

THE CASE FOR EDUCATIONAL FEDERALISM:  
PROTECTING EDUCATIONAL POLICY FROM  
THE NATIONAL GOVERNMENT'S  
DISECONOMIES OF SCALE

*Roderick M. Hills, Jr.\**

There have been reform committees of fifty, of sixty, of seventy, of one hundred and all sorts of numbers that started out to do up the regular political Organizations. They were mornin' glories—looked lovely in the mornin' and withered up in a short time, while the regular machines went on flourishin' forever, like fine old oaks. . . . The fact is that a reformer can't last in politics. He can make a show for a while, but he always comes down like a rocket. Politics is as much a regular business as the grocery or the dry-goods or the drug business. You've got to be trained up to it or you're sure to fail.<sup>1</sup>

INTRODUCTION

In a federal system, which level of government—federal, state, or local—should pursue educational innovations? And should the level of government affect how aggressively the innovators proceed? It would be folly to insist on clear and rigid answers to such general questions. But I will press the less risky (and, therefore, less interesting) position of a weak presumption: the higher the level of government pressing the innovation, the stronger the presumption that the innovation should be modest. Moreover, the national government's intervention ought to be geared towards promoting an otherwise voiceless constituency's political participation, not towards promoting a particular policy prescription.

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1 WILLIAM L. RIORDON, *PLUNKITT OF TAMMANY HALL* 17, 19 (1963).

My argument for this modest national role is rooted in tempered optimism about what I shall call “stably governed households” and pessimism about the federal government’s capacity to improve household decision-making. Both the pessimism and optimism spring from the same source—the enormous and undiversified stakes that stably governed households have in both their children’s education and the value of owner-occupied residential real estate. These stakes suggest that there are few scale economies in K-12 education that cannot be realized by subnational governments. Even the most capably governed households need help from larger-scale governments, but subnational governments are, for the most part, equal to the task. Moreover, the reasons for giving deference to stably governed households in their educational decisions also suggest deference for subnational governments, because the latter tend to be more firmly under the control of the former than higher levels of government.

Household autonomy, in short, implies federalism. The national government’s role can be limited to supplementing households’ and subnational governments’ incentives where educational programs have spillover benefits not captured by parents and homeowners and where, as a result, subnational government will tend to under-supply the good in question—for instance, military science (e.g., West Point) or aid to the indigent (e.g., Head Start).

On the pessimistic side, I will suggest that the national government does not have a good track record of mobilizing households that lack stable governance to provide political support for its educational programs. Where the beneficiaries of federal educational programs have been stably governed households—for instance, family farms or children with learning disabilities—then those beneficiaries control the program and maintain its funding. Unlike stably governed households, however, households headed by indigent or single parents do not have the organizational capacity to mount strong political support for federal initiatives. Federal reforms for the benefit of these households are, therefore, perpetually at risk of being overwhelmed by ethnocultural divisions or cartels of educational providers—the same forces that stymie educational equality at the subnational level, but, at the federal level, further aided by the unwieldy bicameral and presidentialist legislative process that mires the national democracy in perennial gridlock.

National interventions to promote educational equality, therefore, face a paradox of what Paul Peterson has called the mismatch

between “functional” and “political” federalism.<sup>2</sup> If the federal government focuses on its functional advantage of aiding constituencies that subnational governments neglect, then the federal reform may lack sufficient political support. But, if the federal government broadens its mandate to pursue generalized reforms of the K-12 curriculum, teacher evaluation, or testing of students, then they diffuse their revenue and regulatory effort in fixing that which is not broken—the subnational educational system catering to stably governed households. Worse yet, such federal reforms might break what does not need to be fixed, by eroding school districts’ reliance on local political networks and own-source revenue, characteristics that make those districts responsive to the demands of stably governed households. Uniform testing mandates or teacher evaluation standards may also provoke a backlash from middle-class suburban households who find federal reforms—for instance, testing mandates or curricular standards—to be a gratuitous impediment to what they regard as well-functioning schools.

Like Plunkitt’s reforming “mornin’ glories,” reformers are not likely to have staying power unless they can find or create some “machine” with the political capacity to carry on the reform after the federal reformers have lost national power. Federal educational reformers, therefore, might be best advised to focus on the political over the technocratic: they might concentrate less on pedagogical reforms best designed to induce educational achievement and more on fostering subnational constituencies that will sustain federal reforms through the vicissitudes of national politics. Rather than anxiously specify pedagogical programs (“portfolio schools,” KIPP, Successful for All, etc.) to see which offers the best hopes for an upward tick in standardized test scores, reformers might instead focus on cultivating a constituency of grateful low-income parents by giving them the incentives and political skills to fight for their own educational interests. The ultimate goal should be to transform the beneficiaries of federal action into a constituency with the same political clout as the stably governed households that dominate subnational government. Otherwise, federal educational policy may become a recipe for policy-making ADD—in Charles Payne’s pungent phrase: “so much reform, so little change.”<sup>3</sup>

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2 See generally PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 16–49 (1995) (discussing the costs and benefits of federalism in various policy spheres).

3 CHARLES PAYNE, *SO MUCH REFORM, SO LITTLE CHANGE* (2008).

## I. SUCCESS AND FAILURE IN HOUSEHOLDS' EDUCATIONAL SELF-GOVERNANCE

One can usefully think of households in which the households' owners also jointly raise children residing in the households' property as consumer cooperatives specializing in the management of child-rearing services and residential real estate. Two-thirds of American households actually own the real estate that they occupy,<sup>4</sup> but even the remaining third that rents their housing must manage their leasehold by negotiating a price, monitoring the use of utilities, dividing up cleaning chores, making furnishing decisions, allocating living space, and fulfilling payment responsibilities. Likewise, while under three percent of families with children "home-school" those children,<sup>5</sup> a far larger percentage of households actively manage their children's education by making the fundamental decisions about where to live (and, therefore, where their children will attend public school), how to intervene in PTA or school board elections, and how to encourage homework and studying. Finally, households' transfer of wealth to their children is simply staggering, constituting, by some measures, a majority of total social wealth.<sup>6</sup>

How well do these consumer-cooperatives perform in child rearing? (I'll defer the question of real estate management and its relation to education for Part II.). In general, as I explain in more detail in Part I.A, stably governed households have such a good track record in, and such good incentives for, effective child rearing, that governmental officials would do well to treat their decisions as presumptively serving the best interests of their children.

This presumption does not mean that households do not sometimes fail. Even the best governed households face collective action problems requiring help from officials at a higher level of government, and a substantial number of households collapse from internal disagreements, corruption, or incompetence. For these household problems, as I explain below in Part I.B, some sort of governmental intervention is required. I reserve for Part II the question of which level of government, national or subnational, is best suited for coming to households' assistance.

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4 FED. INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING, 2011, *available at* <http://www.childstats.gov/americaschildren/index3.asp>.

5 *Id.* at 197.

6 See Laurence J. Kotlikoff, *Intergenerational Transfers and Saving*, 2 J. ECON. PERSP. 41, 43-44 (1988).

A. *The Case for Governmental Deference to Stably Governed Households*

By “stably governed households,” I mean a special subset of all households in which two adults jointly own and manage their common living space and also jointly act as guardians for children residing on the premises.<sup>7</sup> These specially defined households are stably governed in that (a) the co-owners of the household own the real estate and other resources needed for the children as an undivided commons, (b) either law or strong social norms or both discourage unilateral decision-making by either of the pair of owners regarding the household or children, and (c) exit is discouraged through social norms as well as the division of pooled assets regardless of initial contribution.<sup>8</sup>

On this admittedly sketchy definition, the substantial majority of children in the United States continue to be raised within stably governed households. Two-thirds of all children are raised by two married parents.<sup>9</sup> To avoid misunderstanding, I emphasize that marriage of the households’ co-owners is neither necessary nor sufficient for that household to be stably governed: in theory, any two persons who have pooled resources and impeded their capacity to exit from the common child-rearing enterprise can qualify as stably governed by my definition. In practice, creating such households through contract is rare and, in any case, there are no statistics on such contractually bound stakeholders’ track record. Therefore, the track record of married couples has to serve as a crude proxy by which to measure the prevalence and performance of stably governed households. Although family law varies from state to state, all such rules involve

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7 As Robert Ellickson has noted, it is important to distinguish between “households” and “families.” “Households” are systems of collective internal governance regulating relations among common occupants of residential real estate, while “families” are collectivities of persons related by blood, marriage, or adoption that may or may not cohabit in the same residential structure. In my lexicon, “stably governed households” are a subset of all households—those households controlled by a pair of individual owners in which both owners also enjoy the rights and duties of guardians of the minor children residing in the household. See Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 *YALE L.J.* 226, 229–31 (2006).

8 The definition of a stably governed household offered here is akin to the definition of a “liberal commons” as defined by Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *YALE L.J.* 549, 581–98 (2001).

9 Although the number of U.S. children living with a single parent increased from twenty-three percent in 1960 to thirty-four percent in 2010, two-thirds of all children are still raised by married couples who constitute a subset (albeit a large majority) of what I term stably governed households. AMERICA’S CHILDREN, *supra* note 4.

substantial pooling of resources of spouses, equal division of pooled resources on dissolution, and norms discouraging dissolution (one of which, indeed, is the equal division itself). To the extent that such rules give each of the two childcare providers an equal share of post-dissolution common pool, the rules discourage individualistic shirking and aggrandizement of common-pool resources, effects that tend to redirect those resources towards expenditures beneficial to children.<sup>10</sup> To the extent that parties to a marriage bargain less in the shadow of post-dissolution outcomes and more in light of the social norms for dividing household labor, the post-dissolution rules matter less and social norms, more.<sup>11</sup> Measured according to norms rather than law, the social norms of marriage in the United States, although far from ideal, are relatively egalitarian when compared to those of other societies.<sup>12</sup> Again, this egalitarianism encourages resource pooling and discourages both dissolution and pre-dissolution shirking on contributions to the common household enterprise.

The continued prevalence of such households in child-rearing is good news for their constituent children: it is one of the most consistent findings of research on child welfare that children in such stably governed households are better off than children raised by plausible

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10 On the effects of post-dissolution rules for dividing resources on parties' share of marital resources during the marriage, see generally Robert A. Pollak, *A Transaction Cost Approach to Families and Households*, 23 J. ECON. LIT. 581 (1985) (applying the transactional cost approach to the family changes the structure and relationships regarding marital resources). On the idea that improving the post-dissolution position of each party and thereby balancing the bargaining position of each party within the household can improve the position of the children by reducing the incentive of either party to aggrandize resources for personal benefit, see generally Shoshana Grossbard, *Repack the Household: A Response to Robert E. Ellickson's*, *Unpacking the Household*, 116 YALE L. J. POCKET PART 341 (2007) (addressing the need to include household labor in economic analyses); Marjorie B. McElroy & Mary Jean Horney, *Nash-Bargained Household Decisions: Toward a Generalization of the Theory of Demand*, 22 INT'L ECON. REV. 333 (1981) (using demand theory to characterize family economics).

