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## Equality in Dual Enrollment: How Congress Cn Fix the Current Inequalities Created by Dual Enrollment Programs

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# Equality in Dual Enrollment: How Congress Can Fix the Current Inequalities Created by Dual Enrollment Programs

Emily M. LaSpina\*

## ABSTRACT

The educational-achievement gap between socioeconomic classes is a problem in education that remains unsolved. Proponents tout dual enrollment—a program wherein high school students take college classes and receive both high school and college credit—as a solution to this issue. However, in its current form, dual enrollment can actually increase, rather than reduce, the educational-achievement gap.

Fortunately, Congress can reduce the educational-achievement gap by financially incentivizing the states, through the Taxing and Spending Clause, to adopt better dual enrollment practices. Congress can financially incentivize the states to adopt better dual enrollment practices so long as Congress makes clear that the states must adopt better dual enrollment practices before receiving the financial incentive. Importantly, Congress cannot tack the requirement of better dual enrollment practices on to old financial incentives. Rather, Congress must financially incentivize the states to adopt better dual enrollment practices with new federal funding.

For dual enrollment to no longer discriminate against students from low-income families, Congress's better dual enrollment practices must include: mandatory dissemination of dual enrollment information, creation of a funding structure that does not require students and their parents to pay out of pocket for dual enrollment courses, and removal of harmful credit caps. These proposed changes to current dual enrollment programs will transform dual enrollment into a real solution for reducing the educational-achievement gap between socioeconomic classes by making dual enrollment programs truly accessible to all.

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### I. INTRODUCTION

The cost of college education continues to rise,<sup>1</sup> bringing student debt to an all-out crisis.<sup>2</sup> Though the student debt crisis plagues all students, student debt is an especially heavy burden for low-income and minority students.<sup>3</sup> To make matters worse, programs such as dual

1. See Camilo Maldonado, *Price of College Increasing Almost 8 Times Faster Than Wages*, FORBES (July 24, 2018, 8:23 AM), <https://bit.ly/2PxWA8P> (noting that the cost of attending a university doubled from 1989 to 2016 after accounting for inflation and determining that “the cost to attend a university increased nearly eight times faster than wages did”); see also Patrick B. Healey, *We Should All Be Concerned About the Student Debt Crisis*, CNBC (Nov. 4, 2019, 8:00 AM), <https://cnb.cx/2M8Mwky> (pointing out that “[o]ver the past 20 years, college costs have grown at over three times the rate of inflation” and stating that as a result “70% of college graduates have student debt”).

2. See Mark Zandi, *Student Loan Crisis Is Undermining the U.S. Economy. Here’s a Way Out*, PHILA. INQUIRER (Feb. 10, 2020), <https://bit.ly/31PF2JS> (“There is a student loan crisis.”); see also Hillary Hoffower & Allana Akhtar, *11 Mind-Blowing Facts That Show Just How Dire the Student-Loan Crisis in America Is*, BUS. INSIDER (Oct. 11, 2019, 11:17 AM), <https://bit.ly/2uzWSUU>.

3. See *The Income Gaps in Higher Education Enrollment and Completion*, AAC&U NEWS (June/July 2018), <https://bit.ly/34tHwNK> (noting that “as costs of attendance and student loan debt rise while federal Pell Grant support does not, higher education enrollment and completion continue to be less accessible for low-income students and some students of color”); see also Michael Mitchell et al., *State Higher Education Funding Cuts Have Pushed Costs to Students, Worsened Inequality*, CTR. ON BUDGET & POL. PRIORITIES (Oct. 24, 2019), <https://bit.ly/2sBvIvt> (pointing out that states with the largest tuition increases see the greatest expansions in educational-achievement between high- and low-income youth).

enrollment—which allow high school students to take college coursework while in high school and receive both high school and college credit<sup>4</sup>—increase the educational-achievement gap between high- and low-income individuals when the college courses are not offered to students free of charge.<sup>5</sup> Dual enrollment programs, however, still offer wonderful benefits,<sup>6</sup> so eradicating these programs would be harmful to those students currently benefitting.

The experiences of students such as Grace Bush,<sup>7</sup> Sadira Stallings,<sup>8</sup> and Mackenzie O’Berry,<sup>9</sup> demonstrate how students can benefit tremendously from dual enrollment programs. Grace Bush was able to graduate with her bachelor’s degree a week before graduating high school, allowing her to save money on tuition and pursue her master’s degree at 18 years old.<sup>10</sup> Sadira Stallings completed an associate’s degree before graduating high school, all while working two jobs.<sup>11</sup> Mackenzie O’Berry earned a Certified Nursing Assistant (“CNA”) certification during her junior year of high school, which she used to work as a CNA

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4. See *Your Burning Questions About Dual Enrollment, Answered*, DEP’T EDUC.: HOMEROOM (July 1, 2019), <https://bit.ly/31IwCUi> (explaining that “dual enrollment allows students to access college classes and achieve college credit before they graduate high school”).

5. See Erik Gilbert, *How Dual Enrollment Contributes to Inequality*, CHRONICLE OF HIGHER EDUC. (Nov. 5, 2017), <https://bit.ly/36OyOMs> (stating that there is a clear appeal to completing college coursework in a shorter amount of time and “[p]aying \$2,000 for a year of college that would otherwise cost . . . \$10,000,” but noting that “to get that \$8,000 discount, a student needs \$2,000 on hand to pay the tuition” and “[b]ecause [dual-enrolled] students are not in degree-granting programs, they are not eligible for financial aid”).

6. See Matthew Diebel, *Indiana Teen Is Graduating College – Before She Gets Her High School Diploma*, USA TODAY (May 3, 2017, 10:03 AM), <https://bit.ly/2SqQqZR> (discussing Raven Osborne, who completed an associate’s, and then a bachelor’s degree—all before graduating high school—which allowed Raven to obtain a job as a teacher immediately after graduating high school); see also Jen Steer, *Warrensville Heights Student Graduates College Before High School*, FOX 8 CLEVELAND, (Dec. 19, 2019, 10:57 AM), <https://bit.ly/2QeuPRS> (discussing Cameron Ray, who graduated with his associate’s degree as a junior in high school and noting that Ohio’s dual enrollment program, called College Credit Plus, has saved families more than \$569 million in college tuition).

7. See *Florida Girl Graduating from High School and College in Same Week*, CBS NEWS (May 5, 2014, 8:12 PM), <https://cbsn.ws/2ERG5y0>.

8. See *Girl, 17, Earns College Degree Before High School Diploma*, MORNING CALL (May 9, 2017, 9:27 AM), <https://bit.ly/375DuN1>.

9. See *Dual Enrollment Student Earns High School Diploma and Associate Degree Simultaneously*, S. REG’L TECH. C. (June 18, 2018), <https://bit.ly/35SGY5j>.

10. See *Florida Girl Graduating from High School and College in Same Week*, *supra* note 7.

11. See *Girl, 17, Earns College Degree Before High School Diploma*, *supra* note 8.

while completing an associate's degree during her senior year of high school.<sup>12</sup>

As the above examples reflect, dual enrollment programs can positively impact the lives of participating students.<sup>13</sup> Nevertheless, due to the vast differences in dual enrollment programs from state to state,<sup>14</sup> low-income students can be implicitly discriminated against,<sup>15</sup> worsening the educational-achievement gap between socioeconomic classes.<sup>16</sup> To prevent dual enrollment programs from expanding the educational-achievement gap between high- and low-income individuals, without losing the benefits dual enrollment programs provide, states must provide all students, including underprivileged students, with proper access to dual enrollment programs.<sup>17</sup>

Simply making dual enrollment accessible to all, however, is a fruitless effort in states where dissemination of information about dual enrollment programs is voluntary, as students that are unaware of an opportunity cannot take advantage of the opportunity.<sup>18</sup> Furthermore, states that limit the number of college credits a student can take while partaking in dual enrollment hinder that student's ability to benefit from dual enrollment.<sup>19</sup>

In order to provide students with the benefits of dual enrollment without widening the educational-achievement gap between high- and low-income individuals, states need to adopt better dual enrollment practices.<sup>20</sup> Specifically, states need to: make dissemination of dual enrollment information mandatory, fund dual enrollment programs in a way that does not require students and their parents to pay out of pocket for college credits, and remove dual enrollment credit caps.<sup>21</sup> To motivate states to adopt better dual enrollment practices, Congress

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12. See *Dual Enrollment Student Earns High School Diploma and Associate Degree Simultaneously*, *supra* note 9.

