

States of Inequality: Fiscal Federalism, Unequal States, and Unequal People

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The current system of federalism undermines the social and economic equality of the people of the United States. Although states have broad responsibilities to provide basic services, they have vastly different financial capacities. Some states are richer while others are poorer, and these differences have critical implications for the ability of states to meet the needs of their residents. Among developed federal nations, the United States alone does not seek to equalize resources among the states. The interstate disparities undermine the values commonly associated with federalism and have especially severe consequences for the realization of certain core commitments, such as education and health care. Focused on constitutional doctrine, scholars of federalism in the legal academy have largely ignored the significance of these interstate financial disparities. The growing attention to social and economic inequality, as evidenced by debates about the Affordable Care Act and proposals for “Medicare for All” and “College for All,” heightens the urgency of the issue. These programs require substantial state funds. Unless policy-makers attend to the reality of interstate financial disparities, the plans will fail to achieve their goals and will instead exacerbate the current savage inequalities among the people of different states. After illustrating the impact of interstate inequality on education and health care, this Article argues for a new approach to federalism that seeks to mitigate these inequalities while continuing to promote the benefits of decentralization. The New Deal required a revolution in conceptions of federalism, empowering the national government and the states. The

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civil rights era reconstructed federalism on a foundation of political equality. Similarly, the protection of basic commitments to education, health care, and other critical areas requires a new understanding of the federal system. The fiscal disparity among states demands attention, not because states have inherent dignity, but because the inequality of states diminishes the dignity of their people.

Introduction.....	1532
I. The Problem of Inequity.....	1538
A. Disparity in State Resources.....	1538
B. The Relevance of Interstate Disparity	1547
II. Paying for the Values of Federalism.....	1548
A. Responsive Governance	1550
B. Participatory Democracy	1551
C. Guaranteeing Fundamental Rights	1553
III. Education	1555
A. Disparities in Educational Spending.....	1556
B. Causes of Educational Spending Disparities	1559
C. Impact of Educational Spending Disparities	1562
IV. Health Care.....	1565
A. Medicaid Disparities Among the States	1567
B. Causes of Interstate Medicaid Disparities	1570
C. Impact of Medicaid Funding Disparities	1578
V. States of Inequality	1580
A. Implications of Inequality.....	1580
B. Potential Polar Solutions	1581
1. Fiscal Equalization	1583
2. Nationalizing Programs	1588
C. Toward a New Fiscal Compact: Promoting Equity and Rights	1591
Conclusion.....	1595

INTRODUCTION

Over the last twenty-five years, federalism—the allocation of authority among the states and the national government—has returned to the center of judicial and scholarly debates.¹ Commentators and officials praise federalism for fostering dynamism and innovation, for allowing a more contextual application of national programs, and for offering an opportunity to pursue initiatives that

1. See Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1889 (2014) (“Federalism has had a resurgence of late . . .”).

differ from, or even oppose, the policies of the national government.² To understand the “resurgence”³ of federalism, however, it is crucial to remember why federalism receded. For a long time, federalism in the United States was closely associated with state-sponsored denials of equality and, in particular, state-sponsored racism.⁴ The civil rights era, including more vigorous enforcement of constitutional provisions and landmark federal legislation, such as the Civil Rights Act of 1964⁵ and the Voting Rights Act,⁶ sought to provide a national guarantee of equality. The national commitment to equality provided a key prerequisite for the resurgence of federalism. Only when certain rights of equality were established throughout the country could the political system and legal scholars celebrate states’ abilities to provide their own policy solutions. Only when the equality of people was guaranteed could state variation be embraced.

Scholars of federalism, however, have generally ignored a particularly significant and persistent problem of inequality: states have divergent levels of financial resources. Because of their different tax bases, some states have more money and some states have less money. In general, the states that have more money spend more money on vital programs, such as education and indigent health care.⁷ The disparity in state resources thus translates into different opportunities and outcomes for citizens in different states across the country. People’s chances of obtaining an adequate level of core services depends on where they live. In this way, the inequality of states undermines the equality of their residents.

Addressing interstate fiscal disparities is especially timely. Recent years have seen increased focus on economic inequality and on the responsibility of government to guarantee a range of vital services. This trend is evident in discussions concerning the Affordable Care Act (ACA),⁸ as well as proposals for

2. See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

3. See Gerken, *supra* note 1, at 1889.

4. See WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 155 (1964) (“[I]f in the United States one disapproves of racism, one should disapprove of federalism.”); Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL’Y REV. 227, 233–34 (1996) (“[T]he inescapable conclusion is that federalism protected slavery for the first seven decades of the nation’s history. Then, for nearly another century, it served as a reliable fortress for the perpetuation of systematic racial segregation and discrimination.”).

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

6. 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702 (2018).

7. See *infra* Part III.B, Part IV.B.

8. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

“Medicare for All”⁹ and “College for All.”¹⁰ The exact nature of such national commitments remains subject to debate, but there is a growing consensus in the United States of the government’s duty to ensure certain social goods.¹¹ These programs will require the expenditure of vast sums of money by states and the national government.¹² The attainment of essential goals in areas such as education and health care will depend on the interaction of the states and the national government in allocating and effectively deploying resources. For the projects to succeed, budgetary decisions must account for the varying financial capacities of states.

The glaring inequalities among states are not a necessary feature of federalism. A political system can offer greater financial equality, while still promoting the benefits of federalism. As in other federal systems around the world, states in the United States have broad responsibilities to provide basic services and benefits. Unlike other federal countries, however, the United States has no program for equalizing the resources available to states.¹³ Each state has the same obligations, but a differing ability to fulfill them. If a national government divided a country into administrative regions, each with primary obligation to provide services for the people, and then allocated national funding among those regions without regard to the population, need, or other available resources of the regions, we would likely decry that system as irrational, inequitable, and unjust. That is the system of federalism in the United States.

As a historical matter, the states preceded the national government established by the Constitution of the United States. The national government did not divide a unitary nation into administrative regions. From the perspective of the residents of the various states, however, that history does not lessen the impact of inequality. To be sure, the ability of states to allocate their resources differently from other states is generally considered to be a feature, not a bug, of federalism. Federalism allows the states to tailor their taxing and spending decisions to match the preferences of their citizens. Those preferences, however, operate in a framework of dramatically differing capacities. States’ divergent tax

9. See Medicare for All Act of 2017, S. 1804, 115th Cong. The bill was introduced by Senator Bernie Sanders and sixteen co-sponsors, including Senators Cory Booker, Kirsten Gillibrand, Kamala Harris, and Elizabeth Warren. *Id.*

10. See College for All Act of 2017, S. 806, 115th Cong.

11. In a 2017 survey of U.S. adults, 69% of respondents said that the federal government should have a “major role” in ensuring access to health care; 68% said that the federal government should have a “major role” in ensuring access to quality education. PEW RESEARCH CTR., GOVERNMENT GETS LOWER RATINGS FOR HANDLING HEALTH CARE, ENVIRONMENT, DISASTER RESPONSE (2017), <https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2017/12/12-14-17-Government-release.pdf> [<https://perma.cc/5QXT-Y9JZ>].

12. See *infra* text accompanying notes 288–290, 307–308.

13. See Paul Bernd Spahn, *Equity and Efficiency Aspects of Interagency Transfers in a Multigovernment Framework*, in INTERGOVERNMENTAL FISCAL TRANSFERS 75, 77 (Robin Boadway & Anwar Shah eds., 2007); Kirk J. Stark, *Rich States, Poor States: Assessing the Design and Effect of a U.S. Fiscal Equalization Regime*, 63 TAX L. REV. 957, 957 (2010) (characterizing the United States as an “extreme outlier” in not systematically addressing interstate financial inequities).

bases mean that a given level of taxation will yield much more revenue in some states than in others. These financial constraints impose varying limits on citizens' choices, depending on where they live. When it comes to raising revenue and investing in schools, roads, or other priorities, citizens of poorer states have fewer options than citizens of richer states. Not only are the interstate disparities unfair, but they also undermine the values generally associated with federalism.¹⁴ Certain states have less ability than others to offer a broad range of choices to their citizens, or even a minimum level of support to all of their inhabitants. As discussed below, compared with citizens of poorer states, such as Mississippi and West Virginia, citizens of wealthier states, such as Connecticut and Delaware, have access to resources that are one and a half to two times as large, depending on the measure chosen.¹⁵ I argue that greater financial equality is essential for a well-functioning federal system. In a federal democracy, the principle of equality does not require that citizens receive equal levels of government services without regard to where they live or their particular preferences. That promise of uniformity is not consistent with federalism.¹⁶ Equality does, however, require that citizens have equal opportunity to receive equal levels of government services. The current system of federalism in the United States does not honor that principle.

Legal scholars have largely ignored interstate inequality because they have concentrated on regulatory federalism, the relationship between the states and national government in establishing laws that govern the activity of people and entities.¹⁷ Many scholars have focused on the constitutional boundaries of state and national power and on the role of courts in policing these borders.¹⁸ The legal

14. For a discussion of the values of federalism, see *infra* Part II.

15. See *infra* Part I.A.

16. For a discussion of different conceptions of equality in a federal system, see Peter Mieszkowski & Richard A. Musgrave, *Federalism, Grants, and Fiscal Equalization*, 52 NAT'L TAX J. 239 (1999). As Mieszkowski and Musgrave point out, a federal system might contemplate differential levels of services among people in different regions that would be viewed as violating principles of equity in a unitary system. See *id.* at 250. Interjurisdictional equity offers an alternative to interpersonal equity. See *id.*

17. See David Schleicher, Essay, *Vermont is a Constitutional Problem*, 61 ARIZ. L. REV. 253, 277 (2019) (“[M]ost scholarship on federal-state relations does not exert too much effort analyzing the differences among states . . .”). Some scholars, such as Professor Schleicher, have emphasized the significance of the differences among states in terms of the size of their populations and economies. See, e.g., *id.* They have focused less, though, on the critical issue of the disparities in the resources of the states. See Brian Highsmith, Essay, *The Implications of Inequality for Fiscal Federalism (or Why the Federal Government Should Pay for Local Public Schools)*, 67 BUFF. L. REV. 407, 448 (2019) (“Many have missed the deep implications of economic inequality for core [tenets] of fiscal federalism.”). Other scholars, most notably Professor Stark, have directly addressed the issue of interstate resource inequalities. See Stark, *supra* note 13; see also Benjamin Austin et al., *Jobs for the Heartland: Place-based Policies in 21st-Century America*, 2018 BROOKINGS PAPERS ON ECON. ACTIVITY 151, 156–61 (discussing interstate disparities); Highsmith, *supra*. This Article seeks to connect the fiscal insights of Professor Stark and others with current debates about federalism.

18. See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2551 (2005) (“[R]egulatory federalism primarily seeks to define and protect separate zones of authority for the two levels of government . . .”).

academy has devoted much less consideration to fiscal federalism, the allocation of financial resources among states and the national government.¹⁹ That relative lack of scholarly attention has persisted notwithstanding the United States Supreme Court's recent focus on fiscal federalism.²⁰ We have concentrated too much attention on constitutional doctrine and not enough on money. This Article seeks to correct that balance. We need a new conception of federalism that takes account of states and their financial disparities as they actually exist. As a matter of constitutional doctrine, all states are equal.²¹ But that formal, constitutional equality should not obscure the reality of actual inequality.

Scholars have noted in select areas the tremendous individual disparities that flow from the fiscal inequality of the states. Important work in education²² and health care²³ in particular has highlighted these inequities, and scholars have proposed various responses, including greater federal intervention.²⁴ However, the differential spending on education and health care is not anomalous. These disparities flow directly from the United States' system of fiscal federalism. Given the unequal resources of states, and the absence of any systematic attempt to compensate for the divergences, it is not surprising that states spend dramatically different amounts on education, health care, and a whole range of government services.

19. See Ernest A. Young, *What Can Europe Tell Us About the Future of American Federalism?*, 49 ARIZ. ST. L.J. 1109, 1126 (2017) (noting that "much of the federalism literature in this country skirts the topic of *fiscal* federalism"). Professor Young attributes this lack of attention, in part, to the disciplinary inclinations of law professors in the United States: "I suspect that most American constitutional lawyers are the sort of people who were attracted to law school on the understanding that there would be no math." *Id.* The work of Professor David Super offers a notable exception. In a series of enlightening articles, Professor Super has sought to connect federalism theory with the operation of fiscal federalism. See, e.g., Super, *supra* note 18; David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541 (2008); David A. Super, *The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism*, 66 STAN. L. REV. 873 (2014). While this work demonstrates the limitations of traditional models of federalism, see Super, *supra* note 18, at 2551–59, it does not focus on the implications of the substantial disparities in state resources.

20. From the perspective of states, the most important federalism decisions of the past few years have been *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), and *Murphy v. NCAA*, 138 S. Ct. 1461 (2018). *Wayfair* permitted states to require interstate sellers of goods to collect sales taxes, potentially yielding states an additional \$30 billion in revenue each year. See 138 S. Ct. at 2088. *Murphy* allowed states access to sports gambling revenues, which by some estimates amount to \$500 billion in wagers per year. See 138 S. Ct. at 1484–85; Justin Fielkow et al., *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 23 (2016).

21. See *Shelby County v. Holder*, 570 U.S. 529, 544 (2013) ("Over a hundred years ago, this Court explained that our Nation 'was and is a union of States, equal in power, dignity and authority.'" (quoting *Coyle v. Smith*, 221 U.S. 559, 567 (1911))).

22. See, e.g., Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044 (2006).

23. See, e.g., Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431 (2011).

24. See, e.g., Liu, *supra* note 22, at 2116–26; Huberfeld, *supra* note 23, at 473–84.

The New Deal demanded a reconstruction of federalism, freeing state social policies from federal judicial constraints,²⁵ while creating a vast array of new federal economic guarantees such as Social Security and a national minimum wage.²⁶ The civil rights era reformed and redeemed federalism by demanding a national guarantee of political equality.²⁷ Honoring a commitment to health care, education, and other basic services demands a comparable reconceptualization of federal-state financial relations.

Having identified the need for a new framework for fiscal federalism, this Article suggests how the United States might begin to honor a new fiscal compact. Two potential solutions that have been proposed for addressing the fiscal disparity among states are (1) following the lead of other federal nations and adopting a system of interstate fiscal equalization or (2) ending federalism and fully nationalizing key programs. As I will discuss, neither of these polar solutions is feasible or desirable. Instead, drawing on contemporary federalism scholarship and on scholarship in the area of fiscal federalism, I will argue that the federal government should address fiscal disparities by engaging in calibrated matching grants across an array of programs. This framework for a new financial relationship between the states and the national government would promote equality while advancing the values of choice, participation, and liberty generally associated with federalism.

Part I sets the stage by documenting the substantial inequality of resources among the states. These disparities reflect circumstances largely out of the control of state politicians or citizens. To highlight the connection between fiscal matters and federalism, Part II reviews the values traditionally associated with federalism and argues for the critical relevance of financial considerations in promoting or obstructing the realization of these aims. Parts III and IV turn to the crucial areas of education and health care. I argue that the current allocation of budgetary responsibilities among the states and the national government undermines a national commitment to providing adequate education and health care, especially in light of the vast resource differences among the states. Part V generalizes the argument of Parts III and IV and contends that state financial disparities impede not only commitments such as education and health care, but

25. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), and upholding state minimum wage law).

26. See Scheiber, *supra* note 4, at 257–65; see also Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 23 (1950) (asserting that the constitutional revolution of the New Deal transformed American federalism into an instrument for achieving “economic security for ‘the common man’”); Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 727 (1984) (“For the first time, the national government became the chief custodian of both economic security and social justice for all citizens.”).

27. See Scheiber, *supra* note 4, at 285 (noting role of civil rights laws and judicial decisions in reforming states, improving their image, and contributing to state “renaissance”); see also ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, A–98, THE QUESTION OF STATE GOVERNMENT CAPABILITY 21 (1985) (noting role of Supreme Court decisions and federal civil rights legislation in revitalizing state governments and thereby enabling state power and influence).

also the realization of all goals of federalism in the United States. Part V concludes by outlining how the United States might begin to reshape state-federal relations so as to vindicate equality and the promise of federalism in light of the underlying realities of state fiscal inequality.

I.

THE PROBLEM OF INEQUITY

In the constitutional structure of the United States, all states are entitled to equal dignity and respect.²⁸ From the perspective of fiscal federalism, however, states are not equal. Some have substantially greater resources than others. I refer not to the variation in the actual revenues that each state collects. States' abilities to make decisions about how much revenue to raise and how to raise it serve as a key feature of the federal system. Instead I am focusing on the great variation in states' capacities to raise money. Based on the incomes of their people and businesses, natural resources, and other factors, some states have much larger tax bases than others. Accordingly, some states can raise much more money with lower effective tax rates than other states.²⁹ In other words, some states are richer, and some states are poorer. This Section explains various methods for demonstrating the wealth gaps among states, discusses how federal expenditures fail to remedy these disparities, and begins to explore the significance of the interstate inequalities.

A. *Disparity in State Resources*

One way to assess the wealth of states is by reference to "total taxable resources" (TTR), which is calculated by the Treasury Department each year.³⁰ It is designed to account for all income flows that a state could tax.³¹ TTR assesses a state's fiscal capacity by measuring the total tax base available to the state. Thus, TTR looks beyond the actual taxes that a state levies and considers the tax revenue that a state could reach if it chose to do so. TTR per capita

28. See *Shelby County v. Holder*, 570 U.S. 529, 544 (2013).

29. See PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 107 (1995).

30. See Total Taxable Resources, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/policy-issues/economic-policy/total-taxable-resources> [<https://perma.cc/HV4M-83CA>].

31. For a discussion of the method for deriving TTR, see OFFICE OF ECON. POLICY, U.S. DEP'T OF TREASURY, *TREASURY METHODOLOGY FOR ESTIMATING TOTAL TAXABLE RESOURCES (TTR)* 2 (2002), <https://www.treasury.gov/resource-center/economic-policy/Documents/nmpubsum.pdf> [<https://perma.cc/YW3P-NT32>]. This document describes TTR and its relationship to other potential measures of state fiscal capacity, such as "gross state product" (GSP) and "state personal income" (SPI):

TTR is defined as the unduplicated sum of the income flows produced within a state (GSP) and the income flows received by its residents (SPI) which a state can potentially tax. The distinction between flows which a state can potentially tax and the actual fiscal choices made by states is critical. TTR says nothing about, nor does it consider, the actual fiscal choices made by the states. In sum, TTR is a flow concept, a comprehensive measure of all the income flows a state can potentially tax.

Id.

compares how much the states could spend on each resident. TTR has been described as the U.S. General Accounting Office’s “preferred measure” of a state’s ability to fund public services.³² Table 1 below gives the figures from 2016, both unadjusted and adjusted for regional cost-of-living differentials.³³ Either way, the differences are substantial.

Table 1. 2016 TTR Per Capita

Rank		Unadjusted		Adjusted for Cost of Living
1	District of Columbia	\$106,302	District of Columbia	\$92,759
2	Connecticut	\$86,480	Delaware	\$83,254
3	New York	\$83,465	North Dakota	\$82,858
4	Delaware	\$83,254	Connecticut	\$80,596
5	Massachusetts	\$82,427	Wyoming	\$77,719
6	New Jersey	\$77,628	Massachusetts	\$75,483
7	North Dakota	\$75,732	Nebraska	\$75,108
8	Wyoming	\$74,533	Iowa	\$72,001
9	Maryland	\$74,087	New York	\$71,705
10	Washington	\$73,316	South Dakota	\$71,593
11	California	\$72,171	Illinois	\$69,449
12	New Hampshire	\$71,352	Washington	\$69,101
13	Alaska	\$69,852	New Jersey	\$68,035
14	Illinois	\$68,546	Maryland	\$67,970
15	Nebraska	\$67,672	Minnesota	\$67,890
16	Virginia	\$66,452	Kansas	\$67,560

32. See Liu, *supra* note 22, at 2085 (describing TTR).

33. To calculate cost-of-living differentials, I used the 2016 Regional Price Parities published by the Bureau of Economic Analysis. Regional Data: GDP and Personal Income, BUREAU OF ECON. ANALYSIS, <https://apps.bea.gov/itable/itable.cfm?ReqID=70&step=1> [<https://perma.cc/P5GS-XA6H>] (select “REAL PERSONAL INCOME AND PRICE PARITIES BY STATE AND METROPOLITAN AREA”; then “Regional Price Parities (RPP)”; then “SARPP - Regional Price Parities by state” and click “Next Step”; then select “All Areas” and “RPPs: All items” and click “Next Step”; then select “2016” and click “Next Step”). When making regional comparisons of resources, scholars debate the appropriateness of including cost-of-living adjustments. See, e.g., Stark, *supra* note 13, at 1001–02 (discussing cost-of-living differentials); Louis Kaplow, Regional Cost-of-Living Adjustments in Tax/Transfer Schemes, 51 TAX L. REV. 175, 189–93 (1996) (discussing difficulty of accurately calculating regional cost-of-living differences); Michael S. Knoll & Thomas D. Griffith, Taxing Sunny Days: Adjusting Taxes for Regional Living Costs and Amenities, 116 HARV. L. REV. 987, 1018–20 (2003) (same). A significant factor in cost of living is housing. The variation in housing costs reflects in part a difference in the amenities available in each state. More expensive housing, for example, might include access to better schools and other higher-quality services. These amenities complicate the comparison. See Stark, *supra* note 13, at 1001.

