity*, in Belfield and Levin, eds, *Price We Pay* 255, 262–63 (cited in note 2); Jennifer L. Hochschild and Nathan Scovronick, *The American Dream and the Public Schools* 10–11 (Oxford 2003).

provided to students in many affluent and majority white schools.³ Many schoolchildren receive educational opportunities that do not prepare them to succeed in postsecondary education or work.⁴ Many students also are more likely to attend school with those who look like themselves than with those from different racial or ethnic backgrounds and thus leave school without the tools that they will need to engage effectively in the diverse world in which they will live.⁵ For example, the average white student attends a school in which approximately 83 percent of the students are white, while the average minority student attends a majority-minority school, and approximately one-third of black and Latino students attend schools that are 90 to 100 percent minority.⁶

Our nation also obtains poor outcomes from our education system. Approximately 30 percent of high school students fail to graduate from high school on time, and blacks and Hispanics fail to finish high school and fail to finish on time at higher rates than whites.⁷ Furthermore, graduation rates for high school are falling rather than rising.⁸ In 2009, approximately 25 percent of twelfth graders that were tested⁹ did not read at a basic level on the National Assessment of Educational Progress (NAEP).¹⁰ NAEP reading scores for twelfth graders have declined overall since 1992, and the racial achievement gap in reading has not improved since 1992.¹¹ Similarly, approximately 36 percent of the tested twelfth graders scored below basic on the NAEP mathematics assessment.¹²

³ Hochschild and Scovronick, *American Dream* at 3, 54, 59 (cited in note 2).

⁴ Achieve, Inc, *Closing the Expectations Gap: An Annual 50-State Progress Report on the Alignment of High School Policies with the Demands of College and Work 5* (2007), online at <http://www.achieve.org/files/50-state-07-Final.pdf> (visited Nov 8, 2011).

⁵ See Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge* 3–4, 13 (The Civil Rights Project 2009), online at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf> (visited Nov 8, 2011).

⁶ *Id.* at 13.

⁷ Belfield and Levin, *Education Attainment Gap* at 7 (cited in note 2).

⁸ Rebell, *Need for Comprehensive Educational Equity* at 256–57 (cited in note 2) (noting that the continuation of current trends would bring the dropout rate to 18.5 percent in 2020, compared to 16.1 percent in 2000).

⁹ The National Assessment of Educational Progress is administered to “nationally representative samples” of students from 1,670 school districts. National Center for Education Statistics, Department of Education, *The Nation’s Report Card: Grade 12 Reading and Mathematics 2009 National and Pilot State Results* 1 (2011), online at <http://nces.ed.gov/nationsreportcard/pdf/main2009/2011455.pdf> (visited Nov 8, 2011).

¹⁰ *Id.* at 9.

¹¹ *Id.* at 2.

¹² *Id.* at 26.

Although twelfth grade math scores have improved since 2005, the racial achievement gap in math has remained the same.¹³

Schoolchildren in substandard schools and their families are not the only ones that experience and live with the harmful effects of the current inequities in our nation's schools. Research establishes that the nation pays a high price tag for substandard schools.¹⁴ For instance, the nation loses \$156 billion in tax and income revenues over the lifetime of each annual cohort of eighteen-year-old high school students who fail to graduate from high school.¹⁵ Similarly, the nation experiences higher health care costs for its substantial high school dropout rate because "[e]ach and every annual cohort of high school dropouts represents a cost of \$23 billion in public funds and \$110 billion in forfeited health and longevity."¹⁶ The nation would save \$1.4 billion annually from reduced criminal activity by raising the high school completion rate by 1 percent for males between ages twenty and sixty.¹⁷ Improving educational attainment for high school graduates also could save between \$7.9 and \$10.8 billion in welfare assistance, food stamps, and housing assistance.¹⁸ Therefore, investments in reducing educational inequities and increasing educational attainment would not only create a more just and equitable society and enhance the ability of individuals to reach their full potential, it also would yield substantial benefits and revenue savings to the nation at a time when it is struggling to reduce the national debt. Improving educational opportunities and outcomes also would increase participation in the political process and civic involvement.¹⁹

The undeniable costs associated with low-quality schools and substantial disparities in educational opportunity throughout the

¹³ National Center for Education Statistics, Department of Education, *Nation's Report Card* at 2 (cited in note 9).

¹⁴ Belfield and Levin, *Education Attainment Gap* at 2 (cited in note 2) (noting that "a copious body of research literature" has documented the numerous costs to society of low educational achievement).

¹⁵ Cecilia Elena Rouse, *Consequences for the Labor Market*, in Belfield and Levin, eds, *Price We Pay* 99, 101 (cited in note 2).

¹⁶ Peter Muennig, *Consequences in Health Status and Costs*, in Belfield and Levin, eds, *Price We Pay* 125, 137 (cited in note 2).

¹⁷ Enrico Moretti, *Crime and the Costs of Criminal Justice*, in Belfield and Levin, eds, *Price We Pay* 142, 157 (cited in note 2) (including the cost to both victims of crime and society at large).

¹⁸ Jane Waldfogel, Irwin Garfinkel, and Brendan Kelly, *Welfare and the Costs of Public Assistance*, in Belfield and Levin, eds, *Price We Pay* 160, 173 (cited in note 2) (showing that the bulk of these costs come from the government's Temporary Assistance to Needy Families (TANF) program).

¹⁹ Belfield and Levin, *Education Attainment Gap* at 16 (cited in note 2) ("Even these benefits of more and better education as a good investment do not include the gains in political participation or civic engagement that are also causally influenced by education.").

United States raise an important question: Why does equal educational opportunity remain an unfulfilled promise within the United States (p 1)? After all, the nation's highest court declared in *Brown v Board of Education*²⁰ that "education is a right which must be made available to all on equal terms."²¹ Since *Brown* and the efforts to desegregate public schools, education reformers have used a variety of tools to reduce the pervasive inequality within US schools, including school desegregation, school finance litigation, school choice, and most recently the standards and accountability movement. Despite these efforts, inequality in educational opportunities remains stubbornly entrenched throughout the nation (p 1).

James Ryan, one of the nation's most highly regarded education law and policy scholars, has written an eloquent, comprehensive, and thoroughly researched book, *Five Miles Away, a World Apart: One City, Two Schools, and the Story of Educational Opportunity in Modern America*, that seeks to explain why more than half a century of school reform has failed to make the promise of equal educational opportunity a reality (p 1). He captures and critiques how our nation arrived at the point at which schools that offer disparate opportunities and that too often educate students of different races exist only a short distance from each other (pp 3–14). He analyzes this complex history while also tracing the impact of school reform efforts on two Richmond, Virginia, high schools that exist only five miles apart but that offer different worlds to the students who attend the schools (p 2). Ryan weaves together a compelling story that explains why the nation has failed to achieve equal educational opportunity, including why disparities in educational opportunity exist between Thomas Jefferson High School, which educates mostly poor and minority students in Richmond, Virginia, and Freeman High School, which primarily educates white, middle-class students in nearby suburban Henrico County (pp 1–2).

Although the title of the book suggests that the book focuses on two high schools in Richmond and a nearby suburb, the book emphasizes the national evolution of education law and policy over the last fifty years rather than educational opportunities within Richmond. The inclusion of how these national policies impact the lives of students at Thomas Jefferson and Freeman high schools crystallizes Ryan's analysis of national education reform. However, apart from his extensive discussion of school desegregation in Richmond, Virginia, the discussion of Thomas Jefferson and

²⁰ 347 US 483 (1954).

²¹ *Id.* at 493.

Freeman high schools serves more as a backdrop to national reform efforts rather than as the book's focal point. For example, Ryan does not address the disparities of educational opportunity offered within Henrico County, which is currently under investigation by the US Department of Education's Office for Civil Rights for discrimination against African American students for providing fewer opportunities and resources to poor and majority African American schools in eastern Henrico County than to those in the more affluent and whiter western part of the county.²² Although those seeking an in-depth understanding of educational opportunity in Richmond and its surrounding suburbs will find the book's analysis of Richmond to be somewhat limited, those interested in understanding the evolution of educational opportunity across the United States will appreciate Ryan's focus on national education reform.

While exploring the failure of major education reforms to achieve equal educational opportunity over the past half century, Ryan points to a single persistent "compromise" that both shaped and undermined these reforms. He traces this compromise in part to President Richard Nixon's speech in March 1972 about school desegregation in which he sharply criticized cross-district busing and instead proposed that

[i]t is time for us to make a national commitment to see that the schools in central cities are upgraded so that the children who go there will have just as good a chance to get a quality education as do the children who go to school in the suburbs (p 5).

Ryan argues that President Nixon's speech and the essence of much of school reform efforts sought to "save the cities, but spare the suburbs" and that this "compromise, broadly conceived to mean that urban schools should be helped in ways that do not threaten the physical, financial, or political independence of suburban schools, continues to shape nearly every modern education reform" (p 5). He boldly claims that "[t]he continued separation of urban and suburban students has been the most dominant and important theme in education law and policy for the last fifty years" (pp 12–13). Ryan admits that it would oversimplify the complexities of education law and policy to claim that this compromise alone explains the current education landscape (p 5). But he alleges that the oversimplification is slight (p 5).

²² Luz Lazo, *Henrico Resolute on Fixing School Disparities*, Richmond Times-Dispatch (May 31, 2011), online at <http://www2.timesdispatch.com/news/news/2011/may/31/tdmain01-henrico-resolute-on-fixing-school-dispari-ar-1074604/> (visited Nov 8, 2011).

Ryan notes that this persistent effort to safeguard the suburbs handcuffs not just education policies but also education politics. He explains that urban districts lack the political clout to push local, state, and federal politicians to institute the reforms and provide the essential resources that urban schools desperately need (p 14). As a result, education politics protects suburban schools and districts while failing to maximize education within urban schools (p 14). Ryan contends that “[t]he truth is that separating the poor and politically powerless in their own schools and districts is antithetical to the idea of equal educational opportunity” (p 304). Furthermore, educating children of different income levels and races in different schools also prevents schools from accomplishing their larger civic purpose of creating engaged citizens who know how to work with those unlike themselves (p 279). He contends that if education reform is ever going to be successful at reducing the important disparities in educational opportunity, then education politics must change by linking together the fate of poor and minority schoolchildren with affluent white children through diverse schools (pp 14, 272).