13. See Brian P. An, *The Impact of Dual Enrollment on College Degree Attainment: Do Low-SES Students Benefit?*, 35 EDUC. EVALUATION & POL'Y ANALYSIS 57, 64 (2013), available at <https://bit.ly/2tOf10y> (concluding that low-income students that are able to participate in dual enrollment programs have boosted rates of college degree attainment and noting that prior studies comparing dual enrolled students to non-dual enrolled students have shown more short term beneficial effects for the dual enrolled students, such as increased high school graduation rates and better grades in college).

14. See *Dual Enrollment – All State Profiles*, EDUC. COMMISSION OF THE STATES, <https://sforce.co/2CcORpd> (last updated Apr. 2019).

15. See *infra* Section III.B.

16. See Gilbert, *supra* note 5.

17. See *infra* Section III.B.2.

18. See *infra* Section III.B.1.

19. See *infra* Section III.B.3.

20. See *infra* Section III.B.

21. See *infra* Part IV.

should incentivize states to adopt better dual enrollment practices through the use of the Taxing and Spending Clause.<sup>22</sup>

Part II of this Comment provides an in-depth look at the Taxing and Spending Clause,<sup>23</sup> the history of public education and the federal government's role in education,<sup>24</sup> and the differences in dual enrollment policies from state to state.<sup>25</sup> Part III explains how Congress can use the Taxing and Spending Clause to incentivize states to adopt better dual enrollment practices.<sup>26</sup> Part III then proposes three better dual enrollment practices and explains why these practices are essential.<sup>27</sup> Ultimately, this Comment recommends that Congress incentivize the states to adopt these better dual enrollment practices,<sup>28</sup> which is permitted by federal law and necessary to advancing important public policy goals.<sup>29</sup>

## II. BACKGROUND

An in-depth look at the relevant law is necessary before diving into how and why Congress can and should incentivize the states to adopt better dual enrollment practices.<sup>30</sup> Reviewing the history and purpose of the Taxing and Spending Clause<sup>31</sup> elucidates when Congress can financially incentivize the states to take certain actions. The history of public education and the federal government's role in education<sup>32</sup> clarifies the amount of control the federal government can constitutionally exert on education. Lastly, explaining how dual enrollment program opportunities differ from state to state<sup>33</sup> allows for an understanding of the options currently available for dual enrollment programs.

### A. *Taxing and Spending Clause*

The Taxing and Spending Clause of the United States Constitution<sup>34</sup> provides that “Congress shall have Power To lay and collect Taxes,

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22. See U.S. CONST. art. I, § 8, cl. 1; see also *infra* Section III.A.

23. See *infra* Section II.A.

24. See *infra* Section II.B.

25. See *infra* Section II.C.

26. See *infra* Section III.A.

27. See *infra* Section III.B.

28. See *infra* Part IV.

29. See *infra* Parts IV, V.

30. See *infra* Section III.A.

31. See *infra* Section II.A.

32. See *infra* Section II.B.

33. See *infra* Section II.C.

34. Article I, § 8, clause 1 of the Constitution is commonly known as the Taxing and Spending Clause because it provides Congress with the power to create federal taxes and spend federal monies. See *Taxing Power*, CORNELL L. SCH.: LEGAL INFO. INST., <https://bit.ly/37ckiUk> (last visited Dec. 27, 2019).

Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”<sup>35</sup> As is often the case with legislation,<sup>36</sup> the debate over the breadth of Congressional power granted in the Taxing and Spending Clause focuses on increasingly nuanced questions of when Congress has the power to tax and spend.<sup>37</sup>

The debate surrounding the extent of Congress’s power under the Taxing and Spending Clause was first addressed by Alexander Hamilton in his Report on Manufactures in 1791, wherein he stated: “the power to *raise money* is *plenary*, and *indefinite*; and the objects to which it may be *appropriated* are no less comprehensive, than the payment of the public debts and the providing for the common defence and ‘*general Welfare*.’”<sup>38</sup> However, Hamilton did not feel that he alone should state what the “general welfare” encompasses.<sup>39</sup>

Rather, Hamilton continued his argument by stating that the National Legislature must determine what concerns the “general welfare.”<sup>40</sup> Hamilton did pause, though, to emphasize that “there seems to be no room for a doubt that whatever concerns the general Interests of *learning of Agriculture of Manufactures* and of *Commerce* are within the sphere of the national Councils *as far as regards an application of Money*.”<sup>41</sup> Additionally, Hamilton noted that “general welfare” is just that: general, not local.<sup>42</sup> To be considered general, federal taxing and

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35. U.S. CONST. art. I, § 8, cl. 1.

36. Legislation is often hotly debated due to differing opinions regarding the balance of governmental power. Compare, e.g., *Great American Families, Education, Healthcare, and Justice*, GOP.COM, <https://bit.ly/2Q0wWcU> (last visited Dec. 27, 2019) (arguing for fewer federal student loans), with *Jobs and the Economy*, DEMOCRATS.ORG, <https://bit.ly/2rymtw1> (last visited Dec. 27, 2019) (arguing for debt-free college). See generally ISIDEWITH.COM, <https://bit.ly/2Q4Feke> (last visited Dec. 27, 2019) (polling individuals on a number of currently debated issues).

37. See Mark Seidenfeld, *The Bounds of Congress’s Spending Power*, 61 ARIZ. L. REV. 1, 1–31 (2019) (exploring the case law relating to Congress’s spending power); see also Ruth Mason, *Federalism and The Taxing Power*, 99 CALIF. L. REV. 975, 994–1008 (2011) (analyzing Congress’s taxing power through case law and how it differs from Congress’s spending power).

38. Alexander Hamilton, Secretary of the Treasury, Alexander Hamilton’s Final Version of the Report on the Subject of Manufactures, Address Before the Speaker of the House of Representatives (DEC. 5, 1791) (transcript available in the National Archives), <https://bit.ly/34x62xH>.

39. See *id.*

40. See *id.*

41. *Id.*; see also *Ass’n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 458–59 (2012) (incorporating education and learning as within the general welfare by stating that the Department of Education had authority to attach conditions to federal funds that were going to education even though schools, rather than states, are the recipients of the federal funds).

42. See Hamilton, *supra* note 38. Hamilton stated:

spending initiatives<sup>43</sup> cannot focus on just one state or territory; rather, such federal taxing and spending initiatives must apply throughout the entirety of the United States.<sup>44</sup>

Following Hamilton's Report on Manufactures, Justice Joseph Story,<sup>45</sup> in 1833, agreed with Hamilton's view that Congress's taxing and spending power is plenary and not restricted to the enumerated powers of Congress.<sup>46</sup> However, Story clarified that the phrase "to pay the Debts and provide for the common Defence and general Welfare of the United States"<sup>47</sup> qualified Congress's taxing and spending power.<sup>48</sup> Story explained that Congress's taxing and spending power is limited to paying national debts, providing national defense, and providing for the general welfare of the United States.<sup>49</sup> Any tax laid by Congress for spending outside of these objectives would therefore be unconstitutional and in excess of its legislative authority.<sup>50</sup>

Whereas Hamilton and Story agreed that the Taxing and Spending Clause should be read broadly, individuals like James Madison<sup>51</sup>

The only qualification of the generality of the Phrase in question, which seems to be admissible, is this—That the object to which an appropriation of money is to be made be *General* and not *local*; its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot.