17	Minnesota	\$66,396	New Hampshire	\$66,809
18	Iowa	\$64,801	Alaska	\$66,085
19	Colorado	\$64,451	Wisconsin	\$65,127
20	Rhode Island	\$64,433	Virginia	\$65,022
21	Pennsylvania	\$63,475	Ohio	\$64,994
22	South Dakota	\$63,217	Pennsylvania	\$64,704
23	Hawaii	\$62,561	Rhode Island	\$64,049
24	Texas	\$61,092	Indiana	\$63,933
25	Kansas	\$60,872	Colorado	\$63,374
26	Oregon	\$60,464	Texas	\$63,242
27	Wisconsin	\$60,308	California	\$62,922
28	Nevada	\$58,119	Missouri	\$60,844
29	Vermont	\$57,968	Nevada	\$60,541
30	Ohio	\$57,910	Louisiana	\$60,321
31	Indiana	\$57,348	Oregon	\$60,163
32	Utah	\$55,259	Tennessee	\$59,866
33	Georgia	\$55,198	North Carolina	\$59,851
34	North Carolina	\$54,644	Georgia	\$59,545
35	Missouri	\$54,455	Michigan	\$58,330
36	Louisiana	\$54,229	Utah	\$57,561
37	Michigan	\$54,130	Oklahoma	\$57,497
38	Florida	\$54,001	Vermont	\$56,499
39	Tennessee	\$53,640	Kentucky	\$55,355
40	Oklahoma	\$51,000	Montana	\$54,298
41	Montana	\$50,714	Alabama	\$54,096
42	Maine	\$50,313	Arkansas	\$54,005
43	Kentucky	\$48,436	Florida	\$53,947
44	Arizona	\$48,430	South Carolina	\$52,633
45	New Mexico	\$48,068	Hawaii	\$52,616
46	South Carolina	\$47,738	New Mexico	\$52,022
47	Idaho	\$47,093	West Virginia	\$51,862
48	Arkansas	\$46,876	Idaho	\$51,077
49	Alabama	\$46,577	Maine	\$50,617
50	West Virginia	\$45,535	Arizona	\$50,553
51	Mississippi	\$41,391	Mississippi	\$48,129

With a relatively small population and substantial taxable resources, the District of Columbia stands out. Even excluding the district and comparing only states, the disparities remain sizeable. Considering the unadjusted figures, the TTR per capita in Connecticut is more than twice as large as the TTR per capita in Mississippi. Taking into consideration the cost of living, the divergence shrinks somewhat, but the TTR per capita in Connecticut is still more than one and a half times as large as in Mississippi.

These differences are fairly stable over time. The Treasury Department computes an index of TTR per capita, setting the average at one hundred, which facilitates a comparison of the states. Table 2 below compares the TTR per capita index in 1995, the first year available under the current methodology, with the index in 2016. For this comparison over time, I have used the unadjusted figures.³⁴

Table 2. TTR Per Capita Index

Rank		1995		2016
1	District of Columbia	154.6	District of Columbia	168.2
2	Delaware	142.7	Connecticut	136.8
3	Connecticut	139.5	New York	132.0
4	New Jersey	130.3	Delaware	131.7
5	Alaska	129.3	Massachusetts	130.4
6	Wyoming	119.0	New Jersey	122.8
7	New York	118.7	North Dakota	119.8
8	Massachusetts	118.6	Wyoming	117.9
9	Nevada	116.0	Maryland	117.2
10	New Hampshire	114.4	Washington	116.0
11	Maryland	110.7	California	114.2
12	Illinois	108.9	New Hampshire	112.9
13	Hawaii	108.7	Alaska	110.5
14	Virginia	106.4	Illinois	108.4
15	Colorado	103.4	Nebraska	107.1
16	California	103.4	Virginia	105.1
17	Washington	101.1	Minnesota	105.0
18	Minnesota	100.9	Iowa	102.5

34. As discussed above, calculating regional cost-of-living levels presents practical and theoretical complexities. *See supra* note 33. As this table examines the resources of a particular state over time, rather than directly compares states at a single point in time, I concluded that the unadjusted TTR figures would convey a more accurate picture.

19	Rhode Island	99.3	Colorado	102.0
20	Pennsylvania	97.0	Rhode Island	101.9
21	Georgia	97.0	Pennsylvania	100.4
22	Texas	96.4	South Dakota	100.0
23	Nebraska	95.1	Hawaii	99.0
24	Ohio	94.9	Texas	96.6
25	Missouri	94.7	Kansas	96.3
26	Wisconsin	94.4	Oregon	95.7
27	Oregon	94.2	Wisconsin	95.4
28	Kansas	94.2	Nevada	91.9
29	Florida	93.7	Vermont	91.7
30	North Carolina	93.6	Ohio	91.6
31	Michigan	92.3	Indiana	90.7
32	Indiana	92.2	Utah	87.4
33	Louisiana	91.9	Georgia	87.3
34	Iowa	91.8	North Carolina	86.4
35	South Dakota	91.5	Missouri	86.1
36	Tennessee	90.7	Louisiana	85.8
37	Vermont	89.2	Michigan	85.6
38	Arizona	88.3	Florida	85.4
39	New Mexico	86.8	Tennessee	84.9
40	Idaho	84.8	Oklahoma	80.7
41	Kentucky	83.8	Montana	80.2
42	Maine	83.7	Maine	79.6
43	South Carolina	83.3	Arizona	76.6
44	Utah	81.7	Kentucky	76.6
45	North Dakota	80.7	New Mexico	76.0
46	Alabama	80.1	South Carolina	75.5
47	Arkansas	77.9	Idaho	74.5
48	Oklahoma	76.5	Arkansas	74.2
49	Montana	76.5	Alabama	73.7
50	West Virginia	75.9	West Virginia	72.0
51	Mississippi	72.8	Mississippi	65.5

The relative differences among the richest and poorest states remain similar. The coefficient of variation was 0.18 in 1995 and 0.20 in 2016, indicating a slight increase in overall inequality. Some states have experienced remarkable changes in position. For example, North Dakota rose from the forty-fifth in TTR per capita to seventh, due to its natural resources. In general, however, a state's rank remains consistent. Seven of the top ten in 1995 (including the District of Columbia) remain in the top ten in 2016. Six of the states in the bottom ten in 1995 remain in the bottom ten in 2016. Overall, the average change in rank from 1995 to 2016 was 5.5. The median change in rank was 3.³⁵

Scholars have also developed other methods to measure state resources. The variation among the states remains substantial across methodologies. A 2012 study published by the Urban Institute used the concept of the “representative revenue system” (RRS) to estimate a state's ability to raise revenue from all possible sources, including lotteries and user fees, in addition to taxes.³⁶ In a 2010 article, Professor Kirk Stark used a slightly narrower “representative tax system” (RTS) method, which includes broad taxable resources, but excludes non-tax sources.³⁷ As with TTR, both the RRS and RTS methods can be combined with the population of a state to generate a measure of per person revenue capacity. Both studies documented great disparities among the states. Using figures from 2012, the Urban Institute study found that annual per capita revenue capacity varied from a low of \$4,776 in Mississippi to a high of \$10,229

35. One factor contributing to TTR is per capita income. Some studies suggest that per capita income among the various states moved toward greater equality from 1880 to 1980, but converged at a much slower rate thereafter, with convergence generally stopping after 2010. See Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76, 76 (2017); see also Robert J. Barro & Xavier Sala-i-Martin, *Convergence Across States and Regions*, 1991 BROOKINGS PAPERS ON ECON. ACTIVITY 107, 114–15 (showing convergence in the period from 1880 to 1988). Other studies question whether incomes have converged since 1969. See Riccardo DiCecio & Charles S. Gascon, *Income Convergence in the United States: A Tale of Migration and Urbanization*, 45 ANNALS REGIONAL SCI. 365, 376 (2010) (concluding that the per capita income in states did not converge in the period from 1969 to 2005, but that the population in the United States shifted to wealthier states). Professor Schleicher has presented a powerful argument that a decline in internal migration helps to explain the recent persistence in inequality in wealth among the people in different states. David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78 (2017). He argues that historically, the movement of people within the United States from areas of less opportunity to areas of greater opportunity helped to decrease these disparities. See *id.* at 81–84. He describes a variety of government policies, ranging from land use regulation to occupational licensing schemes, that have served as barriers to interstate mobility. See *id.* at 111–32; see also Sabrina Tavernise, *Frozen in Place: Americans Are Moving at the Lowest Rate on Record*, N.Y. TIMES (Nov. 20, 2019), <https://www.nytimes.com/2019/11/20/us/american-workers-moving-states.html> [<https://perma.cc/Z4JZ-GCJ7>] (reporting Census Bureau findings that Americans are moving at the lowest rate since the government started keeping records).

36. See TRACY GORDON ET AL., URBAN INST., *ASSESSING FISCAL CAPACITIES OF STATES 4* (2016), https://www.urban.org/sites/default/files/publication/78431/2000646-assessing-fiscal-capacities-of-states-a-representative-revenue-system-representative-expenditure-system-approach-fiscal-year-2012_1.pdf [<https://perma.cc/U2Y7-F78U>].

37. See Stark, *supra* note 13, at 960, 981–84.

in North Dakota and \$11,404 in the District of Columbia.³⁸ Using figures from 2005, Professor Stark found the annual per capita RTS ranged from \$2,607 in Mississippi to \$5,344 in Alaska.³⁹ In other words, both studies concluded that the richest states had a per capita revenue-raising capacity approximately twice as large as the poorest states.⁴⁰ The list of richest and poorest states also shows remarkable consistency across time and methodology. Table 3 below lists the five richest and poorest states using various methodologies at different points in time.

Table 3. State Revenue Capacities Over Time Across Various Measures

Rank (D.C. omitted)		Per Capita State Taxable Resources, TTR (2016)		Per Capita State Revenue Capacity, RRS (2012) ⁴¹		Per Capita State Tax Capacity, RTS (2005) ⁴²
1	Connecticut	\$86,480	North Dakota	\$10,229	Alaska	\$5,344
2	New York	\$83,465	Wyoming	\$9,628	Wyoming	\$5,134
3	Delaware	\$83,254	Alaska	\$9,567	Massachusetts	\$5,019
4	Massachusetts	\$82,427	Connecticut	\$8,694	Connecticut	\$4,910
5	New Jersey	\$77,628	Massachusetts	\$8,472	Delaware	\$4,904
46	Idaho	\$47,093	Idaho	\$5,287	Alabama	\$2,997
47	Arkansas	\$46,876	Arkansas	\$5,259	Louisiana	\$2,985
48	Alabama	\$46,577	Alabama	\$5,229	Arkansas	\$2,892
49	West Virginia	\$45,535	South Carolina	\$5,218	West Virginia	\$2,763
50	Mississippi	\$41,391	Mississippi	\$4,776	Mississippi	\$2,607

The range of disparity and the identity of richer and poorer states show remarkable persistence. The coefficient of variation is 0.18 for all three measures.⁴³

These resource measures do not include transfers of money from the federal government. The federal government engages in an extensive program of grants to state and local governments. These transfers, however, do not have the effect

38. See GORDON ET AL., *supra* note 36, at 96 tbl.D.5.

39. See Stark, *supra* note 13, at 987. Professor Stark included only states and thus omitted the District of Columbia.

40. For comparison, the TTR per capita in 2012 had a roughly similar differential, ranging from \$38,758 in Mississippi to \$92,455 in Wyoming and \$100,231 in the District of Columbia. The raw numbers of TTR are higher than RRS or RTS because the latter two measures attempt to approximate tax revenue for each state, assuming each state taxed all its resources at an average rate. TTR attempts to measure raw fiscal capacity, before a tax rate is applied.

41. See GORDON ET AL., *supra* note 36, at 96 tbl.D.5.

42. See Stark, *supra* note 13, at 987.

43. In other countries in the Organisation for Economic Co-operation and Development (OECD), regional disparities in economic resources similarly appear generally stable and persistent over time. See Hansjörg Blöchliger et al., OECD Network on Fiscal Relations Across Levels of Gov't, *Fiscal Equalisation in OECD Countries*, at 8, OECD Doc. COM/CTPA/ECO/GOV/WP(2007)4, <https://www.oecd.org/ctp/federalism/39234016.pdf> [https://perma.cc/BG32-G2AF].

of equalizing overall state fiscal capacity. As Part IV explores in detail, the Medicaid program attempts, albeit imperfectly, to take account of varying state resources and needs, but most federal grant programs lack even Medicaid's attempt to account for overall disparities in state resources.⁴⁴

Given that lack of attention to state disparities, it is not surprising that adding federal transfers does not materially change the deviations. The Urban Institute calculated transfers from the federal government to the various states. Including the transfers shuffled the list slightly, but the deviations remained of similar scale. When transfers from the federal government were included, per capita revenue capacity calculated under the RRS method ranged from \$6,771 in South Carolina to \$13,892 in Alaska. The coefficient of variation (not including the District of Columbia) increased slightly to 0.19. Professor Stark similarly found that federal grants did not substantially diminish the disparities in state capacity using the RTS measurement.⁴⁵ Indeed, he found a slight positive correlation between per capita federal grants and per capita fiscal capacity, suggesting that overall federal grants may increase, rather than decrease, the divergence in state resources.⁴⁶ He noted that this positive relationship holds for other measures of fiscal capacity, including per capita income, the RRS methodology, and the TTR methodology.⁴⁷ In his 1995 study, Paul Peterson also found a positive relationship between state resources and federal grants.⁴⁸ States

44. Among the handful of programs that do consider the available state resources are the Community Mental Health Service and Substance Abuse Prevention and Treatment block grant programs, which include TTR in the formula used to calculate grants. *See Total Taxable Resources, supra* note 30; *see also* J. SCOTT ASHWOOD ET AL., RAND CORP., REVIEW AND EVALUATION OF THE SUBSTANCE ABUSE, MENTAL HEALTH, AND HOMELESSNESS GRANT FORMULAS xi (2019), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2400/RR2454/RAND_RR2454.pdf [<https://perma.cc/K7ZN-XHVG>] (discussing reasons for using TTR in allocation formula). These programs, however, are comparatively small. In 2018, the combined amount distributed to states through these two programs was approximately \$2.4 billion. *See HHS FY 2018 Budget in Brief - SAMHSA*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/about/budget/fy2018/budget-in-brief/samhsa/index.html> [<https://perma.cc/9X64-X5MV>]. By comparison, the amount distributed to states through the Medicaid program in FY 2018 was approximately \$370 billion. *See Federal and State Share of Medicaid Spending*, KAISER FAMILY FOUND., <https://www.kff.org/medicaid/state-indicator/federalstate-share-of-spending/> [<https://perma.cc/EN86-7KQ3>] (select "Currency" as data view).

45. *See Stark, supra* note 13, at 990.

46. *See id.*; *see also* Daniel Béland & André Lecours, *Fiscal Federalism and American Exceptionalism: Why Is There No Federal Equalisation System in the United States?*, 34 J. PUB. POL'Y 303, 306 (2014) ("According to a 1985 government report, patterns of federal grant distribution in the United States 'tended to exacerbate fiscal disparities among states.'" (quoting Daphne A. Kenyon & John Kincaid, *Fiscal Federalism in the United States: The Reluctance to Equalize Jurisdiction*, in FINANZVERFASSUNG IM SPANNUNGSFELD ZWISCHEN ZENTRALSTAAT UND GLIEDSTAATEN 34, 41 (Werner W. Pommerehne et al. eds., 1996))); Stephen Laurent & François Vaillancourt, *Federal Transfers in Canada and the United States, 1989-1990 to 1998-1999: How Equalizing Are They?*, 95 PROCEEDINGS 203 (finding that transfers in the United States do not promote equalization among states).

47. *See Stark, supra* note 13, at 990 n.114; *see also* Michael Keen, *Peculiar Institutions: A British Perspective on Tax Policy in the United States*, 50 NAT'L TAX J. 779, 790 (1997) (rejecting the idea that federal grants have the effect of equalizing interstate resources).

48. *See PETERSON, supra* note 29, at 143-45.

with higher tax capacities received more per capita federal aid. This relationship follows from the fact that many federal grants are calculated based on matching state spending, and states that have more resources tend to spend more.⁴⁹

The general progressivity of federal taxes can reduce the inequality of average state incomes. But, the effect is small, and its influence on state fiscal capacity is attenuated.⁵⁰ In theory, the federal government's relatively larger share of revenue might diminish the ability of a state to raise revenue through taxation. However, the theoretical and empirical evidence is mixed.⁵¹ Similarly, the overall distribution of federal spending has little impact on the interstate financial disparities. The federal government may place installations in various states or enter into procurement contracts with firms in a state. To the extent those transactions boost the incomes of local people and businesses, these increases will be included in the TTR or other measures of resources in a state. Thus, the federal spending may have an impact on TTR or other resource measures, but it does not act as an independent equalizing factor.⁵²

The discussion so far has focused simply on differing state capacities. The Urban Institute study took the additional step of assessing each state's expenditure needs using the "representative expenditure system" (RES).⁵³ This system accounts for the different spending needs in each state depending on such factors as the number of school-aged children and the number of children in poverty. RES also attempts to measure the varying cost of supplying services in different states.⁵⁴ Using the RES and RRS results, the study calculates the gap between a state's resources, including federal transfers, and its needs. The per capita gap between resources and needs ranged from a deficit of \$1,986 in Georgia to a surplus of \$5,679 in Alaska.⁵⁵ Georgia, Alabama, South Carolina, Mississippi, and Arizona represent the five states with the largest deficits between resources and needs.⁵⁶ On the other hand, Alaska, Wyoming, Delaware, the District of Columbia, and North Dakota had the largest surpluses of resources over needs.⁵⁷ By any measure, states have very different financial resources and very different needs, and federal grants do little to mitigate this inequality.

49. See Laurent & Vaillancourt, *supra* note 46, at 206.

50. See Keen, *supra* note 47, at 790–91.

51. See, e.g., Brian Galle, *The Effect of National Revenues on Sub-National Revenues Evidence from the U.S.*, 37 INT'L REV. L. & ECON. 147, 154 (2014) ("Overall, I find evidence to suggest that in recent U.S. experience federal revenues do not diminish state revenues, and if anything that the opposite is true."); Brian Galle, *Does Federal Spending "Coerce" States? Evidence from State Budgets*, 108 NW. U. L. REV. 989, 993–94 (2014) (finding, based on data from 1998 to 2010, that federal revenues do not "crowd out" state revenues).

52. See Stark, *supra* note 13, at 966–67.

53. See GORDON ET AL., *supra* note 36, at 68–72 (explaining the RES method).

54. See *id.*

55. *Id.* at 92 tbl.D.2.

56. *Id.*

57. *Id.*

Given the states' differing fiscal capacities, some states need to utilize a larger proportion of their resources to raise a given amount of money. For example, in 2015, the two jurisdictions with the highest TTR per capita, the District of Columbia and Connecticut, raised revenues of \$13,231 and \$8,939 per person.⁵⁸ These amounts represented 12.4% and 10.3% of their TTR, respectively. The two jurisdictions with the lowest TTR per capita, West Virginia and Mississippi, raised \$6,093 and \$5,895 per person. These amounts represented 13.4% and 14.6% of their TTR.⁵⁹ In other words, the poorer states had to use a higher percentage of their taxable resources to raise smaller amounts of money.⁶⁰ The fiscal autonomy of states also leads to interjurisdictional competition, limiting the ability of states to raise taxes. States may avoid tax hikes out of fear of driving businesses and wealthier citizens to relocate. The United States' relatively large number of states, compared to other federal systems, may enhance the competition.⁶¹ The federal system of the United States means that citizens in different jurisdictions benefit from varying pools of potential resources. At the same time, competitive pressures limit the ability of the jurisdictions to decide how much of their potential resources to utilize.