Ryan then proposes how the fate of these two groups of children might be linked to provide equal educational opportunity within the United States. Ryan notes that if districts astutely manage demographic shifts that are drawing middle-class families into urban centers and minorities into suburbs, then new alliances within education politics can be created that promote equal opportunity (p 275). He argues that urban districts should attract middle-class families by allowing students to attend any public or private school within the district (p 287). The presence of significant numbers of middle-class families within urban districts would increase the political strength of these districts (p 279). Ryan then argues that suburban districts should embrace their increasing diversity by emphasizing that diverse schools provide students an invaluable opportunity to learn from diverse peers and by adopting effective academic programs to meet the needs of the diverse student population (pp 275, 295). Finally, in addition to igniting a new conversation about the importance of learning in diverse settings, Ryan proposes that colleges and universities should provide an admissions advantage to students who attend diverse schools to reinforce to white, middle-class families the importance of being educated in a diverse setting (p 298).

Ryan’s analysis and proposals represent a novel and thoughtful contribution to the scholarly literature on education law and policy because he identifies a consistent theme within the past half century

of education reforms and develops new ideas that would advance equal educational opportunity. In analyzing Ryan's book, this Review contends that Ryan effectively identifies how the last fifty years of education law and policy may be characterized as an attempt to "save the cities, spare the suburbs," and he identifies numerous examples of how the reforms fell short of living up to this goal. However, Ryan's critique of these reforms would have greatly benefited from the inclusion of a cohesive counternarrative that captured some of the consistent ways in which these education reforms failed. This Review shows that one such counternarrative is that the education reforms could more accurately be described as efforts to "save the suburbs, tinker with the cities" because these reforms have attempted to "save the suburbs" for mostly white, middle-class schoolchildren while at the same time only marginally addressing the challenges confronting urban schools. This Review then demonstrates that although Ryan has offered several thoughtful and innovative proposals, their potential effectiveness in advancing equal educational opportunity would be hindered by such challenges as the lack of adequate incentives to institute the reforms, the omission of additional funding sources during a time of education budget cutbacks, and the failure to remedy much of the existing inequalities within cities. This Review concludes by contending that the principal shortcoming of Ryan's proposals is that he overlooks the need for the federal government to play a central role in promoting equal educational opportunity. This Review further contends that if equal educational opportunity is to become a reality, then the nation should embrace a new understanding of education federalism that would establish an enhanced and more effective federal role in ensuring equal educational opportunity.

I. UNDERSTANDING PAST AND PRESENT SCHOOL REFORM EFFORTS

Education reform efforts that attempt to increase the provision of equal educational opportunity have taken many forms over the past half century. Ryan's book analyzes four of the leading education reforms for this time frame: school desegregation, school finance litigation, school choice, and standards and testing. Part I.A describes Ryan's analysis of these efforts and his argument that the essence of these efforts can be encapsulated in the compromise "save the cities, spare the suburbs." Part I.B offers a critique of his analysis and proposes a counternarrative that captures some of Ryan's critiques of these reforms.

A. Save the Cities, Spare the Suburbs

Ryan argues that most of the last half century of education law and policy attempted to make city schools equal to suburban schools, while at the same time it reinforced the dividing line between urban and suburban school districts and intentionally exempted suburban schools from efforts to reform urban schools (p 260). He encapsulates this compromise in the phrase “save the cities, spare the suburbs” (p 5). He contends that this approach has prevented the United States from providing equal educational opportunity because it creates an education politics in which urban districts lack the political clout that they need to obtain the reforms that would make urban schools equal to suburban schools (p 272). He substantiates this claim by uncovering how this compromise drove the four primary education reform efforts over the last half century: school desegregation, school finance, school choice, and standards and accountability.

School desegregation best embodies the “save the cities, spare the suburbs” compromise as shown by Ryan’s examination of the decisions in the *Milliken v Bradley*²³ (*Milliken I* and *Milliken II*) case. In *Milliken I*, the Supreme Court overturned a lower court decision that had ordered interdistrict busing between Detroit and the surrounding suburban districts to address the intentional discrimination of the State of Michigan and the Detroit Board of Education.²⁴ The Court held that when a court finds that a school district has violated the Equal Protection Clause by creating segregated schools, it cannot order an interdistrict remedy—typically busing—unless the plaintiffs have shown an interdistrict violation.²⁵ The Supreme Court in *Milliken II* subsequently approved of court-ordered remedial programs for districts that had been intentionally segregated.²⁶ The *Milliken I* decision dealt a crippling blow to desegregation efforts because most urban schoolchildren in northern and western cities were trapped within urban districts that lacked sufficient numbers of white students for meaningful desegregation given the substantial exodus of middle-class whites to the suburbs that occurred during the 1960s and 1970s.²⁷ The *Milliken II* remedies that were sought by many districts to attempt to improve urban schools

²³ 418 US 717 (1974) (*Milliken I*); 433 US 267 (1977) (*Milliken II*).

²⁴ *Milliken I*, 418 US at 724, 752–53.

²⁵ See *id.* at 744–45.

²⁶ *Milliken II*, 433 US at 272, 281–82, 287.

²⁷ Molly S. McUsic, *The Law’s Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in Jay P. Heubert, ed., *Law and School Reform: Six Strategies for Promoting Educational Equity* 88, 102 (Yale 1999).

proved inadequate to make a substantial impact on these districts (p 108).

Ryan argues that the *Milliken I* decision created an insurmountable barrier to desegregation between urban and suburban schools and ensured that busing would fail (pp 105, 178). Desegregation decrees within urban districts “often meant transporting poor white and poor black students from shoddy, single-race schools to shoddy, somewhat integrated schools” (p 105). Rather than provide an effective school desegregation remedy that would have created integrated schools and linked the fate of urban and suburban school districts, *Milliken II* attempted to address some of the challenges confronting primarily poor, urban districts by providing these districts additional funding (pp 104, 178). At the same time, the decisions safeguarded the inviolable autonomy of wealthier districts typically found in the suburbs (p 178). Ryan argues that the *Milliken* decisions’ attempts to improve city schools without involving suburban schools embodies the compromise “save the cities, spare the suburbs.”

Ryan also contends that school finance litigation in both federal and state court conforms to the “save the cities, spare the suburbs” compromise. In *San Antonio Independent School District v Rodriguez*,²⁸ the Supreme Court rejected an invitation to uphold a federal right to education that could have enabled many urban districts to receive funding that was comparable to the funding of suburban districts.²⁹ In *Rodriguez*, the Court encountered a claim from parents from the Edgewood school district, a low-income, Mexican American community within San Antonio, Texas, that alleged that the Texas school finance system violated the federal and state constitutions because of the significant disparities in funding between their property-poor district and property-rich districts like Alamo Heights.³⁰ The Court held that the Constitution did not explicitly or implicitly create a right to education and that education’s significance and connection to other rights were inadequate to render education a fundamental right.³¹ Ryan contends that this decision respected the boundary between city and suburb “by protecting the ability of some districts to spend more than others” (p 178).

Rather than challenge the city-suburb divide, state school finance litigation has attempted to garner additional resources primarily for “poor, struggling districts, which are usually in urban or

²⁸ 411 US 1 (1973).

²⁹ *Id.* at 35–36.

³⁰ *See id.* at 4–5, 11–14, 16–17.

³¹ *See id.* at 35–36.

rural areas” (p 178). Plaintiffs have prevailed in their highest state court in seventeen cases and have lost in nineteen cases (p 145). However, even prevailing plaintiffs have not succeeded in changing the basic design of school finance systems that rely upon school district boundaries and property wealth within a district to pay for schools (p 178). Instead, resulting school finance reforms typically focus on modest increases in funding levels for low-wealth districts while simultaneously maintaining existing funding levels or raising more slowly the funding rate for wealthier districts (pp 153, 178). This approach preserves the fiscal autonomy of wealthier, typically suburban school districts (p 178). According to Ryan, these outcomes of state school finance litigation also conform to the compromise “save the cities, spare the suburbs” (p 178).

Similarly, Ryan argues that each of the four types of school choice—intradistrict public school choice, interdistrict public school choice, charter schools, and vouchers—also conforms to the “save the cities, spare the suburbs” compromise because each represents an effort to improve the educational opportunities within city schools while simultaneously not threatening the autonomy of suburban schools (pp 184, 209–10). For instance, intradistrict choice, the most common type of school choice, enables approximately five million students to choose a school within their school district (p 185). While this approach is the most popular form of school choice, no more than 10 percent of all students exercise this option (pp 185–86). Intradistrict school choice includes a variety of approaches, including opportunities to attend a specialized program and magnet schools (pp 186–88). These efforts operate consistent with the compromise because these programs give only a very small percentage of typically urban school students a chance to attend a specialized school within their district while the overwhelming majority of schoolchildren continue to attend their neighborhood school (p 188).

Interdistrict school choice also affects less than half-a-million students and thus helps only a small handful of students obtain improved educational opportunities while including provisions that protect the autonomy of suburban schools (pp 191–93). For instance, open enrollment plans, which ostensibly enable students to attend any school within the state, include a variety of limitations that narrow the choices available to students (p 192). Almost two-thirds of the thirty-eight states with open enrollment plans make participation optional, and in those states that mandate some district involvement, most do not demand that districts accept students from outside their district (p 192). School districts that do not want to participate in open enrollment plans may keep out transfer students

by either refusing to participate when this option is provided or stating that they lack capacity when opting out is prohibited (p 193). Many districts have taken advantage of these opportunities to opt out of open enrollment programs (p 192). Given that suburban schools are likely to be attractive to other students and thus are most often called upon to accept other students, the opt-out provisions “essentially protect suburban autonomy” (p 193).

Charter schools and vouchers similarly fit the “save the cities, spare the suburbs” compromise. Both exist almost exclusively within urban school districts (pp 201, 204). Charter schools generally seek to address the challenges confronting failing urban school districts, and these schools sometimes spark considerable anger and opposition when proposed for suburban schools (pp 201–02). Voucher programs in Washington, DC, Milwaukee, Cleveland, and elsewhere in the state of Ohio are by design or in practice provided to small numbers of typically urban students who either are low-income, are in failing schools, or both so that these students may attend private schools located primarily within cities (pp 204–05). The placement of charter schools and voucher programs within cities prevents them from affecting, much less harming, suburban schools (pp 202, 209).

Therefore, like desegregation and school finance litigation, school choice attempts to improve city schools and the opportunities provided by them (pp 209–10). At the same time, school choice ensures that suburban schoolchildren may attend their local suburban school, that city schoolchildren have very limited access to suburban schools, and that suburbanites are not forced to pay for the education of others (p 209). As a result, the restrictions on and the limited scope of school choice render it merely another example of how education law and policy attempts to “save the cities, spare the suburbs” (p 213).