*Id.*

43. An example of a federal spending initiative is the Every Student Succeeds Act (ESEA), which is a federal grant to states that are willing to comply with the educational provisions set forth in the Act. See The Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27, (codified as amended at 20 U.S.C. §§ 6301 et seq.); see also *infra* Section II.B. An example of a federal taxing initiative is the Federal Insurance Contributions Act, which is a federal tax that comes out of each person's paycheck to help fund Social Security and Medicare. SOCIAL SECURITY ADMINISTRATION, WHAT IS FICA? (2019), <https://bit.ly/2Q0Paf1>.

44. See John Davison, *The General Welfare: Congress's Original Power to Fight Economic Inequality Under the Taxing and Spending Clause*, 24 GEO. J. ON POVERTY L. & POL'Y 89, 94 (2016) (interpreting Hamilton's focus on the general welfare as not local to mean "Congress's use of taxation and appropriation must redound to the *collective* benefit of the public").

45. Justice Joseph Story was an Associate Justice of the Supreme Court of the United States from 1811 until his death in 1845. See *STORY, Joseph (1779-1845)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <https://bit.ly/2pM411R> (last visited Oct. 27, 2019).

46. See *United States v. Butler*, 297 U.S. 1, 66 (1936) (stating that "Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position").

47. U.S. CONST. art. I, § 8, cl. 1.

48. See JOSEPH STORY & MELVILLE M. BIGELOW, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 662–63 (5th ed. 1994).

49. See *id.*

50. See *id.*; see also *Butler*, 297 U.S. at 64 (agreeing with Mr. Justice Story that "[t]he true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare").

51. James Madison was the fourth president of the United States of America. See *James Madison*, WHITE HOUSE, <https://bit.ly/2Q2GunO> (last visited Dec. 27, 2019).



opposed this view.<sup>52</sup> Madison argued that the enumerated powers of Congress limit the Taxing and Spending Clause.<sup>53</sup> Furthermore, Madison felt that Hamilton's broad reading of the Taxing and Spending Clause was a "misconstruction"<sup>54</sup> and that the more narrow reading was obvious.<sup>55</sup> Madison believed the narrow reading was obvious in light of the Constitution's enumeration of Congress's powers.<sup>56</sup> Madison argued that "[n]othing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars."<sup>57</sup> Applying this logic to the Constitution, Madison believed that the phrase "general welfare" was clearly limited by the enumerated powers.<sup>58</sup> However, Madison's views on the reading of the Taxing and Spending Clause were later rejected in favor of Hamilton and Story's broader reading.<sup>59</sup>

Hamilton and Story's view that Congress's taxing and spending power should be read more broadly was adopted by the Supreme Court in *United States v. Butler*.<sup>60</sup> In *Butler*, the United States Supreme Court determined that "the reading advocated by Mr. Justice Story is the correct one."<sup>61</sup> The Supreme Court clarified that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."<sup>62</sup> In accordance with Mr. Justice Story's view, however,

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52. See John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 66–67 (2001); see also THE FEDERALIST NO. 41 (James Madison) (arguing that the Taxing and Spending Clause was being interpreted too broadly, and the clause needed to be limited to the Constitutionally enumerated powers of Congress).

53. See THE FEDERALIST NO. 41, *supra* note 52; see also *Butler*, 297 U.S. at 65. The Court held that:

Madison asserted [the "general welfare"] amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that . . . the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress.

*Id.*

54. Davisson, *supra* note 44, at 95 (quoting THE FEDERALIST NO. 41 (James Madison)).

55. See *id.* (citing THE FEDERALIST NO. 41 (James Madison)).

56. THE FEDERALIST NO. 41 (James Madison) ("Had no other enumeration or definition of the powers of the Congress been found in the Constitution, than the general expressions just cited, the authors of the objection might have had some color for it.").

57. See *id.*

58. See *id.*

59. See *United States v. Butler*, 297 U.S. 1, 66–68 (1936) (concluding that the Taxing and Spending Clause should be interpreted more broadly such that Congress's power to tax and spend is a separate enumerated power that can be used in furtherance of the general welfare).

60. *United States v. Butler*, 297 U.S. 1, 66–68 (1936).

61. *Id.* at 66.

62. *Id.*

the Court did limit the spending power to paying national debts, providing national defense, and providing for the general welfare of the United States.<sup>63</sup>

The conclusion that the Taxing and Spending Clause should be read broadly, while still being limited to paying national debts, providing national defense, and providing for the general welfare of the United States, presents the question of how far Congress's taxing and spending power reaches when Congress is taxing or spending for the "general welfare" of the United States.<sup>64</sup> Although American jurisprudence has yet to agree on the precise contours of "general welfare,"<sup>65</sup> the Supreme Court in *South Dakota v. Dole*<sup>66</sup> provided some guidance on the limitations of the Taxing and Spending Clause.<sup>67</sup>

Specifically, the Court held that Congress may use conditional federal funds to encourage uniformity among the states when Congress lacks authority to regulate the states directly.<sup>68</sup> However, Congress must meet four requirements before granting federal funds with conditions: (1) the spending must be for the general welfare;<sup>69</sup> (2) the conditions must be unambiguous, such that states are able to make a choice knowingly;<sup>70</sup> (3) the conditions must be rationally related to the federal interest in a national project or program;<sup>71</sup> and (4) no other constitutional provision

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63. *See id.*

64. The Court in *United States v. Butler* made it clear that "general welfare" encompasses more than just the enumerated powers, *id.*, but how much more has not been clearly defined. *See infra* note 65 and accompanying text.

65. *See Helvering v. Davis*, 301 U.S. 619, 640–41 (1937) (arguing that drawing the line between what is and is not covered under the general welfare "cannot be known through a formula in advance of the event" because the concept of general welfare is not static and changes with the times); *see also* Davisson, *supra* note 44, at 91 (arguing that the General Welfare Clause in the Taxing and Spending Clause "empowers Congress to tax and spend in order to combat profound economic inequality").

66. *South Dakota v. Dole*, 483 U.S. 203 (1987).

67. *See id.* at 207.

68. *Id.* at 206.

69. *See id.* at 207; *see also* *Kansas v. United States*, 214 F.3d 1196, 1199 (10th Cir. 2000) (noting the four *Dole* requirements Congress must meet to condition federal funds and using these four requirements in the court's analysis). When determining whether Congress's spending is for the general welfare, "courts should defer substantially to the judgment of Congress." *Dole*, 483 U.S. at 207 (citing *Helvering*, 301 U.S. at 640).

70. *See Dole*, 483 U.S. at 207 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); *see also* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 584 (2012) (clarifying that Congress applying conditions to funds retroactively is an unconstitutional use of Congress's spending powers because states that already rely on those funds will be financially induced into accepting the retroactive conditions, essentially removing the State's power to knowingly choose).

71. *See Dole*, 483 U.S. at 207–08. The required degree of this relationship between the conditions and the federal interest is one of reasonableness or minimum rationality. *See Kansas*, 214 F.3d at 1199 (citing *New York v. United States*, 505 U.S. 144, 167 (1992)) (stating that the conditions must "bear some relationship to the purpose of the federal spending").

can bar the conditional funds.<sup>72</sup> Additionally, the conditioned federal funds cannot be so monetarily large as to “pass the point at which ‘pressure turns into compulsion.’”<sup>73</sup> Simply motivating or tempting a state to enact certain policies or legislation through monetary incentives, however, does not necessarily create a coercive situation.<sup>74</sup> Unconstitutional compulsion only occurs where the monetary incentives are of such a magnitude that a state loses its unfettered will to choose to deny the financial incentives.<sup>75</sup>

In sum, Congress’s taxing and spending power has been interpreted broadly since the genesis of the Constitution.<sup>76</sup> When the four *Dole* requirements are met, Congress may reach beyond its explicitly enumerated powers through the use of conditions attached to federal funds.<sup>77</sup> Therefore, by utilizing the Taxing and Spending Clause, Congress can attach conditions to federal funds as a way to influence education, which is not an explicitly enumerated power.<sup>78</sup>

### B. *Education and the Federal Government*

The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>79</sup> Because regulating education is a power not reserved to the federal government, nor prohibited to the states, the states have jurisdiction over education.<sup>80</sup> However, the federal government still exercises some authority over education decisions through federal funding.<sup>81</sup> Just how much authority

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72. See *Dole*, 483 U.S. at 207–08; see also *Kansas*, 214 F.3d at 1199 (noting the four *Dole* requirements Congress must meet to condition federal funds and using these four requirements in the court’s analysis).