B. *The Relevance of Interstate Disparity*

This Section has examined in detail the fiscal disparity among states. The remainder of the Article explores the impact of these inequalities on the lives of

58. The revenue data come from the Urban-Brookings Tax Policy Center. *See State and Local Finance Data*, URBAN INST., <http://slfdqs.taxpolicycenter.org/pages.cfm> [<https://perma.cc/U5LB-ET6U>] (select "GET STARTED"; then fill in the "State and Local" radio button and "2: Select State" at top of page; then select all of the available states in the leftmost box, click the ">>>" button to import them into the rightmost box, and then click "3: Select Series" at top of page; then select "(R04) Gen Rev-Own Sources" in the leftmost box, click the ">>>" button to import it into the rightmost box, select "(R01) Total Revenue" in the rightmost box, click the "<<<" button to remove it, and then click "4: Select Years" at top of the page; then select "2015," click the ">>>" button to import it, select "2017" in the rightmost box, click the "<<<" button to remove it, and then click "5: Select Units" at top of the page; then, for the per capita data, fill in the "Per Capita" and "Nominal" radio buttons [for the total revenue data, fill in the "Total" and "Nominal" radio buttons], then click "6: View Results" at the top of the page, and then click "Series" at the top left). The Urban Institute's data come from the U.S. Census Bureau's Annual Survey of State and Local Government Finances and the Census of Governments. *Id.* The TTR data come from *Total Taxable Resources*, *supra* note 30.

59. Using cost-of-living adjustments, the District of Columbia and Connecticut raised \$11,300 and \$7,500 per person, while West Virginia and Mississippi raised \$7,100 and \$6,800 per person. The cost-of-living adjustment does not change the percentage of TTR represented by these amounts. Thus, while cost-of-living factors lead to greater convergence in revenue, the divergence in amount of TTR utilized remains.

60. A 2008 study by Yesim Yilmaz and Robert Zahrndnik documented similar disparities. *See YESIM YILMAZ & ROBERT ZAHRADNIK, MEASURING THE FISCAL CAPACITY OF THE DISTRICT OF COLUMBIA—A COMPARISON OF REVENUE RAISING CAPACITY AND EXPENDITURE NEED: FISCAL YEAR 2005, at 51 tbl.7 (2008)*, http://docs.wixstatic.com/ugd/ddda66_d479b50d8ca854dd519326947e1bafd9.pdf [<https://perma.cc/4BR8-94US>].

61. *See* Daphne A. Kenyon, *Theories of Interjurisdictional Competition*, *NEW ENG. ECON. REV.*, March/April 1997, at 13, 15.

the people who live in the states. One might question the relevance of the financial status of states. If the ultimate concern is the well-being of individuals, why focus on states, rather than directly on people? As explained in more detail below, given the federal system of the United States, the fiscal equality of states tightly links to the equality of people for two interrelated reasons, one political and the other socioeconomic.

The equal opportunity to participate in resource allocation decisions is an essential component of political equality. Federalism should enhance that participation by bringing certain decisions closer to the people. The vast disparities in state resources, however, undermine that right to equal participation. The citizens of some states have control over very different amounts of money than citizens in other states. In a real sense, the citizens of the poorer states have less political power than citizens of wealthier states.

In addition, the states play a critical role in the delivery of an array of vital services, such as education and health care. As Parts III and IV make clear, the inequality of state resources threatens the equity and, ultimately, the adequacy of these programs. The amount and quality of important social services varies with the wealth of the state. Interstate disparities thus undermine the social and economic equality of the people of the United States. To be fair, state policy choices play some role in this inequality. Interstate financial equality alone would not guarantee the adequacy of vital services. However, given the federal structure of the United States, greater interstate equality, though not sufficient to ensure the maintenance of critical programs, remains necessary. The equality of the people depends on the equality of the states.

II.

PAYING FOR THE VALUES OF FEDERALISM

This Article argues that the disparity in the financial resources of the states not only undermines a commitment to equality, but also threatens the values associated with federalism. This Section identifies those values and the importance of money in realizing them. As I will discuss, state control over budgetary resources plays an important role in promoting all of these values. In turn, varying state financial capacities and the accompanying fiscal constraints interfere with the realization of these values.

Studies of regulatory federalism generally assert that federal systems advance a variety of important goals. Judicial opinions and academic works often justify federalism by reference to these aims. Speaking for the Court in *Gregory v. Ashcroft*, for example, Justice Sandra Day O'Connor extolled the virtues of federalism:

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes;

it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. Perhaps the principal benefit of the federalist system is a check on abuses of government power.⁶²

Scholars debate whether federalism does indeed advance these values, and they point out important principles that federalism may undermine. For a long time, for example, officials invoked principles of federalism to shield racist state practices from federal civil rights initiatives.⁶³ Nevertheless, even those who question the effectiveness of federalism in promoting various goals generally acknowledge the desirability of these asserted benefits. Scholars focus on how to increase the chances that federalism will advance the desired aims, while decreasing the chances that federalism supports unwelcome ends.⁶⁴

As illustrated by Justice O'Connor's opinion in *Gregory v. Ashcroft*, the values traditionally ascribed to federalism fit into three general categories, broadly reflecting different goals of the law.⁶⁵ Economic efficiency is one important aim. From this perspective, the law should facilitate the ability of individuals to maximize their utility by "buying" the public goods and services they desire. In this respect, federalism promotes responsive governance. Federalism can also promote participatory democracy. In this view, citizen engagement in self-rule constitutes an independent good. Accordingly, political systems should seek to enhance citizens' participation in and control over decisions of fundamental importance. A third set of federalism aims relates to promoting liberty and avoiding tyranny, sometimes described as guaranteeing fundamental rights.⁶⁶ This goal may be the one most closely associated with the development of federalism as part of the United States Constitution. However, as history and theory suggest, the implications of this goal are complex. A powerful central government may intrude on individual liberty. At the same time, as the history of the United States well attests, local governments may use their authority to subordinate certain residents. Further, the intervention of a national government may be necessary to safeguard certain fundamental principles. Especially with regard to affirmative social commitments, such as health care and education, government action may be especially important. This Section

62. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (citations omitted).

63. See RIKER, *supra* note 4, at 155.

64. See Gerken, *supra* note 1, at 1890 ("Any account of federalism must begin with the values it serves."); see also ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 97–104 (2009) (discussing values and countervalues of federalism).

65. See Robert P. Inman & Daniel L. Rubinfeld, *Rethinking Federalism*, J. ECON. PERSP., Fall 1997, at 43, 61 ("[T]he selection of the institutions of federalism necessarily carries with it a balancing of these competing social goals of economic efficiency, political participation, and the protection of individual rights and liberties."); see also Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 917–18 (1985) (discussing four values of federalism of providing a check against concentration of power, promoting republican participation, spurring interjurisdictional competition, and fostering diverse environments).

66. See *infra* notes 76–80 and accompanying text.

reviews these three sets of values and explores how unequal state resources may undermine their realization.

A. Responsive Governance

The first set of values assumes the viewpoint of the economist. Federalism can maximize individual welfare by satisfying citizens' preferences. In this model, the state functions as a firm, and the residents as consumers. The state seeks to maximize consumer welfare by offering the package of services and taxes that best matches the preferences of its citizens. Because each state can shape the package to meet the wishes of its citizens, as opposed to the national government's offering of one uniform bundle for the nation, federalism allows for a better match of policy and preference.⁶⁷ The more localized shaping of policy provides a better opportunity to meet citizen desires than a one-size-fits-all policy dictated in Washington. Further, citizens unhappy with the policies offered by their state can move to a state that provides a better match. If, by contrast, the federal government dictates a single policy outcome for the nation, citizens have fewer options. It is easier to move from one state to another within the United States than to leave the United States for a foreign country. Indeed, the ability of citizens to move, taking their tax dollars with them, imposes a market discipline on the states. They must constantly strive for economic efficiency by providing the best package of benefits and taxes, or else they risk losing their citizens/customers. This competition may also provide an incentive for policy innovation. Like firms in the marketplace, states have an incentive to find new and better ways to give their citizens what they want—be it better schools, better economic development, or any other social good. Other states and the national government can benefit from observing the experiments undertaken and depending on the results, can choose to follow or avoid these novel policies.⁶⁸

The budgetary dimension plays an important role in realizing the benefits of federalism from this economic perspective. For a state to offer the package of services and taxes that best meets the preferences of its citizens, it needs to have control over its revenues and expenditures. Decisions on how much to tax, how much to spend, and on what, constitute essential elements of the product that a state sells to its citizens. Federal control over these budgetary matters removes the ability of states to respond to their citizens. Responsive state governance requires some level of budgetary autonomy.

67. For an extended discussion of this argument, see Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–1500 (1987) (book review).

68. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); James A. Gardner, *The “States-as-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 478–79, 486–87 (1996) (noting limitations of the “states-as-laboratories” concept).

At the same time, given constrained local financial resources, the extent of citizen control may be restricted. A state's budgetary limitations may place certain possibilities out of reach. Citizens may be willing to impose a tax on themselves to pay for certain benefits, but it may be the case that only citizens of certain states have that option. A given level of taxation will raise more money in some states than in others. The overall poverty of a state may take some options off the table—if the decision must be locally funded. For citizens of poorer states, the only way to attain certain goals may be for the funding decisions and resources to come from a higher level of government.

B. Participatory Democracy

The second value emphasizes the importance of political participation.⁶⁹ Even aside from the efficiency of registering preferences, citizen participation in decision-making stands as an independent good. Citizens should feel in control of their collective lives. Voting is part of political participation, but only a part. From this perspective, citizens should have an opportunity for active engagement outside of the voting booth. They can learn about important issues and promote their views through lobbying, activism, and other forms of civic engagement. Such active political participation may occur more readily at the local level. Citizens can more easily become experts in local issues and enjoy greater access to local officials.

One strain of political theory, building on the civic republican tradition, emphasizes the importance of deliberation.⁷⁰ On this view, citizens must have opportunities for meaningful discussion of public policy. Mere voting, as opposed to engaged dialogue and deliberation, does not allow citizens to enjoy the full benefits of self-governance and denies to society the insights that arise from real deliberative democracy. Such true participation in self-governance may remain difficult to realize at the national level. Geographic distance and jurisdictional scale may pose substantial barriers to full participation. Federalism, with its potential for meaningful local control, can create greater opportunities for citizen involvement in issues of importance.⁷¹ Through

69. For discussions of federalism as promoting political participation, see, for example, Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 389–94 (1997); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 710–14 (1991); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 7 (1988); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 401–08.

70. For descriptions of republican political theory, see, for example, J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969); Hoke, *supra* note 69, at 703–10; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547–58 (1988).

71. See DAVID L. SHAPIRO, *FEDERALISM* 91–92 (1995); see also Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1355 (2006) (noting argument that decentralized decision-making brings government closer to the people).

decentralization of decision-making, federalism may advance the goal of civic engagement. The values of republicanism may flourish more easily in a smaller republic.⁷²

Budgetary control constitutes a central aspect of self-government. For citizens to exercise meaningful political authority, they must participate in decisions about taxing and spending. Fiscal federalism thus figures importantly in promoting the value of self-governance. To the extent that more local levels of government make budgetary decisions, citizens may enjoy greater involvement. Similarly, citizen participation in dialogue and deliberation about budgetary priorities may more readily occur at the local level. Decentralized decision-making may enhance both citizen control and citizen perception of empowerment.⁷³ That sense of control may be especially significant with regard to budgetary matters, as citizens decide how much to tax themselves to fund public expenditures. Citizens may more willingly impose taxes on themselves if they feel greater control over the choices of tax policy and spending priorities. Local control of taxing and spending may facilitate citizen appreciation of the connection between the two. The importance of this local control and investment may be especially significant with respect to particular issues. For example, both in the United States and among other Organisation for Economic Co-operation and Development (OECD) countries, education spending tends to be relatively decentralized.⁷⁴ Parents value control over their children's education, and that control may translate into a willingness to pay higher educational taxes, which the parents view as an investment in their children. It may also be the case that citizens want to invest more in social services for their neighbors than for unknown individuals in farther reaches of the country.⁷⁵ In this way, local control may increase the overall tax burden that citizens are willing to assume. Local control may raise the level of taxes—and concomitant services—preferred by the citizens. Thus, local control may allow citizens to increase their satisfaction by paying higher taxes and funding additional services.

Decentralized budgeting, however, may limit citizens' actual and perceived political power. Various policies may simply lie beyond the budgetary capability of some state and local governments. Engagement in politics may more easily occur at the state or local level, but without the necessary resources, meaningful deliberation may be impossible. At the very least, the fiscal disparity among

72. For a discussion of this republican perspective, see SCHAPIRO, *supra* note 64, at 78.

73. See McConnell, *supra* note 67, at 1510 (“If the citizens are actively engaged in the public debate they will have more of a stake in the community.”).

74. See OECD & KOR. INST. OF PUB. FIN., FISCAL FEDERALISM 2016: MAKING DECENTRALISATION WORK 18 fig.1.4 (Hansjörg Blöchliger & Junghun Kim eds., 2016), https://read.oecd-ilibrary.org/governance/fiscal-federalism-2016_9789264254053-en [<https://perma.cc/QC9R-W87K>].

75. See John R. Brooks II, *Fiscal Federalism as Risk-Sharing: The Insurance Role of Redistributive Taxation*, 68 TAX L. REV. 89, 116 (2014); Mark V. Pauly, *Income Redistribution as a Local Public Good*, 2 J. PUB. ECON. 35, 37–38 (1973).

states means that the domain for effective political participation may be more limited in some states than in others.

C. *Guaranteeing Fundamental Rights*

Protection against tyranny remains one of the most significant values ascribed to federalism. Federalism divides power between states and the national government, thereby limiting the ability of either government to exercise unjust domination. Federalism safeguards the liberties of citizens by ensuring that no government is all-powerful. Specifically, guaranteeing some measure of local control prevents oppression from a distant and perhaps out-of-touch central authority. However, limiting the power of the national government in the name of federalism can serve to license local tyranny. States and localities have subjected minorities in their midst to oppressive measures, while invoking principles of federalism as a shield from federal intervention. Discussions of federalism have long noted the national responsibility to guarantee certain rights.⁷⁶ The federal government must be powerful enough to honor this obligation. Limitations on the reach of national power can constrain the ability of the federal government to safeguard all citizens of the United States. The *Civil Rights Cases*⁷⁷ offer a notable example of how restrictions on federal power can undermine the protection of core rights. In those cases, the United States Supreme Court held the Civil Rights Act of 1875 unconstitutional for exceeding the scope of federal authority.⁷⁸

In light of this history of federalism as a potential shelter for state tyranny, contemporary theories of federalism focus less on limiting federal authority than on empowering states.⁷⁹ Furthermore, while classical conceptions of tyranny focused on the danger of unjust government action, contemporary theories note the perils of government inaction.⁸⁰ As in the case of civil rights laws,

76. See, e.g., THE FEDERALIST NO. 10 (James Madison) (noting role of central government in protecting rights by opposing local faction); SCHAPIRO, *supra* note 64, at 106; Inman & Rubinfeld, *supra* note 65, at 54.

77. 109 U.S. 3 (1883).

78. See *id.* at 26.

79. See, e.g., ERWIN CHEMERINSKY, ENHANCING GOVERNMENT (2008); Erwin Chemerinsky, Paper, *Federalism Not as Limits, But as Empowerment*, 45 KAN. L. REV. 1219 (1997).

80. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 12 & n.21, 29 (expanded ed. 2006) (referring to James Madison's implied conception of tyranny as "every severe deprivation of natural rights" and describing tyranny inflicted by private individuals); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2284 (1990) ("Government can harm by its inaction and its inadequate action, as well as its direct action."); Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2130 (1999) ("[A]t the base of these New Deal electoral mandates lay a public belief that the national government should be held accountable not only when it acts, but when it fails to act . . ."); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 501-04 (1987) (describing the New Deal critique of government inaction); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 683 (1985) ("The rise of the modern regulatory state results in large part from an understanding that government 'inaction' is itself a decision and may have serious adverse consequences for affected citizens.").

government regulation may be necessary to combat private discrimination. In addition, in areas such as education, health, and income security, government action may be necessary to protect vital interests.

Fiscal concerns play a critical role in every aspect of this liberty-enhancing account. Whether one focuses on the danger of governmental action or inaction, financial issues persist. To the extent that state autonomy limits the risk of federal tyranny, state budgetary authority is essential. Expenditures constitute a significant aspect of government power, and centralizing all taxing and spending would give enormous authority to the national government. The ability of states to act as independent sources of power depends on access to their own financial resources. State policy initiatives require state revenue. The lack of fiscal resources would create a policy vacuum that would invite federal intervention. To the extent that vindicating core commitments, such as education and health care, requires the expenditure of funds, these vital interests depend on adequate state fiscal capacity.

While state budgetary authority is necessary to advance the value of liberty, the reality of interstate fiscal inequity means that allocating responsibility to the states risks unequal support for crucial priorities. Limited state financial capacity might undermine the realization of these important goals. This Article does not attempt to define the full range of services that the national government should guarantee, but it is important to recognize this category of national commitments.⁸¹ The national government need not itself provide these core services, but it must ensure that some combination of federal and state programs vindicate these goals. This kind of shared federal-state commitment depends on sufficient state resources. Financial constraints limit the ability of states to be effective partners in the national project of guaranteeing core services, such as education and health care. For this reason, interstate financial disparities may

81. For a discussion of the kinds of concerns that might qualify as national commitments, see, for example, CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004); MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* (2008); Francesca Bignami & Carla Spivack, *Social and Economic Rights as Fundamental Rights*, 62 *AM. J. COMP. L.* 561 (2014). For a recent overview of the debates concerning constitutional protections for economic and social rights, see *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS* (Katharine G. Young ed., 2019). Not all economic and social rights are positive rights demanding affirmative government action. For example, rights to unionize and to choose private schools require only lack of government intrusion. See Stephen Gardbaum, *The Myth and Reality of American Constitutional Exceptionalism*, 107 *MICH. L. REV.* 391, 445 (2008). In the United States, these particular rights are guaranteed by federal law. See National Labor Relations Act of 1935, 29 U.S.C. § 157 (2018) (right to unionize); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (right to send child to private school). The most familiar economic and social rights, however, include health care and education. See Jorge M. Farinacci-Fernós, *Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect, and Reach*, 41 *HASTINGS INT'L & COMP. L. REV.* 31, 38 (2018). These rights are positive rights, requiring affirmative government support. See *id.* at 44. These kinds of rights, which are generally not guaranteed by the United States Constitution, nevertheless constitute national commitments. In the United States, these topics are generally allocated to the states, and thus the realization of these national commitments requires support and funding at the state level. See Gardbaum, *supra*, at 446.

interfere with the fulfilment of substantive national responsibilities. Like the system of federalism that barred the realization of national rights in the *Civil Rights Cases*, the current system of fiscal federalism may impede the realization of certain national commitments that require the expenditure of funds. In the United States, core government obligations depend on a combination of state and federal effort. That partnership cannot function effectively if the state partners have vastly different resources and the federal government does not account for these disparities.

The allocation of budgetary responsibility among states and the national government is essential for promoting the three sets of values: enhancing economic efficiency, advancing deliberative democracy, and protecting liberty. The disparity in state resources interferes with the realization of all of these goals. The next two parts explore the implications of financial inequality for the vital areas of education and health care.

III.

EDUCATION

Education represents a core government responsibility in the contemporary United States. As the United States Supreme Court recognized in *Brown v. Board of Education*, “Today, education is perhaps the most important function of state and local governments.”⁸² Given the growth of a knowledge-based economy, those words are as true today as they were in 1954. *Brown* also stressed the vital civic role of education. Chief Justice Earl Warren’s celebration of the many values of education merits quoting at length:

[Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.⁸³

Around the world as well, communities acknowledge education as a fundamental human value. International human rights instruments recognize the right to education.⁸⁴ In the 2000 United Nation’s Millennium Development Goals,

82. 347 U.S. 483, 493 (1954).