Finally, Ryan contends that the reforms adopted in the standards and testing movement also conform to the “save the cities, spare the suburbs” compromise (p 241). Ryan first acknowledges that setting the same standards for urban and suburban schools, if implemented properly, could have helped to raise city schools to the higher standards typically found in suburban schools (p 240). However, the politics of education prevented this from happening because many legislatures adopted rather low standards to attempt to avoid the sanctions that are imposed on failing schools under the No Child Left Behind Act of 2001³² (NCLB) and to prevent mounting pressure to

³² Pub L No 107-110, 115 Stat 1425 (2002), codified at 20 USC § 6301 et seq.

improve urban schools (p 241). As a result, the standards and testing movement embodies the compromise because it “offers some help to the cities, by trying to ensure that urban students learn the basics, but it imposes relatively few burdens on the suburbs” (p 241).

B. The Missing Counternarrative: Save the Suburbs, Tinker with the Cities

Ryan’s book presents a thorough and perceptive analysis of each of the reforms that he examines. His contention that these reforms attempted to “save the cities, spare the suburbs” identifies a common impetus that may have driven divergent reform efforts. His analysis is praiseworthy for its depth, insight, and consistently comprehensive analysis of the research surrounding each of these issues.

Nevertheless, Ryan’s argument that education reform efforts for the last half century may be captured in the compromise “save the cities, spare the suburbs” exhibits an important shortcoming. Although Ryan repeatedly explains how education law and policy reforms attempted to “save the cities, spare the suburbs” and he acknowledges numerous ways that the reforms fell short of accomplishing this goal, he does not offer a cohesive counternarrative that captures the shortcomings of these policies. A counternarrative would have strengthened and crystallized Ryan’s analysis because it would have left the reader with a more in-depth understanding of not just what education reform attempted to do but also how and why the reforms consistently fell short of their goals. This Review proposes one possible counternarrative that helps to highlight some of the key shortcomings of the reforms that Ryan identifies. Of course, other counternarratives also could be imagined, but space limitations prevent examining all possible counternarratives here.³³

Ryan notes numerous ways in which education reform sought to “spare the suburbs.” However, his analysis reveals that the phrase “spare the suburbs” understates the consistent, affirmative efforts of white, middle-class families not just to prevent harm to suburban schools but rather to keep out poor and minority schoolchildren. In addition, Ryan uses the phrase “save the cities” to capture the idea

³³ Another counternarrative that Ryan could have offered is that “save the cities, spare the suburbs” failed because it was simply a warmed-over version of the separate but equal policy sanctioned by *Plessy v. Ferguson*, 163 US 537 (1896). Although Ryan acknowledges that *Milliken I* and *Milliken II* embraced a separate but equal approach (p 105), echoes of *Plessy* also can be heard in the efforts of school finance litigation to channel additional resources to urban schools while leaving suburban schools autonomous, in the attempts to use school choice to improve the opportunities provided to some urban schoolchildren within city school districts while limiting their ability to attend suburban schools, and in the accountability movement’s endeavors to raise standards in urban schools to those of suburban schools.

that the reforms sought to make city schools equal to suburban schools. However, his analysis also repeatedly shows how this characterization overstates what most of the reforms attempted to accomplish and how the reforms proceeded in ways that were inconsistent with this compromise. Therefore, this Review contends that Ryan's analysis of these policies reveals that the reforms may be characterized as efforts to "save the suburbs, tinker with the cities."

1. Save the suburbs.

Education reform efforts sought to "save the suburbs" rather than merely "spare the suburbs," as Ryan's narrative makes clear, because many predominantly white, middle-class families sought to "save the suburbs" for themselves and to keep out most minority and poor families. The difference between the two characterizations is subtle but important. "Spare the suburbs" conveys the notion that suburban families seek merely to prevent any harmful changes to the suburbs while urban schools are fixed. However, the history and policy that Ryan compiles in great detail point to a history of more consistent efforts to preserve the benefits of suburban education for middle-class whites and to keep out poor and minority schoolchildren. A message of "keep out" is substantively different from a sign that says "do no harm."

For example, in the years following *Brown*, the overwhelming majority of middle-class whites opposed school integration and instead supported only token integration (pp 60–61). The courts acted consistent with their preferences (pp 60–61). Once it became clear that school desegregation would proceed, Ryan explains, middle-class whites fled to the suburbs and private schools and then strongly opposed busing between urban and suburban schools (pp 61, 64). "After middle-class whites decamped for the suburbs, they circled the wagons to shield their children and their schools from the reach of desegregation orders" (p 61). In the early 1970s, middle-class whites waged unprecedented protests to prevent busing from entering their schools, including some marching with signs reading "Preserve Our Neighborhood Schools" (p 97). In the *Milliken I* case, the Supreme Court used the law to reinforce the barrier that middle-class whites had created by making interdistrict desegregation virtually impossible for states in which urban and suburban schools existed in separate counties (p 65). Thus, with the help of the courts, middle-class whites successfully fought to preserve their schools for themselves by preventing integration—and the minority students that integration required—from entering their schoolhouse doors (p 114).

Similarly, suburbanites successfully limited school choice efforts to prevent significant numbers of poor and minority schoolchildren from leaving city schools to attend suburban schools. For instance, the tiny number of students that participate in urban-suburban transfer programs are intentionally kept small because cabining these programs prevents them “from becoming too threatening or controversial” to suburbanites (p 195). It is worth noting that the number of students participating is tiny because of space limitations in these programs, most of which have waiting lists (p 195). The ability to opt out or claim space limitations in open enrollment plans and the participation caps on urban-suburban choice options and vouchers also keep the overwhelming majority of urban schoolchildren in urban schools and away from suburban schools (pp 192–93, 195, 204). It is particularly telling that when white parents are provided with choices among schools, they typically choose schools with the least diversity (p 216). The limits on school choice reforms undoubtedly reveal an affirmative effort to “save the suburbs” for middle-class, white schoolchildren.

The standards and accountability movement also has proceeded in ways that save the suburbs for white, middle-class families. Under NCLB, students enrolled in schools that do not meet the annual assessment goals for two consecutive years may transfer to a school within their district that has met its goals.³⁴ This provision has been used infrequently in part because of the dearth of successful schools within many districts (p 191). Despite NCLB’s statement that it seeks to ensure that all children receive an equal opportunity to obtain a “high-quality education,”³⁵ the law does not authorize students to transfer to other school districts, even when a student cannot transfer to a successful school within her district (p 191). The statute instead indicates that when it is practicable, districts with insufficient transfer options should work with other districts to create voluntary “cooperative agreement[s]” that would permit students to transfer.³⁶ However, cooperative agreements and interdistrict transfers under NCLB are rare.³⁷ Urban superintendents typically find that suburban districts are not receptive to interdistrict transfers.³⁸

³⁴ NCLB § 1116(b)(5)(A), 20 USC § 6316(b)(5)(A).

³⁵ NCLB § 1001, 20 USC § 6301.

³⁶ NCLB § 1116(b)(11), 20 USC § 6316(b)(11).

³⁷ Meredith P. Richards, Kori J. Stroub, and Jennifer Jellison Holme, *Can NCLB Choice Work? Modeling the Effects of Interdistrict Choice on Student Access to Higher-Performing Schools* 6 (Century Foundation 2011), online at <http://tcf.org/publications/2011/5/can-nclb-work-modeling-the-effects-of-interdistrict-choice-on-student-access-to-higher-performing-schools> (visited Nov 9, 2011); Abigail Aikens, *Being Choosy: An Analysis of Public School Choice under No Child Left Behind*, 108 W Va L Rev 233, 247 (2005); Cynthia G. Brown,

These examples reveal that much of the last fifty years of education reform was not directed merely at ensuring no harm was done to high-quality suburban schools. Instead, the counternarrative present within Ryan's analysis of the reforms also indicates that white, middle-class families oftentimes set up impenetrable roadblocks to the admittance of poor and minority students to suburban schools. "Save the suburbs" for us (white, middle-class families) and keep others out is a much more indicting—but ultimately more accurate—portrayal of much of education law and policy over the last decade than the phrase "spare the suburbs."

2. Tinker with the cities.

When one initially hears Ryan's argument that the last fifty years of education law and policy have attempted to "save the cities, spare the suburbs" by adopting reforms that would make urban schools equal to suburban schools without harming suburban schools, one might initially believe that school reform has attempted the comprehensive overhaul of city schools that it would take to accomplish this. Undoubtedly, Ryan accurately contends that numerous politicians and policy makers have stated an interest in reforming city school districts over the last fifty years and that some have taken steps to improve the educational opportunities found in these schools. However, the counternarrative within Ryan's examination of these reforms also reveals that some of the reforms that he examines too often tinkered at the margins of urban schools rather than offered them the comprehensive overhaul that they would need to make them equal to suburban schools.

In considering what would be necessary to make urban schools equal to suburban schools, it is important to remember some critical background information that Ryan acknowledges. First, urban students bring to the schoolhouse door a host of additional needs that are less often found in suburban schools, including such challenges associated with concentrated poverty as poor nutrition, unstable homes, and substance abuse, as well as the need for enhanced security (pp 158–59). Scholars have labeled the greater educational challenges that confront urban schools, including the challenges associated with educating higher percentages of low-income, disabled, and English-language-learners students,

Choosing Better Schools: A Report on Student Transfers under the No Child Left Behind Act 67–70 (Citizens' Commission on Civil Rights 2004).

³⁸ Ronald Brownstein, *Implementing No Child Left Behind*, in Paul E. Peterson, ed, *The Future of School Choice* 213, 214 (Hoover 2003).

“educational overburden.”³⁹ Ryan further acknowledges that urban districts also must pay more for a variety of goods and services compared to suburban districts (p 159). Finally, cities also typically spend more on noneducational services, such as welfare services and fire and police assistance, and must use their property taxes to cover each of these services along with education.⁴⁰ As a result, no one disagrees that it is a daunting task to undertake a genuine effort to make city schools equal to suburban schools.

Ryan’s book provides substantial evidence that many of the principal education reform efforts have merely tinkered at the margins of the reforms needed to transform urban schools to be as good as suburban schools. For example, Ryan offers a stinging indictment of the standards and testing movement and its relationship to urban school reform. He states, “[W]e are not even seriously trying to make urban schools as good as suburban ones; we are just pretending to by playing around with the definition of a quality education” (p 241). Ryan explains that given the minimal standards and low benchmarks set by most states, “[p]roficiency does not guarantee equal opportunity; it promises the basics” (p 260). Because suburban schools teach beyond the standards, while some urban schools struggle to meet the standards, a sizeable gap exists between the quality of education offered in urban and suburban schools (p 260). Similarly, his discussion of school choice notes that the opposition to and limitations on school choice have kept it cabined to helping only a small number of almost exclusively urban students (pp 184–86, 241).