11 See generally Shelly Lundberg & Robert A. Pollak, *Separate Spheres Bargaining and the Marriage Market*, 101 J. POL. ECON. 988 (1993) (explaining how bargaining equilibria change between single and two-parent households); Robert A. Pollak, *Bargaining Around the Hearth*, 116 YALE L.J. POCKET PART 414, 415 (2007) (arguing that in single-parent households, laws matter more than Ellickson thinks).

12 On the GLOBE survey of sixty-two societies' gender egalitarianism, the United States scored 5.06 (social values), ranking seventh out of sixty-two societies. See ROBERT J. HOUSE ET AL., *CULTURE, LEADERSHIP, AND ORGANIZATIONS* 365–66 (2004). The United States does not fare so well on an assessment of gender equality when compared to other industrialized democracies, ranking only seventeenth out of fifty-eight nations, albeit eighth in educational attainment. See AUGUSTO LOPEZ-CLAROS & SAADIA ZAHIDI, *WOMEN'S EMPOWERMENT* 8 (2004).

rival institutions (e.g., single parents, orphanages, foster families, etc.), regardless of whether welfare is measured by current poverty,<sup>13</sup> mortality and health,<sup>14</sup> or rates of child abuse and neglect.<sup>15</sup> Although it is possible that these findings are a “selection effect” caused by a hidden variable correlated with but different from marriage itself, multiple efforts to uncover that hidden non-marital variable have proven fruitless: even “shotgun” marriages, for instance, seem radically to reduce poverty.<sup>16</sup>

Why do stably governed households so consistently outperform rival institutions? If one believes, as does Jim Dwyer, that child care expertise is important for child-rearing success,<sup>17</sup> then the apparent superiority of stably governed households over its rivals is a mystery. The adults in charge of a stably governed household, after all, are not required to be licensed or otherwise screened before they assume child-rearing duties.<sup>18</sup> Moreover, precisely because they are stable, there are few occasions (such as divorce hearings or 911 calls) for *ex post* interventions by court-appointed psychiatrists or other child care professionals to which one of the parents does not consent.

Yet, contrary to the predictions of Dwyer’s expertise-based theory, children in stably governed households do much better than either children raised in aggregate-care facilities— orphanages, group homes, etc.— or foster families, where professional screening, licensing, and supervision is required.<sup>19</sup> One possible answer to the mystery

13 See Robert I. Lerman, *The Impact of the Changing U.S. Family Structure on Child Poverty and Income Inequality*, 63 *ECONOMICA* 119, 137 tbl.10 (1996); Adam Thomas & Isabel Sawhill, *For Richer or for Poorer: Marriage as an Antipoverty Strategy*, 21 *J. POL’Y ANALYSIS & MGMT.* 587, 597 (2002).

14 G. Weitoft et al., *Mortality, Severe Morbidity, and Injury in Children Living with Single Parents in Sweden: A Population-Based Study*, 361 *LANCET* 289, 295 (2003).

15 ANDREA J. SEDLAK ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT § 5.3 (2010). The NIS-4 study was based on a survey of almost 11,000 child welfare professionals in 122 counties within the United States.

16 See ROBERT I. LERMAN, *MARRIED AND UNMARRIED PARENTHOOD AND ECONOMIC WELL-BEING* 21–22 (2002).

17 See James. G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 *CALIF. L. REV.* 1371, 1447 (1994).

18 Despite occasional calls for licensing of parents, see, e.g., Hugh LaFollette, *Licensing Parents*, 9 *PHIL. & PUB. AFFAIRS* 182, 182 (1980) (arguing the merits of requiring a parenting license), no such *ex ante* screening exists in the United States for married couples who raise their own children.

19 For a sample of studies describing the relatively poor performance of institutional care when compared to either foster-family care, see DEP’T OF HEALTH & HUMAN SERVS., *REPORT OF THE SURGEON GENERAL’S CONFERENCE ON CHILDREN’S MENTAL HEALTH* (2000); Sandra J. Altshuler & John Poertner, *The Child Health and*

might be that good incentives are more important for child rearing than expertise. Childcare providers with good incentives, after all, will seek out the assistance of experts and defer to those who can make a credible signal of expertise. Experts with weak incentives to care about their wards' welfare, however, have little reason to bring their expertise to bear. Persons in charge of stably governed households have powerful incentives to pay close attention to their children's welfare created by the basic structure of the household—in particular, long-term cohabitation and vicarious liability.

Because they must share living quarters with the persons under their supervision for extended periods of time—typically sixteen to eighteen years—caregivers in stably governed households have incentives to develop strong attachments to their children and train them in important social and self-care skills. Because they are legally liable to support such children over the long term and can be legally liable for their children's misbehavior, such guardians have incentives to train their children to avoid anti-social or criminal behavior and embrace economic self-sufficiency. Because there are two care providers, each with a veto on the unilateral decisions of the other, there is some minimum separation of powers to reduce the chances of capricious or self-interested decisions.<sup>20</sup> Because there are only two executives, however, the danger of diluted responsibility from spreading decision-making power over a larger group is mitigated: parents in a stably governed household come close to being a “unitary executive” with the familiar advantage of low decision-making costs. This does not mean that such decision-makers cannot delegate their parenting

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*Illness Profile—Adolescent Edition: Assessing Well-Being in Group Homes or Institutions*, 81 CHILD WELFARE 495 (2002); Richard P. Barth, *Institutions vs. Foster Homes: The Empirical Base for the Second Century of Debate*, JORDAN INST. FOR FAMILIES (2002); M. Colton, *Carers of Children: A Comparative Study of the Practices of Residential and Foster Carers*, 6 CHILDREN & SOC'Y 25 (1992); Deborah A. Frank et al., *Infants and Young Children in Orphanages: One View from Pediatrics and Child Psychiatry*, 97 PEDIATRICS 569 (1996).

20 On the idea that separation of powers in household governance protects children's interests in deliberate decision-making, see Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1327–28 (1994) (arguing for some capacity for state intervention to insure that parents do not maintain an unmonitored monopoly on the children's access to information, medical care, and other necessities). I suggest only that the advantage of two parents over a single parent rests on analogous logic of checks and balances. Of course, adding an extra pair of hands to help with conflicts between work and child care provide an equally obvious explanation for the advantages of two caretakers over a single provider. See generally Chloe E. Bird, *Gender Differences in the Social and Economic Burdens of Parenting and Psychological Distress*, 59 J. MARRIAGE & FAM. 809 (1997) (analyzing the division of the burden of childcare between partners and the effects thereof).

duties to schools, nannies, doctors, therapists, coaches, and other childcare specialists or collectives. So long as parents can retract these delegations, however, they remain structurally more unified than governance arrangements with larger numbers of decision-makers. It may take a village to raise a child, but it takes a far smaller number of people to decide what kind of village (or *kibbutzim*) will be effective child-rearing delegates.

All of these structural incentives insure that stably governed households tend to keep “caseloads” small enough to insure the careful monitoring of their charges: the average number of children in stably governed households hovers around two.<sup>21</sup> This is not to say that the adults of a household cannot experience conflicts of interest with even such a small and homogenous constituency (between, say, educating their children and putting them to work to earn income for the household). But even such conflicts are tempered by the adults’ long-term responsibility for the welfare of their “employees.”<sup>22</sup>

By contrast, the major rivals to stably governed households have low stakes in the outcomes of the children entrusted to their care. Their jurisdiction tends to be fragmented and uncoordinated, based on the provision of some narrow range of specialized services over a tiny segment of the child’s life (e.g., education, law enforcement, psychiatric counseling, etc.) to a large number of children (ranging from classrooms with dozens, to caseloads of hundreds, of kids). Unsurprisingly, such providers can develop professional interests in employment or political patronage<sup>23</sup> distinct from the interests of the children with whose care they are officially charged.

The superiority of stably governed household caregivers’ incentives over those of alternative providers remains regardless of whether one assumes that parents are motivated by altruism or self-interest. Since Gary Becker made the economics of family relations a subject

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21 U.S. BUREAU OF THE CENSUS, *Average Number of Children per Family and per Family with Children*, (2004), <http://www.census.gov/population/socdemo/hh-fam/tabST-FI-2000.pdf>.

22 For an analysis of how households in different cultures reflect their own children’s interests and desires in the tradeoff between labor and education, see JO BOYDEN ET AL., *WHAT WORKS FOR WORKING CHILDREN?* (1998); MANFRED LIEBEL, *A WILL OF THEIR OWN* (2004). Unlike much of the literature on child labor, Boyden et al. and Liebel, accept the possibility that children’s choices to work rather than attend school are sometimes both sincere and rational, and attempt to gauge children’s preferences through field surveys.

23 For illustrations of corruption and incompetence in one family court system, see generally CAROLE BELL FORD, *THE WOMEN OF COURTWATCH* (2005) (detailing sexism and corruption in the Harris County Family Court).

for formal economics,<sup>24</sup> the debate over parental motivation continues with no definite empirical resolution: likely, parental motivations vary with parents' characteristics (for instance, parents' level of education).<sup>25</sup> Regardless of whether altruism in the child's well-being or self-interest in, say, old age insurance motivates household care providers, those providers have more direct interest in their child's well-being than alternative caregivers who lack either sort of motivation to the same degree. Caregivers outside of the stably governed household have ties to children too tenuous or short-lived to generate either incentives rooted in love or money.

How should the superiority of stable households' incentives affect governmental attitudes towards those households' decisions about their children's education? I have suggested elsewhere that, on purely instrumental grounds, government would be wise to adopt a rule of deference to household decision-making regarding children's best educational interests.<sup>26</sup> As noted above, governmental officials face extraordinary constraints of time and resources in supervising children: unable to assess the merits of most child-rearing decisions

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24 GARY S. BECKER, *TREATISE ON THE FAMILY* (1991). Becker assumed altruistic parents. Becker has since recanted on the exclusive reliance on parental altruism. See Gary Becker, Nobel Prize Lecture (Dec. 9, 1992), at 50, <http://home.uchicago.edu/gbecker/Nobel/nobellecture.pdf> ("Many economists, including myself, have excessively relied on altruism to tie together the interests of family members.").