83. *Id.*

84. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 26 (Dec. 10, 1948); Convention on the Rights of the Child art. 28, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination against Women art. 10, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Economic, Social and Cultural Rights art. 13, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

achieving universal primary education constituted Goal 2.⁸⁵ Ensuring “inclusive and equitable quality education” for all remains a key Sustainable Development Goal of the United Nations.⁸⁶

A. Disparities in Educational Spending

In the United States, educational funding has overwhelmingly come from state and local governments, rather than from the national government. In 2014-2015, public elementary and secondary schools in the United States received approximately \$664 billion dollars of revenue.⁸⁷ The federal government contributed \$56 billion or 8.5%; states supplied \$309 billion or 46.6%; local governments accounted for \$299 billion or 45.0%.⁸⁸ Federal contributions reached their highest level of 12.7% in the 2009-2010 school year.⁸⁹ Federal contributions constitute a relatively small percentage of school funding across all states. The state with the highest federal share, South Dakota, received 14.9% of its elementary and secondary educational revenue from the federal government.⁹⁰ Connecticut and New Jersey received the smallest federal share at 4.2%.⁹¹

The substantial local funding for education tends to create wide disparities in available resources in school districts within a particular state. Local funding overwhelmingly comes from local property taxes. The available resources, then, depend on the local property tax base, and the taxable property across districts may vary widely, based on the value of the local residences and the location of commercial property. Available resources depend as well on the local tax rate, but the differential tax bases mean that communities that assess themselves at a higher rate may nevertheless receive substantially less revenue. In 1973, the United States Supreme Court upheld this financing scheme in *San Antonio Independent School District v. Rodriguez*.⁹² The Court found no fundamental right to education⁹³ and held that poverty did not constitute a suspect class.⁹⁴ Accordingly, the Court applied rational basis scrutiny and concluded that the

85. See UNITED NATIONS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2015, at 4 (Catharine Way ed., 2015).

86. See UNITED NATIONS, THE SUSTAINABLE DEVELOPMENT GOALS REPORT 2018, at 6 (Lois Jensen ed., 2018), [https://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20\(July%2011\).pdf](https://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%2011).pdf) [<https://perma.cc/29W3-CKUB>].

87. See *Digest of Education Statistics: Table 235.10*, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/digest/d17/tables/dt17_235.10.asp?current=yes [<https://perma.cc/L79E-FJCZ>].

88. See *id.*

89. See *id.*

90. See *Digest of Education Statistics: Table 235.20*, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/digest/d17/tables/dt17_235.20.asp [<https://perma.cc/TZJ9-HD9Z>].

91. See *id.*

92. 411 U.S. 1 (1973).

93. See *id.* at 35–38.

94. See *id.* at 28–29.

value of local control of education provided a legitimate basis for the school funding system.⁹⁵

Even before *Rodriguez*, advocates for school funding equity had turned to state constitutions.⁹⁶ The Court's rejection of federal constitutional claims in *Rodriguez* accelerated that development. Waves of state constitutional litigation attacking the educational finance system ensued. All state constitutions contain some kind of guarantee of education.⁹⁷ Earlier cases focused on state constitutional guarantees of equality.⁹⁸ Later litigation relied on state constitutional provisions to assert rights to educational adequacy, arguing for a constitutional guarantee of a sound basic education. This strategy of focusing more on the adequacy of education, which began in the late 1980s, yielded more favorable results for plaintiffs.⁹⁹ Between 1989 and 2009, plaintiffs prevailed in 69% of the cases.¹⁰⁰ Perhaps because of judicial reluctance to intrude in state budgetary matters in the wake of the Great Recession,¹⁰¹ the plaintiffs' success rate fell to 47% from 2009 to 2017, lowering the overall success rate of plaintiffs to 58% for the entire period from 1989 to 2017.¹⁰²

School finance litigation under state constitutions has reduced disparities in funding between districts within a given state.¹⁰³ In this way, state litigation has had some success addressing the problem that the United States Supreme Court noted in *Rodriguez*, but left unremedied. The most substantial inequality in educational funding, however, is not between different districts within a state. Rather, the disparities in funding between states are much more substantial.¹⁰⁴ By way of example, Table 4 below lists the states (including the District of

95. See *id.* at 49–55.

96. See, e.g., *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (en banc). State constitutional litigation concerning local financing of education dates to the nineteenth century. See Kirk J. Stark, Note, *Rethinking Statewide Taxation of Nonresidential Property for Public Schools*, 102 YALE L.J. 805, 805–12 (1992).

97. See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991).

98. See MICHAEL A. REBELL, *COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH STATE COURTS* 16–17 (2009).

99. See *id.* at 17–22; see also Julien Lafortune et al., *School Finance Reform and the Distribution of Student Achievement*, AM. ECON. J.: APPLIED ECON., Apr. 2018, at 1, 5 (discussing wave of finance reform litigation).

100. See MICHAEL A. REBELL, *COURTS & KIDS: PURSUING EDUCATIONAL EQUITY THROUGH STATE COURTS* 8 (Supp. 2017), <http://schoolfunding.info/wp-content/uploads/2017/07/COURTS-AND-KIDS-2017-Supplement.-07.12.17-.pdf> [https://perma.cc/3BXP-HAVU].

101. See *id.* at 9.

102. See *id.*

103. See Liu, *supra* note 22, at 2046–47.

104. See CAMILLE WALSH, *RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869–1973*, at 162 (2018); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 332–33 (2006); Liu, *supra* note 22, at 2061–72.

Columbia) spending the most and the least per pupil in 2015. These figures are adjusted to take account of regional cost differences.¹⁰⁵

Table 4. Disparities in Per Pupil Expenditures

Rank	State	Spending per Pupil
Most		
1	Vermont	\$20,795
2	Alaska	\$20,640
3	New York	\$18,655
4	Wyoming	\$17,700
5	Connecticut	\$17,283
Least		
47	Nevada	\$8,801
48	Texas	\$8,485
49	Idaho	\$8,422
50	Arizona	\$8,131
51	Utah	\$7,207
Overall	United States	\$12,526

Although these raw numbers may ignore certain relevant state-specific factors, the variation in spending is substantial. The highest-spending state, Vermont, spends almost three times as much per pupil as the lowest-spending state, Utah. Even though these figures are adjusted for cost of living, perhaps they do not fully reflect variations in cost. Perhaps because of different labor agreements or other factors, the salaries of teachers of equal quality might vary more dramatically than the cost adjustment measures. In addition, students in some states might require additional services to compensate for poverty or language issues.¹⁰⁶ Scholars have attempted to account for these features. By any

105. *Per-Pupil Educational Expenditures Adjusted for Regional Cost Differences in the United States*, KIDS COUNT, <https://datacenter.kidscount.org/data/tables/5199-per-pupil-educational-expenditures-adjusted-for-regional-cost-differences#detailed/2/2-52/false/573/any/11678> [https://perma.cc/YB7R-DDHL] (deselect all years but 2015). This Data Center, hosted by KIDS COUNT, a project of the Annie E. Casey Foundation, combines information from the National Center for Education Statistics relating to expenditures and to regional cost differences.

106. See generally Liu, *supra* note 22, at 2116–17 (discussing aid formulas directed to schools with disadvantaged children).

measure, substantial interstate variation in spending persists.¹⁰⁷ As the Equity and Excellence Commission noted, “[N]o other developed nation has inequities nearly as deep or systemic; no other developed nation has, despite some efforts to the contrary, so thoroughly stacked the odds against so many of its children.”¹⁰⁸

These substantial interstate disparities mean that the variance in school districts in different states is much larger than the variation within a particular state. Based on their research, economists Sheila Evans, William Murray, and Robert Schwab concluded in 1998 that “roughly two-thirds of nationwide inequality in spending is between states and only one-third is within states.”¹⁰⁹ A more recent study found that in 2001 disparities in funding among the states accounted for 78% of the difference in per-pupil spending.¹¹⁰ In his 2006 study, Justice Goodwin Liu used various measures to confirm the dominance of interstate inequality in educational spending.¹¹¹ Among other indices, he compared per-pupil expenditures in fourteen high-spending states and fifteen low-spending states, based on the 2001-2002 school year. He found that the median expenditures in the low-spending states trailed the expenditures in the tenth-percentile districts in the higher-spending states. Such a statistic highlights the limitations of school finance reform within a state. Even if the low-spending states somehow managed to raise all of their lower-spending districts to the median level in their states, those districts would still trail the spending in 90% of the districts in the higher-spending states.¹¹²

B. Causes of Educational Spending Disparities

The differences in educational expenditures reflect both capacity and effort. State and local funds depend both on the chosen tax rate and on the size of the tax base. States with a greater tax base can set a lower tax rate, but still raise more money for education than poorer states. States with smaller tax bases are constrained in the funds they can raise for education.

Justice Liu sought to determine whether effort or capacity played the more significant role in explaining interstate spending variation. To determine state capacity, Justice Liu considered several possible measures, but emphasized

107. See *id.* at 2062–72.

108. See Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 980 (2015) (quoting THE EQUITY & EXCELLENCE COMM’N, FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 15 (2013)).

109. Sheila E. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. ECON. REV. 789, 808 (1998).

110. See Sean P. Corcoran & William N. Evans, *Equity, Adequacy, and the Evolving State Role in Education Finance*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 353, 358 tbl.21.2 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015); see also Kimberly Jenkins Robinson, *No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism*, 27 STAN. L. & POL’Y REV. 201, 203 (2016) (discussing variations in funding among the states).

111. See Liu, *supra* note 22, at 2062–72.

112. *Id.* at 2068.

TTR.¹¹³ Justice Liu computed state capacity based on TTR per pupil. To assess state effort, he then calculated the hypothetical tax rate that would be necessary to raise the per-pupil state and local revenue devoted to elementary and secondary education in each state.¹¹⁴ These computations allowed Justice Liu to assess the relative significance of capacity and effort in explaining the state's level of educational spending.

To make this comparison, Justice Liu calculated the correlation of nonfederal revenue per pupil with state capacity and state effort. Using data from the 2001-2002 school year, he first looked at both unadjusted figures and those adjusted for geographic cost differences. He then considered the different needs of pupils (the number of pupils requiring extra expenditures because of poverty, disability, or limited English proficiency).¹¹⁵ With the unadjusted figures, he found that the correlation of state expenditures and state capacity was .70, and that the correlation with state effort was .35.¹¹⁶ With the adjusted figures, the correlation of state expenditures and capacity was .56, and the correlation with effort was .39.¹¹⁷ Justice Liu summarized the evidence as follows: "In sum, fiscal capacity and effort are both determinants of interstate disparities in educational resources, and between the two, capacity plays the larger role. States with higher capacity tend to make less effort yet raise more revenue than states with lower capacity."¹¹⁸

To update these findings, I performed a similar analysis using 2015 figures and found a similar result. To assess state capacity, I used TTR per student. To assess state effort, I calculated the percentage of a state's TTR per student that was devoted to K-12 educational expenditures. I did not attempt to recreate Justice Liu's effort to account for the different needs of different students. The correlation of state expenditures with capacity was .55. The correlation of expenditures with effort was .46.¹¹⁹ The disparity in the roles of capacity and effort was somewhat diminished in my 2015 calculations, compared to Justice Liu's earlier analysis, but the overall relationship remained. Most importantly, the correlation of state capacity and educational expenditures remained fairly strong. A recent study by Professor Bruce Baker and colleagues similarly

113. *See id.* at 2084–86.

114. *See id.* at 2085–86.

115. For a discussion of the weighting process, *see id.* at 2063–64.

116. *Id.* at 2088.

117. *Id.*

118. *Id.* at 2089.

119. For these calculations, I used educational expenditures adjusted to take account of geographic cost differences. *See supra* note 105 and accompanying text. The enrollment figures came from the Education Counts database, *Education Counts*, ED. WK., <http://edcounts.org> [<https://perma.cc/JA53-JZ8Y>].

documented the important role of both state effort and capacity in achieving spending levels necessary to attain adequate educational outcomes.¹²⁰

A key driver of interstate inequality in educational expenditures remains state wealth. The amount spent per student depends significantly on the resources of the state, not the policy choices of the state. In general, the states that spend more money on education are the states that have more money to spend. From the economic perspective, federalism seeks to empower states to choose an optimal package of taxes and benefits. With regard to education, however, the predominance of state and local funding has the effect of limiting local choices. Fiscal capacity presents very different options to different states.

The federal government currently does little to equalize the educational resources in the different states, and its spending actually exacerbates the inequalities. First, as noted above, the federal government's contribution to educational funding is small.¹²¹ Through Title I of the Elementary and Secondary Education Act of 1965,¹²² the federal government does target resources to students in high-poverty districts. However, the formula used to dispense federal aid limits the equalizing effect of the program.

The Title I formula has evolved somewhat over the decades and has several different components. The two basic factors driving the allocation of funds are (1) the number and concentration of poor children in the state and (2) state expenditures per pupil.¹²³ The first factor tends to direct resources to high-poverty states. The expenditure factor, though, has the opposite effect. The expenditure factor is intended to take account of the varying cost of providing education and the varying cost of living in different states.¹²⁴ However, poorer states tend to spend less per student, and richer states tend to spend more per student. By providing more money to states that spend more per student, this component of the formula reproduces and exacerbates inequalities in state resources.¹²⁵

The Title I formula also guarantees states certain minimum grant amounts.¹²⁶ The minimum grant provision further reduces the impact of the children-in-poverty factor. The aggregate effect of the different components is that the amount of Title I funds per eligible child varies greatly across states and

120. See BRUCE D. BAKER ET AL., RUTGERS GRADUATE SCH. OF EDUC. & EDUC. LAW CTR., *THE REAL SHAME OF THE NATION: THE CAUSES AND CONSEQUENCES OF INTERSTATE INEQUITY IN PUBLIC SCHOOL INVESTMENTS* 37–38, 38 fig.19 (2018), <https://drive.google.com/file/d/1cm6Jkm6ktUT3SQplzDFjJly3G3iLWOtJ/view> [<https://perma.cc/3D3A-XFP6>].

121. See *supra* notes 87–91 and accompanying text.

122. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

123. See Liu, *supra* note 22, at 2095.

124. REBECCA R. SKINNER & LEAH ROSENSTIEL, CONG. RESEARCH SERV., R44898, *HISTORY OF THE ESEA TITLE I-A FORMULAS 4–5* (2017).

125. See Liu, *supra* note 22, at 2095–97.

126. See SKINNER & ROSENSTIEL, *supra* note 124, at 5–6.

does not reflect the poverty of that state.¹²⁷ For example, Mississippi and New Mexico, which have high levels of poor students, receive substantially fewer dollars per eligible child than Vermont and Wyoming, which have relatively low rates of poor students.¹²⁸ Therefore, although federal aid provides some support for poor students, it does not address the overall problem that differential state resources result in differential educational spending.¹²⁹

C. Impact of Educational Spending Disparities

The reason to focus on spending is because of its impact on educational outcomes. The connection between school spending and educational achievement has been subject to scholarly debate.¹³⁰ It certainly matters how the money is spent. However, research has generally confirmed that more spending leads to better educational outcomes and lower spending results in worse outcomes.¹³¹ A recent comprehensive study by the Center for American Progress

127. See NORA GORDON, *THE HAMILTON PROJECT, INCREASING TARGETING, FLEXIBILITY, AND TRANSPARENCY IN TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT TO HELP DISADVANTAGED STUDENTS* 8 (2016), http://www.hamiltonproject.org/assets/files/gordon_policy_proposal.pdf [https://perma.cc/U96F-QZGL]; see also Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309, 1339 (2017) (“For at least the past two decades, the Elementary and Secondary Education Act’s funding formulas have failed to distribute federal funds fairly.”); Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 348–52 (2010) (discussing how the Title I formula exacerbates existing inequalities).

128. See GORDON, *supra* note 127, at 8.

129. Federal grants to support the education of children with disabilities are almost as large as the grants targeted to economically disadvantaged children. In the 2017 fiscal year, for example, the federal government budgeted \$15.4 billion for Title I programs serving disadvantaged children and \$11.9 billion to fund special education and related services under the Individuals with Disabilities Education Act. U.S. DEP’T OF EDUC., *FY 2017 EDUCATION BUDGET FACT SHEET* 3–4, <https://www2.ed.gov/about/overview/budget/budget17/budget-factsheet.pdf> [https://perma.cc/48QH-MMJP]. Some of the disability funding is distributed based on a state’s share of children living in poverty, but the great majority of the money is allocated based on total school-age population. KYRIE E. DRAGOO, CONG. RESEARCH SERV., R44624, *THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FUNDING: A PRIMER* 10–11 (2019).

130. See Michael A. Rebell, *The Courts’ Consensus: Money Does Matter for Educational Opportunity*, 674 ANNALS AM. ACAD. POL. & SOC. SCI. 184, 187–88 (2017); see also Jonathan Remy Nash et al., *The Production Function of the Regulatory State: How Much Do Agency Budgets Matter?*, 102 MINN. L. REV. 695, 705, 705 n.26 (2017) (noting conflicting evidence with regard to education and other areas concerning the connection between spending and outcomes); ANDREW J. COULSON, CATO INST., *STATE EDUCATION TRENDS: ACADEMIC PERFORMANCE AND SPENDING OVER THE PAST 40 YEARS* (2014), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa746.pdf> [https://perma.cc/AXB2-68LV] (finding a lack of connection between educational spending and SAT scores).

131. See BRUCE D. BAKER, ALBERT SHANKER INST., *DOES MONEY MATTER IN EDUCATION?*, at I (2d ed. 2016) (“On average, aggregate measures of per-pupil spending are positively associated with improved or higher student outcomes.”); Liu, *supra* note 22, at 2073–82 (reviewing evidence); Kimberly Jenkins Robinson, *Fisher’s Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 208 (2016) (“A research consensus has emerged that money matters for education because of the influential resources that it can purchase” (citing BRUCE D. BAKER,

focusing on return on educational investment endorsed this basic thesis: “how much” and “on what” are both relevant factors in connecting expenditures and educational achievement.

Lots of evidence suggests that dollars do make a large and significant difference, and some of the schools and districts that posted large achievement gains in recent years have done so by spending more money. . . . [W]e are arguing that money matters when it is spent wisely. . . .¹³²

Research specifically on school finance reform litigation confirms that such litigation has resulted not only in increased spending on education in lower-wealth districts, but also in enhanced educational achievement.¹³³ In addition, in the context of these cases, courts have surveyed the relevant literature on the connection between spending and outcomes. Reviewing the judicial decisions, Michael Rebell recently found that state courts had considered the relationship of educational expenditures and student outcomes in forty cases.¹³⁴ In thirty-four of them, courts found a “substantial correlation between expenditures and student outcomes.”¹³⁵ In the other six cases, the courts “expressed uncertainty or some degree of skepticism” about the connection between spending and achievement, but none of these courts “definitively” rejected a correlation.¹³⁶ Other studies also have noted a correlation between educational spending and student achievement.¹³⁷ The research shows that in general more money does indeed lead to better education.

The United States certainly has a great need for the higher educational achievements that money can buy. If even the students in the lowest-spending states achieved strong educational outcomes, the harm of the interstate disparities might be limited. The core national commitment may be understood to guarantee an adequate level of education, rather than a strictly equal outcome across the nation. International comparisons, however, suggest that the educational system in the United States does not provide a strong education for all of its students. International comparisons are facilitated by the Programme for International Student Assessment (PISA), a worldwide study by the OECD evaluating the educational systems of member and non-member countries every three years. In

ALBERT SHANKER INST., REVISITING THAT AGE-OLD QUESTION: DOES MONEY MATTER IN EDUCATION?, at iv–v (2012)).

132. ULRICH BOSER, CTR. FOR AM. PROGRESS, RETURN ON EDUCATIONAL INVESTMENT: 2014, at 7 (2014), <http://cdn.americanprogress.org/wp-content/uploads/2014/07/ROI-report.pdf> [<https://perma.cc/NCB5-26BY>].

133. See C. Kirabo Jackson et al., *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, 131 Q.J. ECON. 157, 212–24 (2016); Lafortune et al., *supra* note 99, at 31–34; Rebell, *supra* note 130, at 194–95.

134. See Rebell, *supra* note 130, at 190–91.

135. *Id.* at 191.

136. *Id.* at 193.

137. See Liu, *supra* note 22, at 2076–82 (reviewing studies of connection of spending with educational outcomes).

2012 and 2015, the results in the United States lagged behind those in other developed countries.¹³⁸

In the 2018 PISA, students in the United States scored comparatively better, especially in reading and science, but important gaps remain. Of the seventy-seven countries surveyed, fifteen-year-olds in the United States ranked thirteenth in reading, eighteenth in science, and thirty-seventh in math.¹³⁹ In comparison with the thirty-seven members of the OECD, the United States ranked ninth in reading, thirteenth in science, and thirty-first in math.¹⁴⁰ However, the performance of students in the United States is notably uneven. One measure of disparity is the gap between the scores of the students performing in the ninetieth percentile and in the tenth percentile. For the United States, that gap was especially large in reading and in science—the areas in which the mean scores were relatively strong. Of the seventy-seven countries included in the PISA results, only eight countries had gaps in reading scores as large as that in the United States.¹⁴¹ Of the thirty-seven countries in the OECD, only three—Israel, Luxembourg, and Australia—had reading performance gaps larger than that in the United States.¹⁴² In science, the United States had the tenth-largest gap overall, and the seventh-largest among OECD countries.¹⁴³ In math, the United States had the twenty-fourth-largest gap among the seventy-seven countries, and the twelfth-largest among OECD countries.¹⁴⁴

As a further measure of educational adequacy, one could compare the performance of students at the twenty-fifth percentile in the United States to the mean score in other countries. In reading, the students in the United States at the twenty-fifth percentile would rank forty-sixth among the seventy-seven countries. In science, the rank would be forty-ninth; in math, fifty-ninth. In each of these measures, the students at the twenty-fifth percentile in the United States score lower than the mean score in every OECD country, except Colombia and Mexico. Thus, one quarter of the students in the United States lag behind compared to the performance of the average student in thirty-five of the thirty-seven OECD countries. Accordingly, whatever one's measure of educational

138. See Robinson, *supra* note 108, at 980–81; see also OECD, COUNTRY NOTE: KEY FINDINGS FROM PISA 2015 FOR THE UNITED STATES 7 (2016), <https://www.oecd.org/pisa/PISA-2015-United-States.pdf> [<https://perma.cc/UL5V-S2ZQ>].