Ryan also acknowledges how *Milliken I*’s limits on interdistrict desegregation⁴¹ hampered effective school desegregation (p 105). However, he omits a discussion of how several additional influential school desegregation decisions undermined desegregation efforts and left city schools without an effective remedy to “save the cities.” For instance, the Supreme Court’s decision in *Board of Education of Oklahoma City Public Schools v Dowell*⁴² limited the potential impact of desegregation by instructing courts to examine whether a school board acted in good faith and whether the school board had eliminated the vestiges of intentional discrimination “to the extent practicable.”⁴³ This decision’s emphasis on the intentions of school

³⁹ See, for example, Mark G. Yudof, et al, *Educational Policy and the Law* 856 (Wadsworth 5th ed 2012).

⁴⁰ *Id.*

⁴¹ See *Milliken I*, 418 US at 752–53.

⁴² 498 US 237 (1991).

⁴³ *Id.* at 249–50.

boards rather than the effect of their actions eviscerated prior requirements that school districts must eliminate discrimination “root and branch”⁴⁴ and that school districts must accomplish the maximum possible desegregation.⁴⁵ In its place, school districts could be freed from desegregation orders if they attempted unsuccessfully to desegregate their schools.⁴⁶ In *Freeman v Pitts*,⁴⁷ the Court sanctioned the incremental release of school districts from desegregation decrees by allowing courts to find some aspects of a district unitary while others remained under court order.⁴⁸ This decision undermined the Court’s past insistence that school districts must eliminate white and black schools and establish “just schools.”⁴⁹ In its place, the Court approved of school districts’ being released from desegregation orders even though the districts had never operated a completely desegregated district and had failed to desegregate racially isolated schools.⁵⁰ Finally, in *Missouri v Jenkins*,⁵¹ the Court invalidated remedial improvements to the Kansas City schools because the improvements were designed to attract white students to the district.⁵² This decision eliminated a critical and viable avenue for city schools to enroll the white students that might integrate racially isolated schools.⁵³ Through these decisions, desegregation was prevented from serving as an effective vehicle for equalizing city and suburban schools because the Court handcuffed effective desegregation and sanctioned a return to segregated schools.⁵⁴

Much of school finance litigation also proceeded in ways that prevented it from effectively equalizing city and suburban schools. School finance litigation oftentimes shut the courthouse doors to typically urban and rural districts that sought to remedy the substantial finance disparities that crippled their ability to provide a high-quality education for their students. For example, *Rodriguez* foreclosed federal constitutional claims that state legislatures were

⁴⁴ *Green v County School Board of New Kent County*, 391 US 430, 438 (1968).

⁴⁵ See *Swann v Charlotte-Mecklenburg Board of Education*, 402 US 1, 15, 26 (1971); Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 NC L Rev 787, 823 (2010).

⁴⁶ Robinson, 88 NC L Rev at 824 (cited in note 45).

⁴⁷ 503 US 467 (1992).

⁴⁸ *Id.* at 471.

⁴⁹ *Green*, 391 US at 442.

⁵⁰ Robinson, 88 NC L Rev at 826–27 (cited in note 45).

⁵¹ 515 US 70 (1995).

⁵² *Id.* at 94–99.

⁵³ See *Jenkins v Missouri*, 11 F3d 755, 759 (8th Cir 1993).

⁵⁴ Robinson, 88 NC L Rev at 819–37 (cited in note 45).

violating the Equal Protection Clause when the Court held that disparities in state school finance systems were constitutional because the systems were rationally related to states' efforts to promote local control of schools.⁵⁵ However, as Justice Byron White explained in dissent, local control under the Texas school finance system eluded the low-wealth districts that were suing the state because these districts could not tax their property at a rate that enabled them to provide comparable educational opportunities to those in higher-wealth districts.⁵⁶ Thus, while *Rodriguez* upheld the autonomy of suburban school finance systems, the Court in no way took action that would "save the cities." In fact, it did just the opposite when it foreclosed efforts by overwhelmingly urban and rural school districts to challenge school finance systems in federal court.

Similarly, many state school finance cases also foreclosed litigation as a vehicle to "save the cities." The state school finance cases do not consistently support the "save the cities, spare the suburbs" narrative because, as Ryan acknowledges at the outset of the chapter, although seventeen plaintiffs have been successful in the highest courts of their states, nineteen plaintiffs have been unsuccessful, and the school finance systems in those states remain virtually immune from challenge in court (p 145). The courts in states where plaintiffs lost upheld the validity of the disparities that plaintiffs claimed significantly disadvantaged urban districts to the detriment of the children attending those schools.

Even when plaintiffs were successful, school finance litigation overwhelmingly failed even to attempt to equalize urban and suburban school districts. As Ryan acknowledges, prevailing plaintiffs have been unable to change the basic structure of a school finance system that is built around school district lines and that relies heavily on district property wealth to fund public schools (p 178). In fact, Ryan boldly claims that "not a single suit has done much to alter the basic structure of school finance schemes" (p 153). Courts have not redrawn district lines or prohibited the use of the property tax (pp 153, 174). Furthermore, when additional funding has been obtained, most increases have been quite minimal (p 154). For example, Ryan notes that one study found that plaintiff victories resulted in "a 16 percent decrease in spending disparities between high- and low-spending districts" (p 154). In spite of the greater needs of urban districts, even successful school finance litigation

⁵⁵ See *Rodriguez*, 411 US at 49–51.

⁵⁶ See *id.* at 64–65, 70 (White dissenting).

leaves substantial disparities in quality between urban and suburban districts (p 154). Given the inability of school finance litigation to change the basic structure of school finance, “[t]he end result is that school funding systems in just about every state continue to be unequal and strongly influenced by differing levels of property wealth” (p 153).

Of course, this is not to deny that a genuine effort to “save the cities” has occurred in some places. For example, in New Jersey, successful school funding litigation has required both additional programs like full-day kindergarten and funding for low-income, majority-minority urban school districts equal to funding for the top-spending suburban districts (p 160). However, such efforts to make urban schools of the same quality as suburban schools are noteworthy because they are the exception rather than the norm.

Given Ryan’s repetition of his argument that more than fifty years of school reform conformed to this “save the cities, spare the suburbs” compromise, it is worth highlighting that many of his critiques of these reforms also paint a cohesive counternarrative that reveals that these reforms consistently failed to proceed in ways that would have enabled them to equalize city and suburban schools. Otherwise, those unfamiliar with the history of school reform may think that such an effort has been tried for the last half century and has failed, when the reality is that a comprehensive effort to transform city schools to be of the same quality as suburban schools has not consistently been attempted.⁵⁷

II. CHARTING A NEW PATH TOWARD EQUAL EDUCATIONAL OPPORTUNITY

Ryan’s analysis of the problem goes far beyond his argument that much of the last fifty years of education law and policy has pursued a compromise to “save the cities, spare the suburbs.” Indeed, the book’s most important and insightful contribution argues that the key problem with these education reforms is that they have failed to address the education politics that drive these reforms—that is, that the fate of urban, typically poor and minority students and suburban, typically white and middle-class students are not linked (p 271). According to Ryan, the last half century of education policy has “been more about severing ties than creating them, and more about maintaining rather than eliminating the boundaries between urban and suburban schools and districts” (p 271). This separation

⁵⁷ In some ways, this argument is similar to Ryan’s argument that school desegregation was not a failure; instead, it was found to be challenging and was never tried (p 116).

exists in direct conflict to the vision of public schools advanced over 150 years ago by Horace Mann, who advocated for common schools that educated rich and poor students together because if wealthy families did not send their children to common schools, then they would not make sure that common schools were of high quality (p 271).

History has proven Horace Mann correct. The separate geography in which poor and wealthy students are educated allows suburban-dominated legislatures to exempt themselves and suburban schools from all efforts to improve urban schools (p 272). Legislatures are not held accountable because most urban school systems do not educate the families with the political leverage to advocate successfully for their children in local or state politics (p 272).

Separate urban and suburban educational spheres undoubtedly harm the urban students who are trapped in inferior schools (pp 272–73). In addition, both sets of students also can complete their education without learning with or from students with different backgrounds (p 272). Ryan admits that reigniting discussions to promote school integration is “unfashionable” (p 273). Nevertheless, he believes that the topic should be revisited because the reforms that were adopted in lieu of integration have failed (p 273). Instead, “[u]rban schools continue to lag behind suburban ones on every measure, including test scores, graduation rates, the quality of teachers, the quality of facilities, academic rigor and expectations, and reputation” (p 273).

The discussion to promote integration also should be revisited because research indicates that minorities experience modest gains from attending diverse schools, whites are not harmed by attending diverse schools, and both groups experience gains from the exposure to others unlike themselves (p 273). Extensive research documents the harms of racial isolation and the benefits of integration.⁵⁸ Similarly, research also indicates that poor students benefit from attending middle-class schools while middle-class students are not harmed by attending schools with poor students if the school enrolls a majority of middle-class students (p 273).

To reform the politics that hinder effective education reform, Ryan argues that the fate of poor and affluent students and black and white students must be tied together (p 272). Ryan develops a multifaceted approach that would accomplish this by increasing race

⁵⁸ See Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 BC L Rev 277, 327–36 (2009).

and class diversity within schools and districts and thereby reengineering education politics. Part II.A presents his proposals. Part II.B identifies numerous potential obstacles to the adoption and effectiveness of the proposals.

A. Understanding Ryan's Proposals for Promoting Equal Educational Opportunity

Ryan first notes that demographic shifts are increasing the number of middle-class families who live in urban areas, and that suburbs are becoming more diverse (pp 275, 282–83). These demographic shifts will enable new political coalitions to form between those with political influence and abundant resources and those who lack either (p 275). Ryan then proposes reforms for both urban and suburban schools that could reengineer education politics in a way that could lead to equal educational opportunity (p 275). Policies that promote socioeconomic and racial integration should be pursued in both urban and suburban districts (p 278).

Ryan contends that urban school districts must adopt policies that encourage middle-class families to live in cities (p 275). Ryan proposes a program of universal choice for urban and poor suburban school districts that would enable all students to attend any school of their choice within the district, whether the school is private or public, including charter schools (p 287). Universal choice would provide sufficient high-quality school options to draw a substantial number of middle-class families into urban centers (pp 286–87). Ryan admits that “nothing close to a comprehensive system of school choice exists in Richmond or anywhere else in the country” (p 184). Even an intradistrict—as compared to an interdistrict—universal-choice program may not garner adequate political support; however, Ryan contends that the current support for school choice within urban districts along with the potential for support from affluent urban families and the likelihood of limited resistance from suburban districts makes such a program plausible (pp 287, 289). Ryan acknowledges that such a program would have to be structured carefully to prevent racial and class isolation within urban districts (p 288). The inclusion of charter schools in this universal choice program also creates an opportunity for some educators to create charter schools that embrace the common school ideal by showing that diverse schools can be high-achieving schools (p 290). Ultimately, Ryan acknowledges that this proposal may appear to be “radical” to some; however, the strength of his proposal lies in its ability to attract middle-class families into urban school districts so

that the education politics surrounding these districts is changed (p 291).