25 See Joseph G. Altonji et al., *Parental Altruism and Inter Vivos Transfers: Theory and Evidence*, 105 J. POL. ECON. 1121, 1159 (1997); Donald Cox & Mark R. Rank, *Inter-Vivos Transfers and Intergenerational Exchange*, 74 REV. ECON. & STAT. 305, 313 (1992); Fumio Hayashi, *Is the Japanese Extended Family Altruistically Linked? A Test Based on Engel Curves*, 103 J. POL. ECON. 661, 672 (1995); Shelly J. Lundberg et al., *Do Husbands and Wives Pool Their Resources? Evidence from the UK Child Benefit*, 32 J. HUMAN RESOURCES 463, 479 (1997); see also J. Ignacio Gimenez-Nadal, *Parents' Education as Determinant of Time Transfers to Children: An Intergenerational Transfer Approach* (Univ. of Zaragoza Ctr. for Time Use, Research Working Paper), available at <http://www.eea-esem.com/files/papers/EEA-ESEM/2011/143/Manuscript%20EEA%20Conference.pdf> ("[W]e hypothesize that, while exchange purposes may drive the decisions of low educated individuals regarding transfers of human capital to children, altruism may drive the decisions of highly educated individuals.").

26 I defend this view in Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003). The premise of my article is identical to the position defended in JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (2006)—namely, that parents' entitlements to deference for their child-rearing decisions must rest entirely on the benefits of such deference to the welfare of the child. I disagree with Dwyer insofar as Dwyer argues that such entitlements to deference cannot be characterized as a parental "right": the Constitution frequently protects the "rights" of institutions (juries, home-rule cities, trade unions, political parties, churches, and other collective entities) to govern their constituents for the sake of those constituents' own welfare.

through direct observation of outcomes, such officials ought to treat decisions of stably governed households as presumptively more likely to serve the best interests of the child than, say, the decisions of teachers or probate judges.

Federal and state law, indeed, frequently gesture towards something roughly like such a presumption. Both federal and state constitutional substantive due process doctrines require some level of deference towards parental decision-makers.<sup>27</sup> Likely more significant are the myriad of decisions construing state statutes in favor of parental authority to make educational decisions on behalf of their children.<sup>28</sup> These judicial efforts to support parental authority, however, tend to be narrow in scope, leaving governmental authorities with broad latitude to intervene in familial affairs, especially when there are signs that the household in question might not be stably governed.<sup>29</sup>

As argued in the next section, this judicial reluctance to define a broad area of parental autonomy in raising children makes sense, because households are properly entitled to deference only when they are stably governed and only when they are not impeded by collective action problems that interfere with their children's legitimate educational interests. Institutions larger than the individual household are needed to insure these conditions of household autonomy in child-rearing.

### B. *Failure of Households in Educational Governance*

The deference to which stably governed households are entitled does not eliminate the need for extra-household interventions from state officials. Even stably governed households face collective action

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27 See, e.g., *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (invalidating a state law allowing any person to petition for visitation rights); *Von Eiff v. Azicri*, 720 So. 2d 510, 516–17 (Fla. 1998) (same); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993) (same).

28 See, e.g., *Jonathan L. v. Superior Court*, 81 Cal. Rptr. 3d 571 (Ct. App. 2008) (construing state teacher certification requirements to exempt home-schooling parents); *Birst v. Sanstead*, 493 N.W.2d 690, 696 (N.D. 1992) (ruling that home-schooling parents need not comply with fire codes applicable to school buildings).

29 See, e.g., *Dupuy v. Samuels*, 465 F.3d 757, 761–62 (7th Cir. 2006) (deciding that parents were not entitled to pre-deprivation hearing before complying with child safety plan, because such compliance is “voluntary” despite threat from state of loss of child custody absent compliance); *In re Adoption of J.P.*, 2011 Ark. 535 (2011) (holding that custodial father could forbid grandparents' visitation with father's children but that father's spouse and children's stepmother could not adopt children, because, given familial friction, adoption would not serve the best interests of the children). See generally JEANNIE SUK, *AT HOME IN THE LAW* (2009) (discussing possible areas in which the government may intervene in private citizens' personal affairs).

problems in overcoming market failures—in particular, failures in credit and insurance markets—that require coordination with other households. Moreover, not all households are stable: like any other organization, the household’s decision-making reliability can collapse as a result of irreconcilable internal disagreements, incompetence, or corruption. In either the case of market-failure or internal breakdown, some system of governance that transcends the individual household is required. What sort of government (local, subnational, national) is a question I defer until Part II. For now, I will describe in more detail below how such failures arise, grouping them into the expositionally convenient categories of “market failures” that afflict even well-governed households and “internal breakdowns” that burden those households that lack a stable government.

### 1. Inter-household Coordination to Address Market Failures

Education costs money. Even home-schooling households need sufficient resources to support one parent’s staying at home to teach the kids. If the educational investment produces human capital worth the expense, then altruistic parents would make optimal investments in education without much pressure from state officials. Even selfish parents would make such investments if they could secure later repayment from their offspring.

The likely failure of credit and insurance markets, however, impedes even stably governed households from raising funds sufficient to cover the costs of optimal educational services. In theory, households could borrow the additional funds required for educational services, securing them by the extra earning capacity that such funds provide. In practice, lenders cannot easily obtain security interests in human capital produced by educational expenditures: foreclosing on a high school diploma is a trickier proposition than foreclosing on mortgaged real estate, because of the intangibility and mobility of the asset and norms against indentured service.<sup>30</sup> Assuming (implausibly) that parents lack altruistic regard for their own offspring, the parents would face a similar problem in obtaining a credible commitment for repayment from their children. The failure of insurance markets leads to a similar problem of insufficient human capital:

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30 See Dirk Krueger & Jessica Tjornhom Donohue, *On the Distributional Consequences of Child Labor Legislation*, 46 INT’L ECON. REV. 785, 788 (2005) (“[W]e assume that adults cannot borrow against their children’s incomes to finance their educations . . .”). See generally Edward Lazear, *Family Background and Optimal Schooling Decisions*, 62 REV. ECON. & STAT. 42 (1980) (analyzing the differences between rich and poor and the cost of borrowing for that education).

households facing income shocks because of an adult member's sickness, death, or unemployment cannot easily purchase unemployment insurance to smooth the disruption in cash flow. Putting children to work becomes an informal form of household self-insurance.<sup>31</sup> While this decision is not necessarily irrational or harmful either to household or child,<sup>32</sup> failures in the market of unemployment insurance will lead to the over-use of children in labor and the under-accumulation of human capital.

It is sometimes also argued that human capital investments have spillover benefits on social welfare beyond the individual household that households would, therefore, under-value. In an intuitive way, for instance, it is easy to see that society as a whole benefits from mass literacy necessary for a competent democracy. But the notion that parents lack sufficient incentive to teach their children to read because the children would not internalize all of the benefits of democracy, culture, etc., that reading promotes seems implausible, given that the private benefits of education are so large in an industrialized society where the price of illiteracy is destitution.<sup>33</sup> The problem of educational spillover benefits might better be understood not as households' neglect of spillovers beneficial to society as a whole but rather as selfish parents' indifference to educational investments even when they improve the earning power of their children, because the parents derive no private benefit from those investments and cannot secure any credible commitment from those children to re-pay parental effort. Understood as a problem of selfish parents, the spillover problem might better be analyzed as a failure of credit markets.

The obvious solution for these failures of credit or insurance markets is to use taxation or regulation to mandate and finance education and unemployment insurance. The question remains whether this solution ought to be imposed subnationally or nationally, a question to which I turn in Part II.

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31 See Kaushik Basu, *Child Labor: Cause, Consequence, and Cure With Remarks on International Labor Standards*, 37 J. ECON. LIT. 1083, 1104 (1999); Krueger & Donohue, *supra* note 31, at 787–88.

32 SANDY HOBBS & JAMES McKECHNIE, *CHILD EMPLOYMENT IN BRITAIN* (1997) (noting empirical evidence suggesting that five hours of child labor per week has no effect on children's educational attainment). Even a trade-off between present and future income might be in the child's own self-interest depending on the returns of each activity.

33 Robert Topel notes that it is exceedingly difficult to find evidence that investments in education produce spillover benefits in excess of its considerable private benefits. See Robert Topel, *The Private and Social Values of Education*, in *EDUCATION AND ECONOMIC DEVELOPMENT* 47, 53–56 (2004), available at <http://www.clevelandfed.org/research/conferences/2004/november/cbook.pdf>.

## 2. The Internal Breakdown of the Stably Governed Household

Even assuming that households run by married couples meet my definition of “stable government,” it is plain that there are lots of children in unstable households. Not all such households fail in their child-rearing, but, as Jim Dwyer argues, there are a sufficient number of such households that some mechanism beyond the household itself by which to repair the breakdown or wind up the household’s affairs—in the extreme case, through removal of children from the home and assignment of child custody.

Even when households with children remain stably governed, there still is a need for “constitutional rules” to insure a stability-inducing bargaining framework in which caregivers deliberate about the deployment of resources. Put simply, tyrannical families do not make for stably governed households. Instead, tyrannically constituted households create incentives for the tyrant to skim household resources for personal consumption, depriving children of educational resources and inspiring the sorts of non-cooperative behavior succinctly described by Ted Bergstrom as “harsh words and burnt toast.”<sup>34</sup> Necessary framework rules include not only rules for property division upon divorce but also mediation of intra-household conflicts in anticipation of ongoing household relations.<sup>35</sup> Even if one takes the view that formal contract law has little role to play in an ongoing marriage, there are many subsidies, services, and policies, ranging from “automatic arrest” and “no-drop” policies for domestic violence complaints to testing requirements for the children of home-schooling parents, all of which require some funding or regulating body larger than the dysfunctional household itself. Finally, parents need a minimum level of competence correctly to evaluate the educational offerings funded by the state: parents with very high discount rates or very low information about the future value of human capital are unlikely to make rational decisions about investments in such capital. There is some evidence that home-schooling parents who allow themselves to be assessed do a competent job of providing educa-

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34 Theodore C. Bergstrom, *Economics in a Family Way*, 34 J. ECON. LIT. 1903, 1926 (1996).

35 Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 227 (2011); see also LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* (1981) (containing an extended defense of the idea that disputes within an ongoing marriage ought to be resolved through formal contract litigation, a position traditionally resisted by courts).

tional services.<sup>36</sup> But the evidence is unreliable, because it does not correct for rampant selection bias: minimum schooling requirements, private school certification, and testing of home-schooled students would, therefore, seem to be part of the framework necessary to insure that caregivers possess the minimum competence necessary to take the lead role in supervising their children's education.