73. *Dole*, 483 U.S. at 211 (quoting *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)); see also *Sebelius*, 567 U.S. at 584 (clarifying that Congress applying conditions to funds retroactively is an unconstitutional use of Congress’s spending powers because states that already rely on those funds will be financially induced into accepting the retroactive conditions).

74. See *Chas. C. Steward Mach. Co.*, 301 U.S. at 589–90 (“But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties.”).

75. See *id.* (explaining that motive cannot be confused with coercion and noting that “the point at which pressure turns into compulsion, and ceases to be inducement, [is] a question of degree, at times, perhaps, of fact”).

76. See *supra* notes 60–63 and accompanying text.

77. See *supra* notes 66–75 and accompanying text.

78. See Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 642–44 (2013) (applying a Taxing and Spending Clause coercion analysis to federal education programs).

79. U.S. CONST. amend. X.

80. See Kathryn Baron, *Finding a Balance for the Federal Role in Education Policy*, CARNEGIE COMMONS BLOG (Dec. 16, 2016), <https://bit.ly/2JSRznP>.

81. See, e.g., Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 (2015); see also Anna Williams Shavers, *Katrina’s Children: Revealing the Broken*

the federal government is allowed over education, however, is a topic of continuing debate.<sup>82</sup>

In 1790, Pennsylvania was the first state to provide state-level public education<sup>83</sup> to families in financial need.<sup>84</sup> In 1820, Massachusetts became the first state with a tuition-free high school for all, regardless of financial need.<sup>85</sup> Massachusetts also became the first state to implement compulsory education.<sup>86</sup> By the late-1800s, the common school movement<sup>87</sup> had begun, spreading public education to most states.<sup>88</sup> Also in the mid- to late-1800s, the federal government began to carve out a role for itself in education.<sup>89</sup>

The federal government's role in education began in 1862 with the Morrill Act,<sup>90</sup> which granted federal land to each state as a way to fund

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*Promise of Education*, 31 T. MARSHALL L. REV. 499, 519 (2006) (“[T]he federal government . . . exercises some influence on K-12 education through its allocation of funding from the federal budget.”).

82. Compare Shavers, *supra* note 81, at 519 (arguing that the federal government should take a more active role in education financing), with Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J.L. & EDUC. 1, 2, 36 (2010) (arguing that the future of the Elementary and Secondary Education Act should look to maintain federal oversight but allow states and districts to maintain majority control over education policy), and Shannon K. McGovern, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1519 (2011) (arguing for “a continued, albeit more prudent, role for the federal government in reforming K-12 education”).

83. This public education was mandated by Pennsylvania's Constitution and provided education, free of cost, to the poor. See Beth Daley, *Federal Role in Education Has a Long History*, CONVERSATION (Apr. 26, 2017, 9:51 AM), <https://bit.ly/2NNbWUV>. It was assumed that wealthy families could afford to pay for their children's education on their own. See *id.*

84. See *id.*

85. See *id.*

86. See *id.* Compulsory education in the 1800s required children between the ages of 8 and 14 to be educated for at least three months a year and for at least six weeks in a row. See Hayley Glatter, *Throwback Thursday: Massachusetts Passes the Nation's First Compulsory Education Law*, BOS. MAG. (May 17, 2018, 7:30 AM), <https://bit.ly/2MHZWnV>. Congress enacted these compulsory education laws in part to combat growing concerns over child labor. See *Compulsory Education Laws: Background*, FINDLAW, <https://bit.ly/37nQjCx> (last visited Dec. 31, 2019). Parents who broke these laws by not sending their children to school were fined. See *id.*

87. The common school movement was a movement for free, universal, non-sectarian, and public education institutions for all. See Graham Warder, *Horace Mann and the Creation of the Common School*, VCU LIBR., <https://bit.ly/2F9KWe9> (last visited Dec. 31, 2019).

88. See Daley, *supra* note 83.

89. See *Morrill Act*, LIBR. CONGRESS, <https://bit.ly/2NkEdDi> (last visited Nov. 1, 2019) (stating that the Morrill Act was signed into law in 1862); see also *The Federal Role in Education*, U.S. DEP'T EDUC. (May 25, 2017), <https://bit.ly/2PSHKKy> (noting that the federal Department of Education was created in 1867).

90. The Morrill Act, officially titled “An Act Donating Public Lands to the Several States and Territories which may provide Colleges for the Benefit of Agriculture and the

public colleges.<sup>91</sup> Following the Morrill Act, in 1867, the Department of Education<sup>92</sup> was created.<sup>93</sup> The Department of Education's original purpose was to aid the states in establishing effective school systems by collecting information on schools and teaching.<sup>94</sup> Following the creation of the Department of Education, in 1890, Congress passed the Second Morrill Act.<sup>95</sup> The Second Morrill Act required the Department of Education to provide financial support to the original land-grant colleges and universities.<sup>96</sup> Congress's next legislative actions involving education were the Smith-Hughes Act<sup>97</sup> in 1917 and the George-Barden Act<sup>98</sup> in 1946, which focused on providing federal aid for vocational education<sup>99</sup> and agricultural, industrial, and home economics courses<sup>100</sup> for high school students, respectively.<sup>101</sup>

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Mechanic Arts" in 1862, was enacted at Pub. L. No. 37-108, 12 Stat. 503 (codified as amended at 7 U.S.C. § 301 et seq.).

91. See *Morrill Act*, *supra* note 89.

92. Due to concerns that the Department of Education would exercise too much control, the Department was quickly demoted to an Office of Education in 1868, but it re-earned the name Department of Education in 1979 due to expanded federal funding for education. See *An Overview of the U.S. Department of Education*, U.S. DEP'T EDUC. (Sept. 2010), <https://bit.ly/2NWqVMn>.

93. See *The Federal Role in Education*, *supra* note 89.

94. See *id.*

95. See *id.* The Second Morrill Act, also known as the "Agricultural College Act of 1890," was enacted at Pub. L. No. 51-841, 26 Stat. 417 (codified as amended at 7 U.S.C. §§ 321 et seq.).

96. See *The Federal Role in Education*, *supra* note 89; see also COMM. ON THE FUTURE OF THE COLLS. OF AGRIC. IN THE LAND GRANT UNIV. SYS., COLLEGES OF AGRICULTURE AT THE LAND GRANT UNIVERSITIES: A PROFILE I (1995), <https://bit.ly/39rNF0v>. The Morrill Act created 69 land-grant colleges, including the Pennsylvania State University. See *Morrill Act*, *supra* note 89; see also *Our History*, PENNSTATE, <https://bit.ly/2O0wBEO> (last visited Nov. 9, 2019).

97. The Smith-Hughes Act, also known as the "Vocational Education Act of 1917," was enacted at Pub. L. No. 64-347, 39 Stat. 929 (codified as amended at 20 U.S.C. §§ 11 et seq.) (repealed 1997).

98. The George-Barden Act, also known as the "Vocational Education Act of 1946," was enacted at Pub. L. No. 79-586, 60 Stat. 775 (previously codified as amended at 20 U.S.C. §§ 15i-15ggg; repealed 1968).