139. OECD, PISA 2018 RESULTS annex B1 tbls.I.B1.4, I.B1.6, I.B1.5 (2019), <https://doi.org/10.1787/888934029090> [<https://perma.cc/44U6-K9UN>] (use hyperlink to download spreadsheet) (mean scores and variations in reading performance, science performance, and math performance).

140. See *id.*

141. See *id.* tbl.I.B1.4; NAT'L CTR. FOR EDUC. STATISTICS, HIGHLIGHTS OF U.S. PISA 2018 RESULTS WEB REPORT 7–8, https://nces.ed.gov/surveys/pisa/pisa2018/pdf/PISA2018_compiled.pdf [<https://perma.cc/4FBU-Q8KF>] (discussing gap in reading scores).

142. See sources cited *supra* note 141.

143. See OECD, *supra* note 139, tbl.I.B1.6; NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 141, at 41–42.

144. See OECD, *supra* note 139, tbl.I.B1.5; NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 141, at 24–25.

adequacy, it seems almost certain that the performance of students in low-achieving states, generally states with lower educational expenditures, would fall below this bar. The likelihood of receiving an adequate education varies substantially based on where in the United States a student happens to live.

IV.

HEALTH CARE

In the United States, health care is funded through a variety of public and private sources. The two biggest government programs, Medicare and Medicaid, were established by the same legislation, the Social Security Amendments of 1965.¹⁴⁵ Nevertheless, the two have different forms. Medicare follows a model similar to Social Security. It is fully funded by the national government, supported by a dedicated payroll tax. All people age sixty-five or older qualify, and the benefits are generally not means-tested. Medicare has several different “Parts” covering various services, including hospitalization, physicians’ services, and prescription drugs. Some of the coverage requires premiums, which may vary based on income.¹⁴⁶ In 2018, the federal government was projected to spend \$747.4 billion through Medicare.¹⁴⁷

Medicaid is a means-tested program providing health benefits for low-income children, pregnant women, parents of dependent children, the elderly, and individuals with disabilities. The program also covers some low-income adults, and the Affordable Care Act expanded coverage for this group.¹⁴⁸ Medicaid is jointly funded by the federal government and the states. The federal payments are structured as a match of state spending, with the matching rate varying based on the per capita income of the states.¹⁴⁹ By law, the matching rate must be at least 50%.¹⁵⁰ Currently, fourteen states receive the minimum 50% match.¹⁵¹ The state with the highest matching rate is Mississippi at 76%.¹⁵²

145. Pub. L. No. 89-97, 79 Stat. 286 (codified as amended in scattered sections of 42 U.S.C.).

146. See *Medicare Costs at a Glance*, MEDICARE.GOV, <https://www.medicare.gov/your-medicare-costs/costs-at-a-glance/costs-at-a-glance.html> [<https://perma.cc/RG6T-7V2A>].

147. CTRS. FOR MEDICARE & MEDICAID SERVS., Table 3: National Health Expenditures; Aggregate and per Capita Amounts, Percent Distribution and Annual Percent Change by Source of Funds: Calendar Years 2011-2027, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/Proj2018Tables.zip> [<https://perma.cc/5HR5-6DYH>] (use hyperlink to download zip file, then open “Table 03 National Health Expenditures by Source of Funds.xlsx”); see also Gigi A. Cuckler et al., *National Health Expenditure Projections, 2017–26: Despite Uncertainty, Fundamentals Primarily Drive Spending Growth*, 37 HEALTH AFF. 482, 483 ex. 1 (2018).

148. See ALISON MITCHELL ET AL., CONG. RESEARCH SERV., R43357, MEDICAID: AN OVERVIEW 1–2 (2019).

149. *Id.* at 14–15.

150. *Id.* at 15.

151. Federal Matching Shares for Medicaid, the Children’s Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2018 Through September 30, 2019, 82 Fed. Reg. 55,383, 55,385 (Nov. 21, 2017).

152. *Id.*

Certain Medicaid programs, including the expansion of Medicaid to childless adults under the Affordable Care Act, are matched at different, generally higher, rates.¹⁵³

The federal government sets guidelines regarding eligibility and covered services.¹⁵⁴ However, states enjoy discretion about the scope of coverage within these guidelines.¹⁵⁵ States have the option to impose cost sharing through premiums, copayments, deductibles, and the like, though certain recipients and certain services are exempt.¹⁵⁶ The total of federal and state expenditures on Medicaid in 2018 is projected to be \$594.8 billion.¹⁵⁷ States are not required to participate in Medicaid, but all states do.¹⁵⁸

Medicaid plays a tremendously important role in state budgets. When considering expenditures from general funds, states spend about 20% of their budgets on Medicaid.¹⁵⁹ Medicaid represents the second largest item in state budgets, following the 35% spent on elementary and secondary education.¹⁶⁰ Considering total state expenditures, including funds from federal reimbursements, Medicaid constitutes the largest element of state spending, at 29% of the total.¹⁶¹ This pattern is fairly consistent across the states. Considering total state expenditures (including the Medicaid matching funds received from the federal government) for the 2016 fiscal year, the percent of state expenditures devoted to Medicaid ranged from 11.4% in Wyoming to 37.7% in Ohio.¹⁶² But in all but eight states, Medicaid constituted the largest single expenditure.¹⁶³

153. See MITCHELL ET AL., *supra* note 148, at 14–15; Jean C. Sullivan & Rachel Gershon, *State Fiscal Considerations and Research Opportunities Emerging from the Affordable Care Act's Medicaid Expansion*, 40 AM. J.L. & MED. 237, 242 (2014).

154. See MITCHELL ET AL., *supra* note 148, at 2–3.

155. See *id.* at 7–12.

156. See *Cost Sharing*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/cost-sharing/index.html> [<https://perma.cc/VQL5-9A63>].

157. CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 147.

158. See MITCHELL ET AL., *supra* note 148, at 1. In *National Federation of Independent Business v. Sebelius*, the U.S. Supreme Court held that states could still participate in Medicaid, even if they refused to expand Medicaid coverage to certain indigent adults under the Affordable Care Act. See 567 U.S. 519, 580–85 (2012).

159. NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: EXAMINING FISCAL 2015-2017 STATE SPENDING 3 (2017), https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/State_Expenditure_Report__Fiscal_2015-2017_-S.pdf [<https://perma.cc/PVB4-U5LQ>].

160. *Id.*

161. See *id.* at 13 tbl.5.

162. See *id.* at 10 tbl.3.

163. See *id.*

A. Medicaid Disparities Among the States

States have made varying decisions about what people and services to cover. From this structure, significant disparities have resulted among states.¹⁶⁴ For example, the eligibility level for working parents varies substantially among states.¹⁶⁵ In Alabama, the upper level of income eligibility for parents is 18% of the federal poverty level; in Connecticut, the upper level is 155% of the federal poverty level.¹⁶⁶ Before the ACA, states could not extend Medicaid coverage to childless adults without a waiver.¹⁶⁷ The ACA authorized coverage of low-income adults without children. The decision of whether to expand coverage to this group has become a focus of great political controversy.¹⁶⁸ States also have flexibility about how to structure their programs. For example, coverage for dental, vision, hearing, and physical therapy services varies dramatically among the states.¹⁶⁹ As of 2007, 40% of total Medicaid funding went to federally required services for core beneficiaries.¹⁷⁰ The remaining 60% represented spending for benefits or beneficiaries that states decided to cover.¹⁷¹ The amount spent covering optional populations and benefits varies significantly across the states.¹⁷²

Coverage also may vary over time due to economic cycles. In 2010, Arizona cut Medicaid coverage for certain transplants and other procedures.¹⁷³ Other states also decreased services and reimbursements in response to budgetary pressures.¹⁷⁴ Even when all states cover particular services, the scope of the coverage may vary substantially. All states participate in Medicaid's prescription drug program, and through this program, states are generally required to cover all FDA-approved prescription drugs for their accepted

164. See JAMILA MICHENER, *FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS* 1–10 (2018) (discussing variations in Medicaid coverage among states).

165. See LAURA SNYDER ET AL., *KAISER COMM'N ON MEDICAID & THE UNINSURED*, HENRY J. KAISER FAMILY FOUND., *WHY DOES MEDICAID SPENDING VARY ACROSS STATES: A CHART BOOK OF FACTORS DRIVING STATE SPENDING 20* (2012), <https://www.kff.org/wp-content/uploads/2013/01/8378.pdf> [<https://perma.cc/9VPT-FQ2A>].

166. See Tricia Brooks et al., Henry J. Kaiser Family Found., *Medicaid and CHIP Eligibility, Enrollment, and Cost Sharing Policies as of January 2019: Findings from a 50-State Survey* 41 tbl.5 (2019), <http://files.kff.org/attachment/Report-Medicaid-and-CHIP-Eligibility-Enrollment-Renewal-and-Cost-Sharing-Policies-as-of-January-2019> [<https://perma.cc/Z9T3-2QJ7>].

167. See *id.*

168. See Allison M. Baker & Linda M. Hunt, *Counterproductive Consequences of a Conservative Ideology: Medicaid Expansion and Personal Responsibility Requirements*, 106 *AM. J. PUB. HEALTH* 1181, 1181 (2016); Robin Flagg, *Medicaid Expansion: A Tale of Two Governors*, 41 *J. HEALTH POL. POL'Y & L.* 997, 1000 (2016).

169. See MICHENER, *supra* note 164, at 52–53.

170. See SNYDER ET AL., *supra* note 165, at 21.

171. See *id.*

172. See *id.*

173. Kevin Sack, *Arizona Medicaid Cuts Seen as a Sign of the Times*, *N.Y. TIMES* (Dec. 4, 2010), <http://www.nytimes.com/2010/12/05/us/05transplant.html> [<https://perma.cc/B36Z-6SMV>].

174. *Id.*; see also Huberfeld, *supra* note 23, at 480 (discussing variation in state Medicaid benefits).

indications.¹⁷⁵ However, states can impose their own access requirements, including determinations of medical necessity and other eligibility criteria.¹⁷⁶ As a practical matter, the availability of medications for Medicaid recipients can vary substantially among states.

In view of the varying state coverage decisions and other state-specific choices, it is not surprising that overall Medicaid expenditures vary widely among the states. The following table lists the states (including the District of Columbia) that spend the most and the least per enrollee on Medicaid. The spending includes state and federal matching funds expended in that state. The table also includes total average spending in the United States. The numbers are from fiscal year 2014.¹⁷⁷ Given the particular complexities of health care costs, I have not attempted to adjust these figures for regional cost-of-living variations.

175. See Marea B. Tumber, *Restricted Access: State Medicaid Coverage of Sofosbuvir Hepatitis C Treatment*, 37 J. LEGAL MED. 21, 28 (2017).

176. See *id.* at 36; Christine Y. Lu et al., *State Medicaid Reimbursement for Medications for Chronic Hepatitis C Infection from 2012 through 2015*, 21 VALUE IN HEALTH 692, 696 (2018).

177. *Medicaid Spending Per Full-Benefit Enrollee*, KAISER FAMILY FOUND., <https://www.kff.org/medicaid/state-indicator/medicaid-spending-per-full-benefit-enrollee> [<https://perma.cc/V4YB-6U6F>].

Table 5. Interstate Disparities in Medicaid Spending

Rank	State	Spending per Medicaid Enrollee
Most		
1	North Dakota	\$10,721
2	Alaska	\$10,001
3	Pennsylvania	\$9,638
4	D.C.	\$9,237
5	Delaware	\$9,041
Least		
47	Georgia	\$4,838
48	Alabama	\$4,827
49	Florida	\$4,788
50	South Carolina	\$4,169
51	Nevada	\$4,003
Overall	United States	\$6,396

The differentials are substantial. North Dakota spends more than two and a half times as much per enrollee as Nevada. One could use other measures that would reflect less disparity, but the interstate divergences remain large. For example, the average spending of the highest-spending third of states is \$8,674. The average spending of the lowest-spending third is \$5,173. The higher-spending third spends 68% more than the bottom-spending third.

By any measure, the current system produces substantial spending differences among the states. Further, this information considers spending per actual enrollee, not potential enrollee. The table thus does not reflect the further disparity resulting from state decisions regarding which populations to include within Medicaid. The recent state debates about whether to extend Medicaid coverage to additional categories of recipients under the Affordable Care Act have highlighted the significant and sometimes controversial nature of these kinds of coverage choices.¹⁷⁸

178. See *infra* notes 206–212 and accompanying text.

B. Causes of Interstate Medicaid Disparities

The difference in Medicaid spending levels among the states reflects several factors in addition to state choices.¹⁷⁹ Given the divergent health characteristics of populations across the United States and the differing costs of care, some variance in expenditures would be expected, even with a more uniform national system of coverage decisions. Medicare offers a pertinent comparison. Medicare is funded by the national government, and basic eligibility and coverage decisions reflect national policies. Nevertheless, some state-by-state variations in Medicare expenditures exist.¹⁸⁰ The reasons for the disparities are not entirely clear, but scholars generally attribute them to differences in cost of care, beneficiary health status, and variations in the use of services.¹⁸¹ The disparities do not reflect state-based resource allocation decisions. The magnitude of the differences is much less than in the case of the Medicaid program, in which the states play a substantial role in administration and funding. As with the Medicaid figures, Table 6 below uses numbers from fiscal year 2014.¹⁸²

179. See SNYDER ET AL., *supra* note 165.

180. See AMANDA CASSIDY, HEALTH AFFAIRS & ROBERT WOOD JOHNSON FOUND., GEOGRAPHIC VARIATION IN MEDICARE SPENDING 1 (Amitabh Chandra et al. eds., 2014), https://www.healthaffairs.org/doi/10.1377/hpb20140306.633790/full/healthpolicybrief_109.pdf [<https://perma.cc/NP5A-BVTN>].

181. See *id.* at 2–3; see also JULIETTE CUBANSKI ET AL., THE HENRY J. KAISER FAMILY FOUND., THE LATEST ON GEOGRAPHIC VARIATION IN MEDICARE SPENDING (2015) (reviewing causes for variations in Medicare spending).

182. *Medicare Spending Per Enrollee, by State*, KAISER FAMILY FOUND., <https://www.kff.org/medicare/state-indicator/per-enrollee-spending-by-residence> [<https://perma.cc/WYW4-FN5A>].

Table 6. Interstate Disparities in Medicare Spending

Rank	State	Spending per Medicare Enrollee
Most		
1	New Jersey	\$12,614
2	Florida	\$12,229
3	New York	\$12,179
4	Maryland	\$12,000
5	Connecticut	\$11,964
Least		
47	Oregon	\$8,942
48	Idaho	\$8,737
49	New Mexico	\$8,663
50	Hawaii	\$8,592
51	Montana	\$8,238
Overall	United States	\$10,986

With regard to Medicare, the top-spending state, New Jersey, spends about 50% more than the lowest-spending state, Montana—a much smaller variance than for Medicaid. A comparison of the average spending in the highest-spending and lowest-spending third of the states reveals a similarly diminished disparity. The average spending in the highest-spending third is \$11,677, while the average spending in the lowest-spending third is \$9,083. Thus, the per-enrollee Medicare expenditures in the top-spending states is only 28% greater than those in the lower-spending states. The coefficient of variation for state Medicare spending is .11, compared to .23 for Medicaid spending.

Perhaps most telling is the complete lack of overlap between the Medicaid and Medicare lists. None of the states that have the highest or lowest per enrollee expenditures for Medicaid also have the highest or lowest spending for Medicare. Overall, the correlation in per-state spending on Medicaid and Medicare is a weak .10. The difference between the lists reflects the importance of the structure of the two programs. Variations in Medicare spending generally

reflect differences in cost of care, patient health, and utilization of services.¹⁸³ Variations in Medicaid spending reflect the allocation decisions made by each state.¹⁸⁴ This evidence demonstrates that it is the structure of the Medicaid system, in particular, the authority exercised by states, that leads to the great disparities in Medicaid expenditures among the states.

Why do the states make such different decisions about how much to spend for each Medicaid enrollee? The decisions reflect many factors, but the two key determinants are likely state budgetary capacity and the strength of the state's desire to fund indigent medical care. With regard to educational spending, the evidence suggests that fiscal capacity plays a dominant role. The lower-spending states generally spend a larger share of their resources on education than the higher-spending states.¹⁸⁵

With respect to Medicaid, Congress intended for the variable matching rate formula to account for the different needs and capacities of the states.¹⁸⁶ The formula uses a state's per capita income as a measure both of the likely requirement for indigent care and of the resources available to a state.¹⁸⁷ The formula reflects a presumption that the lower the level of per capita income compared to the national average, the greater the need for Medicaid expenditures and the lesser the ability of the state to provide from its own resources. Hence the lower the relative per capita income, the higher the federal matching rate.

However, the matching formula has long been the subject of controversy. In a 1983 report to Congress, the Comptroller General recommended changing the matching formula because it was not achieving the intended equity among states.¹⁸⁸ In a series of reports over the years, the General Accounting Office (GAO) (later the Government Accountability Office) suggested better measures of state capacity, for example, total taxable resources, and of state need, for

183. See sources cited *supra* note 181.

184. See Richard Kronick & Todd P. Gilmer, *Medicare and Medicaid Spending Variations Are Strongly Linked Within Hospital Regions but Not at Overall State Level*, 31 HEALTH AFF. 948, 953 (2012) (noting different drivers of interstate health expenditure variation for Medicare and Medicaid).

185. See *supra* note 118 and accompanying text.

186. See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-83-27, CHANGING MEDICAID FORMULA CAN IMPROVE DISTRIBUTION OF FUNDS TO STATES 3-6 (1983).

187. The Federal Medical Assistance Percentage (FMAP) is calculated using state per capita income (PCI) according to the following formula: $FMAP = 1 - .45(\text{State PCI}/\text{U.S. PCI})^2$. The matching rate thus varies based on how the state's per capita income compares to the national average. In a state in which the per capita income equals the national average, the federal government would pay 55% of Medicaid costs, and the state would pay 45%. By statute, the minimum matching rate is set at 50%, and the maximum matching rate is 83%. 42 U.S.C. § 1396d(b) (2018). As of FY 2019, twenty-four states have the statutory minimum rate of 50%. Mississippi has the highest FMAP rate of 76.39%. See ALISON MITCHELL, CONG. RESEARCH SERV., R43847, MEDICAID'S FEDERAL MEDICAL ASSISTANCE PERCENTAGE (FMAP) 4 (2018).

188. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 186.

example, the percentage of the state population in poverty.¹⁸⁹ With regard to capacity, experts generally consider TTR a superior measure to per capita income.¹⁹⁰ With respect to need, per capita income fails to account for the distribution of a state's wealth. States with similar per capita income may have vastly different numbers of residents in poverty.¹⁹¹ The state with the greater percentage of the population in poverty will have greater need for Medicaid expenditures. Because of the continued use of the same matching formula, the GAO noted that states with higher poverty rates and fewer resources still had to undertake greater tax burdens to provide programs comparable to states with lower poverty rates and greater resources.¹⁹² Indeed, a 2003 GAO report concluded that for twenty-one states, the matching formula actually widened the gap between an individual state's capacity and the national average.¹⁹³

I have used TTR information to illuminate the role of state capacity and effort in determining Medicaid spending. Assuming TTR provides the right basis for state wealth, various measures of capacity are still possible. For example, one could look to TTR per person as a measure of the total amount of money that a state could devote to all spending including Medicaid. Alternatively, one could use TTR per person in poverty as a measure of state capacity. TTR per person in poverty captures the concept that the state's capacity is relative to the number of poor people in the state. For example, if two states have the same TTR and same population, their capacity to spend on Medicaid would be the same if measured by TTR per person. However, if one of the states has a higher percentage of indigent people, that state would have to devote a larger share of its TTR to achieve the same level of per-person Medicaid benefits. TTR per person in poverty measures capacity in a way that takes account of the difference in need for Medicaid among the states. To measure actual state spending, one could use Medicaid spending per enrollee. However, the number of enrollees reflects in part state policy decisions about eligibility criteria. To assess overall state commitment to indigent medical care, one could look at Medicaid expenditures per person in poverty.