In sum, the stably governed households' large stakes in their children's educational outcomes suggest that such households' caregivers receive a presumption of autonomy in arranging for the education of children. But collective action problems and the need to insure that the households are indeed competent and stable suggest that some governmental officials outside the household ought to play a substantial, albeit deferential, role as well. The question remains, however, how to divide authority between national and subnational governments over the necessary governmental role in supplying the deficits of households.

## II. FEDERALISM FOR FAMILIES: STRIKING THE RIGHT BALANCE BETWEEN NATIONAL AND SUBNATIONAL POWER IN EDUCATIONAL POLICY-MAKING

Using governmental policies to redress the educational shortcomings of households does not eliminate collective action problems but merely relocates them. Instead of worrying about how households will overcome failures of credit and insurance markets, one must worry about overcoming failures of political mobilization. Lobbying for educational benefits has spillover benefits extending beyond the interests of any single individual or household: given that they can enjoy the benefits of others' political activity without contributing to it, why would beleaguered household caregivers, juggling children's homework, household chores, and employment, take time out of their beleaguered schedules to participate in politics? The usual problem of political collective action is magnified when trying to raise public funds to overcome failures of credit markets in education, because most households, at any given moment, are childless. Persuading or outvoting these childless households is costly. Winning against the childless means hiring babysitters to attend boring hearings or PTA meetings, informing oneself of rival politicians' and bureaucrats' educational proposals, organizing often acrimonious parent groups, showing up at hearings, passing petitions, sending postcards and e-

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<sup>36</sup> See, e.g., Lawrence Rudner, *Scholastic Achievement and Demographic Characteristics of Home School Students in 1998*, 7 EDUCATION POL'Y ANALYSIS ARCHIVES (1999), available at <http://epaa.asu.edu/ojs/article/view/543/666>.

mails to elected officials, and generally insuring that government provides the funds and rules necessary for effective education. What incentives do busy parents have to do their fair share and not free ride off of their neighbors' efforts?

As I suggest below in Part II.A, subnational government is that collective-action facilitating device: households with children can more easily overcome collective action problems where they do not face the *diseconomies of scale* to which national government is subject. There are several causes of such diseconomies, ranging from the absence of capitalization of school quality into home values to the higher relative costs of political participation for households with children in jurisdictions larger than a school district. This is not to say that the federal government ought not to play a role in setting educational policy. As I shall argue in Part II.B, there is an important but constrained role for federal officials in redistributing wealth, funding unemployment insurance, mandating certain educational programs with national benefits, and supplying other national public goods. But that role must be limited to avoid eliminating the institutional advantages that stably governed households enjoy in subnational as opposed to national democracy.

#### A. *Three Advantages of Subnational Democracy For Mobilizing Support for Education*

Consider three advantages of subnational democracy in mobilizing support for education—bonding social capital, home-value capitalization, and ideological sorting. Each of these advantages suggests that subnational government ought to play a lead (although not an exclusive) role in raising revenue for, and regulating the content of, education.

##### 1. Bonding Social Capital and Subnational Democracy

Increasing the size of a community tends to increase its demographic and ideological heterogeneity, and there are reasons to believe that heterogeneity can impede cooperation by reducing what Robert Putnam has termed “bonding social capital.”<sup>37</sup> “Bonding social capital” refers to the capacity of like-minded persons to cooperate with each other in collective action tasks requiring high degrees of trust and reciprocity.<sup>38</sup> Putnam has defended the claim that social

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37 ROBERT D. PUTNAM, *BOWLING ALONE* 19 (2000).

38 *See id.* Credit for coining the term “social capital” goes not to Putnam but to L.J. Hanifan, *The Rural School Community Center*, 67 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 130 (1916), who argued that individuals could accumulate “social capital” just as

heterogeneity decreases the capacity of citizens to cooperate, because people who think alike will tend to trust each other more than people who have ideological, religious, or cultural differences,<sup>39</sup> a contention that, despite being hotly controverted, has found support from other researchers measuring the capacity of citizens to unite for civic projects or interact with each other in political activities.<sup>40</sup> Despite the controversy that Putnam's claim has generated, the claim that ideological diversity impedes political cooperation is hardly novel, dating at least from James Madison's *Federalist No. 10*.

Regarding education in particular, there is some historical support for the claim that communities with lower levels of ethnocultural, ideological, and income diversity have found it easier to raise revenue for educational investments. Claudia Goldin and Laurence Katz found that school districts' voters were more likely to embrace the massive investment in high schools during the early twentieth century if they were more economically and ethnoculturally homogenous.<sup>41</sup> Likewise Marion Orr found that inter-racial distrust distracted Baltimore schools from their educational mission.<sup>42</sup>

Households with children tend to have many opportunities for social and political interaction, simply because children draw parents into social networks of sports leagues, parent-teacher associations, and more informal school activities. As William Fischel notes, these networks can be used to participate in public life, as households with chil-

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corporations could accumulate financial or physical capital. According to Hanifan, if an individual "may come into contact with his neighbor, and they with other neighbors, there will be an accumulation of social capital, which may immediately satisfy his social needs and which may bear a social potentiality sufficient to the substantial improvement of living conditions in the whole community." *Id.*

39 Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137, 142–43 (2007).

40 David Campbell has produced empirical evidence that ideological homogeneity within a community increases political participation motivated by a sense of civic duty to a common social enterprise, while ideological heterogeneity increases participation motivated by a desire to prevail in a political conflict. See generally DAVID E. CAMPBELL, *WHY WE VOTE* (2006) (detailing the study discussed above). Campbell's study found that civic motivation was primarily affected by ideological rather than demographic heterogeneity: Boulder, Colorado counts on this score as more heterogeneous than Metro Detroit or Rochester, New York. David E. Campbell, *Community Homogeneity and Participation*, Address at the Annual Meeting of the American Political Science Association (Sept. 2–5, 2004) (transcript at 25–26).

41 See Claudia Goldin & Laurence F. Katz, *The Origins of State-Level Differences in the Public Provision of Higher Education: 1890–1940*, 88 AM. ECON. REV. 303, 306 (1998); Claudia Goldin & Laurence F. Katz, *The Shaping of Higher Education: The Formative Years in the United States, 1890 to 1940*, 13 J. ECON. PERSP. 37, 53 (1999).

42 MARION ORR, *BLACK SOCIAL CAPITAL* 40–41 (1999).

dren come to know and trust each other as a result of their other interactions in school-based networks.<sup>43</sup> But Fischel also notes that the social capital created by these networks is “community-specific”: it is most effective within the local jurisdictions in which the network of “social capitalists” is concentrated.<sup>44</sup> Learning how to divide up time and talking points with one’s neighbors helps a lot at the school board’s microphone, because the neighbors are all physically concentrated within the jurisdiction of the school board. Those skills will not, however, help a lot with coordinating a campaign to influence a congressional committee chair residing in another state.<sup>45</sup>

Elevating educational policymaking to the federal level, therefore, strips households with children of their most valuable political asset—their social capital derived from their local networks. As the relevant constituency increases in size, those personal networks become less politically useful: they are replaced by media that create connections between strangers—mass mail alerts, email blasts, blog posts, newsletters, television advertisements, etc. Because these mass-mobilizing devices cost money and require expertise in mass communication, groups with expertise in fundraising will have a comparative advantage over households with children. In effect, the change in level of government also changes relative to political power, placing households with children on turf where their skills and in-person networks are least relevant and where fundraising skills are most relevant.<sup>46</sup>

By suggesting that households with children will do better subnationally rather than nationally, I do not mean to suggest that smaller jurisdictions are always “closer to the people.” On issues where the costs of acquiring information are very high, there might be scale economies in communication that outweigh the advantages of cheap access to local political networks. For constituencies that are unaware or uninterested in the relevant policies, the advantages of a large and heterogeneous political ecology—a diverse national media with dozens of websites, high levels of television coverage, nationally competitive political parties, a plethora of competing interest groups, etc.—may promote political participation far more effectively than the ease of showing up at a hearing in person. Because national political

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43 See WILLIAM A. FISCHEL, *MAKING THE GRADE* 238 (2009).

44 See *id.* at 227–29.

45 See *id.*

46 On the increasing importance of money in larger jurisdictions, see generally Anthony Gierzynski & David Breaux, *Legislative Elections and the Importance of Money*, 21 LEGIS. STUD. Q. 337 (1996). On the trade-off between cash and in-person networks, see SIDNEY VERBA ET AL., *VOICE AND EQUALITY* 288, 303 (1994).

processes tend to be more salient than subnational processes, the former might actually be “closer to the people” than the latter whenever public consciousness of or interest in political issues is low.<sup>47</sup>

But the peculiar characteristic of stably governed households with children is that their high stakes in educational policymaking already tend to make them well-informed about educational policy disputes, without the aid of a dense and heterogeneous interest group and media environment. The marginal gains in issue-salience from elevating educational issues to the national level will, therefore, likely be small, while the loss of access to the relevant decision-makers is large. If one accepts the argument in Part I that these households deserve special deference on their educational decisions, then it also follows that subnational politics ought to receive special primacy on educational policy-making, because subnational politics tend to give more weight to the political strengths of stably governed households.

## 2. Capitalization and Subnational Democracy

Caregivers in charge of households with children are a minority of voters.<sup>48</sup> Political institutions that enable them to acquire allies among the childless, therefore, are important for such households’ political success. Tying the values of residential real estate to the quality of local schools is one way for these households to acquire such allies. Local school districts funded by *ad valorem* property taxes imposed on structures within the district tie together home values and school quality, giving childless homeowners an incentive to vote for increased school spending. School quality affects home values, because potential homebuyers are well-informed about local governments’ policies to improve local school quality and shun markets that lack amenities like schools. To avoid driving away potential buyers from the local market, local “home voters” carefully monitor local governments’ decisions even when those voters do not directly consume the services produced by local governments. Thus, childless couples are driven by capitalization of educational decisions into home values

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47 On the tradeoff between political “access” (high at the subnational level) and political “salience” (high at the national level but lower at the subnational levels), see Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 THEORETICAL INQUIRIES L. 113, 122 (2005).

48 See SCHOOL WISE PRESS, <http://www.schoolwisepress.com/index.html> (last visited Apr. 22, 2012).

to care about the quality of local public schools even though they do not care about the welfare of other people's children.<sup>49</sup>

The key to capitalization, however, is decentralization of school finance. The benefits of improvements financed by extra tax effort must be available only to those home buyers who purchase structures to which that extra tax liability attaches. If one could attend the schools without buying the home, then only the cost of the tax effort, not the benefit of the expenditures, would be capitalized into the value of the homes, significantly eroding the incentive of those homes' owners to lobby for higher school taxes.