99. Though the definition of vocational education has evolved through the years, vocational education is understood to encompass any education in preparation of obtaining gainful employment as a semiskilled or skilled worker or technician but is not a professional program or one that results in a baccalaureate or higher degree. See Vocational Education Act of 1963, Pub. L. No. 88-210, § 8(1), 77 Stat. 403, 408 (1963). During the time of the Smith-Hughes Act, vocational education included instruction in the areas of agriculture, trades and industry, and home economics, as well as education on teaching. See Darrel Parks & N.L. McCaslin, *Vocational and Technical Education*, STATEUNIVERSITY, <https://bit.ly/2NMDutc> (last visited Nov. 3, 2019). By the time of the George-Barden Act, vocational education had expanded to also include education in the areas of practical nursing and the fishery trades. See *id.*

100. Practitioners considered early home economics a science of domestic activities that allowed women to run their homes as efficiently as possible. See Brie Dyas, *Who Killed Home Ec? Here's the Real Story Behind Its Demise*, HUFFPOST (Sept. 29, 2014,

During the mid-twentieth century, World War II significantly expanded the federal government's role in education with the Lanham Act<sup>102</sup> in 1941 and the Impact Aid laws<sup>103</sup> of 1950.<sup>104</sup> Both Acts provided federal payments to local school districts in communities that were affected by a military presence.<sup>105</sup> Additionally, Congress passed the GI Bill<sup>106</sup> between the enactment of the Lanham Act and the Impact Aid laws to provide college assistance to World War II veterans.<sup>107</sup>

The legislative branch, however, was not the only branch of the federal government involving itself with education.<sup>108</sup> In 1954, the federal judiciary heard *Brown v. Board of Education*.<sup>109</sup> In *Brown*, the Supreme Court declared that states must provide "equal educational opportunities."<sup>110</sup> Before *Brown*, the federal government's role in education was small and had focused mostly on higher education;<sup>111</sup> however, *Brown's* holding created the precedent necessary for the federal government to exert a more active role in regulating education and expand into K-12 education.<sup>112</sup>

During the Cold War, in 1958, the federal government capitalized upon its newfound power from *Brown* to create the first comprehensive federal education legislation.<sup>113</sup> Congress passed the National Defense Education Act of 1958<sup>114</sup> to provide vocational-technical training and

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8:36 AM), <https://bit.ly/2urflm2>. Home economics covered topics such as nutrition, clothing, physical fitness, sanitation, and efficient practices for cooking and cleaning. *See id.*

101. *See The Federal Role in Education, supra* note 89.

102. The Lanham Act was enacted at Pub. L. No. 76-849, 54 Stat. 1125 (repealed 1946).

103. The Impact Aid laws were enacted at Pub. L. No. 81-815, 64 Stat. 967 (codified as amended at 20 U.S.C. §§ 631 et seq.; repealed 1994) and Pub. L. No. 81-874, 64 Stat. 1100 (codified as amended at 20 U.S.C. §§ 236 et seq.; repealed 1994).

104. *See The Federal Role in Education, supra* note 89 (explaining that the Lanham Act and the Impact Aid laws were enacted to "ease[] the burden on communities affected by the presence of military and other Federal installations").

105. *See id.*

106. Congress enacted the GI Bill, officially titled the "Servicemen's Readjustment Act of 1944," at Pub. L. No. 78-346, 58 Stat. 284 (previously codified as amended at 38 U.S.C. §§ 693 et seq.; repealed and reenacted in 1958 to 38 U.S.C. Part III).

107. *See The Federal Role in Education, supra* note 89.

108. *See generally* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding "that in the field of public education the doctrine of 'separate but equal' has no place").

109. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

110. *Id.* at 493.

111. *See* Brendan Pelsue, *When it Comes to Education, the Federal Government Is in Charge of . . . Um, What?*, HARV. ED. MAG., <https://bit.ly/2NtcKPK> (last visited Nov. 8, 2019) (stating that "[b]efore 1965, the 10th Amendment seemed to prevail over the 14th, and federal involvement in K-12 education was minimal").

112. *See id.*

113. *See The Federal Role in Education, supra* note 89.

114. The National Defense Education Act of 1958 was enacted at Pub. L. No. 85-864, 72 Stat. 1580 (no current effective sections in the U.S.C.).

loans to college students, as well as to provide elementary and secondary school improvements in the areas of science, mathematics, and foreign languages.<sup>115</sup>

Then, in the 1960s and 1970s, the anti-poverty and civil rights laws propelled the passage of Title VI of the Civil Rights Act of 1964,<sup>116</sup> Title IX of the Education Amendments of 1972,<sup>117</sup> and Section 504 of the Rehabilitation Act of 1973.<sup>118</sup> Additionally, the Education for All Handicapped Children Act was signed into law in 1975.<sup>119</sup> These laws, taken together, prohibited discrimination in education on the basis of race, sex, and disability.<sup>120</sup>

Also in the 1960s, Congress authorized the Higher Education Act.<sup>121</sup> The Higher Education Act provided financial assistance for college students in need.<sup>122</sup> Almost simultaneously, Congress enacted the Elementary and Secondary Education Act (“ESEA”)<sup>123</sup> “to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.”<sup>124</sup> The ESEA was a part of President Lyndon B. Johnson’s<sup>125</sup> “war on poverty.”<sup>126</sup> Part of the goal of the war on poverty was to close the gap between the education of wealthy and poor children.<sup>127</sup> The ESEA aided in fulfilling this goal by doubling the amount of federal expenditures for K-12 education.<sup>128</sup>

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115. See *The Federal Role in Education*, *supra* note 89.

116. Title VI of the Civil Rights Act of 1964 was enacted at Pub. L. No. 88-352, Title VI, 78 Stat. 241, 252 (codified as amended at 42 U.S.C. §§ 2000d et seq.).

117. Title IX of the Education Amendments of 1972 was enacted at Pub. L. No. 92-318, Title IX, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. §§ 1681 et seq.).

118. See *The Federal Role in Education*, *supra* note 89. Section 504 of the Rehabilitation Act of 1973 was enacted at Pub. L. No. 93-112, Title V, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794).

119. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975), available at <https://bit.ly/2WNqLKU>.

120. See *The Federal Role in Education*, *supra* note 89.

121. The Higher Education Act was enacted at Pub. L. No. 89-329, 79 Stat. 1219, (codified as amended at 20 U.S.C. §§ 1001 et seq.). See also *The Federal Role in Education*, *supra* note 89.

122. See *The Federal Role in Education*, *supra* note 89.

123. The Elementary and Secondary Education Act was enacted at Pub. L. No. 89-10, 79 Stat. 27, (codified as amended at 20 U.S.C. §§ 6301 et seq.).

124. Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 (2015).

125. President Lyndon B. Johnson served as president of the United States from November 1963 to January 1969. See *Lyndon B. Johnson*, WHITE HOUSE, <https://bit.ly/3pr1inD> (last visited Feb. 13, 2021).

126. See Mitchell Yell, *Elementary and Secondary Education Act (ESEA)*, in *ENCYCLOPEDIA OF SPECIAL EDUCATION* (Cecil R. Reynolds et al. eds., 4th ed. 2013), <https://bit.ly/2PRjCYW>.

127. See Daley, *supra* note 83.

128. See *id.*

Since its enactment, Congress has amended and reauthorized the ESEA multiple times.<sup>129</sup> In 1994, for example, the ESEA was reauthorized under the Improving America's Schools Act<sup>130</sup> for the stated purpose of fostering "a high-quality education for all individuals and a fair and equal opportunity to obtain that education."<sup>131</sup> In 2002, the ESEA was reauthorized again under the No Child Left Behind Act ("NCLB")<sup>132</sup> "[t]o close the achievement gap with accountability, flexibility, and choice, so that no child is left behind."<sup>133</sup> Following NCLB, Congress struggled to reauthorize the ESEA.<sup>134</sup> However, the Every Student Succeeds Act ("ESSA")<sup>135</sup> was ultimately signed into law in 2015, reauthorizing the ESEA yet again.<sup>136</sup> While the purpose of the ESSA has remained parallel to the goals of both NCLB and the ESEA,<sup>137</sup> the ESSA differs from NCLB in that it "restores to States, school districts, classroom teachers, and parents the responsibility for making important decisions,"<sup>138</sup> effectively giving more control back to the states with regards to education.<sup>139</sup>

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129. *See id.*; *see also* Alyson Klein, *The Nation's Main K-12 Law*, EDUC. WK. (Mar. 31, 2015), <https://bit.ly/34ukiao>.

130. The Improving America's Schools Act was enacted at Pub. L. No. 103-382, 108 Stat. 3518, (codified as amended at 20 U.S.C. §§ 6301 et seq.).