I begin by comparing TTR per capita with per enrollee Medicaid funding in a state. I computed the correlation of a state's TTR per capita with Medicaid

189. See, e.g., JANET L. SHIKLES, U.S. GEN. ACCOUNTING OFFICE, GAO/T-HRD-91-5, MEDICAID FORMULA: FAIRNESS COULD BE IMPROVED (1990); U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-91-66FS, MEDICAID: ALTERNATIVES FOR IMPROVING THE DISTRIBUTION OF FUNDS (1991); SARAH F. JAGGAR, U.S. GEN. ACCOUNTING OFFICE, GAO/T-HEHS-95-226, MEDICAID: MATCHING FORMULA'S PERFORMANCE AND POTENTIAL MODIFICATIONS (1995); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-434, MEDICAID: ALTERNATIVE MEASURES COULD BE USED TO ALLOCATE FUNDING MORE EQUITABLY (2013).

190. See Liu, *supra* note 22, at 2084-85.

191. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 186, at 10.

192. See *id.* at 25.

193. See U.S. Gen. Accounting Office, GAO-03-620, Medicaid Formula: Differences in Funding Ability among States Often Are Widened (2003).

spending. Table 7 below looks at overall Medicaid spending per enrollee in a state, including the variable match.

Table 7. State Fiscal Capacity and Medicaid Spending

	Correlation of TTR per Capita with per Enrollee Medicaid Spending
Total Medicaid Spending per Enrollee in State (Both State and Federal Share) ¹⁹⁴	.56

This correlation of .56 indicates a positive relationship between a state's fiscal capacity and the level of Medicaid expenditures in the state. The goal of the differential federal match is to detach a state's resources and need from the amount spent per enrollee in the state. These figures indicate that at least with respect to resources, the matching formula does not achieve that goal. Even after the equalizing effects of the federal match, Medicaid expenditures per enrollee still have a significant correlation with a state's fiscal capacity.

Using information from the 2003 GAO report, which utilizes fiscal year 2000 figures, I also calculated correlations using the alternate measures of TTR per persons in poverty and Medicaid spending per persons in poverty. These measures more broadly reflect the capacity and effort of a state with respect to indigent persons, whether or not enrolled in Medicaid. This figure thus likely provides a better measure of a state's overall commitment to indigent medical care.¹⁹⁵ The GAO report also calculates the share of a state's resources (measured by TTR per person in poverty) devoted to Medicaid.¹⁹⁶ This number offers a rough measure of state effort.

Table 8. Relationship Between Medicaid Spending and State Capacity and Effort

	Correlation with Medicaid Spending per Person in Poverty
State Capacity (State Funding Ability Including Federal Matching Aid)	.46
State Effort (Share of State Resources Devoted to Medicaid)	.64

Table 8 reveals a moderately strong correlation of .46 between a state's funding ability, including federal matching funds, and Medicaid spending per person in poverty. Thus, even after the federal match, Medicaid funding still has

194. This table uses FY 2014 figures for Medicaid spending reported by the Kaiser Foundation and 2014 TTR figures prepared by the Treasury Department. *See Medicaid Spending Per Full-Benefit Enrollee, supra* note 177; *Total Taxable Resources, supra* note 30.

195. *See* U.S. Gen. Accounting Office, *supra* note 193, at 14–17.

196. *See id.* at 44 tbl.10.

a moderately strong relationship with a state's own resources.¹⁹⁷ In looking at the share of a state's resources devoted to Medicaid spending, the GAO figures provide a measure of state effort. This measure of effort has a strong correlation of .64 with Medicaid spending. These figures suggest that state capacity and state effort both have a role in determining the level of state Medicaid expenditures. The proxy for state effort indicates that effort likely plays a larger role than financial capacity. However, a state's own financial capacity plays a substantial role as well. These conclusions are consistent with other studies of the determinants of variable Medicaid spending.¹⁹⁸ These calculations all reflect a snapshot in time, but the consistency of the findings suggests persistence. The results reflect the continued use of the Medicaid formula first adopted in 1965,¹⁹⁹ a formula that does not accurately reflect a state's resources or a state's need for indigent medical care.

In sum, the states that spend more per Medicaid enrollee are generally the states that have more money to spend. The differential federal match lessens, but certainly does not negate that relationship. As noted above, TTR measures how much money a state theoretically could raise through taxes. It does not take into account a state's preferences to tax at a higher or lower level. These numbers suggest that factors outside of the control of a state's political leadership have an important influence on Medicaid spending. The tables indicate that a state's policy choices about Medicaid also influence the level of expenditures. States choose to devote different amounts of their fiscal capacity to Medicaid spending. Of course, it is difficult to control for the relationship between politics and budgets. It is possible that poorer states also happen to be politically less inclined to fund indigent medical care. It is also possible that there is a kind of wealth effect in that poorer states devote a smaller percentage of their resources to Medicaid because they are concerned about having sufficient resources for other priorities. Overall, it seems likely that a significant reason that indigent residents receive lower levels of medical care in some states than in others is that some states have less ability to pay for the care.

197. See Stark, *supra* note 13, at 994, 994 n.131 (noting positive relationship between state resources and Medicaid spending).

198. See John Holahan, Urban Inst., Variations Among States in Health Insurance Coverage and Medical Expenditures: How Much is Too Much? 33 (2002), <https://www.urban.org/sites/default/files/publication/60166/310520-variations-among-states-in-health-insurance-coverage-and-medical-expenditures.pdf> [<https://perma.cc/QDT7-TN9A>] ("Some of these variations reflect differences in ability to pay but much reflects differences in the willingness of states to devote resources to health care for low-income populations."); John Holahan & David Liska, Urban Inst., Variations in Medicaid Spending Among States 1 (1997), http://webarchive.urban.org/UploadedPDF/anf_a3.pdf [<https://perma.cc/83B8-HJXB>] (noting various causes for differential Medicaid spending among the states, including ability to pay and political philosophy); Charles J. Barrilleaux & Mark E. Miller, *The Political Economy of State Medicaid Policy*, 82 Am. Pol. Sci. Rev. 1089, 1099 (1988) (finding that "[s]tates that spend relatively high proportions of personal income on Medicaid are primarily poor states"); see also John Holahan, *State Variation in Medicaid Spending: Hard to Justify*, 26 Health Aff. w667 (2007).

199. For a statement of the precise formula, see *supra* note 187.

The Affordable Care Act, along with the U.S. Supreme Court's decision in *NFIB v. Sebelius*, introduced another entire dimension to interstate variation. The ACA expanded the categories of people eligible for Medicaid, most importantly extending coverage for indigent adults.²⁰⁰ Under the ACA, the federal government initially funded the entire expansion.²⁰¹ Over time, the federal contribution decreased to 90% for the newly eligible.²⁰² In the *NFIB* decision, the Supreme Court gave states the option to refuse to expand their Medicaid coverage.²⁰³ As of August 2020, thirty-eight states and the District of Columbia had opted to expand Medicaid.²⁰⁴ Interstate variations in Medicaid spending have always reflected not just different choices for enrollees, but also fundamental divergences with regard to the covered population. In the wake of the Supreme Court's decision, the ACA has ended up magnifying these divergences.²⁰⁵

Here too, the disparities reflect the underlying funding structure. For millions of Americans, eligibility for Medicaid depends on the budgetary allocation decisions of the states in which they reside. The reasons for states to refuse expansion are complex. Given the partisan political environment, and the intense debate concerning the ACA, opposition to expansion may reflect in part simple opposition to the policies underlying the legislation.²⁰⁶ Some politicians have objected in particular to the philosophy of the expansion, which extends benefits to non-disabled adults.²⁰⁷ These politicians question the policy of subsidizing health care for this group, as opposed to focusing on helping individuals to secure employment.²⁰⁸ However, in explaining their opposition to expansion, governors and legislators generally cite cost as the dominant

200. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 542 (2012).

201. See Sullivan & Gershon, *supra* note 153, at 238.

202. See *id.*

203. See 567 U.S. at 580–85.

204. *Status of State Action on the Medicaid Expansion Decision*, Kaiser Family Found., <https://www.kff.org/state-category/health-reform/medicaid-and-health-reform-health-reform/> [https://perma.cc/MB6P-WQVZ] (select “Status of State Action on the Medicaid Expansion Decision”).

205. See, e.g., STAN DORN ET AL., ROBERT WOOD JOHNSON FOUND. & URBAN INST., WHAT IS THE RESULT OF STATES NOT EXPANDING MEDICAID? (2014), <https://www.urban.org/sites/default/files/publication/22816/413192-What-is-the-Result-of-States-Not-Expanding-Medicaid-.PDF> [https://perma.cc/PNG7-9P8U] (describing variations in Medicaid coverage resulting from states' decisions whether to expand Medicaid).

206. See Baker & Hunt, *supra* note 168, at 1181 (“Nonetheless, Medicaid expansion remains highly unpopular among political conservatives. Decisions regarding expansion have fallen largely along party lines, with most Democratic-led states moving quickly in support of expansion and most Republican-led states rejecting expansion or delaying a decision.”); Flagg, *supra* note 168, at 1000.

207. See Sullivan & Gershon, *supra* note 153, at 238.

208. See, e.g., Bobby Jindal, Opinion, *Why I Opposed Medicaid Expansion*, NOLA.COM (July 23, 2013), https://www.nola.com/opinions/article_c0155e08-f87b-5c8f-b4e3-092a5b095991.html [https://web.archive.org/web/20181212173844/https://www.nola.com/opinions/index.ssf/2013/07/gov_bobby_jindal_why_i_opposed.html] (“A second related point is that we should design our policies so that more people are pulling the cart than riding in the cart.”).

concern.²⁰⁹ Leaders have expressed skepticism about whether the federal government will maintain the current substantial level of support for coverage of the expanded population.²¹⁰ Further, even at the present high levels of federal support, expansion is expensive. Though recent studies have questioned some of the high cost estimates,²¹¹ it appears that expansion could cost some states hundreds of millions of dollars or more in added annual expenditures.²¹²

As a result of the Supreme Court's decision, the ACA will have the effect of increasing the divergence in coverage. Even for states that do expand Medicaid, the ACA may exacerbate existing resource disparities. Unlike the matching rate for other Medicaid expenditures, the federal match for Medicaid expansion under the ACA does not vary based on the needs of the state.²¹³ Thus, while the 90% federal match is higher than any current matching rate, the relative benefits of this higher rate are greater for wealthier states than for poorer states. For example, for the states with the highest level of resources, which generally receive federal Medicaid matching funds at a rate of 50%, the enhanced match is 80% higher; by contrast, for a less-wealthy state that is receiving federal matching funds at a rate of 70%, the enhanced matching rate for the expansion population is only 29% higher.²¹⁴ Moreover, Medicaid expansion will increase a state's administrative costs in running its Medicaid program, and the federal government generally matches administrative costs at only a 50% rate.²¹⁵ The relative growth in administrative costs will likely be greatest for states that covered fewer of the newly eligible people before the expansion.²¹⁶ These states, which tended to be the states with fewer resources, will experience

209. See, e.g., Daniel Malloy, *Deal Rejects Expansion of Medicaid*, ATLANTA J.-CONST. (Aug. 28, 2012), <https://www.ajc.com/news/state--regional-govt-politics/deal-rejects-expansion-medicaid/3pNCCrCCiYiNwKqpW4zeNO> [https://perma.cc/S4YD-42WN].

210. See Jindal, *supra* note 208; see also Flagg, *supra* note 168, at 1006.

211. See Mark Hall, *Do States Regret Expanding Medicaid?*, BROOKINGS INST. (Mar. 26, 2018), <https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2018/03/26/do-states-regret-expanding-medicaid> [https://perma.cc/D3KX-UYER].

212. See, e.g., MARK A. HALL & EDWIN SHOAF, HEALTH LAW & POLICY PROGRAM, WAKE FOREST UNIV. SCH. OF LAW, MEDICAID EXPANSION COSTS IN NORTH CAROLINA: A FRANK DISCUSSION 3 (2016), <http://hlp.law.wfu.edu/files/2016/01/Expansion-Issues-final-2b.pdf> [https://perma.cc/9UTV-6YQP] (estimating direct financial cost of expansion in North Carolina of \$600 million per year when the federal match declines to 90% in 2020); NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES: SPRING 2017, at 71 (2017), [https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/Fiscal%20Survey/NASBO%20Spring%202017%20Fiscal%20Survey%20\(S\).pdf](https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/Fiscal%20Survey/NASBO%20Spring%202017%20Fiscal%20Survey%20(S).pdf) [https://perma.cc/6KX2-8ZR4]; see also NIC HORTON & JONATHAN INGRAM, FGA, HOW THE OBAMACARE DEPENDENCY CRISIS COULD GET EVEN WORSE – AND HOW TO STOP IT 7 (2018), <https://thefga.org/wp-content/uploads/2018/01/How-the-ObamaCare-dependency-crisis-could-get-even-worse-%E2%80%94-and-how-to-stop-it-1-15-18.pdf> [https://perma.cc/WMJ2-STCM] (discussing potentially high cost of Medicaid expansion).

213. See Sullivan & Gershon, *supra* note 153, at 246.

214. See *id.* at 245 (noting “different fiscal and state administrative impacts among states that elect to expand Medicaid under the ACA option”).

215. See *id.* at 246.

216. See *id.*

proportionally larger increases in the covered population and accompanying administrative expenses.²¹⁷ For all of these reasons, the Medicaid expansion will impose greater proportional financial obligations on poorer states.

C. *Impact of Medicaid Funding Disparities*

When it comes to advancing the constitutive commitment to health care, what matters is not the level of expenditure, but the health outcomes. To the extent there is a national entitlement to health care, the problem is not that states spend different amounts, but that the differential expenditures translate into health disparities. If different states can spend less, but achieve the same health outcomes, the lower-spending states should elicit praise for their efficiency, rather than concern for failing to protect their residents.

It can be difficult to prove a tight connection between health care spending and health care outcomes.²¹⁸ The differential implementation of Medicaid expansion under the ACA, though, has provided new opportunities for research assessing the links between Medicaid coverage and health. The results so far show that Medicaid expansion does indeed lead to better health.²¹⁹ For example, a recent review of the literature found evidence that Medicaid expansion leads to improvements in access to care and quality of care.²²⁰ Documenting enhancements to health status proved more difficult, but studies suggested improvements in this area as well.²²¹ Prior research had demonstrated a connection between Medicaid coverage and both financial security and access to health services.²²² Medicaid recipients had lower levels of out-of-pocket expenses and reduced risks of bankruptcy.²²³ They also obtained higher levels of preventive treatment.²²⁴ This evidence is consistent with a wide range of investigations showing that increasing health insurance coverage improves access to care and a wide range of health outcomes.²²⁵ Early studies also suggest that enhanced access to Medicaid may lead to increased political participation by recipients.²²⁶

217. *See id.* at 245–46.

218. *See* Nash et al., *supra* note 130, at 706, 706 n.27.

219. *See* Abbe R. Gluck & Nicole Huberfeld, *What is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1788–89 (2018) (discussing studies finding health benefits associated with Medicaid expansion).

220. *See* Olena Mazurenko et al., *The Effects of Medicaid Expansion Under the ACA: A Systematic Review*, 37 HEALTH AFF. 944, 948–50 (2018); *see also* MICHENER, *supra* note 164, at 8.

221. *See* Mazurenko et al., *supra* note 220, at 949.

222. *See* Benjamin D. Sommers et al., *Health Insurance Coverage and Health — What the Recent Evidence Tells Us*, 377 NEW ENG. J. MED. 586, 586–88 (2017).

223. *See id.* at 586.

224. *See id.* at 588.

225. *See id.* at 591.

226. *See* Jake Haselswerdt, *Expanding Medicaid, Expanding the Electorate: The Affordable Care Act's Short-Term Impact on Political Participation*, 42 J. HEALTH POL. POL'Y & L. 667, 689–90

As this Section has explained, through Medicaid, the United States has chosen to offer health insurance coverage to a substantial portion of the population using a combination of state and federal spending. This funding structure leads to significant disparities among states with regard to expenditures per enrollee and, especially after the passage of the ACA, with regard to the scope of the covered population. These interstate differentials in turn lead to divergences in access to care, quality of care, and ultimately health outcomes. As the Medicare program evidences, the United States could have chosen an alternative funding structure. Medicare, which is funded by the federal government and administered under uniform national standards, does not produce comparable levels of interstate disparity. The decision of how to allocate budgetary responsibility among the states and the federal government has played an enormously significant role in the success, or failure, of honoring a national commitment to health.

These disparities in spending and in health among states might present less of a concern if even the lower-spending states produced strong health outcomes. As with education, if adequacy of health care were guaranteed everywhere, equity among the states might pose a less-pressing problem. To put it differently, a commitment to health care might be understood as a commitment to an adequate level of health care. That commitment might be vindicated even if some states decided to allocate their resources to produce even better results. However, while an adequate level of health care can be difficult to determine, various indicators suggest that states are not achieving that standard. The United States overall has less favorable health outcomes than other comparable countries.²²⁷ In light of this negative comparison at the international level, it is reasonable to conclude that at least in some states, people are not receiving adequate levels of health care.

(2017); *see also* MICHENER, *supra* note 164, at 168–69 (discussing impact of Medicaid on political participation).

227. *See* ELIZABETH H. BRADLEY & LAUREN A. TAYLOR, *THE AMERICAN HEALTH CARE PARADOX: WHY SPENDING MORE IS GETTING US LESS 2* (2013) (noting that compared to people in other industrialized countries, Americans have lower life expectancy and higher rates of infant mortality, diabetes, heart disease, and chronic lung disease, among other conditions); OECD, *HEALTH AT A GLANCE 2017* (2018), https://read.oecd-ilibrary.org/social-issues-migration-health/health-at-a-glance-2017_health_glance-2017 [<https://perma.cc/3SG5-PBYJ>]; ERIC C. SCHNEIDER ET AL., *THE COMMONWEALTH FUND, MIRROR, MIRROR 2017: INTERNATIONAL COMPARISON REFLECTS FLAWS AND OPPORTUNITIES FOR BETTER U.S. HEALTH CARE 4* (2017), https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_fund_report_2017_jul_schneider_mirror_mirror_2017.pdf [<https://perma.cc/4TJX-YGV5>].

V.

STATES OF INEQUALITY

The discussion of education and health care in Parts III and IV highlighted the significance of the divergence in state capacities. This Section seeks to generalize the consideration of fiscal inequity. The disparity in the resource bases of the states, I will argue, has profound implications for federalism in the United States, reaching well beyond education, health care, or other core social programs. The inequality strikes at the heart of federalism.

A. Implications of Inequality

How does the reality of interstate fiscal disparity intersect with the values of federalism? In particular, if the federal government properly assumes its responsibility to guarantee a minimum level of vital services throughout the United States, including adequate levels of funding,²²⁸ does the inequality of state resources matter? The answer is yes for several reasons.

First, the vast inequality of resources among the states constitutes a substantial barrier to the federal government's ability to guarantee adequate levels of education, health care, and other core commitments over time. In order to guarantee a sufficient level of vital services, the federal government would have to implement financial-equalization programs in each area and monitor their effectiveness on an ongoing basis. Further, adequacy will be difficult to determine, and richer states will be in a position to promise a more adequate level of vital services. Even if the federal government assumed responsibility for health care, education, and every other area of critical social programs—a political and financial impossibility—the issue of richer states offering additional, higher levels of service in these areas would remain. The adequacy of some services may inevitably entail an element of equity. An adequate level of education, for example, likely involves some assessment of the educational level of the population as a whole. Substantial inequality will threaten adequacy. In this way, the disparity in state funds interferes with federalism's promise to promote the protection of rights. To the extent that rights require resources for their realization, the different budget capacities of states undermine the full enjoyment of this value of federalism across the United States.

Second, the concern with interstate inequality extends beyond the area of vital services. With regard to values of responsive governance and democratic participation, states' varying fiscal capacities remain a challenge to federalism. The disparity in resources means that some states can be more responsive to the preferences of their citizens and that some states can offer broader options for democratic participation. People's abilities to achieve their preferences and to

228. For a discussion of the responsibility of the federal government to ensure the adequacy of certain services, see *supra* note 81 and accompanying text.

deliberate over important matters vary based on accidents of geography.²²⁹ For this reason, an assessment of whether a policy advances the values of federalism must take account of the reality of differing resources. Across a wide range of issues, from infrastructure to public safety to drug treatment, a decision to allocate power to the states is much more or less empowering of the people of the United States depending on where they live.