That capitalization can induce support for educational expenditures in a decentralized system of school finance is suggested by the rapid expansion of age-graded schools and high schools between 1870 and 1925. This expansion represented a massive increase in school expenditures—the second-largest in the nation's history—because high schools cost far more than one-room mixed-aged schoolhouses.<sup>50</sup> As William Fischel has demonstrated, voters' willingness to shoulder these costs was rooted in the desire to protect their property values. Far from being a "top-down" imposition by professional educators on rural voters, the decision to consolidate school districts required local referenda controlled by local voters who approved the consolidations out of fear that their jurisdictions would be bypassed by home buyers migrating to cities in search of better educational opportunity.<sup>51</sup> The need to cater to a mobile population also drove voters to adopt uniform curricular standards so that the children of new migrants arriving in September could pick up their schooling where they left off in June.<sup>52</sup> In effect, local action produced national curricular uniformity and massive educational expenditures, driven by what Fischel calls "the persuasion of property."<sup>53</sup>

How willing would the childless be to pay for other people's children in the absence of capitalization? There has been a fierce debate over whether capitalization is necessary to induce voters to support

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49 For an outline and defense of this capitalization-based theory of childless households' incentives to finance education, see WILLIAM A. FISCHEL, *THE HOME VOTER HYPOTHESIS* 39–97 (2001).

50 See Fischel, *supra* note 44, at 68–72 (detailing the decline of one-room schoolhouses).

51 See *id.* at 101–06; Claudia Goldin & Lawrence F. Katz, *Human Capital and Social Capital: The Rise of Secondary Schooling in America, 1910–1940*, 29 J. INTERDISCIPLINARY HIST. 683, 683 (1999).

52 See FISCHEL, *supra* note 44, at 119–56.

53 See *id.* at 117–80.

school spending.<sup>54</sup> There is, however, significant evidence that capitalization can provide important motivation for elderly voters to cast favorable votes for school spending.<sup>55</sup> In light of the evidence of generational competition in the allocation of public sector resources,<sup>56</sup> it seems reasonable not to test one's luck with elderly voters' altruism but instead to provide maximum incentives for the childless to support educational expenditures. Decentralization of school finance is one such incentive.

### 3. Ideological sorting and subnational government

Education policy is divisive, touching on ethnoculturally sensitive issues of language and religion. The ideological "heat" generated by these issues can either paralyze the national political process in an ethnoculturally heterogeneous nation or result in the marginalization of cultural minorities. Unsurprisingly, federal regimes with histories of linguistic or religious conflict—Canada, Switzerland, and Germany—devolve educational issues to subnational governments where each demographic group constitutes a local majority.<sup>57</sup> Such subna-

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54 Much of this debate has revolved around whether centralization of school finance in the wake of the California Supreme Court's decision in *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977), induced voters to oppose state taxation sufficient to maintain expenditures for California schools. Compare Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?*, 50 UCLA L. REV. 801 (2003) (arguing that the *Serrano* decision had little effect on Proposition 13), with William A. Fischel, *How Serrano Caused Proposition 13*, 12 J.L. & POL. 607 (1996) (asserting *Serrano* did cause Proposition 13), and William A. Fischel, *Did John Serrano Vote for Proposition 13? A Reply to Stark and Zasloff's "Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?"*, 51 UCLA L. REV. 887 (2004) (claiming that Stark and Zasloff's work does not refute such an assertion).

55 See FISCHEL, *supra* note 44, at 49–51.

56 See generally James M. Poterba, *Demographic Structure and the Political Economy of Public Education*, 16 J. POL'Y ANALYSIS & MGMT. 48 (1997) (discussing the negative relationship between school spending and voter age). For a survey of evidence, see James M. Poterba, *Demographic Change, Intergenerational Linkages, and Public Education*, 88 AM. ECON. REV. 315 (1998).

57 See, e.g., GRUNDGESETZ FÜR DIE BUNDESREPUBLIC DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], May 23, 1949, BGBl. I art. 7(4) (Ger.) (placing the regulation of private schools under the regulation laws of the Länder ["unterstehen den Landesgesetzen"]); *id.* at art. 91a (defining the provision of higher education as a "joint task" under which the federal legislature enacts through "framework legislation" or Rahmengesetze over which the Länder have control through the Bundesrat's veto); *id.* at art. 91b (defining the Federation-Land agreements for "educational planning and in the promotion of research institutions and research projects of supraregional importance"); Constitution Act, 1867, 30 & 31 Vict., c. 3, § 93 (Eng.) ("In and for each Province the Legislature may exclusively make Laws in relation to Education . . .").

tional “sorting” of different groups’ favored policies in subnational enclaves has the normative appeal of pluralism: by giving each group some share of subnational power, ideological sorting satisfies a sense of fair representation of each point of view that a single national resolution of the divisive issue might offend.<sup>58</sup>

This normatively attractive vision of cultural pluralism helps explain why education and family law were reserved for subnational decision-making in the United States by the end of the 19th century. There is a tendency in legal scholarship to implicitly disparage American localism on family matters as the product of racism and sexism.<sup>59</sup> While this view has substantial historical justification, the explanation ignores another basis for the nineteenth century ideology of localism on family matters—cultural pluralism. Within the Democratic Party, a motley coalition of culturally peripheral groups joined the Southerners in espousing a vision of cultural pluralism against what they took to be a culturally imperialistic agenda of New England evangelicals to impose moral uniformity on the nation. This coalition included not only Southern white supremacists but also backwoodsmen who wanted to hunt on Sunday, Catholics who wanted to send their children to parochial school, Irish city dwellers who wanted to socialize with their Tammany ward captain at the local saloon, and German Lutherans who liked their beer.<sup>60</sup> The “Yankee” evangelicals’ agenda against which this coalition fought certainly included anti-patriarchal elements: Evangelicals relied heavily on the mobilization of Christian mothers to purge the household of male violence and male lack of personal self-control.<sup>61</sup> But the program was also an exceptionally intrusive and nativist effort to suppress cultural diversity in the name of social control, an effort that included not only the

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58 See Roderick M. Hills, Jr., *Federalism as Westphalian Liberalism*, 75 *FORDHAM L. REV.* 769, 788, 793 (2006).

59 As Jill Hasday has noted, rhetoric about family and educational matters being “local affairs” has roots in Southerners’ opposition to Reconstruction. See Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 *UCLA L. REV.* 1297, 1299 (1998). Reva Siegel likewise attributes such rhetoric to the efforts of white Southerners to sustain a culture of patriarchy in which male household heads could be dominant at home, free from “external” intrusions of governmental officials. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947, 1000–01 (2002).

60 For this ethnocultural explanation of nineteenth century political conflict, see RONALD P. FORMISANO, *THE BIRTH OF MASS POLITICAL PARTIES* (1971); RICHARD J. JENSEN, *THE WINNING OF THE MIDWEST* (1971); PAUL O. KLEPPNER, *THE CROSS OF CULTURE* (1970).

61 On the gendered character of the Republican calls for moral reform, see REBECCA EDWARDS, *ANGELS IN THE MACHINERY* (1997).

goals of racial equality and women's suffrage but also bans on parochial education of children, use of foreign language in schools, polygamous marriage, drinking of alcohol, smoking of tobacco, dueling, gambling, and obscene literature while promoting Sabbath observance.<sup>62</sup> Liberation of the freedmen from Southern oppression was part of a larger agenda for liberating all non-Protestant minorities from the oppression and social isolation allegedly resulting from Catholic superstition, the German language, gambling, alcohol, and other sins against family values and national Protestant unity.<sup>63</sup>

The various cultural minorities resisting this evangelical program could not be united by any substantive theory of the household or privacy: white Southerners had no love for Catholic parochial schools, and German Lutherans in the Midwest were relatively indifferent to Jim Crow. Instead, the Democratic Party held the coalition together with the rhetoric of decentralizing "domestic matters" in the name of cultural pluralism.<sup>64</sup> Regarding education in particular, this Democratic program of decentralization of family matters began in earnest as early as 1842, when Northern Democrats had used the rhetoric of "local control" in educational matters to pass the 1842 Maclay Act in New York.<sup>65</sup> Decentralization became the standard Democratic method of accommodating Catholic demands for power over schools, enabling them to satisfy Catholics' desire to control hiring and curriculum where they were numerically dominant while avoiding the accusation that Democrats favored "papist" schools.<sup>66</sup> Appealing to this anti-Yankee coalition, the Democratic Party used this slogan of local control over "domestic affairs" to defeat Republican efforts to pro-

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62 On the moral agenda of the evangelical wing of the Republican Party, see FORMISANO, *supra* note 61, at 328. On the idea of a "benevolent empire" of interdenominational Protestant reformers, see RONALD G. WALTERS, *AMERICAN REFORMERS 1815-1860*, p.p. 33-34 (2d ed. 1997).

63 See WARD M. MCAFEE, *RELIGION, RACE, AND RECONSTRUCTION* 20-24 (1998).

64 See *id.*

65 In a bid for Catholic support, Governor Seward of New York, a Whig, offered to replace New York City's system of private schools run by a charitable society with a system of ward-based public schools to be governed by a board elected by voters within the ward. Seward, however, could not bring his Whigs along to endorse his proposed decentralization measure. See DIANE RAVITCH, *THE GREAT SCHOOL WARS, NEW YORK CITY, 1805-1973*, p.p. 67-69 (1974). In response, Democrats led by William Maclay, the state assemblyman who chaired the Schools Committee, then took up the cause of New York City's Catholics, urging ward control over local educational policy in the name of the Democrat's anti-monopoly ideology. *Id.* at 70-71. Despite deep misgivings from Democrats and opposition from Whigs, the Maclay Act passed after being amended to ban "sectarian" instruction in school. *Id.* at 72-76.

66 See BENJAMIN JUSTICE, *THE WAR THAT WASN'T* 69-87, 103-05 (2005); CARL F. KAESTLE, *PILLARS OF THE REPUBLIC* 154 (1983).

mote racial equality in schools, defeating federal bills providing financial aid for schools between 1870 and 1872<sup>67</sup> and stripping Charles Sumner's Civil Rights bill of its provisions barring segregation in education in 1874.<sup>68</sup> The Southerners returned the Northern Catholics' support on race issues in 1875 by helping the Catholics defeat Republicans' proposed constitutional amendments that would have barred public aid to religious schools or societies.<sup>69</sup> Uniting the Democrats was not (merely) white supremacy but hostility to what was perceived as the Yankees' "aggressive didacticism" in family affairs.<sup>70</sup> As one Democratic opponent of the Blaine amendment declaimed, his state did not want "New England and other states to dictate to her what her schools shall be or what her taxes shall be, and least of all what her religion shall be."<sup>71</sup> Southern Protestants might not have loved Catholics, but both hated the "Yankee" reformer even more than they disliked each other.