Ryan also notes that suburban school districts are becoming increasingly diverse and educating higher percentages of low-income and minority residents (p 282). These districts must learn new ways to manage and capitalize on the growing diversity within their midst (p 275). Ryan argues that suburban schools should celebrate diversity and the opportunity to learn from others rather than attempt to hide increasing diversity (p 295). Furthermore, suburban schools must maintain their academic strength by identifying the most effective approaches for obtaining successful outcomes for diverse populations (p 295). Suburban districts also should attempt to promote diversity within the district by using school assignments to overcome the persistence of housing segregation within districts (pp 296–97). Suburban districts should seek to avoid allowing schools to enroll high concentrations of low-income students because research consistently shows that such schools perform poorly (pp 277–78, 296).

Finally, Ryan argues that both urban and suburban districts need to reignite a conversation about the purpose of education that draws attention to the importance of diverse learning environments as critical for preparing students for life in a diverse world while simultaneously showing that diverse schools can succeed (pp 297–98). In particular, Ryan suggests that “[c]hanging the conversation is important because white, middle-income families need to see a benefit to their children from attending diverse schools” (p 298).⁵⁹ Ryan creatively proposes that colleges and universities might help convince families to value diversity if they gave an admissions advantage to students in racially or socioeconomically diverse schools (p 298). Given the great emphasis on college attendance from middle-class families, this proposal would incentivize middle-class families to value diverse schools (p 298). Once middle-class families begin to value diversity, districts will focus on creating diverse schools, and then courts and education law and policy will create environments that support such schools (p 299).

B. Potential Roadblocks to Ryan’s Reforms

Ryan’s insightful and forward-looking proposals have the potential to revolutionize the nature of the debate regarding the

⁵⁹ See also Robert A. Garda Jr, *The White Interest in School Integration*, 63 Fla L Rev 599, 600 (2011) (arguing that white students who attend diverse schools gain social and academic advantages that will help them succeed in the future).

future of equal educational opportunity. Currently, liberal proposals for education reform focus on providing additional resources to urban schools that are generally understood to be competent and well intentioned, while conservatives demand additional accountability to incentivize urban educators to achieve better results (p 245). In rejecting the urban-suburban divide as natural and inexorable, Ryan uncovers and challenges the premise underlying the liberal and conservative proposals that have dominated education politics—that is, that urban and suburban districts teach distinct types of students and these students will remain in separate schools (p 245). Furthermore, Ryan's insistence that education reformers reignite an emphasis on the importance of integrated schools recognizes a fact that reformers have previously attempted to ignore—policies that failed to address the racial and class divide within schools have been unsuccessful.

Ryan's policies are also commendable for the multifaceted approach that he adopts. He recognizes the distinct challenges confronting urban and suburban schools and tailors his proposals to the needs of these schools. Ryan also identifies some of the potential pitfalls in his proposals and advises districts on how to avoid them, such as how urban districts could avoid vouchers promoting racial or class isolation (p 288). He also candidly admits that his proposals currently may not garner the political support they need to be enacted. His recommendation that colleges and universities offer an admissions advantage to students who attend an integrated school is particularly praiseworthy for two reasons. First, colleges and universities could adopt this policy with no additional costs to themselves. Second, he astutely leverages the keen interest and attention that middle-class parents pay to postsecondary admissions variables to incentivize parents to enroll their children in integrated schools.

Despite their many strengths, Ryan's proposals suffer from some substantial weaknesses that hinder the likelihood that they would be adopted. For instance, Ryan does not include in his proposal any mechanism for incentivizing school districts and postsecondary institutions to adopt his proposals. He seems to assume that the anticipated increasing diversity within suburbs and the return of some middle-class families to cities will lead districts to adopt his proposals. However, given the cost and far-reaching nature of his proposals, particularly the universal-choice proposal for urban districts, it seems highly unlikely that districts will adopt the full complement of recommendations that he makes without additional incentives to do so.

Furthermore, given the current budget shortfalls and cutbacks that many states and districts are confronting,⁶⁰ Ryan does not identify how districts would pay for the additional costs that his proposals would involve when many are struggling to provide some of the basics. Ryan suggests that for urban districts that adopt his voucher proposal, the voucher amount should be below the existing per-pupil allocation so that the vouchers could include those students who currently attend private school and could offset the lost revenue to public schools (p 289). However, in Richmond, approximately one-third of the more than 34,000 school-aged children attend private schools.⁶¹ If that number increases under Ryan's universal voucher program, which seems quite possible given the regular exodus of many families to private schools and suburban schools surrounding Richmond in recent years, the loss of per-pupil revenue from Richmond City Public Schools could easily leave the city schools worse off at a time when they are already struggling.⁶²

In addition, if Ryan's proposals were adopted, they undoubtedly would leave a substantial amount of inequality in place, particularly in urban districts. Even if middle-class families who live in cities may send their children to any school within the city school district, there may not be sufficient political pressure from middle-class families to demand that *all* of the schools within urban districts be of high quality. Instead, given the substandard quality of many urban schools, it seems far more likely that there would be significant improvements to the handful of urban schools frequented by children of middle-class families, while other schools remain neglected. Similarly, disparities in quality exist within suburban and urban districts, and those disparities would likely need more direct attention than Ryan's proposals envision.

The existence of disparities in educational opportunity within cities and suburbs highlights another limitation of Ryan's proposals. Although Ryan acknowledges instances of intradistrict inequalities in educational opportunity (pp 69–70), he heavily emphasizes the city-suburban divide as *the* problem limiting the equitable

⁶⁰ See Sean Cavanagh, *Governors, Legislators Face Music*, Educ Wk 26 (Jan 12, 2011).

⁶¹ See Associated Press, *Urban Public Schools Push for More Students*, MSNBC (Aug 22, 2009), online at http://www.msnbc.msn.com/id/32523214/ns/us_news-education/t/urban-public-schools-push-more-students/ (visited Nov 9, 2011).

⁶² See *id.* In fall 2011, Richmond Public Schools was able to slightly increase its enrollment. See Will Jones, *Richmond Schools Buck Trend*, Richmond Times-Dispatch (Apr 11, 2011), online at <http://www2.timesdispatch.com/news/2011/apr/11/tdmain01-enrollment-up-in-city-ar-963771/> (visited Nov 9, 2011). However, as this is a very recent trend that is contrary to an exodus from the district that has occurred for many years, it is unclear if this is an aberration or if Richmond will continue to increase its enrollment.

distribution of educational resources. Yet one need look no further than Henrico County, where Freeman High School is located, to find evidence that the problem is multifaceted. As mentioned in the introduction, the US Department of Education's Office for Civil Rights is investigating Henrico County for discrimination against African American students.⁶³ The Office for Civil Rights is investigating whether Henrico County is providing fewer resources and educational opportunities to the predominantly low-income, African American, eastern part of the county compared to the wealthier and predominantly white western part of the county.⁶⁴ At a May 2011 public meeting, many parents told federal officials that the resources were not distributed equitably between the eastern and western parts of the county, including alleging disparities in the experience level of teachers, facility conditions, and opportunities to enroll in gifted classes.⁶⁵ A 2010 report card from the Virginia Department of Education revealed that teachers with provisional licenses were almost twice as likely to be teaching in several majority African American high schools in eastern Henrico County compared to schools in western Henrico County, including Freeman High School.⁶⁶ The city-suburban line is an important source of inequality; however, given research that indicates that such disparities also exist in other suburbs⁶⁷ and within cities,⁶⁸ it is not the only divide that hinders the equitable distribution of educational opportunity.

In addition, Ryan's emphasis on the urban-suburban divide also overlooks research that shows that interstate disparities represent the most significant component of educational inequality.⁶⁹ As a result, even if Ryan's proposals were successful within states, interstate educational inequities would still result in many children receiving substandard educational opportunities. A comprehensive proposal for achieving equal educational opportunity should address

⁶³ Editorial, *2 Va. School Systems under Investigation*, Wash Post (Nov 23, 2010), online at <http://voices.washingtonpost.com/local-breaking-news/education/2-va-school-systems-under-inve.html> (visited Nov 9, 2011).

⁶⁴ Lazo, *Henrico Resolute on Fixing School Disparities*, Richmond-Times Dispatch (cited in note 22); Andy Jenks and Terry Alexander, *Conclusion to Investigation of Henrico Schools Still Months Away*, WWBT NBC12 (Mar 1, 2011), online at <http://www.nbc12.com/story/14157401/henrico-county-school-discrimination-investigation?redirected=true> (visited Oct 25, 2011).

⁶⁵ Lazo, *Henrico Resolute*, Richmond Times-Dispatch (cited in note 22).

⁶⁶ See *id.*

⁶⁷ Orfield, *Reviving the Goal of an Integrated Society* at 18 (cited in note 5).

⁶⁸ See Ross Rubenstein, et al, *From Districts to Schools: The Distribution of Resources across Schools in Big City School Districts*, 26 Econ Educ Rev 532, 533-34 (2007).

⁶⁹ See Goodwin Liu, *Education, Equality, and National Citizenship*, 116 Yale L J 330, 332 (2006); Stephen D. Sugarman, *Two School-Finance Roles for the Federal Government: Promoting Equity and Choice*, 17 SLU Pub L Rev 79, 93 (1997).

the multifaceted nature of inequality that hinders the provision of equal educational opportunity.

Furthermore, undoubtedly all levels of government are to blame for the current inequitable disparities in educational opportunity because government action has either caused or tolerated these disparities. However, the primary responsibility for education within the United States currently remains with the states and localities and thus they bear a disproportionate share of the blame for the current education landscape in which high-quality educational opportunities are not equitably distributed. Nevertheless, Ryan places a great deal of faith in the increasing diversity of our nation to magically convince school districts and perhaps states to embrace and celebrate diversity and make it work for the nation. However, this seems unlikely given the consistent willingness of states and school districts to tolerate and perpetuate inequality in educational opportunities.

Moreover, Ryan's proposals also do not include a direct mechanism for addressing the low standards that NCLB has encouraged states to adopt. Undoubtedly, attracting more middle-class families into urban districts might result in these families pushing legislatures to improve the educational opportunities within these schools, but that may not result in states revamping their state standards. The low standards were encouraged by federal legislation, and it may take additional federal action to reverse this trend.