This issue of selective empowerment has important implications for decisions about assigning programmatic responsibility to the states or to the national government. Decisions made at the state level might respond more closely to citizen preferences, and citizens might have more opportunity to participate in deliberations about the optimal allocation of resources. However, for citizens of poorer states, the designation of responsibility to states, rather than to the national government, also means a limitation of options. In these poorer states, the lower level of state resources will place additional constraints on the possible choices. To return to the measure of TTR per person, many people live in states in which the TTR per person is less than the national average.²³⁰ These people would have a proportionally greater say over available resources if a decision were made at the national level. We could conceptualize TTR as a pie. For people living in poorer states, national decisions offer not only a larger pie (total TTR), but also a proportionally larger share of the pie (TTR per person). National decision-making would offer citizens of poorer states access to more resources per person. Of course, there would be no guarantee that residents of poorer states actually would receive more resources as a result of national decisions, but they would have the benefit of that possibility.

Values of federalism include responsive governance, democratic deliberation, and the protection of rights. All of these values involve control over the expenditure of funds, and the reality of interstate fiscal disparity means that allocating power to the states does not necessarily advance any of these goals. At the very least, interstate inequity means that the values of federalism will be realized more fully in some states than in others. People may still prefer more localized decision-making on some or many topics. However, that choice comes with significant trade-offs for people in poorer states.

B. Potential Polar Solutions

This defining characteristic of federalism in the United States—large fiscal disparities without any system of equalization—goes a long way toward explaining why levels of education and health care in the United States are unequal and, for some, inadequate. The same reality of inequality pervades all

229. Economic theories of federalism emphasize the ability of citizens to choose to migrate to states with policies that match their particular preferences. However, as discussed below, the differential resources of states disrupt that efficiency-enhancing process. *See infra* note 255 and accompanying text.

230. In 2016, the average TTR per person in the United States was \$63,213. *See Total Taxable Resources, supra* note 30. In twenty-nine states the TTR per person fell below that level. *See id.*

areas of state budgetary authority and undermines the values of federalism. What should policy-makers do in view of this significant problem?

Some scholars have pointed to ways to try to lessen interstate inequality. Professor David Schleicher, for example, has focused on the potential role of migration in decreasing the relative wealth differences among the states.²³¹ If the poorer residents of poorer states moved to richer states in search of greater economic opportunity, the per capita resources in states might indeed become more equal.²³² Professor Schleicher has identified an array of governmental policies that serve as barriers to migration.²³³ However, dismantling the large set of regulations that interfere with interstate movement, including zoning laws and occupational licensing schemes, among many others, would likely prove extremely difficult politically.²³⁴ Further, some regional variance in per capita resources would likely persist.²³⁵ Other scholars have proposed using the federal tax laws to promote development in economically depressed areas.²³⁶ All of these ideas merit serious consideration. Nevertheless, both because of the difficulty of enacting these broad proposals and because of the potential limits in their impact, the interstate disparities discussed in this Article are likely to continue for the foreseeable future. Given the great obstacles to eliminating these disparities, the question is how to compensate for them.

Two polar alternatives would be to adopt a system of fiscal equalization or to nationalize many of the services currently provided by states or shared between the states and the national government.²³⁷ As I will explain, neither of these options is politically feasible or normatively attractive. Neither would realize the promise of federalism to gain the benefits of decentralized decision-making, while honoring a national commitment to certain basic services. Equalization would do little to ensure equal access to health, education, and other vital programs. Federalization would ignore the potential benefits of allowing states and their citizens to define their own goals and ideals, consistent with certain core national commitments. Selective federalization of specific programs—programs that benefit less from decentralization—might offer a

231. See Schleicher, *supra* note 35.

232. See *id.* at 104–06.

233. See *id.* at 111–32.

234. See *id.* at 149–50.

235. See Reuven Avi-Yonah et al., *Bridging the Red-Blue Divide: A Proposal for U.S. Regional Tax Relief* 10 (Univ. of Mich. Pub. Law Research Paper No. 620, 2019), <https://ssrn.com/abstract=3249010> [<https://perma.cc/AAJ7-G9WL>] (rejecting idea that easing the paths of migration would solve regional poverty).

236. See *id.*

237. Professor Schleicher's work on interstate mobility suggests that another way to address disparities in the per-person resources in each state would be to remove some of the barriers to mobility and to encourage interstate migration. See Schleicher, *supra* note 35. The movement of (poorer) people from poorer states to richer states would help to equalize the per-person resources among the states, along with potentially offering greater economic opportunity for individuals in depressed areas. As he acknowledges, it might be quite difficult politically to remove the barriers to migration. See *id.* at 149–50. Further, it is likely that some interstate disparities would remain.

promising way to protect rights while allowing federalism to flourish in other areas.

1. *Fiscal Equalization*

Unlike most other countries, the United States lacks a system for equalizing resources among its states. The existence of regional disparities is not unusual. The world has many federal systems, and the constituent units often have varying levels of resources. The level of interstate variance in the United States is slightly lower than the average of OECD countries and roughly comparable to, or slightly higher than, that in Australia, Canada, and Germany.²³⁸ What differentiates the United States is the absence of any framework for mitigating these disparities. Most federal countries utilize equalization schemes.²³⁹ Countries that use equalization grants include Australia, Canada, Germany, India, and South Africa, among others.²⁴⁰ Indeed, one scholar has written that “the United States stands alone among the federations of the advanced economies in its failure to equalize across the states.”²⁴¹

These equalization schemes vary in their effectiveness, but they generally substantially reduce disparities. In some countries, including Australia and Germany, the differences in revenue-raising capacities are virtually eliminated.²⁴² From 1972 to 1986 the United States did have a “revenue-sharing” program through which the federal government made grants to state and local governments based in part on relative need and resources.²⁴³ However, devolution of power to state and local governments, rather than equalization, constituted the dominant motive of the program, and the equalizing effects were not large.²⁴⁴ As concern with the size of the federal deficit grew in the mid-1980s, the program was allowed to expire.²⁴⁵

Scholars have debated the wisdom of fiscal equalization. The arguments in favor of equalization tend to emphasize concerns for equity, both with regard to states and individuals.²⁴⁶ At the state level, it seems fair that an equal level of tax

238. See OECD, *FISCAL FEDERALISM 2014*, at 101 fig.5.1 (Hansjörg Blöchliger ed., 2013), https://read.oecd-ilibrary.org/governance/fiscal-federalism-2014_9789264204577 [<https://perma.cc/E3SE-GH62>].

239. See Spahn, *supra* note 13, at 77.

240. See Stark, *supra* note 13, at 957.

241. See *id.* at 957 n.1 (quoting Keen, *supra* note 47, at 789).

242. See OECD, *supra* note 238, at 105 & tbl.5.1.

243. See Béland & Lecours, *supra* note 46, at 309–10 (describing revenue sharing); STEVEN MAGUIRE, CONG. RESEARCH SERV., RL31936, *GENERAL REVENUE SHARING: BACKGROUND AND ANALYSIS* (2009) (same).

244. See Béland & Lecours, *supra* note 46, at 309–10.

245. See *id.*

246. See Kenyon & Kincaid, *supra* note 46, at 49; Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LITERATURE 1120, 1127 (1999).

effort should yield an equal level of resources in the states.²⁴⁷ With regard to individuals, the argument is that the opportunity of an individual to receive services from the state should not vary based on accidents of location and state resources.²⁴⁸

Other scholars, by contrast, have criticized this conception of equity. They have questioned the concept of attempting to equalize the financial conditions of states, rather than targeting the financial circumstances of people through direct federal assistance.²⁴⁹ One common objection is that fiscal equalization ends up effectively requiring poor people in wealthy states to subsidize rich people in poor states.²⁵⁰ This argument depends crucially on issues of tax progressivity with regard to residents of the wealthier “donor” states and assumptions about the use of funds in poorer states.²⁵¹ If the intergovernmental transfer came from a fixed-percentage tax on all residents of the richer states, with the funds distributed to all residents of the poorer states, the objection would seem valid. However, if the equalization funds were drawn from wealthier residents of the richer states and used to fund programs benefiting poorer residents of the poorer states, the equity argument would remain sound.

Efficiency also serves as an argument both for and against equalization. In support of equalization, scholars argue that the different resource capacities of the states create inefficient incentives for people and businesses to migrate to the richer states.²⁵² Under a traditional federalism analysis, generally credited to Charles Tiebout, competition among jurisdictions leads to efficiency gains, as jurisdictions attempt to lure people and businesses by designing packages of services and taxes that best match resident preferences.²⁵³ However, Tiebout’s theory assumed that the benefits enjoyed in each jurisdiction reflected payments by its residents.²⁵⁴ People were paying for the level of services they enjoyed. Migration allowed people to choose the package of benefits and taxes they preferred. However, fiscal disparities disrupt this tale of efficient movement. The differential resource bases of the various states create incentives for people to move to richer states so as to enjoy higher levels of benefits without individually

247. See Helen F. Ladd & John Yinger, *The Case for Equalizing Aid*, 47 NAT’L TAX J. 211, 212–14 (1994); William H. Oakland, *Fiscal Equalization: An Empty Box?*, 47 NAT’L TAX J. 199, 200 (1994).

248. See James M. Buchanan, *Federalism and Fiscal Equity*, 40 AM. ECON. REV. 583, 586–88 (1950); see also Stark, *supra* note 13, at 958.

249. See Mieszkowski & Musgrave, *supra* note 16, at 240–41, 250 (discussing arguments against equalizing by jurisdiction).

250. See Oates, *supra* note 246, at 1127 n.16.

251. See Spahn, *supra* note 13, at 82.

252. See WALLACE E. OATES, *FISCAL FEDERALISM* 83 (2011); Buchanan, *supra* note 248, at 589; Stark, *supra* note 13, at 958, 964; see also Zachary D. Liscow, *The Efficiency of Equity in Local Government Finance*, 92 N.Y.U. L. REV. 1828 (2017) (arguing on efficiency grounds for greater centralization of funding for government services).

253. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

254. See Stark, *supra* note 13, at 964–65.

bearing higher costs. For this reason, migration in search of wealthier states does not serve efficiency goals. When fiscal disparities drive the migration, taxpayers' choices of residence do not reflect their preferences regarding policy options, but rather their awareness of the arbitrary connection between geographical lines and resources.²⁵⁵

The Tiebout theory of beneficial jurisdictional competition would have more relevance if states could undertake policies to change their fiscal capacities in a relatively short period of time. While state policy choices play some role in determining fiscal resources, many features outside the control of states limit their fiscal capabilities. Delaware, for example, has been successful in attracting corporate charters and associated revenue. However, other factors, including geography, play an important role as well. Alaska and North Dakota happen to benefit from large supplies of natural resources. Moreover, given interstate competition, it may be difficult for a state with lower capacity to sustain an advantage from policies that promote revenue generation. Other states could copy policy innovations. To the extent states wish to use financial resources to compete, for example through tax incentives, wealthier states will be able to offer the same financial inducements while taxing themselves at a lower rate. Certainly in the short-term framework that drives locational decisions, states have relatively little control over their total available financial resources.

Another relevant concern in assessing the wisdom of adopting a system to mitigate disparities is the enormous complexity in determining the proper equalization technique.²⁵⁶ Further, depending on their design, transfers can create perverse incentives for states to avoid maximizing their own resources, so as to increase the size of their equalizing grant.²⁵⁷

Although these competing arguments about the merits of equalizing transfers apply to all countries, characteristics particular to the United States, including its distinctive history, its relative lack of social solidarity, and its persistent racism, help explain why the United States, alone among advanced industrialized federal nations, has failed to adopt an equalization plan. One factor

255. See JAMES M. BUCHANAN, ATL. INST. FOR MKT. STUDIES ET AL., EQUALIZATION: WELFARE TRAP OR HELPING HAND? 7–8 (2002), <https://www.iedm.org/files/011025buchananpaper.pdf> [<https://perma.cc/4QWA-3MN9>]; Stark, *supra* note 13, at 964–65.

256. See Stark, *supra* note 13, at 959; see also BUCHANAN, *supra* note 255, at 9–11 (noting that the distribution of any equalizing grant within a “recipient” state has important implications for economic efficiency).

257. See OECD, *supra* note 238, at 106–13; Michael Smart, *The Incentive Effects of Grants*, in INTERGOVERNMENTAL FISCAL TRANSFERS 203 (Robin Boadway & Anwar Shah eds., 2007); Stark, *supra* note 13, at 959; see also David Albouy, *Evaluating the Efficiency and Equity of Federal Fiscal Equalization*, 96 J. PUB. ECON. 824 (2012) (evaluating fiscal equalization schemes); Oates, *supra* note 246, at 1127–28 (reviewing efficiency arguments); Jeffrey D. Petchey & Sophia Levchenkova, *Fiscal Capacity Equalization and Economic Efficiency: The Case of Australia* (reviewing efficiency arguments), in FISCAL EQUALIZATION: CHALLENGES IN THE DESIGN OF INTERGOVERNMENTAL TRANSFERS 13, 14–15 (Jorge Martinez-Vazquez & Bob Searle eds., 2007).

that differentiates the United States is the decisive role of the Civil War in repudiating the concept of secession. Since the end of the Civil War, the United States has not faced secessionist movements posing serious threats to its territorial integrity. In other federations, including Australia and Canada, fiscal equalization regimes have arisen at least in part to address concerns that certain states or provinces would seek to leave the federation.²⁵⁸ In addition, scholars have pointed to the intertwined factors of a relatively weak sense of social citizenship and a long history of racial discrimination. Across a variety of areas, as compared with citizens of other countries, people in the United States appear to have less concern for economic equality and less sympathy for explicit forms of redistribution.²⁵⁹ Persistent racism in the United States likely helped to weaken bonds of social citizenship.²⁶⁰ Overall, the more individualistic ethos of the United States did not provide fertile ground for fiscal equalization.²⁶¹ Scholars also have cited the specific racial politics of the United States in the twentieth century as offering another reason for the country's special path. Equalizing regimes tended to emerge in other nations around the middle of the twentieth century.²⁶² In the United States, such plans would have involved large financial transfers to southern states.²⁶³ National politicians had little interest in making such payments to the jurisdictions that were fighting hardest to maintain Jim Crow systems and oppose racial integration.²⁶⁴ Further, the southern states often resisted programs that involved the distribution of federal resources, based on their fear that the federal dollars would be accompanied by efforts to weaken their system of racial hierarchy.²⁶⁵ Although the reasons may be subject to dispute, the bottom line is clear: while fiscal equalization systems constitute the norm in other industrialized federal countries, such a plan has never received serious consideration in the United States.

258. See Béland & Lecours, *supra* note 46, at 312–16 (discussing role of fiscal equalization regimes in bolstering territorial unity).

259. See *id.* at 316–18; Stark, *supra* note 13, at 994–95.

260. See Béland & Lecours, *supra* note 46, at 318.

261. See THOMAS O. HUEGLIN & ALAN FENNA, *COMPARATIVE FEDERALISM* 178 (2d ed. 2015) (arguing that in the United States “a paramount commitment to individualism overrides notions of community, partnership, and regional identity protection prevalent in other federations”); see also Kenyon & Kincaid, *supra* note 46, at 49 (“Just as most Americans do not accept the idea that government should equalize the economic circumstances of individuals, so too do they generally reject the idea that the federal government should equalize the fiscal circumstances of state and local governments.”).

262. See Stark, *supra* note 13, at 995–96.

263. See *id.*

264. See *id.*

265. See *id.* On the pervasive influence of racial politics in shaping national programs in the twentieth century, see IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013).

Some commentators have tried to make the case for adopting fiscal equalization.²⁶⁶ In 2010, Professor Stark estimated the cost of applying a Canadian system of fiscal equalization to the United States.²⁶⁷ When he included cost-of-living differentials, he estimated that thirty-three states would receive equalization grants totaling \$109 billion.²⁶⁸ It is difficult to see how a political consensus would arise to create such an expensive and far-reaching program, with well-defined winners and losers. Actually designing such a plan and ensuring it would not create perverse incentives for states also would present enormous complexities. I do not foresee any such program arising in the United States. This aspect of American exceptionalism will likely endure.

Further, it is not clear that fiscal equalization would represent the most effective expenditure of funds at this time. Equalization involves unconditional grants to states.²⁶⁹ States retain discretion over how to spend the money. Given the correlation between state resources and expenditures on education and Medicaid, states likely would devote some or all of the equalization grants to these or other vital areas. But they might not. To advance the national commitment to education, health care, and other critical services, the national government would do better to target the funds to these areas. In addition, as the ultimate goal is to enhance outcomes, not spending for its own sake, the national government might wish to impose more specific conditions in an attempt to ensure that the funds are spent most effectively.²⁷⁰ Federalism is a means to achieve various goals.²⁷¹ Fiscal equalization is a means to help federalism achieve these goals effectively. Vindicating a national commitment to core services is not a means, but is itself a primary goal. Accordingly, while reducing interstate financial disparities would advance the values of federalism, guaranteeing adequate levels of education, health care, and other national commitments should constitute a higher priority than attempting to equalize overall state resources.

266. See, e.g., Joshua T. McCabe, *Federalism in Blue and Red*, NAT'L AFF., Summer 2017, at 67 (arguing in favor of fiscal equalization); Stark, *supra* note 13, at 997–1008 (outlining options for fiscal equalization in the United States); Stewart, *supra* note 65, at 975–79.

267. See Stark, *supra* note 13, at 1002.

268. See *id.*

269. I am focusing here on a pure system of equalization grants, of the kind discussed by Professor Stark, which would involve unconditional grants to states. See *id.* at 999. As discussed below, one could conceive of a series of conditional grants with equalizing effects. See *infra* Part V.C. For purposes of analysis, I believe it is helpful to distinguish between these alternative methods of pursuing equalization.

270. Of course, in keeping with the general principles of innovation and experimentation, the national government might still allow variation to enable states to try new or different approaches.

271. See Gerken, *supra* note 1, at 1890 (“Any account of federalism must begin with the values it serves.”).

2. Nationalizing Programs

Nationalizing the funding of programs would address interstate spending disparities with regard to those programs, but it would do so at the cost of eliminating the benefits of local control. As is evident from the experience with Medicare, some differences among the states would likely remain after nationalization, but the divergences would decrease.²⁷² Indeed, the United States might well decide to adjust the mix of federal and state funding and control with respect to specific programs. However, a massive federalization of all programs touching on national commitments would involve a vast reordering of federal and state finances. Such a nationalizing effort also would eliminate the benefits of federalism.²⁷³ With regard to education in particular, local funding and control represent the norm in the United States and in other OECD countries.²⁷⁴ Parents value a connection to their children's education and are willing to invest their tax dollars in their schooling. Though interstate inequity demands federal action, eliminating local control would undermine key structures of educational support.²⁷⁵ In other areas, as well, the benefits of decentralization remain substantial. Again, the evidence from other OECD countries is instructive.²⁷⁶ Around the world, people value local control over an array of services.

In some areas, the case for local support and authority may be less powerful. Even in these situations, any selective nationalization must attend to the distributional consequences. For example, in light of the interstate variations in Medicaid, several commentators have called for a federalization of the program.²⁷⁷ Federalization has many appealing features. The federal

272. See *supra* notes 177–182 and accompanying text.

273. See *supra* Part II.

274. See OECD & KOR. INST. OF PUB. FIN., *supra* note 74, at 18 fig.1.4.

275. William Fischel has argued that residents support investment in education because it increases the value of their homes. See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 160–61 (2001). Fischel contends that moving school finance from the local to the state level attenuates the connection to home value and thus reduces political support for investment in education. See *id.* On this view, national financing would represent an even greater obstacle to taxpayer support for school funding. See *id.*; see also Roderick M. Hills, Jr., *The Case for Educational Federalism: Protecting Educational Policy from the National Government's Diseconomies of Scale*, 87 NOTRE DAME L. REV. 1941, 1956–66 (2012) (describing how subnational control of educational funding and content promotes support for education).