Republicans' program of federal regulation of schools for the sake of racial, religious, and linguistic integration turned out to be a consistent political loser, destroying the Republican Party in the South,<sup>72</sup> alienating German Lutherans in the Midwest,<sup>73</sup> and galvaniz-

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67 See MCAFEE, *supra* note 64, at 105–15.

68 *Id.* at 153–57.

69 President Grant proposed an amendment in his annual message to Congress on December 7, 1875, "prohibiting the granting of any school funds or taxes, or any part thereof, either by the legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination, or in aid or for the benefit of any other object of any nature or kind whatever." Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 52 (1992). Blaine's amendment re-worded Grant's proposal to provide that "no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations." 4 CONG. REC. 205 (1875). Although the proposed amendment passed the House, it was narrowly defeated in the Senate after the failure of several efforts to strengthen its perhaps deliberately ambiguous language. Because the amendment passed by the House barred only the use of money "raised by taxation . . . for the support of public schools, or derived from any public fund therefor, or any public lands devoted thereto," the question was left open whether it applied to general revenues raised for general purposes. Efforts to close the loophole floundered in the Senate. See 4 CONG. REC. 5245–46 (1876).

70 DANIEL WALKER HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* 33 (1979).

71 4 CONG. REC. 5589 (1876) (statement by Senator Stevenson).

72 Republican support for Sumner's proposal to racially desegregate schools led to the devastation of the Republican Party in the South and Midwest in the 1874 elections, causing the Republicans to lose control of the House of Representatives. See RICHARD H. ABBOTT, *THE REPUBLICAN PARTY AND THE SOUTH, 1855–1877*, p.p.

ing Catholics everywhere to become passionately loyal Democratic voters. By the 1890s, Republican strategists had had enough: William McKinley assiduously avoided any discussion of culturally divisive racial, ethnic, or religious issues in his 1896 Presidential campaign.<sup>74</sup> Republicans and Democrats alike accepted the principle so thoroughly that, by 1904, Justice Holmes, a Civil War veteran and nationalist, could, in dissenting from the majority's broad reading of congressional powers in *Northern Securities v. United States*,<sup>75</sup> invoke the prospect of "Congress[']s . . . regulat[ing] . . . marriage and divorce" as the ultimate constitutional *absurdum* that commerce clause doctrine ought to avoid.<sup>76</sup>

In sum, there was more to the nineteenth century rhetoric of local control over family affairs than white supremacy or patriarchy (although both prejudices motivated Catholics and Southerners deploying such rhetoric). As with other culturally heterogeneous federal regimes, the United States also adopted devolution of family matters in the late nineteenth century as a way of fostering cultural pluralism on issues that were culturally and religiously sensitive to ethnocultural minorities.

The normative appeal of such subnational "ideological sorting" obviously depends on the ideologies being sorted. If the disputed question is the basic status of a group of persons as equal citizens,

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230–31 (1986); WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION, 1869–1879*, p.p. 198–258 (1979); MICHAEL PERMAN, *THE ROAD TO REDEMPTION* 140–41 (1984). Southern Republicans generally opposed desegregation, fearing correctly that it would destroy their support among poor whites who might otherwise go along with a policy of "separate but equal." Howard N. Rabinowitz, *From Exclusion to Segregation: Southern Race Relations, 1865–1890*, 63 *J. AM. HIST.* 325, 332–33 (1976). Some of these "carpet-bagger" Republicans, such as Albion Tourgee, the North Carolina state court judge and novelist, passionately supported equality for the freedmen at risk of their lives but nevertheless bitterly excoriated Charles Sumner for pressing the school desegregation issue without regard to electoral realities in the South. See OTTO H. OLSEN, *CARPET-BAGGER'S CRUSADE* 203 (1965).

73 See JENSEN, *supra* note 61, at 147 (describing the politics of Midwestern Democrats in appealing to German and Scandinavian Lutherans to resist Republican reformers' efforts to require the teaching of English as a predominant language in all schools during the late 1880s).

74 See OLSEN, *supra* note 73, at 332–35.

75 193 U.S. 197 (2004).

76 *Id.* at 402–03 (Holmes, J., dissenting) ("Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the Government, which I do not believe that it will be, I can see no part of the conduct of life with which on similar principles Congress might not interfere.").

then devolution will not likely be regarded as a morally justified settlement: the jurisdictional divisions of subnational borders will not stop citizens in one jurisdiction from sympathizing with the sufferings of minorities in other regions, and their outrage will likely overwhelm any legalistic limits on national power.<sup>77</sup> Few would applaud federalism for the sake of safeguarding pluralism about Jim Crow. Over some range of issues, however, difference of opinion does not implicate the essential equality of citizens: the Democratic Party's policy of devolving authority to subnational jurisdictions over the regulation of alcoholic beverages and aid to parochial schools, for instance, did not lead to an acrimonious culture war, and it extended equal concern and respect to both sides of the cultural divide. Education and family law present many similar issues—i.e., matters that are religiously or culturally sensitive enough for devolution to advance pluralism but sufficiently remote from oppression as to present small risk of affront to democratic equality.<sup>78</sup> It is natural, then, to preserve subnational jurisdiction over family life as a general matter, while making exceptions for national intervention when subnational jurisdictions behave oppressively towards vulnerable groups—in effect, keeping the baby without the bathwater.

*B. When Should There Be a Federal Role in Education? Supplying National Public Goods and Removing Barriers to Subnational Political Participation*

Given the efficacy of subnational government in supplying education subnationally, what role should the federal government play? Conventional federalism theory suggests two national functions—supplying national public goods and removing barriers to subnational political participation. As I shall suggest in Part II, the former is much easier for the national government to accomplish than the latter.

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77 As Abraham Lincoln noted, slavery constituted such an issue, because subnational resolution in favor of slavery in one region would inevitably spark intense moral revulsion in other regions, prodding the latter to stretch their legal powers to discourage the evil rather than to remain neutral. See Abraham Lincoln, Speech at New Haven Connecticut (Mar. 6, 1860), in 4 COLLECTED WORKS OF LINCOLN 13, 18 (Roy P. Basler ed., 1953). “[W]e cannot help dealing with it: we must do something about it, whether we will or not. . . . We think that a respect for ourselves, a regard for future generations and for the God that made us, require that we put down this wrong where our votes will properly reach it.” *Id.* at 15–16.

78 Consider, for instance, bilingual education, vouchers for religious schools, sexual education, civics curriculum, disciplinary policy, traditional or novel pedagogy, etc., none of which present serious risk that any group will be subordinated with Jim Crow-style oppression.

## 1. Supplying National Public Goods

That the national government has a role to play in supplying national public educational goods has been recognized at least since the federal government created the United States Military Academy at West Point in 1802. A national public good is simply a good the benefits of which transcend subnational boundaries such that no single unit of subnational government—a household, township, municipality, county, or state—has sufficient incentive to produce the benefit in sufficient quantity.<sup>79</sup> Military technology like engineering is an obvious example: fearful that the nation would be dependent on foreign engineers for its military needs, Jefferson created the West Point Academy despite his general philosophy of limiting federal power. The private market for engineering services would not likely motivate parents or school districts to finance human capital in the arcana of civil engineering in sufficient quantity to supply the army's military need, simply because those needs reflect the non-excludable benefits of domestic defense that no private market actor can capture. It is easy enough *mutatis mutandis* to justify many other national educational programs that subsidize national public goods under-supplied by subnational government. Whenever the benefits of an educational program exceed the boundaries of a state, there is a theoretical case for a federal grant program to encourage state production of the program.

The boundary-crossing benefits of a program are not merely the result of the program's inherent characteristics but also the constitutional ground rules that prohibit state interference with the movement of goods and persons across state lines. Take, for example, unemployment insurance and aid to indigent households more generally. Because states are prohibited from excluding or taxing goods manufactured in other states, states cannot easily charge their own manufacturers with the costs of unemployment insurance for fear that those businesses will be put out of business by non-resident firms constitutionally immune from such charges but nevertheless importing cheap goods into the state. Fear of such competition from Southern states deterred Northern states from offering unemployment insurance programs despite then-Governor Franklin Roosevelt's efforts to organize cooperative action among the states.<sup>80</sup> Precisely such worries about the interstate mobility of capital led the U.S. Supreme Court to uphold the Social Security Act's unemployment insurance program in

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79 See Public Goods, in *Glossary*, THE WORLD BANK GROUP, <http://worldbank.org/depweb/english/beyond/global/glossary.html> (last visited Apr. 22, 2012) (defining "national public good" as "benefiting the entire population of a country").

80 See PETERSON, *supra* note 3, at 96–97.

*Steward Machine Co. v. Davis*.<sup>81</sup> Thus, subsidies for unemployment insurance are a national public good, because the benefits of income smoothing transcend the boundaries of any single state.

Likewise, redistribution of wealth to insure a national minimum of income for U.S. citizens constitutes a national public good, because, given the constitutionally guaranteed mobility of indigent citizens,<sup>82</sup> any single state's efforts to supply such a national minimum will encourage other states to export their indigent households to the generous state.<sup>83</sup> Subsidizing education is an especially attractive mechanism for redistributing income, because educational subsidies avoid the perception of moral hazard that dampens well-heeled citizens' willingness to part with their own cash to insure a national welfare minimum. Federal aid for free school lunch, Head Start pre-kindergarten childcare, and aid under the ESEA program are all examples of such federal aid for indigent households, justified by the national scope of redistributive programs' benefits, a scope insured by interstate mobility of indigency.

These familiar general points regarding redistribution of wealth apply with special force to education: subnational governments are notoriously unreliable agents of indigent households when providing educational services, because the usual devices that induce constituents to lobby for educational improvement—capitalization of schools into home values and school-based social networks of child-rearing households—fail where indigent households are concerned. Capitalization fails, because attracting indigent homebuyers generally does not improve “homevoters'” home values.<sup>84</sup> School-based networks fail whenever indigency erodes the bonding social capital that allows other households to dominate the educational process. It is a familiar point that such social capital is closely related to educational attainment and reduced by crime. Single parents are also much less capable of networking to advance their children's interests. Given that crime, single parenthood, and lack of a high school diploma are

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81 301 U.S. 548, 588 (1937).

82 See *Edwards v. California*, 314 U.S. 160, 177 (1941).

83 See PETERSON, *supra* note 3, at 27.

84 Because indigent households purchase or rent cheaper structures than the average structure in a jurisdiction, they pay a lower-than-average property tax bill. Such a cross-subsidy lowers rather than raises home values of the neighbors who pay the cross-subsidy, inducing those neighbors to deter the immigration of indigent households through devices such as restrictive zoning that forces newcomers to live in structures with values comparable to those of current residents. On the general concept of “fiscal zoning,” see David E. Hamilton, *Building the Associative State: The Department of Agriculture and American State-Building*, 64 *AGRIC. HIST.* 207 (1990).

closely correlated with indigency, it is no surprise that indigent households do not make superlative monitors of their educational providers.