Finally, and perhaps most importantly, Ryan does not include a role for the federal government in future efforts to promote racially or socioeconomically diverse schools or to remedy the current disparities in educational opportunity. Yet the federal government undoubtedly bears significant responsibility for the current inequalities in educational opportunity through its limits on desegregation,⁷⁰ its refusal to address school finance disparities in federal court, and the "perverse incentives" of the No Child Left Behind statute that led states to lower their content standards and the bar for attaining proficiency (pp 250–52). Part III explains why the federal government should play a central role in future efforts to promote equal educational opportunity and why a new theory of education federalism is needed to provide a theoretical foundation for this role.

⁷⁰ Robinson, 88 *NC L Rev* at 811–37 (cited in note 45).

III. THE FUTURE OF THE FEDERAL ROLE IN PROMOTING EQUAL EDUCATIONAL OPPORTUNITY

The existing disparities in educational opportunity will demand an arsenal of weapons to successfully combat them. Ryan's proposals deserve a prominent place in that arsenal because they seek to reinvent education politics to overcome the gridlock that has hindered past school reforms. However, Ryan's proposals do not envision a role for the federal government in those reforms. Part III.A explains why the federal government must play a prominent role in future efforts to achieve equal educational opportunity. Part III.B argues that an effective federal role in these reforms will require a new understanding of education federalism. In a future work, entitled *Reconstructing Education Federalism*, this reviewer will further develop the ideas in this Part and propose a new theory of education federalism and innovative mechanisms for promoting equal educational opportunity that build upon this theory.⁷¹

A. The Need for Federal Intervention to Advance Equal Educational Opportunity

A primary reason that the federal government would need to play a central role in ensuring equal educational opportunity in the future is because the overwhelming majority of states have steadfastly refused to take consistent and meaningful action to minimize disparities in educational opportunity. Ryan's discussion of school finance litigation reveals that even when plaintiffs have been successful, increases in funding have been minimal and the basic structure of educational opportunity and finance has remained unchanged (pp 153, 178). Other research similarly concludes that numerous states successfully resisted school finance reform even in the face of court mandates.⁷² Similarly, Ryan chronicles how localities have placed limits on school choice that hamper its ability to have a substantial impact on student achievement and racial isolation (pp 209, 215). Given past resistance to reform at the state and local level, it seems unlikely, at best, that states and localities would

⁷¹ See Kimberly Jenkins Robinson, *Reconstructing Education Federalism* *3 (unpublished manuscript 2012) (on file with author).

⁷² See, for example, Marilyn Gittell, *The Politics of Equity in Urban School Reform*, in Petrovich and Wells, eds, *Bringing Equity Back* 16, 38 (cited in note 1) (noting that the problem is exacerbated because the issue of school finance reform has not been addressed at all by the courts or the legislature in many states).

suddenly have a change of heart and champion equal educational opportunity.

Before examining why the federal government should lead the nation's efforts to achieve equal educational opportunity, it is important to recognize that the federal government also bears substantial responsibility for the current disparities in educational opportunity. For instance, the Supreme Court's decisions on desegregation ultimately sanctioned a return to segregated schools and thus eviscerated the ability of desegregation litigation to ensure educational equity.⁷³ President Nixon also directed executive branch officials charged with enforcing desegregation to slow down their actions and to challenge the National Association for the Advancement of Colored People in litigation (pp 59–60). NCLB also encouraged states to set low academic standards and thus hindered the ability of the standards movement to raise the bar for academic achievement in low-achieving schools (p 250).

Nevertheless, the federal government enjoys a far superior track record in promoting educational equity than states and localities. The federal government has a solid—but not unblemished—historical record in promoting equal educational opportunity.⁷⁴ In fact, a primary impetus for federal involvement in education has been ensuring the equitable provision of educational opportunity since the 1950s.⁷⁵ Federal legislation prohibits recipients of federal funds from discriminating on the basis of race, color, or national origin.⁷⁶ Federal legislation requires that students with disabilities receive a free, appropriate public education.⁷⁷ Indeed, some view guaranteeing equal educational opportunity as the central federal role in education.⁷⁸ Most importantly, the nation's historical reliance on federal intervention to promote equal educational opportunity also indicates that the federal political process is more amenable to

⁷³ Robinson, 88 NC L Rev at 811–38 (cited in note 45).

⁷⁴ See Gittell, *Politics of Equity* at 38 (cited in note 72); Diane Stark Rentner, *A Brief History of the Federal Role in Education: Why It Began and Why It's Still Needed* 6–9 (Center on Educational Policy 1999), online at http://www.cep-dc.org/cfcontent_file.cfm?Attachment=Stark%2DRentner%5FBriefHistoryFedRoleEd%5F100199%2Epdf (visited Nov 10, 2011).

⁷⁵ Rentner, *Brief History of the Federal Role* at 8–9 (cited in note 74).

⁷⁶ 42 USC § 2000d.

⁷⁷ Education of the Handicapped Act, Pub L No 94-142, 84 Stat 121 (1970), codified at 20 USC § 1400 et seq, superseded by the Individuals with Disabilities Education Act, Pub L No 101-476, 104 Stat 1142, codified at 20 USC § 1400.

⁷⁸ See, for example, Betsy Levin, *Equal Educational Opportunity for Special Pupil Populations and the Federal Role*, 85 W Va L Rev 159, 164 (1983) (noting that *Brown* established a baseline but no consensus has developed as to a comprehensive definition of “equal educational opportunity”).

embracing such efforts than state political processes.⁷⁹ This may be the case because it is easier for the wealthy and others invested in the current system to threaten that they will depart from a state than from the entire country.⁸⁰ As a result, “the federal government is uniquely positioned to mobilize a national effort and encourage state and local action whenever a critical educational need arises.”⁸¹

The federal government will also need to shoulder a significant burden to accomplish equal educational opportunity because the problem of inequality is a deeply entrenched and vast problem that a state or district would have difficulty tackling alone. The disparities in educational opportunity exist at the intersection of numerous inequalities that reinforce each other.⁸² Inequality is extremely difficult to eradicate because different types of inequality combine to create “[t]he additive nature of inequity—that poor kids live in poor neighborhoods with poor schools that produce poor academic outcomes that lead to poor job prospects.”⁸³ Indeed, these inequalities have been apparent since the early twentieth century and have remained in place ever since.⁸⁴ The research of critical race theorist and comparative law scholar Daria Roithmayr explains how inequalities reinforce each other and then become “locked in” and thus extremely difficult to remedy.⁸⁵

States lack the capacity and resources to remedy the full range of inequalities in educational opportunities in this country. Ryan’s book focuses on intrastate disparities and the reforms that have attempted to address such disparities. However, as noted in Part II.B, the intrastate disparities that Ryan examines in his book are not the greatest source of educational inequality in the United States. Instead, education law scholar Goodwin Liu has documented that “the most significant component of educational inequality across the nation is not inequality within states but inequality *between* states” and that “the burden of such disparities tends to fall most heavily on disadvantaged children with the greatest educational

⁷⁹ Thomas Kleven, *Federalizing Public Education*, 55 *Vill L Rev* 369, 400 (2010).

⁸⁰ *Id.* at 401.

⁸¹ Rentner, *Brief History of the Federal Role* at 16 (cited in note 74).

⁸² At bottom, “[s]chools are embedded in a structure of inequality that they cannot single-handedly overcome.” Petrovich, *Shifting Terrain of Educational Policy* at 13 (cited in note 1).

⁸³ *Id.* at 6.

⁸⁴ *Id.*

⁸⁵ See Daria Roithmayr, *Locked in Segregation*, 12 *Va J Soc Pol & L* 197, 209–13 (2004); Daria Roithmayr, *Locked in Inequality: The Persistence of Discrimination*, 9 *Mich J Race & L* 31, 40 (2003); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 *Va L Rev* 727, 785 (2000) (explaining the details of her theory, which compares racial inequality to market monopolies).

need.”⁸⁶ His research also shows that states differ substantially in their capacity to fund education, and thus significant federal intervention is needed to remedy interstate educational inequality.⁸⁷ Given the prevalence of intrastate and interstate inequality and the disparate capacities of states to fund education, the capacity and resources of the federal government must be enlisted to remedy the full scope and depth of inequality in educational opportunity in this nation.

A prominent federal role also will be needed to remedy the current disparities in educational opportunity because effective intervention will require a substantial redistribution of educational opportunity that decouples the link between low-income, typically minority families and substandard educational opportunities. Several education scholars have noted that the federal government would most effectively accomplish the redistribution of educational opportunity that equal educational opportunity would require. For example, one education scholar has explained that the federal government is the most appropriate level of government to undertake redistribution

for two reasons: first, the progressivity of the federal tax system, as against the regressivity of the sales and property taxes on which states and localities heavily rely; and, second, the ability of the well-off and of business interests to thwart redistribution more persuasively by threatening to leave a state than to depart the country.⁸⁸

Another has noted that the federal government may be the only level of government that would engage in the redistribution that educational equity requires.⁸⁹ Similarly, Ryan acknowledged in an earlier work that research shows that redistribution is a task that the federal government performs far better than the states.⁹⁰ Thus, charging the federal government with this task enlists the

⁸⁶ Liu, 116 Yale L J at 332–33 (cited in note 69) (emphasis added).

⁸⁷ Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 NYU L Rev 2044, 2082–85, 2089 (2006).

⁸⁸ Kleven, 55 Vill L Rev at 401 (cited in note 79) (citations omitted) (citing a paper that concludes that redistributive efforts should therefore exclusively be the purview of the federal government).

⁸⁹ Gittell, *Politics of Equity* at 39 (cited in note 72).

⁹⁰ See James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 NYU L Rev 932, 989 (2004), citing Daphne A. Kenyon and John Kincaid, eds., *Competition among States and Local Governments: Efficiency and Equity in American Federalism* 127, 127–45 (Urban 1991).

involvement of the level of government that is the most efficient and effective at accomplishing it.⁹¹

Part III.A has shown why federal intervention is needed to ensure equal educational opportunity. Part III.B begins to explore why education federalism must be revamped to allow effective federal intervention.

B. The Need for a New Theory of Education Federalism

A federal role in education that required substantial redistribution of educational opportunity would undoubtedly encounter sharp opposition from those who consistently view the role of the federal government in education as limited and wisely so.⁹² Local control of education remains of critical importance to many Americans.⁹³ As education historian Carl Kaestle has noted, “[T]he tradition of local-state governance has prevailed over efforts to equalize education resources across state lines through litigation or legislation.”⁹⁴ Indeed, state and local control and a limited federal role historically have been the norm in this country.⁹⁵

Nevertheless, the federal role has grown exponentially in recent years.⁹⁶ NCLB represents the most intrusive and demanding federal education law in the nation’s history, as it sanctions an unprecedented level of federal involvement in education.⁹⁷ Furthermore, the American people indicate in polls that they favor a substantial federal role in education.⁹⁸ Given this expanded federal role in public schools and public support for a substantial federal role in education, it is time to reexamine the structure of education

⁹¹ Kevin G. Welner and Jeannie Oakes, *Mandates Still Matter: Examining a Key Policy Tool for Promoting Successful Equity-Minded Reform*, in Petrovich and Wells, eds, *Bringing Equity Back* 77, 89 (cited in note 1) (noting that central authorities may be able to implement changes advancing equity better than local authorities beholden to local elites).