276. See OECD & KOR. INST. OF PUB. FIN., *supra* note 74, at 18 fig.1.4.

277. See, e.g., GREG ANRIG, NEW AM. FOUND., *THE NEXT PRIORITY FOR HEALTH CARE: FEDERALIZE MEDICAID* (2010), https://static.newamerica.org/attachments/4271-the-next-priority-for-health-care-federalize-medicaid/Anrig_Final.d3dec8624b60407aa070582bad2ffe83.pdf [<https://perma.cc/ZE8D-QBAR>]; Ezekiel J. Emanuel & Rahm Emanuel, *A Deal to Save Medicaid, the Unemployed and State Budgets*, N.Y. TIMES (June 15, 2020), <https://www.nytimes.com/2020/06/15/opinion/medicaid-unemployment-insurance.html>; Merrill Goozner, *Make Medicaid Federal*, DEMOCRACY (Dec. 14, 2017), <https://democracyjournal.org/arguments/make-medicaid-federal> [<https://perma.cc/GRD7-RAJX>]; Huberfeld, *supra* note 23; Matthew G. Jones, *Federalizing Medicaid: It Seems Logical Enough*, 21 ANNALS HEALTH L. 143 (2011).

government's assuming full responsibility for Medicaid might lead to administrative simplification and would greatly mitigate interstate disparities in access to care. Federalization also would relieve states of the budget squeeze they now face in recessionary times. The decline in incomes during fiscal downturns swells the rolls of Medicaid, while simultaneously reducing state tax revenues.²⁷⁸ The balanced budget constraints imposed by state constitutions impair the ability of states to maintain their expenditures in the face of falling revenues.²⁷⁹ The national government faces no requirement to balance its budget, and its broad revenue base and essentially unlimited borrowing capabilities give it much greater fiscal capacity than the states.²⁸⁰ Accordingly, the national government would be in a better position to support Medicaid through difficult economic times.²⁸¹ The federal assumption of Medicaid would result in little loss of meaningful state autonomy. The federal guidelines and the national commitment to health care limit the discretion of states to modify their programs in accordance with local preferences. For these reasons, the traditional federalism values of responsive governance and democratic participation have limited relevance. Indeed, if Medicaid did not exist and were being created today, a federally financed and managed program along the lines of Medicare²⁸² would seem very sensible, assuming such increased federal spending would be politically acceptable.

In assessing modifications of federal-state programs, however, policy-makers must attend to the distributional impact on states. Policies that increase interstate disparities should receive very careful scrutiny. In a world of limited resources, federal spending that substantially exacerbates interstate inequality is unlikely to represent the best expenditure of funds. Such an analysis is especially important for Medicaid, which constitutes the largest federal grant to states.²⁸³ Advocates of federalization generally do not address this fiscal federalism dimension, which adds a vital and contrasting point of view.

One potential drawback to federalization is that the federal government might choose benefit levels below those currently offered in some states.²⁸⁴ Those states could use their own funds to enhance indigent care, although that might increase rather than lessen complexity. The major concern with federalizing Medicaid, though, is that it would add more than \$200 billion

278. See Super, *supra* note 18, at 2609–10.

279. See *id.*

280. See *id.* at 2576–77.

281. See *id.* at 2648–50.

282. By referencing Medicare, I mean only a nationally administered and funded program. I do not mean to imply that the new Medicaid would necessarily involve the kind of dedicated payroll tax involved in Medicare.

283. See ROBERT JAY DILGER & MICHAEL H. CECIRE, CONG. RESEARCH SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 6 (2019).

284. See *Congress Cool to Reagan's 'New Federalism,'* 38 CQ ALMANAC 536 (1983).

annually to the federal budget.²⁸⁵ The supporters of federalization point out that the shift would effectively transfer these funds to states, which need money for education, transportation, and other critical priorities.²⁸⁶ It is certainly true that states could use more funds for vital programs. However, unraveling the state-federal Medicaid match would be an irrational way to allocate those funds.

As discussed earlier, the Medicaid matching formula has several flaws that decrease its effectiveness in accounting for state capacity and need. Nevertheless, the formula represents one of the few attempts by the national government to address state fiscal inequity. Certainly, the formula more accurately reflects state resources and requirements than does the inverse of the formula. But federalizing Medicaid would have the effect of using the inverse of the current formula to transfer money from the federal government to the states. Because of the federal match, poorer states contribute a smaller share of Medicaid funding than richer states. Thus, federalization would give less money to poorer states and more money to richer states. Federalizing Medicaid would improve the financial situation of all states, but not in a manner attuned to the actual needs of the states.

Supporters of Medicaid federalization emphasize that shifting the funding responsibilities to the national government promotes fairness because federal taxes, such as the income tax, are often more progressive than state taxes.²⁸⁷ However, that point has no special relevance to Medicaid. It may promote fairness to shift tax burdens from states to the federal government, but given the particular characteristics of Medicaid, shifting that burden to the federal government would not promote equity among the states. The debate over Medicaid federalization illustrates the importance of assessing whether particular programmatic reform would ameliorate or exacerbate underlying fiscal disparities.

“Medicare for All” plans of the kind championed by Senator Bernie Sanders would include a federalization of Medicaid, along with many other changes in health care financing.²⁸⁸ The impact on state Medicaid expenditures would be significant. By one estimate, the federal government would absorb \$320 billion in annual state health care spending.²⁸⁹ As with a simple

285. *Federal and State Share of Medicaid Spending*, *supra* note 44. Administrative efficiency might mean that the total cost of the program would decline, but the cost savings are unlikely to be substantial.

286. *See* Gozner, *supra* note 277.

287. *See* ANRIG, *supra* note 277, at 9.

288. *See* Medicare for All Act of 2017, S. 1804, 115th Cong. §§ 201, 204, 701 (providing for federal payment of health care services, eliminating federal payment for services under Medicaid, except for certain long-term care services, and shifting federal Medicaid funds into new Universal Medicare Trust Fund).

289. *See* JOHN HOLAHAN ET AL., HEALTH POLICY CTR., URBAN INST., THE SANDERS SINGLE-PAYER HEALTH CARE PLAN 25 (2016), <https://www.urban.org/sites/default/files/publication/80486/200785-The-Sanders-Single-Payer-Health-Care-Plan.pdf> [<https://perma.cc/NUL9-WZN7>].

federalization plan, it will be important to analyze the distributive effect on states of the Medicare for All proposal. The bill introduced by Senator Sanders includes provisions for recapturing some of the current state spending on Medicaid.²⁹⁰ These kinds of conditions would be important both for financing the proposal and for avoiding increasing the divergence in state resources.

C. *Toward a New Fiscal Compact: Promoting Equity and Rights*

Instead of adopting a stand-alone equalization scheme or a general program of nationalization, the federal government should address state fiscal disparities by calibrating matching programs across an array of services. Properly designed funding schemes would compensate for state resource inequality, while also promoting a national standard of adequacy. Like the reconstruction of federalism in the New Deal and the civil rights era, this new fiscal compact would empower states, advance equality, and safeguard certain basic commitments across the nation. The compact should begin with a reform of the funding of K-12 education and Medicaid. Not only are these vital areas, but together they account for 49% of total state spending and 56% of spending from state general funds.²⁹¹ Providing greater equalization in these areas would go a long way toward addressing budgetary disparities. Under the new fiscal compact, the federal government should also avoid creating or modifying programs in a manner that would exacerbate current inequities.

The plan that Justice Liu has outlined for greater educational equity provides a model. Justice Liu has suggested that the federal government match state and local spending at differential rates, depending on state resources and considering state-by-state variation in costs.²⁹² A key feature of the proposal is that it would take account of a state's TTR and thus would reduce the overall fiscal disparities among the states.²⁹³ Justice Liu modeled the plan on Medicaid, but enhanced the formula by relying on better measures of state need and capacity.

Medicaid reform provides another example of what a new framework for fiscal federalism would demand. The Medicaid program already attempts to offer a variable federal-state matching plan to account for variation in state resources

290. See S. 1804 § 204; see also Charles Blahous, *The Costs of a National Single-Payer Healthcare System* 17 n.45 (Mercatus Ctr., George Mason Univ., Mercatus Working Paper, 2018), https://www.mercatus.org/system/files/blahous-costs-medicare-mercatus-working-paper-v1_1.pdf [<https://perma.cc/64LV-2VKP>] (noting that the Medicare for All Act contains maintenance of effort requirements for state spending on long-term care, but not for other current state spending on Medicaid).

291. See NAT'L ASS'N OF STATE BUDGET OFFICERS, 2018 STATE EXPENDITURE REPORT: FISCAL YEARS 2016–2018, at 6 fig.4, 7 fig.6 (2018), https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/2018_State_Expenditure_Report_S.pdf [<https://perma.cc/A2AC-YFQ6>].

292. See Liu, *supra* note 22, at 2117–26. This varying match builds on the concept of Medicaid, but improves the formula by using total taxable resources, rather than per capita income. See *id.* at 2120.

293. See *id.* at 2120.

and needs. However, as we have seen, it falls short in achieving these goals.²⁹⁴ How might the indigent health care system be improved?

One option would be to keep the basic state-federal structure, while modifying its implementation. The key features of this option would be providing more resources to states with greater needs and ensuring that the enhanced funding provide a higher level of care. Fixing the Medicaid matching formula to target the funds to states with the greatest need and the fewest resources would help to achieve more equitable funding. As discussed above, government reports have long advocated replacing per capita income in the Medicaid formula with other measures that better represent actual state need and resources, such as persons in poverty and TTR.²⁹⁵ Such a modification of the formula would better direct funds to the states that need them most. The Medicaid formula also could be adjusted to take account of constrained state revenues during recessions. In addition, in connection with modifying the Medicaid formula, the federal government could decide to invest more money in Medicaid by raising the overall share of federal funding.²⁹⁶ As the level of state expenditures likely reflects both resources and policy choices, additional funding is necessary but not sufficient to promote greater coverage. The federal government would need to ensure that the states allocated the enhanced funds to increasing the scope of coverage and the level of services.

A second option would be for the federal government to take over the management of Medicaid but to maintain shared responsibility payments from the states. In effect, the states would pay the federal government to run the Medicaid program in their states. The payments could be calculated in accordance with a revised matching formula with enhanced federal contributions. The system would be designed so that all states would be financially better off than under the current arrangement. However, the amount of state payments would be calibrated to address existing state inequalities. Congress employed a similar model when it created the Medicare prescription drug benefit in 2003.²⁹⁷ For dual eligibles, i.e., people covered by both Medicare and Medicaid, some of these prescription costs had previously been funded by Medicaid. As part of the new plan, the federally funded Medicare program would be assuming this financial obligation, relieving the states of their share of the Medicaid spending. To help pay for the program, Congress included a “clawback” provision requiring states to pay to the federal government a share

294. See *supra* Part IV (documenting how Medicaid fails to account for variation in state resources and needs).

295. See *supra* notes 188–189 and accompanying text.

296. The current formula provides that the average state will receive a federal match of 55%. See *supra* note 187. However the average state is determined, the base rate of the federal match could be increased.

297. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (codified as amended in scattered sections of the U.S. Code).

of their Medicaid savings. Under the statute, the clawback percentage declined over time, beginning at 90% of state savings and eventually reaching 75%.²⁹⁸

The federal government could expand this new compact model beyond K-12 education and Medicaid. Higher education represents the third largest category of state expenditures, accounting for 10% of both total state expenditures and general fund expenditures.²⁹⁹ A federal matching program taking account of differential state resources could promote interstate equity, while advancing a national commitment to college.

Reinstating a national commitment to income security would advance equity in another vital area. Aid to Families with Dependent Children (AFDC), which provided cash grants to needy families, was jointly funded by the federal and state governments and used the same variable matching formula as Medicaid. In 1996, AFDC was converted into a new block program named Temporary Assistance for Needy Families (TANF). The initial amount of the grant was based on prior AFDC levels, but the effective amount of benefits began to erode. Congress froze financing for the program and then began to cut funding.³⁰⁰ The initial legislation included “supplemental grants” to states that historically had low benefits, generally poorer states, but this program expired in 2011.³⁰¹ By 2018, for 99% of TANF recipients, the purchasing power of benefits was below the level in 1996.³⁰² Further, a 2017 study by the Center on Budget and Policy Priorities looked at state spending under TANF and concluded that states had found ways to divert the money away from families and toward other areas of state need.³⁰³ Not surprisingly, it was the poorer states that tended to divert the money.³⁰⁴ These states were more in need of money for other purposes.

298. See ANDY SCHNEIDER, KAISER COMM'N ON MEDICAID & THE UNINSURED, THE HENRY J. KAISER FAMILY FOUND., THE “CLAWBACK:” STATE FINANCING OF MEDICARE DRUG COVERAGE (2004), <https://www.kff.org/wp-content/uploads/2013/01/the-clawback-state-financing-of-medicare-drug-coverage.pdf> [<https://perma.cc/BHF2-RSJV>]; Elizabeth A. Weeks, *Cooperative Federalism and Healthcare Reform: The Medicare Part D “Clawback” Example*, 1 ST. LOUIS U. J. HEALTH L. & POL'Y 79, 82 (2007).

299. See NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 291, at 6 fig.4, 7 fig.6.

300. See Super, *supra* note 18, at 2584–85.

301. See LADONNA PAVETTI ET AL., CTR. ON BUDGET & POLICY PRIORITIES, EXPIRATION OF TANF SUPPLEMENTAL GRANTS A FURTHER SIGN OF WEAKENING FEDERAL SUPPORT FOR WELFARE REFORM 1–2 (2011), <https://www.cbpp.org/sites/default/files/atoms/files/6-27-11tanf.pdf> [<https://perma.cc/YQ8P-YJBQ>].

302. See ASHLEY BURNSIDE & IFE FLOYD, CTR. ON BUDGET & POLICY PRIORITIES, TANF BENEFITS REMAIN LOW DESPITE RECENT INCREASES IN SOME STATES 1 (2019), <https://web.archive.org/web/20191104174444/https://www.cbpp.org/sites/default/files/atoms/files/10-30-14tanf.pdf>; see also Andrew Hammond, *Welfare and Federalism's Peril*, 92 WASH. L. REV. 1721, 1722–23 (2017) (describing erosion of support provided by TANF).

303. See LIZ SCHOTT, CTR. ON BUDGET & POLICY PRIORITIES, LESSONS FROM TANF: BLOCK-GRANTING A SAFETY-NET PROGRAM HAS SIGNIFICANTLY REDUCED ITS EFFECTIVENESS (2017), <https://www.cbpp.org/sites/default/files/atoms/files/2-22-17tanf.pdf> [<https://perma.cc/BJ8B-NMDB>].

304. The Center on Budget and Policy Priorities study found that seven states had spent less than 25% of TANF funds in core welfare reform areas. See *id.* at 4. Five of the seven states had cost-of-living

In implementing a new fiscal compact, officials must consider the distributional consequences for states of changes in federal policy, whether the shifts involve modifying existing programs or commencing new initiatives. Policy-makers should be wary of devolving programs to states without careful analysis of how the new responsibilities would intersect with existing inequalities. For example, the Trump administration has shown renewed interest in transforming some federal entitlements into block grants.³⁰⁵ Interstate financial disparities counsel great skepticism about such plans. Instead of matching state funding, block grants allocate a fixed amount of money to the states, generally with fairly loose programmatic requirements.³⁰⁶ Block grants generally do not take account of the financial differences among states.

Some novel higher education proposals currently under discussion also pose significant risks of exacerbating interstate disparities. Such plans would require large governmental expenditures, including state funds. Unless the programs take account of state capacity, they may well impose disproportionate burdens on poorer states. For example, the College for All Act of 2017,³⁰⁷ introduced by Senator Bernie Sanders, with co-sponsors including Senators Kirsten Gillibrand, Kamala Harris, and Elizabeth Warren, would eliminate tuition at public colleges and universities for families making up to \$125,000 per year and for all students at community colleges. Three provisions of the Act, in particular, would have a substantial impact on state finances: (1) states would be responsible for one-third of the cost of eliminating tuition; (2) for the poorest students, states also would be responsible for covering the full cost of attendance (the amount in excess of tuition and grants); and (3) the federal government would match additional state expenditures on a dollar-for-dollar basis.³⁰⁸ These provisions take no account of differential state financial capacity or need. Poorer states, which would likely have a higher share of the poorest students, would bear a disproportionately large share of the cost. Richer states would be more likely to benefit from the additional federal matching funds. To be clear,

adjusted TTRs per capita below the national average. The report found that in fourteen states, TANF provided cash assistance to 10% or fewer of needy families. *See id.* at 7. Ten of the fourteen states had cost-adjusted TTRs per person below the national average. For the method of calculating the cost-adjusted TTR per person, see *supra* note 33.

305. *See, e.g.*, Aaron E. Carroll, *How Would Republican Plans for Medicaid Block Grants Actually Work?*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/upshot/how-would-republican-plans-for-medicaid-block-grants-actually-work.html> [<https://perma.cc/9X58-NVZH>]; Shefali Luthra, *Everything You Need To Know About Block Grants — The Heart Of GOP's Medicaid Plans*, KAISER HEALTH NEWS (Jan. 24, 2017), <https://khn.org/news/block-grants-medicaid-faq> [<https://perma.cc/9GF8-ZGT3>].

306. *See* Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL'Y REV. (SYMPOSIUM ISSUE) 297, 300–01 (1996) (discussing characteristics of block grant programs).

307. S. 806, 115th Cong.

308. *See id.*; *see also* BERNIE SANDERS, THE COLLEGE FOR ALL ACT 1–2 (2017), <https://www.sanders.senate.gov/download/the-college-for-all-act-fact-sheet?id=A2524A5A-CA3F-41F8-8D93-DD10813DC384&download=1&inline=file> [<https://perma.cc/ND8L-GWRQ>].

“College for All” and similar proposals might well advance meritorious policy goals. The question is how best to achieve these aims. It will be important to consider the differential impact on states and how these effects might impair other state responsibilities. Plans should be designed with these concerns in mind.

The new federal fiscal compact will not solve every issue connected to the divergence in state resources. Some inequality will remain. Some states will be wealthier than others, and the citizens of these states will more fully enjoy the benefits of federalism. However, carefully targeted federal matching expenditures, beginning with Medicaid and K-12 education, and expanding to other areas will help to solve the general problem of interstate fiscal disparity, while focusing on the areas in which these differences cause the greatest harm.

CONCLUSION

This Article has argued for an integration of the insights of the new federalism scholarship in the legal academy with the field of fiscal federalism. Decisions about allocating financial resources in the United States must take account of the values of federalism and how devolving programs to states may advance or undermine those values. This central concern of federalism—how to distribute power among states and the national government—takes place against a background of fundamental state financial inequality. States have greatly varying resources. The states that spend more money on vital programs, such as education and Medicaid, are generally the states that have more money to spend. The resulting geographical inequities are inefficient and unfair. States are not equal in their abilities to respond to the preferences of their residents, to provide opportunities for meaningful democratic participation, and to protect human rights. Their differing capacities make them unequal.

Discussions of appropriate state and federal roles often have ignored this critical issue of interstate financial inequality. Policy debates that fail to take account of these disparities will be much less likely to vindicate core national commitments or to advance other values of federalism. Recent scholarship in the legal academy has emphasized the vital role of states in addressing the many complex problems confronting the United States in the twenty-first century.³⁰⁹ The New Deal of the 1930s reconstructed federalism in a manner that empowered both the national government and the states to respond to pressing concerns.³¹⁰ The civil rights era redeemed federalism by nationalizing a

309. See Heather K. Gerken, Essay, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1721–22 (2017); Gerken, *supra* note 1, at 1901–04.

310. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (broadly construing scope of national regulatory authority); *United States v. Darby*, 312 U.S. 100 (1941) (same); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (same); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (broadly construing scope of state regulatory authority).

commitment to political equality.³¹¹ Similarly, protecting core social commitments today requires a reconceptualization of federalism to empower states financially, while recognizing a critical role for the national government in ensuring adequate funding throughout the nation. Through spending programs calibrated to take account of state needs and state resources, the federal government must play a much more active role in guaranteeing adequate funding for education, health care, and other vital services. The federal government also must avoid creating or modifying programs in a manner that exacerbates existing disparities.

State fiscal capacities and resource inequalities have crucial implications for promoting human dignity in the United States. In its federalism decisions, the Supreme Court sometimes speaks formalistically of the “dignity” of states,³¹² as if states were people. This reference to “dignity” has occasioned much scholarly commentary, often critical of the court’s apparent personification of states.³¹³ The Court’s focus on state dignity seems in contrast to a focus on human dignity.³¹⁴ However, fiscal federalism provides a very real and practical foundation for attention to the impact of policies on states. In many areas, states have principal responsibility for ensuring human dignity. In many more areas, states have the primary obligation for providing the array of services that sustain human flourishing. Officials and scholars should focus on how the actions of the national government relate to state finances, not because of an abstract or formalistic respect for states, but because of the impact on the lives of people in the states. Federalism must indeed focus on dignity—the dignity of the people who reside in the states.

Full citizenship in the United States requires equal access to adequate education, health care, and other fundamental services. Equal citizenship further entails equal control over and access to public resources. Accordingly, because of the federal structure of the nation, full equality for the people of the United States requires fiscal equality of the states. Citizens of Mississippi must have the same opportunity as citizens of New York to achieve the foundations of human flourishing. Fiscal equality, like political equality, may never be fully attained, but it must remain a guiding principle. Equity among people requires equity among states.

311. See Scheiber, *supra* note 4, at 285.

312. See, e.g., *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”).

313. See Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 24–28 (2003).

314. See *id.* at 2–3 (contrasting Justice William Brennan’s focus on human dignity with the Burger and Rehnquist Courts’ focus on the dignity of states).