That the federal government would intervene to supplement and control educational services in jurisdictions containing a high percentage of indigent households, therefore, would seem to follow naturally from the logic of educational federalism. This is analogous to the logic described in Part I.B above that leads the subnational government to intervene when the internal governance of the household itself collapses as a result of poverty, low educational attainment, divorce, etc. Just as such households are not such reliable providers of childcare that the state can easily defer to their judgments about education, so too, jurisdictions dominated by such households are unlikely to be reliable providers of educational services.

## 2. Democratization of Subnational Governments

The national government also has a role to play in democratizing subnational governments, because the reliability of subnational governments depends entirely on their responsiveness to popular demand. This is true both broadly as a matter of popular sovereignty, constitutionally (as a matter of Article IV, section 4), and narrowly as a matter of using federalism to advance children's welfare. Oligarchical governments—for instance, Alabama's government between 1901 and 1946, when it was dominated by the "Big Mules" of local industry and the timberland owners—may tend to under-supply local public goods to protect their interests from taxation.<sup>85</sup> Likewise, deep ethnocultural hostilities may lead a majority coalition to freeze out a minority, consequently undersupplying local public goods to that minority because of its lack of political power.

There is a familiar justification for the national government to play in ending such minority cartels over subnational government: because the national government will be controlled by a different and more heterogeneous coalition of interests than any single state, the oligarchical state's dominant group will not be able, in theory, to stymie national legislation democratizing that state's political process.

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85 CARL GRAFTON & ANNE PERMALOFF, *BIG MULES AND BRANCHHEADS* 39–59 (1985). In theory, even an oligarch will want to maximize the re-sale value of their real estate and, therefore, will have an incentive to supply local public goods to attract homebuyers. In practice, such an attitude requires an active interstate market in housing and liquid real estate interests that can be converted into residential real estate in response to such demand. Both ingredients may have been missing in pre-WWII Alabama.

Likewise, there may be certain economies of scale in political participation: national politics have more developed media, more competitive political parties, and more visible political figures. These scale economies may allow national leaders to highlight and eliminate political abuses at the subnational level that could pass unspotted if left to the exclusive attention of subnational officials.

There are numerous familiar and less obvious examples of the federal government's playing such a democratizing role in subnational government. The obvious examples include the Guarantee Clause of Article IV of the U.S. Constitution,<sup>86</sup> the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments, and the Voting Rights Act<sup>87</sup> and the Motor Voter Act.<sup>88</sup> The less obvious examples include federal prosecutions of subnational officials' corrupt actions under federal statutes like the Mail Fraud Act<sup>89</sup> and the Hobbs Act,<sup>90</sup> prosecutions best justified by the low salience of much subnational politics and consequent need for an outside authority to highlight violations of the subnational jurisdiction's own ethical standards.<sup>91</sup> The federal role in desegregating schools and insuring equal access to education for racial minorities is the obvious education-specific example of such democratization. From *Brown v. Board of Education*<sup>92</sup> to Title VI of the 1964 Civil Rights Act,<sup>93</sup> the federal government's major role in education has been in insuring an end to racial isolation, segregation, and denial of equal educational opportunity, justified implicitly by the subnational governments' lack of trustworthiness in pursuing these goals.

### III. OVERCOMING DISECONOMIES OF SCALE IN FEDERAL EDUCATIONAL REFORM

There is no doubt that, both as a matter of law and political theory, the federal government appropriately plays some sort of role in educational policy. As explained below in Part III.A, however, scale diseconomies threaten to stymie federal policy's effectiveness. The size and heterogeneity of congressional districts make it difficult for

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86 U.S. CONST. art. IV, § 4.

87 42 U.S.C. §§ 1973–1973aa-6 (2006).

88 *Id.* §§ 1973gg–1973gg-10 (2006).

89 Mail Fraud Act, ch. 321, 35 Stat. 1123 (1909) (as codified at 18 U.S.C. §§ 1341–42 (2006)).

90 18 U.S.C. § 1951 (2006).

91 See Hills, *supra* note 48.

92 347 U.S. 483 (1954).

93 Pub. L. No. 88-352, 78 Stat. 252 (1964) (as codified at 42 U.S.C. § 2000d–2000d-4a (2006)).

stably governed households to use their school-based networks to lobby for adequate school revenue in Congress. Federal investments in education, financed from nationally uniform taxes, are not capitalized into home values, depriving the federal government of the power to mobilize childless households on behalf of educational investments. Stripped of these special advantages of capitalization and social capital, the federal government's policies can also be paralyzed by ideological polarization in Congress resulting from a culturally heterogeneous nation, polarization that is mitigated by ideological sorting at the subnational level. All of these diseconomies become exacerbated when the beneficiaries of the federal program already lack the social networks used by stably governed households to monitor educational providers. For such beneficiaries, misuse of federal funds is invisible: they are poor enforcers of federal mandates through either politics or litigation.

As I shall suggest below in Part III.B, the precondition for effective federal assistance is the creation of a "political machine"—a local network of politically active recipients of federal dollars—that can be trusted to advance federal goals by getting federal dollars to the right people for the right purpose. Such a network duplicates the subnational governments' advantages by creating some of the networks of program advocates that the federal government otherwise lacks. I will conclude with some observations about how the federal government might duplicate that track record when aiding low-income households.

A. *How Scale Diseconomies Misdirect Federal Dollars: Title I's and Head Start's Rocky Track Records*

The history of federal involvement in educational aid to indigent households is a history of federal scale diseconomies rendering ineffective the federal assistance. The essential difficulty is that assistance was directed to service providers, the incentives of which were imperfectly aligned with federal goals. In effect, the federal government had chosen an unreliable "machine" to subsidize. If the beneficiaries of the money were politically well-organized or had well-organized allies, then they could have come to the assistance of the federal government (and themselves). But indigent households lack the social capital of stably governed households, and the latter, far from wanting to assist the former in securing federal money, sought to appropriate that money for themselves. Moreover, the heterogeneity of the national population interfered with the federal government's capacity

to seek out more reliable allies: sectional controversy deterred federal use of religious education providers.

The problems with misappropriation of federal aid began soon after Title I of the Elementary & Secondary Education Act (ESEA)<sup>94</sup> was enacted in 1965. The ESEA provided up to \$3 billion of aid (by 1970) to aid “local education agencies serving areas with concentrations of children from low-income families.”<sup>95</sup> Within four years, however, a reputable study found that the money given to school districts was not actually spent on the education of low-income children.<sup>96</sup> Moreover, the Martin-McClure study found that subnational governments made no effort to evaluate whether Title I money was being spent on classroom instruction that had any likelihood of improving socially disadvantaged students’ education.<sup>97</sup> This finding was repeated by later studies showing that school districts systematically spent more on middle-income children than children from low-income households, largely because teacher salaries vary lockstep with seniority and the education of the teacher, insuring that dollars are not targeted to the teachers serving the neediest students.<sup>98</sup> Aside from not being well-targeted towards low-income students, Title I and Head Start expenditures have consistently under-performed in producing educational results. Since the publication of *A Nation at Risk*, the federal government has increasingly demanded that recipients of federal aid for compensatory education test their students to show improvements in their learning.<sup>99</sup> Despite almost thirty decades of increasingly strict accountability measures, however, the results have been disappointing.<sup>100</sup>

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94 Pub. L. No. 89-10, 79 Stat. 27 (1965) (as codified in scattered sections of 20 U.S.C. and 42 U.S.C (2006)).

95 *Id.* § 201.

96 RUBY MARTIN & PHYLLIS McCLURE, TITLE I OF ESEA: IS IT HELPING POOR CHILDREN? (1969).

97 See Jerome T. Murphy, *Title I of ESEA: The Politics of Implementing Federal Education Reform*, 41 HARV. EDUC. REV. 35, 55 (1971) (citing the Martin-McClure study as finding “inadequate time and attendance records, lack of substantiation of overtime pay to [Title I] teachers, inadequate accounting procedures covering contractual services, inadequate equipment controls, and unremitted unused funds”).

98 See generally MARGUERITE ROZA, EDUCATIONAL ECONOMICS (2010) (showing that teacher salaries bear no correlation to educational need of students).

99 See generally MARIS A. VINOVSIS, FROM A NATION AT RISK TO NO CHILD LEFT BEHIND (2009) (chronicling the increasingly strict accountability standards imposed by federal law).

100 For a report card on student progress in at the end of the 1990s, see Maris A. Vinovskis, *Do Federal Compensatory Education Programs Really Work? A Brief Historical Analysis of Title I and Head Start*, 107 AM. J. EDUC. 187 (1999). For a more recent assessment, see DAVID K. COHEN & SUSAN L. MOFFITT, THE ORDEAL OF EQUALITY

The cause of the subnational misdirection of ESEA money was not subnational fraud but rather the usual difficulty with intergovernmental aid: all money being green, school districts could offset the federal aid they received by re-directing state and local funds to serve noisier constituencies—middle-class parents in the suburbs and teachers in search of salary bumps unrelated to the teaching of low-income students. This pattern of subnational governments' redirecting federal grants from assisting low-income households to local goals is not confined to educational grants: subnational agents ordinarily pursue local goals (for instance, economic development) with national resources unless carefully monitored by their national principal.<sup>101</sup> Indeed, these local incentives to under-provide national goods are precisely the justification for the federal grant in the first place.<sup>102</sup>

The federal government has attempted to solve this problem of unfaithful subnational implementation by tightening national standards of curriculum and student evaluation. But the federal government itself is impeded by scale diseconomies that prevent it from controlling errant subnational behavior. The federal government lacks the fiscal tools available to subnational governments—in particular, capitalization of educational investments into property values—that could induce local voters to pay less attention to the fate of grant revenues than own-source revenues. That local voters focus less intensely on the fate of grant revenues than own-source revenues is a familiar point.<sup>103</sup> By contrast with the parents and taxpayers of a school district, voters at the national scale pay little attention to federal reform efforts.<sup>104</sup> Moreover, the federal governments' threats to

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(2009); VINOVSIS, *supra* note 99, at 220–22. On the failure of subnational governments to allocate money on the basis of any research-based theory of cost-effectiveness, see Allan Odden & Lawrence O. Picus, *School Finance Adequacy at a Crossroads*, 32 EDUC. WEEK 40 (2007).