131. Improving America's Schools Act of 1994, Pub. L. No. 103-382, Title I, § 101, 108 Stat. 3518 (1994), *available at* <https://bit.ly/2WNYrsc>.

132. The No Child Left Behind Act ("NCLB") was enacted at Pub. L. No. 107-110, 115 Stat. 1425, (codified as amended at 20 U.S.C. §§ 6301 et seq.).

133. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 1425 (2002), *available at* <https://bit.ly/2WKv17z>.

134. *See* Klein, *supra* note 129. This struggle to reauthorize the ESEA stemmed from disagreement over how much federal control can be exerted over education in the states. *See* Alyson Klein & Lauren Camera, *Battle Lines Drawn on Annual Testing in ESEA Renewal*, EDUC. WK. (Jan. 16, 2015), <https://bit.ly/2QC4tdU>. Specifically, one of the major disagreements was over whether to keep or ditch the law's schedule of annual assessments. *See id.* There have also been discussions over whether NCLB goes beyond Congress's spending powers under the Taxing and Spending Clause. *See* Allison Quick, *Legal Limits on Conditional Spending Including Recent Challenges to No Child Left Behind*, in HARV. L. SCH. FED. BUDGET POL'Y SEMINAR BRIEFING PAPER NO. 19 1, 35-36, 41-47 (May 5, 2006), <https://bit.ly/38a0TOb>.

135. The Every Student Succeeds Act ("ESSA") was enacted at Pub. L. No. 114-95, 129 Stat. 1802, (codified at 20 U.S.C. §§ 6301 et seq.).

136. *See* Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802, *available at* <https://bit.ly/2Ccof2T>.

137. The purpose of the ESSA "is to enable States and local communities to improve and support our Nation's public schools and to ensure that every child has an opportunity to achieve, including categories of historically disadvantaged students." S. REP. NO. 114-231, at 2 (2016), *available at* <https://bit.ly/2WK1dOS>.

138. *Id.*

139. *See The Every Student Succeeds Act: Returning Control to States and Local School Districts*, S. COMM. ON HEALTH, EDUC., LAB. & PENSIONS, <https://bit.ly/34zKgJE> (last visited Nov. 3, 2019).



Although the debate of what exactly the federal government's role is in education continues,<sup>140</sup> history indicates that the federal government does have a role in education.<sup>141</sup> The federal government's role appears to be ensuring that equal educational opportunities are being provided regardless of race, sex, and disability, and that educational-achievement gaps are not ignored.<sup>142</sup> With the advent of dual enrollment programs come new challenges of how to ensure equal educational opportunities and minimize educational-achievement gaps while still ensuring that states maintain their rights to regulate education.<sup>143</sup>

### C. Dual Enrollment

Dual enrollment is an accelerated learning opportunity for high school students that involves a partnership between a high school and a college or university.<sup>144</sup> These partnerships allow high school students to simultaneously take college-level classes and receive both high school and college credit for their course work.<sup>145</sup> Dual enrollment is distinctly different from Advanced Placement ("AP") courses<sup>146</sup> or International Baccalaureate ("IB") courses.<sup>147</sup> The most prominent difference between

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140. See Exec. Order No. 13,791, 82 Fed. Reg. 20,427 (Apr. 26, 2017), available at <https://bit.ly/2rj4F7F> (ordering the Secretary of Education to review and revise Department of Education regulations and guidance documents to comport with "Federal laws that prohibit the Department from exercising any direction, supervision, or control over areas subject to State and local control"); see also *Remarks by President Trump at Signing of Executive Order on Federalism Education*, WHITE HOUSE (Apr. 2017, 2:41 PM), <https://bit.ly/2Q4o7RW> ("The executive order I'm signing today . . . directs Secretary DeVos to review current federal regulations and ensure that they don't obstruct the ability of states, local governments, . . . to make the best decisions for their students.").

141. See *supra* notes 90–136 and accompanying text (showing that the federal government has had a role in education since the Morrill Act of 1862).

142. See *supra* notes 109–39 and accompanying text (discussing *Brown v. Board of Education* and the anti-discrimination laws enacted after the precedent set by *Brown*).

143. See Gilbert, *supra* note 5 (arguing that dual enrollment programs which merely offer a discount to high-achieving high school students actually worsen the educational-achievement gap because low-income students are unable to afford the discount rate without assistance).

144. See LAUREN CASSIDY ET AL., DUAL ENROLLMENT: LESSONS LEARNED ON SCHOOL-LEVEL IMPLEMENTATION 1 (n.d.), <https://bit.ly/2PPyUxd>.

145. See *id.*

146. Advanced Placement courses are courses that are taken at a student's high school and allow the student the opportunity to earn college credit for the course. See Halle Edwards, *What Are AP Classes? Why Should You Take Them?*, PREP SCHOLAR (Feb. 25, 2021, 10:30 PM), <https://bit.ly/2WKDfDc>. Whether a student earns college credit is dependent upon the student's successful passage of the Advanced Placement exam at the end of the school year. *Id.* The exams are created by College Board (the makers of the SAT) and cost \$94 per exam. See *id.*

147. See CASSIDY ET AL., *supra* note 144, at 1. International Baccalaureate ("IB") courses come from a program originally designed in Switzerland that had the purpose of creating an internationally recognized diploma for entry into universities. See Halle

dual enrollment and AP and IB courses is that AP and IB courses have national curriculums and require students to pass a single, end-of-course exam to receive college credit for the course.<sup>148</sup> Dual enrollment, in contrast, does not have a strict national curriculum, and credit from dual enrollment is earned by work completed throughout the course.<sup>149</sup> Furthermore, unlike AP and IB courses, which are taken at a student's high school, dual enrollment programs often require students to take their college courses on a college campus.<sup>150</sup> Requiring high school students to take their college-level coursework on college campuses provides students with a larger selection of course offerings, as well as the chance to become accustomed to the college environment while still living at home.<sup>151</sup> Finally, depending on the participating college or university, some dual enrollment programs allow high school students to complete their college classes online.<sup>152</sup> Online dual enrollment courses provide more flexibility than typical high school courses, or even AP and IB courses.<sup>153</sup>

Although almost all 50 states have some sort of statewide dual enrollment policy in place,<sup>154</sup> dual enrollment programs can differ greatly from state to state.<sup>155</sup> Some of the ways in which dual enrollment programs differ from state to state are: (1) whether dissemination of program information is required; (2) whether students and their parents are responsible for paying the college tuition; and (3) whether there is a cap on the number of college credits a high school student may take.<sup>156</sup>

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Edwards, *What Is the IB Program, and What Are IB Classes?*, PREPSCHOLAR (Mar. 22, 2020, 1:30 PM), <https://bit.ly/2JQ7bbF>. Students can take IB courses at any IB-approved high school, and college credit is determined upon a combination of the student successfully passing his or her IB exams and the IB credit policy at the college the student plans to attend. *See id.* IB exams cost \$119 per IB exam, plus a \$172 registration fee. *See id.*

148. *See* CASSIDY ET AL., *supra* note 144, at 1.

149. *See id.* at 1.

150. *See id.* at 1, 3.

151. *See id.* at 3.

152. *See Dual Enrollment Program*, LIBERTY U. ONLINE ACAD., <https://bit.ly/2WMKL0h> (last visited Oct. 13, 2019); *see also Top 10 Dual Enrollment Programs Online 2019*, ONLINE ASSOCIATE'S DEGREES (Oct. 2018), <https://bit.ly/32gYNbS>.

153. *See Girl, 17, Earns College Degree Before High School Diploma*, *supra* note 8 (discussing a 17-year-old girl who was able to complete an online associate's degree through her school's dual-enrollment program while working two jobs and participating in high school activities).

154. The one state that does not have a statewide dual enrollment policy in place is New York. *See Dual Enrollment – All State Profiles*, *supra* note 14.