⁹² See Kleven, 55 Vill L Rev at 407 (cited in note 79).

⁹³ Carl F. Kaestle, *Equal Educational Opportunity and the Federal Government: A Response to Goodwin Liu*, 116 Yale L J Pocket Part 152, 152 (2006) (“Many Americans are committed to this traditional, anti-centralist position in favor of local control of local schools.”); Hochschild and Scovronick, *American Dream and the Public Schools* at 5 (cited in note 2).

⁹⁴ Kaestle, 116 Yale L J Pocket Part at 153 (cited in note 93) (noting that education has moved in a centralizing direction but still remains at the local level).

⁹⁵ Patrick J. McGuinn, *No Child Left Behind and the Transformation of Federal Education Policy, 1965–2005* vii–viii (Kansas 2006); Kleven, 55 Vill L Rev at 407 (cited in note 79).

⁹⁶ McGuinn, *Transformation of Federal Education Policy* at 25 (cited in note 95).

⁹⁷ See Paul Manna, *School’s In: Federalism and the National Education Agenda* 3 (Georgetown 2006) (“NCLB extended the federal government’s reach into the nation’s public schools more deeply than ever before.”).

⁹⁸ McGuinn, *Transformation of Federal Education Policy* at 136 (cited in note 95).

federalism that might best promote equal educational opportunity and high-quality schools for all children.

Numerous scholars have proposed novel federal approaches to ensuring equal educational opportunity that presume a substantial restructuring of the current federal-state relationship embodied in education law and policy.⁹⁹ For example, Stephen Sugarman has proposed that

[t]he federal government could use its spending power to offset the inequalities in expenditure on elementary and secondary school students that arise from the unequal fiscal capacities of states to deal with the educational burdens they face. . . . Moreover, the federal government could tie its provision of financial assistance to the willingness of states to eliminate unfair inequalities in school spending within their borders.¹⁰⁰

Similarly, Goodwin Liu has argued that Congress possesses a duty “to ensure that all children have adequate educational opportunity for equal citizenship” and that the federal government must ensure that each child has the opportunity to attain “equal standing and full participation in the national community.”¹⁰¹ This reviewer has contended that Congress should recognize a federal right to education that would be enforced through a collaborative enforcement model that envisions federal oversight, assistance, and funding for efforts to reduce interstate and intrastate disparities in educational opportunity.¹⁰² In addition, Daria Roithmayr has contended that Congress should define discrimination in education in a way that would render property-tax-based systems unlawful, because such systems “reproduce[] racial disparities in educational resources that are historically associated with ‘separate but equal’

⁹⁹ See, for example, Derek W. Black, *The Congressional Failure to Enforce Equal Protection through the Elementary and Secondary Education Act*, 90 BU L Rev 313, 321 (2010) (presenting a proposal for modifying Title I’s funding for disadvantaged students that would require states and districts to remedy inequitable disparities in educational funding and that would “restore the federal government to its proper role as a leader in education equality”); Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 UC Davis L Rev 1653, 1711–12 (2007) (arguing for congressional recognition of a federal right to education and a federal panel to oversee its enforcement); Liu, 116 Yale L J at 341 (cited in note 69) (positing that “Congress [should] pursue a deliberate inquiry into the meaning of national citizenship and its educational prerequisites and that it take steps reasonably calculated to remedy conditions that deny children adequate opportunity to achieve those prerequisites”); Roithmayr, 12 Va J Soc Pol & L at 255 (cited in note 85) (explaining that equating racial discrimination to a monopoly “builds on the intuitive notion that dismantling power requires radical restructuring”).

¹⁰⁰ Sugarman, 17 SLU Pub L Rev at 79 (cited in note 69).

¹⁰¹ Liu, 116 Yale L J at 335, 403 (cited in note 69).

¹⁰² See Robinson, 40 UC Davis L Rev at 1715–22 (cited in note 99).

education.”¹⁰³ Furthermore, several scholars have noted a congressional responsibility and role for addressing educational inequity.¹⁰⁴

Yet scholars have failed to recognize that the nation would need to embrace a new understanding of the proper federal role in education before it would adopt such far-reaching proposals. Instead, scholars attempt to fit expanded federal involvement into the cooperative federalism model,¹⁰⁵ which is the reigning model of education federalism.¹⁰⁶ This is unsurprising because Congress exercised its authority under the Spending Clause when it enacted most federal education programs¹⁰⁷ and thereby acted consistently with cooperative federalism.

Cooperative federalism envisions Congress leading and facilitating action without coercing it.¹⁰⁸ It builds upon voluntarily negotiated partnerships between federal and state governments.¹⁰⁹

¹⁰³ Roithmayr, 12 Va J Soc Pol & L at 246 (cited in note 85).

¹⁰⁴ See, for example, Elizabeth DeBray-Pelot and Erica Frankenberg, *Federal Legislation to Promote Metropolitan Approaches to Educational and Housing Opportunity*, 17 Georgetown J Poverty L & Pol 265, 270 (2010) (“Because the federal courts have progressively become less of a venue for promoting voluntary school integration, we and others argue that there is a role for congressionally mandated federal policies to do so.”); Black, 90 BU L Rev at 321 (cited in note 99):

[O]ne of the foremost means of improving educational opportunities for disadvantaged children may be exploring Congress’s constitutional responsibility for addressing educational inequities, rather than focusing solely on whether students have an equal protection claim in court. . . . To the extent Congress has a duty, it rests in the Fourteenth Amendment.

Robinson, 40 UC Davis L Rev at 1712 (cited in note 99); Liu, 116 Yale L J at 334 (cited in note 69) (“[T]he Fourteenth Amendment authorizes and obligates Congress to ensure a meaningful floor of educational opportunity throughout the nation.”).

¹⁰⁵ See, for example, Robinson, 40 UC Davis L Rev at 1726–28 (cited in note 99) (arguing that congressional creation of a federal right to education builds upon the strengths of the cooperative federalism framework); Liu, 81 NYU L Rev at 2104 (cited in note 87) (arguing that the nation should provide all children adequate educational opportunities for equal citizenship by “securing a national floor of educational adequacy and thereby narrowing interstate disparities within an ongoing framework of cooperative federalism”).

¹⁰⁶ See Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum L Rev 267, 434 (1998) (“Congress has used the model of cooperative federalism in other areas as well. Education, traditionally a state function, is a prominent example.”). But see Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 Iowa L Rev 243, 293 (2005) (contending that federal and state control over education represents a “polyphonic” view of federalism).

¹⁰⁷ See James E. Ryan, *The Tenth Amendment and Other Paper Tigers: The Legal Boundaries of Education Governance*, in Noel Epstein, ed, *Who’s in Charge Here? The Tangled Web of School Governance and Policy* 42, 48–49 (Brookings 2004).

¹⁰⁸ See Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, 31 Publius 15, 20 (2001).

¹⁰⁹ See Schapiro, 91 Iowa L Rev at 284 (cited in note 106); Zimmerman, 31 Publius at 18–19 (cited in note 108).

These partnerships enable the federal and state government to share responsibility and may involve a variety of informal and formal arrangements, including exchanges of experience and information and state enactment of federal regulations.¹¹⁰ Federal, state, and local governments negotiate the allocation of responsibility among the governments.¹¹¹ Cooperative federalism offers a mechanism to address a specific problem through a nationwide reform, without federal dominance over the nature of the reforms, while it also allows the federal government to frame reform efforts without making state governments into extensions of the national government.¹¹² The recognition and acceptance of cooperative federalism represent an important triumph over dual federalism's emphasis of separate spheres for federal and state action.¹¹³

Cooperative federalism relies upon the states to reject federal money if the conditions placed on funds are too onerous or undesirable.¹¹⁴ The Court analyzes the constitutionality of Spending Clause legislation by employing the analysis in *South Dakota v Dole*.¹¹⁵ Under *Dole*, the conditions attached to federal spending must be "in pursuit of 'the general welfare'" as defined by Congress.¹¹⁶ They must be unambiguous and related to the national interest in the federal program.¹¹⁷ The conditions also cannot violate an independent constitutional provision—that is, they cannot "induce the States to engage in activities that would themselves be unconstitutional."¹¹⁸ Finally, the conditional grant of funds cannot "be so coercive as to pass the point at which 'pressure turns into compulsion.'"¹¹⁹ The line between pressure and compulsion is difficult to draw and has led some courts to shy away from conducting a meaningful coercion

¹¹⁰ Schapiro, 91 Iowa L Rev at 284 (cited in note 106); Zimmerman, 31 Publius at 18–19 (cited in note 108).

¹¹¹ See Daniel J. Elazar, *Cooperative Federalism*, in Kenyon and Kincaid, *Competition among States* 65, 73–74 (cited in note 90).

¹¹² *Id.* at 82.

¹¹³ See *id.* at 79 (warning that "the idea of dual federalism should not be exaggerated"); Zimmerman, 31 Publius at 18–19 (cited in note 108) (discussing the research of Daniel Elazar that established the end of dual federalism and noting the work of S. Rufus Davis that expressed scholarly sentiment that dual federalism was dead).

¹¹⁴ See Roderick M. Hills Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 Mich L Rev 813, 860–61 (1998).

¹¹⁵ 483 US 203 (1987).

¹¹⁶ *Id.* at 207 (noting that this requirement is stated in the language of the Constitution). The Court has instructed courts to defer to Congress's judgment on what lies within the general welfare. See *id.*

¹¹⁷ See *id.*

¹¹⁸ *Id.* at 208, 210.

¹¹⁹ *Dole*, 483 US at 211 (calling a 5 percent reduction of otherwise available federal highway funding "relatively mild encouragement" to adopt a lower drinking age).

analysis.¹²⁰ In fact, the Court has not invalidated any legislation pursuant to this requirement and some courts refuse to consider whether federal conditions on funds are coercive.¹²¹ Scholars also have found the *Dole* requirements to be insubstantial.¹²² Therefore, the political process operates as the only limit on congressional action pursuant to the Spending Clause.¹²³

The reliance on the political process as the only meaningful limit on the burden that the federal government can place on states through federal conditions on aid is one of the principal shortcomings of the current understanding of cooperative federalism.¹²⁴ The theory assumes that if the federal government asks too much of the states, they will walk away. However, the limited coercion analysis undertaken by courts has not policed whether this occurs in reality, and states often complain about their practical inability to reject federal funds.¹²⁵ Therefore, the political process may not be serving the function that cooperative federalism envisions.