101 PAUL E. PETERSON ET AL., *WHEN FEDERALISM WORKS* 171–72 (1986).

102 See *id.* at 170–74; Helen Ingram, *Policy Implementation Through Bargaining: The Case of Federal Grants*, 25 PUB. POL'Y 499, 513–19 (1977); Donald B. Rosenthal, *Bargaining Analysis in Intergovernmental Relations*, 10 PUBLIUS 5, 26–28 (1980) (describing local governments' officials dickering with federal officials over vague terms in federal statute to secure greater power to use federal grants for local ends).

103 That voters monitor grant revenue less carefully than own-source revenue generated from local taxes is suggested by the so-called “flypaper” effect, under which bureaucrats have more control over grant revenue than own-source revenue. See generally James R. Hines, Jr. & Richard H. Thaler, *Anomalies: The Flypaper Effect*, 9 J. ECON. PERSP. 217 (1995) (explaining the anomalies of the “flypaper effect”).

104 For an account of widespread voter ignorance about federal promises and performance in education, see PETER D. HART RESEARCH ASSOCS. & WINSTON GRP., *STANDARDS, ACCOUNTABILITY, AND FLEXIBILITY* (2007), [http://www.ets.org/Media/Education\\_Topics/pdf/5884\\_Key\\_Findings.pdf](http://www.ets.org/Media/Education_Topics/pdf/5884_Key_Findings.pdf).

discipline the local school district for sluggish response to federal mandates are impeded by the small amounts of federal revenue at stake: threats to pull grants can be empty threats when the realization of the threat would injure the very constituencies that the feds are trying to aid.<sup>105</sup> Parental social networks that might work at the local level are less effective at the national level. Ideological gridlock is most intense at the national level, and such strife has impeded the federal government's ability to impose accountability measures. The re-authorization of "No Child Left Behind" has languished in legislative limbo since 2007 as Congress is paralyzed by partisan gridlock, and ethnocultural conflict has prevented the federal government from using private educational providers to induce greater fidelity from local school districts.<sup>106</sup>

The problem in monitoring federal compensatory education is obviously not exclusively the result of federal scale diseconomies: the whole point of federal intervention, as noted in Part I.B.2, is to remedy subnational unresponsiveness to the educational need of low-income households that existed long before the federal government tried to remedy this inattention. Low-income parents might be expected to pay less attention to educational politics than more stably governed households because they lack education, confidence, time, and energy, as noted in Part I.A. The important point is that the federal government cannot solve the problem of subnational indifference to merely imposing federal mandates of curricular standards, testing mandates, and the like. Ordering the tide of student ignorance to recede with a statutory edict declaring high national standards and ordering recalcitrant educators to comply has Canute-like futility to it. Without some local mechanism to exact compliance, such orders remain empty rhetoric.

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105 See MICHAEL J. RICH, *FEDERAL POLICYMAKING AND THE POOR* 233–34 (1993). The threats by various states and school districts to turn down federal money rather than accept federal testing mandates and the Obama Administration's recent waiver of NCLB requirements for states that accept yet further accountability measures suggest that federal revenue lacks the coercive effect sometimes attributed to it. See Sam Dillon, *Facing State Protests, U.S. Offers More Flexibility on School Rules*, N.Y. TIMES, Apr. 8, 2005, at A22, available at <http://www.nytimes.com/2005/04/08/education/08child.html>; Winnie Hu, *10 States Are Given Waivers from Education Law*, N.Y. TIMES, Feb. 10, 2012, at A13, available at <http://www.nytimes.com/2012/02/10/education/10-states-given-waivers-from-no-child-left-behind-law.html>.

106 No Child Left Behind Act, 20 U.S.C. § 6301 (2006). From the outset of Title I, controversy over aid to religious schools has prevented Congress from providing any voucher option to supplement federal aid for "compensatory education" even for palpably inadequate public schools.

B. *The Importance of Household-Based Networks to Successful Federal Educational Policy*

The federal government needs to re-create the sort of institutions for low-income households that enable stably governed households to overcome their collective action problems at the subnational level. Instead of trying to figure out the most technically perfect form of school through research-based mandates, the federal government needs some “boots on the ground” with an interest in low-income children’s educational success. In short, the federal government needs a reliable “machine.”

The importance of having well-organized networks of program beneficiaries to police federal mandates is suggested by those federal educational mandates that have been successfully enforced. The federal government’s first foray into educational policy involved setting aside sections of Western land for the support of schools.<sup>107</sup> As William Fischel has noted, this policy was driven by a desire to make Western land marketable to pioneering households migrating westwards in search of family-friendly real estate.<sup>108</sup> Landowners bidding on federal lots and territorial officials had a large incentive to comply with the federal command, because it was enforced not only by national officials’ action but by western migrants’ purchases. Likewise, the system of agricultural extension education, in which federally financed agents would travel to farms, propagating modern farming technology in the county where the farmers resided, was successful, because the Department of Agriculture cultivated county-based networks of farmers organized into local Farmers’ Bureaus.<sup>109</sup> Those Bureaus effectively controlled the extension agents, advancing the federal agenda because they had incentives properly aligned with the federal government’s program of farming modernization.<sup>110</sup>

Could the federal government foster similar networks to enforce federal mandates for low-income students’ academic achievement? The example of agricultural extension is encouraging insofar as farmers were relatively disorganized at the national level until the Department of Agriculture stepped in to organize them into Farmers’ Bureaus, creating a national network of program advocates that did

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107 See FISCHEL, *supra* note 44, at 21.

108 *Id.*

109 Hamilton, *supra* note 84, at 214–15.

110 See GRANT MCCONNELL, *THE DECLINE OF AGRARIAN DEMOCRACY 171–76* (1953) (describing the power of Farmers’ Bureaus over extension agents); Hamilton, *supra* note 85, at 214–15.

not previously exist.<sup>111</sup> But the analogy is discouraging in that family farms already possessed the bonding social capital of a stably governed household that the federal government merely had to redirect into a national network of federally fostered connections forming a powerful national lobby. By contrast, low-income households do not tend to be stably governed households and would need a boost in self-organization.

It is beyond the scope of this article to lay out a theory of parental empowerment. Instead, I note only that inattention to the political organizations necessary to sustain both the techniques and outcomes are a recipe for a kind of policy-making Attention Deficit Disorder—in Charles Payne’s telling phrase, “so much reform, so little change”<sup>112</sup>—in which politicians raise unrealistic expectations that some educational program will yield test-score improvements in the short-term. In designing a system of federal aid for compensatory education, therefore, the federal government ought to pay some attention to sustaining the parental networks necessary to sustain a program.

How might such attention affect the character of federal reforms? First, a focus on fostering the parental networks capable of sustaining reforms might lead to a greater emphasis on parental satisfaction and involvement in the schools as criteria for educational success. Some types of schools—notably, private schools funded with vouchers given to the parents—seem consistently to generate much higher levels of parental satisfaction than others.<sup>113</sup> Should these levels of satisfaction count in the same way that test scores count—as criteria for a successful school? Should the level of parental willingness to involve themselves in school, by attending a PTA meeting or meeting with teachers, count? If one were interested in fostering parental networks, then one might argue that such indicia of interest and involvement ought to be relevant to the continuing flow of federal aid. The criteria for the Obama Administration’s “Race to the Top” (“RT<sup>3</sup>”) program, awarding aid to subnational jurisdictions under the America Recovery and Reinvestment Act,<sup>114</sup> makes subnational governments’ fostering of parental interest in education a minor criterion for awards.<sup>115</sup> But

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111 See DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* 316–20 (2001); McCONNELL, *supra* note 111, at 171–76.

112 PAYNE, *supra* note 4.

113 See WILLIAM G. HOWELL ET AL., *THE EDUCATION GAP* 168–84 (rev. ed. 2006).

114 Pub. L. 111-5, 123 Stat. 115 (2009).

115 States can win up to ten points (out of 125 points for “state success factors”) by using “support from a broad group of stakeholders to better implement its plans, as evidenced by the strength of statements or actions of support from . . . (b) parents,

none of the criteria for fostering “Great Teachers and Leaders” include any evaluation of teachers and principals for their success in getting parents to show an interest in the school through volunteer activity, showing up at meetings, or otherwise.<sup>116</sup> If one wanted the RT<sup>3</sup> program to be sustained beyond the current Administration, then taking into account the robustness of parental networks involved with the school might be worth a few more points. Second, there is some evidence that schools can be a site for generalized social capital, either by drawing together parents whose children live in the school’s attendance zone<sup>117</sup> or by forming a focus for local entrepreneurs who involve themselves with community affairs ranging from litter cleanup to crime watches.<sup>118</sup> The extent to which a subnational jurisdiction can encourage such entrepreneurship might, again, be a criterion worth considering in assessing a subnational jurisdiction’s educational success.

Third and most important, the federal government should be wary of trying to re-make subnational education from the ground up. There have been various proposals over the last half-century for comprehensive federal reform of subnational education—for instance, replacing subnational systems of taxation with nationally supervised systems of finance<sup>119</sup> or imposing curricular standards and standardized tests aligned with those standards on stably governed households as well as low-income households.<sup>120</sup> But there is no reason to believe that the federal government enjoys any comparative advantage in managing education as a general matter. In discrete educational areas where stably governed households are not dominant or where their incentives are misaligned with the national interest, there is a case for a federal presence. Given that information is the paradigmatic national public good, there is a strong case for a federal role in

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students, and community organizations.” See U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY 7 (2009), <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

116 *Id.* at 9–10.

117 See FISCHER, *supra* note 44.

118 See generally Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Charter Schools, and Urban Neighborhoods*, 122 YALE L. J. (forthcoming 2012) (discussing the negative effects of Catholic school closures).

119 *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1972) represents the U.S. Supreme Court’s rejection of such an effort, often criticized for preserving subnational financial inequity.

120 For an account of New York protests from a decade ago against standardized testing, see Anemona Hartocollis, *Boycotts and a Bill Protest Mandatory State Tests*, N.Y. TIMES, Mar. 6, 2002, at B9, available at <http://www.nytimes.com/2002/03/06/us/boycotts-and-a-bill-protest-mandatory-state-tests.html?pagewanted=all&src=pm>.

promulgating information about subnational school systems' inputs and outputs. There is also a powerful case for federal educational empowerment of low-income households that are not stably governed. Neither of these national functions, however, requires the wholesale federalization of curriculum, evaluation of teachers or students, or management and finance of schools.<sup>121</sup>

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121 For a reform proposal that limits federal involvement in K-12 education to promulgating information and directly financing low-income households' education in public and private schools, see HOOVER INST. KORET TASK FORCE ON K-12 EDUC., CHOICE AND FEDERALISM (2012), <http://media.hoover.org/sites/default/files/documents/Choice-and-Federalism.pdf>.