155. *See id.*

156. *See id.*

## 1. Dual Enrollment Notification Requirements

Only 19 states, including Ohio and Texas, require schools to notify students and their parents of dual enrollment opportunities.<sup>157</sup> However, not all state notification requirements are created equal.<sup>158</sup> For example, Ohio requires that dual enrollment information be provided to “all students enrolled in grades six through eleven.”<sup>159</sup> In Ohio, all public secondary schools and participating non-public secondary schools must provide counseling to students and their parents about: eligibility, the process of obtaining college credits, the financial arrangement for the program, available support services, potential benefits and consequences of the program, and so forth.<sup>160</sup> In contrast, Texas only requires school districts to provide information to “the parent of each district student enrolled in grade nine or above.”<sup>161</sup> Additionally, Texas considers the notification requirement to be satisfied if program information is provided “on the district’s Internet website.”<sup>162</sup> These notification requirements are just one of many ways dual enrollment programs differ in each state.<sup>163</sup>

## 2. Dual Enrollment Funding Structures

States have discretion to determine the funding structures of their respective dual enrollment programs.<sup>164</sup> At least 36 states either: (1) do not have funding structures set by state policies;<sup>165</sup> (2) leave the funding structures up to local decision;<sup>166</sup> or (3) require students and their parents

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157. *See id.* Thirty-one states and Washington D.C. do not require schools to notify students and their parents of dual enrollment opportunities. *See id.* However, although Vermont contributes to the number of states that do not have a statute requiring notification, the Vermont Dual Enrollment Program Manual does require high schools to notify the students and parents. *See id.*

158. *See id.*; *see also infra* notes 159–62 and accompanying text; *infra* Section III.B.1.

159. OHIO REV. CODE ANN. § 3365.04 (West 2020).

160. *See id.*

161. TEX. EDUCATION CODE ANN. § 28.010 (West 2019).

162. *Id.*

163. *See Dual Enrollment – All State Profiles, supra* note 14.

164. *See id.*

165. *See id.*

166. *See id.* The local decision typically involves an agreement between school districts and participating colleges/universities, but the local decision can also include local grants and scholarships. *See Dual/Concurrent Enrollment: Who is Primarily Responsible for Paying Tuition*, EDUC. COMMISSION OF THE STATES, <https://sforce.co/2FGwESp> (last updated Apr. 2019). When states leave their funding structures up to local decision, students and their parents could end up paying some or all of the tuition, depending on where they live. *See id.*

pay some or all of the tuition costs.<sup>167</sup> Remaining states have policies that require payment of tuition by either: (1) the student's school district; (2) the state department of education or another state organization; (3) the participating postsecondary institution; or (4) some combination thereof.<sup>168</sup> Three states with dual enrollment policies worth comparing are Wyoming, Iowa, and Pennsylvania.

Wyoming serves as an example of a state that has a comprehensive dual enrollment policy with regards to cost, wherein a student and the student's parents are not responsible for paying tuition.<sup>169</sup> Wyoming's dual enrollment statutes provide that "[t]he university or community college shall not directly assess and collect any fee from the participating student for textbooks, materials, student services or any other fees otherwise assessed and collected from students attending the institution."<sup>170</sup> In other words, Wyoming's dual enrollment statute not only ensures that students do not pay out of pocket for tuition, but it also ensures that students do not have to pay for textbooks or any other "fees" typically billed to students by universities.<sup>171</sup> Iowa has a similar policy to Wyoming, but with one important caveat.<sup>172</sup>

Iowa's dual enrollment policy contains comprehensive language similar to Wyoming's policy;<sup>173</sup> however, Iowa's policy includes the caveat that "if the student fails to complete and receive credit for the course, the student is responsible for all district costs directly related to the course . . . and shall reimburse the school district for its costs."<sup>174</sup> If, on the other hand, the student succeeds in his or her college course work, the student's school district provides payment for "tuition, textbooks, materials, [and] fees."<sup>175</sup>

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167. *See Dual Enrollment – All State Profiles*, *supra* note 14. However, some of these 36 states have grants or other means of reducing or eliminating student costs. *See id.*

168. *See id.*

169. *See* WYO. STAT. ANN. § 21-20-201(d) (West 2020).

170. *Id.*

171. *See* WYO. COMMUNITY COLLEGES ET AL., WYOMING DUAL AND CONCURRENT ENROLLMENT: MANUAL OF PROCEDURES 12–13 (n.d.), <https://bit.ly/33xshDA>.

172. *See* IOWA CODE ANN. § 261E.7 (West 2020).

173. *Compare* IOWA CODE ANN. § 261E.7 (West 2020) ("An eligible postsecondary institution that enrolls an eligible student under this section shall not charge that student for tuition, textbooks, materials, or fees directly related to the course in which the student is enrolled except that the student may be required to purchase equipment that becomes the property of the student."), *with* WYO. STAT. ANN. § 21-20-201(d) (West 2020) ("The university or community college shall not directly assess and collect any fee from the participating student for textbooks, materials, student services or any other fees otherwise assessed and collected from students attending the institution.").

174. IOWA CODE ANN. § 261E.7 (West 2020).

175. *Id.*

Unlike Wyoming and Iowa, which have comprehensive dual enrollment program funding policies, states such as Pennsylvania have dual enrollment programs that can require students and their parents to pay out of pocket.<sup>176</sup> Dual enrollment programs that require students and their parents to pay out of pocket reward participating students by discounting the cost of each college credit for those students.<sup>177</sup> Students unable to pay even the reduced cost of the dual enrollment program, however, are similarly unable to participate in the program and are therefore forced to forgo the college discount awarded to students who partake in dual enrollment.<sup>178</sup> These vast differences among funding structures, however, are not the only other way that dual enrollment programs vary from state to state.<sup>179</sup>

### 3. Dual Enrollment Credit Caps

Another way states' dual enrollment programs differ from one another is through credit caps, which limit the number of college credits each student is permitted to take while in high school.<sup>180</sup> Ohio,<sup>181</sup> for example, has an explicit credit cap written into its dual enrollment statutes.<sup>182</sup> However, the credit cap in Ohio is high enough to still allow a student to take a full-time course load at a college or university.<sup>183</sup>

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176. See PA. DEP'T OF EDUC., DUAL CREDIT PROGRAM TOOLKIT FOR PENNSYLVANIA SCHOOL ENTITIES 10 (2017), <https://bit.ly/3ctZHJ3> (stating that "The Pennsylvania School Code requires that secondary school entities must pay the tuition for dual credit only if the entity is submitting the student in the average daily membership" and warning schools that "cost may prohibit student participation and equal access to dual credit courses"); see also *Dual Enrollment FAQ*, PENNSTATE BEAVER, <https://bit.ly/2OQzA6X> (last visited Mar. 14, 2021) (stating that students could have to pay up to 50% of the current tuition rates without financial aid or loans).

177. *Compare Dual Enrollment*, CLARION U., <https://bit.ly/2qC56JN> (last visited Mar. 14, 2021) ("Current costs: \$115 per credit (up to 4 credits only) plus a one-time \$50 nonrefundable records fee . . . Students in [STEM] related courses . . . will pay a fee of \$36.30 per credit."), with CLARION UNIV., SPRING 2021 TUITION AND FEES (2020), <https://bit.ly/38D6aQR> (stating that the undergraduate tuition cost for PA residents is \$322 per credit).

178. See Gilbert, *supra* note 5 (noting that "to get that \$8,000 discount, a student needs \$2,000 on hand to pay the tuition" and "[b]ecause [dual-enrolled] students are not in degree-granting programs, they are not eligible for financial aid").

179. See *Dual Enrollment – All State Profiles*, *supra* note 14.

180. See *id.*

181. See OHIO ADMIN. CODE 3333-1-65.2(B)(4) (2020) ("Each secondary school shall verify . . . that a student electing to participate in the college credit plus program is not taking more than thirty college credit hours during an academic year and not more than the equivalent of four academic years or one hundred and twenty college credit hours total through the college credit plus program . . .").

182. See *id.*; see also *Dual Enrollment – All State Profiles*, *supra* note 14.

183. Full-time is 12 or more college credits, and Ohio's policy allows students to take up to 15 credits per semester, which is roughly 30 credits per year. See *Dual Enrollment – All State Profiles*, *supra* note 14.