In addition to criticizing the absence of meaningful limits to congressional authority under the cooperative federalism approach, some also contend that Congress should pay for what it wants to achieve,¹²⁶ but that cooperative federalism allows the government to sharply limit its fiscal responsibility even when it wants far reaching reforms. Scholars also have criticized cooperative federalism for its failure to guide how to resolve conflicts between the federal and state governments.¹²⁷ The use of the cooperative federalism model within education recently also has generated some criticism for, among other things, its indeterminacy and its inadequate explanatory value.¹²⁸

¹²⁰ Ryan, *Paper Tigers* at 65 (cited in note 107) (noting that there is “no easy way to discern permissible inducement from impermissible compulsion,” and attributing court hesitance to this difficulty).

¹²¹ See *id.*

¹²² See Michael Heise, *The Political Economy of Education Federalism*, 56 *Emory L J* 125, 139 (2006); Ryan, *Paper Tigers* at 50 (cited in note 107); Lynn A. Baker and Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 *Ind L J* 459, 539 (2003); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 *Cornell L Rev* 1, 33 (2003).

¹²³ See Ryan, *Paper Tigers* at 53–55 (cited in note 107).

¹²⁴ See *id.* at 50, 65–67; Garnett, 89 *Cornell L Rev* at 33 (cited in note 122).

¹²⁵ See Ryan, *Paper Tigers* at 48–49 (cited in note 107).

¹²⁶ See Heise, 56 *Emory L J* at 153–54 (cited in note 122). See also *Dole*, 483 US at 216 (O’Connor dissenting).

¹²⁷ See Schapiro, 91 *Iowa L Rev* at 284–85 (cited in note 106).

¹²⁸ See Manna, *School’s In* at 23 (cited in note 97) (criticizing cooperative federalism because, among other things, “it does not necessarily specify the mechanisms that might

NCLB provides a recent example of some of the shortcomings of cooperative federalism. NCLB embraces a cooperative federalism approach in that it involves a traditional carrot inducement of states to adopt national policies.¹²⁹ Congress passed NCLB by exercising its authority under the Spending Clause.¹³⁰ Scholars disagree about whether NCLB complies with the current Spending Clause requirements for federal legislation.¹³¹ Although some find that NCLB meets the weak requirements in *Dole*,¹³² substantial arguments have been made that NCLB is coercive.¹³³ For instance, one scholar has argued that “[m]ost, if not all, states faced with the combination of state budget crises that have loomed since NCLB was enacted and the prospect of losing significant federal funds would indeed conclude that they had no choice but to accept the law’s additional requirements.”¹³⁴ Moreover, although education law scholar Michael Heise contends that NCLB is not coercive under *Dole*, he acknowledges that it is politically coercive because it “*functionally* compels policy changes in states that extend beyond the statutorily required policy.”¹³⁵ These arguments suggest that the cooperative federalism framework is not effectively preventing federal coercion of the states.

Furthermore, even if NCLB meets the *Dole* requirements, the statute raises other shortcomings of cooperative federalism. Some have criticized NCLB because it enables Congress to accomplish its policy objectives while the states bear the principal financial burden.¹³⁶

enhance or retard cooperation,” does not provide predictions that may be tested against empirical evidence, and does not explain why governments address some policy reforms collaboratively and not others).

¹²⁹ Heise, 56 Emory L J at 142 (cited in note 122); See also James S. Liebman and Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 NYU Rev L & Soc Change 183, 283–86 (2003).

¹³⁰ See *School District of the City of Pontiac v Secretary of the United States Department of Education*, 584 F3d 253, 260, 263 (6th Cir 2009).

¹³¹ See Regina R. Umpstead, *The No Child Left Behind Act: Is It an Unfunded Mandate or a Promotion of Federal Education Ideals?*, 37 J L & Educ 193, 194–96 (2008) (describing debate among scholars over the constitutionality of NCLB); Ann McColl, *Tough Call: Is No Child Left Behind Constitutional?*, 86 Phi Delta Kappan 604, 606, 610 (Apr 2005) (arguing that it is a “tough call” to decide whether NCLB is constitutional).

¹³² See, for example, Heise, 56 Emory L J at 138–40 (cited in note 122); Philip T.K. Daniel, *No Child Left Behind: The Balm of Gilead Has Arrived in American Education*, 206 Educ L Rep 791, 800–01 (2006); Ryan, *Paper Tigers* at 53 (cited in note 107).

¹³³ See McColl, 86 Phi Delta Kappan at 609 (cited in note 131); Kathryn A. McDermott and Laura S. Jensen, *Dubious Sovereignty: Federal Conditions of Aid and the No Child Left Behind Act*, 80 Peabody J Educ 39, 41–44 (2005).

¹³⁴ McColl, 86 Phi Delta Kappan at 609 (cited in note 131).

¹³⁵ Heise, 56 Emory L J at 150, 156 (cited in note 122) (emphasis in original).

¹³⁶ See L. Darnell Weeden, Essay, *Does the No Child Left Behind Law (NCLBA) Burden the States as an Unfunded Mandate under Federal Law?*, 31 Thurgood Marshall L Rev 239, 250–51 (2006); Heise, 56 Emory L J at 141 (cited in note 122) (“[T]hrough NCLB the federal government can achieve its policy goals on the proverbial financial backs of states and local school districts.”).

States have complained about the lack of federal financial support for the far-reaching changes required by NCLB.¹³⁷ Estimates of the costs imposed by NCLB vary depending on what costs are measured, but research indicates that costs greatly exceed the federal funding under NCLB,¹³⁸ despite language within NCLB that states that the statute may not authorize a federal officer or employee to require states and localities to “spend any funds or incur any costs not paid for under this chapter.”¹³⁹ Cooperative federalism does not establish any limits on the costs that the federal government can impose on states and localities and instead depends on the political process to establish those limits. While this allows the federal government to accomplish important objectives, the political process may leave the states without adequate protection to insist that the federal government should shoulder an adequate share of the financial burden. Furthermore, cooperative federalism’s indeterminacy and its failure to provide guidance on how to resolve conflicts between the federal and state governments leaves the framework without tools to address the current dispute over who should pay for the costs of NCLB.

The shortcomings of the cooperative federalism approach within the education statute that has involved the most expansive federal involvement in the nation’s history¹⁴⁰ indicate that a new model of education federalism is needed. In a future work, entitled *Reconstructing Education Federalism*, this reviewer will propose such a model. For now, it is sufficient to establish that the current education federalism approach is in need of revision and that a new theory must address the weaknesses of cooperative federalism.

CONCLUSION

Ryan’s commendable book sheds new light on why our nation has failed to deliver on its promise of equal educational opportunity. It identifies some of the shortcomings of past reform efforts and presents novel ideas on how education politics should be reengineered to advance equal educational opportunity. This Review has shown why the federal government will need to play an important role in achieving equal educational opportunity and why a new

¹³⁷ David J. Hoff, *Debate Grows on True Costs of School Law*, *Educ Wk* 1 (Feb 4, 2004).

¹³⁸ See generally William J. Mathis, *The Cost of Implementing the Federal No Child Left Behind Act: Different Assumptions, Different Answers*, 80 *Peabody J Educ* 90 (2005).

¹³⁹ 20 USC § 7907(a). The Sixth Circuit held that NCLB is ambiguous because it was not clear that states would have to spend their own funds in light of this provision. See *Pontiac*, 584 F3d at 256, 277. The Second Circuit decided that Connecticut’s challenge to this provision was not ripe for review. See *Connecticut v Duncan*, 612 F3d 107, 114 (2d Cir 2010).

¹⁴⁰ See McGuinn, *Transformation of Federal Education Policy* at 196 (cited in note 95).

understanding of education federalism is needed to lay a foundation for future federal involvement in education. In a future work, entitled *Reconstructing Education Federalism*, this reviewer will propose a new theory of education federalism and how this theory should guide reform efforts to promote equal educational opportunity.¹⁴¹

Despite the criticisms in Part II, this reviewer believes that Ryan's book and his proposals are an important and insightful starting point for considering proposals for how to accomplish equal educational opportunity. One of the most exciting aspects of Ryan's book is that he offers cause for hope to those committed to integrated schools and equal educational opportunity. He argues convincingly that the future can be different despite what the past and present might suggest. For instance, Ryan offers cause for hope when he identifies communities, such as Charlotte-Mecklenburg, that have embraced integrated schools and fought hard to keep them when substantial numbers of schoolchildren have attended integrated schools for a sustained period of time (pp 112–14). He offers cause for hope—albeit a tentative one—when he notes the preliminary improvements in student outcomes in predominantly minority city school districts in New Jersey that received funding equal to amply funded suburban districts (p 160). Ryan also offers cause for hope when he highlights the attitudes of young people that embrace diverse settings more than their parents and thus explains that younger generations might help to reduce some of the existing patterns of racial isolation in schools and housing (pp 292–93). The fact that past reforms have failed does not doom the nation to failure in the future. Instead, the persistence of large disparities in educational opportunity challenges the nation to embrace new ways of thinking about education law and policy that would enable it to make the promise of equal educational opportunity a reality.

When considering the future possibilities for equal educational opportunity and integrated schools, including the proposals developed by Ryan, the good news is that the nation does not yet know what can happen if it gets behind equal educational opportunity and is led by a federal government that is committed to making it a reality. It is noteworthy that in the case of school desegregation, Congress, the President, and the courts were committed to integration for only seven months (p 60). During the rest of the desegregation era, at least one branch of the federal government narrowed the scope of the *Brown* decision or failed to

¹⁴¹ See Kimberly Jenkins Robinson, *Reconstructing Education Federalism* *3–5, 30 (unpublished manuscript, 2011) (on file with author).

take steps to make integration a reality in America's schools (p 60). Therefore, Ryan makes the important point that it was not the case that desegregation was attempted and then found unsuccessful. Instead, it was simply never tried (p 60). Similarly, the federal government has never embarked upon comprehensive efforts to encourage states to maintain equitable education finance systems or to make equal educational opportunity a reality.

In considering the future of educational opportunity in the nation, what remains uncertain is whether the nation will respond to the clarion call of Ryan and others for equal educational opportunity. What remains certain is that children's lives and future opportunities, as well as the prosperity and competitive success of our nation, lie in the balance. May the nation choose wisely.¹⁴²

¹⁴² See *Deuteronomy* 30:19 (New International Version) ("This day I call heaven and earth as witnesses against you that I have set before you life and death, blessings and curses. Now choose life, so that you and your children may live.").