Michigan,<sup>184</sup> Pennsylvania,<sup>185</sup> and South Dakota,<sup>186</sup> on the other hand, do not allow students to take a full-time course load at their participating college or university.<sup>187</sup> In fact, of all 50 states, Michigan's and South Dakota's credit caps are the most limiting to students.<sup>188</sup> Michigan allows students to dual enroll in a total of only ten courses—roughly 30 credits—over their four years in high school.<sup>189</sup> South Dakota restricts its dual enrollment program to only ten credit hours per year.<sup>190</sup>

In addition to explicit credit caps, some states, like New Hampshire,<sup>191</sup> have funding-focused credit caps.<sup>192</sup> These funding-focused credit caps prohibit students from receiving funding for college credits taken as part of dual enrollment after students have surpassed a certain credit limit—essentially creating a credit cap only for financially disadvantaged students.<sup>193</sup>

States like Nevada<sup>194</sup> and Texas,<sup>195</sup> however, have already preempted the issue of credit caps; these states have statutes preventing

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184. See MICH. COMP. LAWS ANN. § 388.513(d) (West 2020) (“[A] course . . . is not an eligible course if the eligible student’s enrollment in, and the payment of eligible charges under this act for, the course would exceed the following limits: . . . Not more than 10 courses overall.”); see also MICH. COMP. LAWS ANN. § 388.1903(e) (West 2020) (stating verbatim the language from MICH. COMP. LAWS ANN. § 388.513(d) (West 2020)—that no more than ten courses may be taken—but with regard to career and technical programs rather than colleges and universities).

185. See 24 PA. STAT. AND CONS. STAT. ANN. § 16-1615-B(e) (West 2020) (“A concurrent student’s concurrent course enrollment may not exceed 24 postsecondary credits in any school year.”).

186. See SOUTH DAKOTA BOARD OF REGENTS, ACADEMIC AFFAIRS GUIDELINE 7.1, Section 4.6.3 (2019), <https://bit.ly/3mXyIKJ> (“Student enrollment is limited to no more than 10 credit hours in any given academic term.”).

187. See *Dual Enrollment – All State Profiles*, *supra* note 14.

188. See Koby Levin, *How an Effort to Prepare Michigan High Schoolers for College Slipped Through the Cracks*, CHALKBEAT (Feb. 20 2019, 7:43 PM), <https://bit.ly/33x2jju> (noting that Michigan’s dual enrollment credit cap “is the strictest of any state”); see also *Dual/Concurrent Enrollment: Cap on Number of Credits Students May Earn*, EDUC. COMMISSION OF THE STATES, <https://sforce.co/30RRXua> (last updated Apr. 2019).

189. See *Dual/Concurrent Enrollment: Cap on Number of Credits Students May Earn*, *supra* note 188.

190. See SOUTH DAKOTA BOARD OF REGENTS, *supra* note 186, at Section 4.6.3. However, South Dakota does allow waivers of this limit for students who have completed all prior attempted credit hours with a grade of a “B” or higher. See *id.*

191. See N.H. REV. STAT. ANN. § 188-E:27 (West 2020) (“A student may take more than 2 dual or concurrent enrollment courses per year at his or her own expense.”).

192. See *Dual/Concurrent Enrollment: Cap on Number of Credits Students May Earn*, *supra* note 188.

193. See Levin, *supra* note 188 (noting that “[i]fifting the [Michigan dual enrollment credit] cap ‘expands access for students, especially low-income students’”).

194. See NEV. REV. STAT. ANN. § 389.160(3) (West 2020) (“The State Board must not unreasonably limit the number of dual credit courses in which a pupil may enroll or for which a pupil may receive credit.”).

students from being unreasonably limited in the number of dual credit courses or semester credit hours in which they can enroll.<sup>196</sup> Credit caps are thus a third way that states can differ in their dual enrollment programs.<sup>197</sup>

### III. ANALYSIS

The existence of differences in dual enrollment programs from state to state is not categorically a bad thing; however, when states have dual enrollment provisions that implicitly discriminate against low-income students, the educational-achievement gap between socioeconomic classes risks expansion.<sup>198</sup> To avoid these discriminatory provisions and their unfortunate consequences, Congress should financially incentivize the states to adopt better, non-discriminatory dual enrollment practices.<sup>199</sup> An important threshold consideration, though, is whether Congress has the power to incentivize states to adopt better dual enrollment practices.<sup>200</sup> Once this question has been answered in the affirmative, the next issue becomes what better dual enrollment practices look like.<sup>201</sup> At a minimum, better dual enrollment practices should include: mandatory dissemination of dual enrollment information,<sup>202</sup> dual enrollment funding from sources other than students and their parents,<sup>203</sup> and removal of low credit caps.<sup>204</sup>

#### A. *Incentivizing Adoption of Better Dual Enrollment Practices Through the Taxing and Spending Clause*

Under the Taxing and Spending Clause, Congress can financially incentivize states to adopt better dual enrollment practices.<sup>205</sup> For

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195. See TEX. EDUCATION CODE ANN. § 28.009(b) (West 2019) (“A rule may not limit the number of dual credit courses or semester credit hours in which a student may enroll while in high school or limit the number of dual credit courses or semester credit hours in which a student may enroll each semester or academic year.”).

196. See *Dual/Concurrent Enrollment: Cap on Number of Credits Students May Earn*, *supra* note 188.

197. See *Dual Enrollment – All State Profiles*, *supra* note 14.

198. See Gilbert, *supra* note 5.

199. See *infra* Part III.

200. See *infra* Section III.A.

201. See *infra* Section III.B.

202. See *infra* Section III.B.1.

203. See *infra* Section III.B.2.

204. See *infra* Section III.B.3.

205. The alternative argument is that Congress can use its power from the Equal Protection Clause, U.S. CONST. amend. XIV, § 1, to require states to adopt better dual enrollment practices. This is because *Brown v. Board of Education* made it clear that states must provide “equal educational opportunities.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). In fact, the Elementary and Secondary Education Act supports that *Brown*’s holding applies to equal educational opportunities regardless of socioeconomic

Congress to use the Taxing and Spending Clause to reach beyond its specifically enumerated powers,<sup>206</sup> Congress must be spending to either pay national debts, provide national defense, or provide for the general welfare of the United States.<sup>207</sup> Notably, dual enrollment is not a matter of national debts or national defense.<sup>208</sup> Therefore, Congress can only financially incentivize states to adopt better dual enrollment practices under the Taxing and Spending Clause if Congress's spending on dual enrollment provides for the general welfare of the United States.<sup>209</sup> Additionally, Congress cannot constitutionally attach conditions to these federal funds until certain requirements have been met.<sup>210</sup>

Congress may condition federal funds only if: (1) the spending is for the general welfare; (2) the conditions are unambiguous, such that states are able to make a choice knowingly; (3) the conditions are rationally related to the federal interest in a national project or program; and (4) there are no other constitutional provisions that bar the conditional funds.<sup>211</sup>

As to the first requirement, American jurisprudence has yet to finitely describe what is and is not spending for the general welfare.<sup>212</sup> Alexander Hamilton once suggested that “there seems to be no room for a doubt that whatever concerns the general Interests of *learning* . . . [is] within the sphere of the national Councils *as far as regards an application of Money*.”<sup>213</sup> Hamilton's view would thus suggest that spending for the general welfare includes spending for education.<sup>214</sup>

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status. See Yell, *supra* note 126 (explaining that the Elementary and Secondary Education Act was a part of President Lyndon Johnson's war on poverty). However, because equal-protection analysis has not historically included socioeconomic status, an equal protection argument for dual enrollment is not considered in this Comment. See Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA. L. REV. 407, 407 (2010).

206. See *supra* Section II.A.

207. See *United States v. Butler*, 297 U.S. 1, 66 (1936); see also *supra* Section II.A.

208. National debt means “[t]he total amount owed by the government of a country.” *National Debt*, BLACK'S LAW DICTIONARY (11th ed. 2019). National defense means “[a]ll measures taken by a country to protect itself against its enemies.” *National Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019).

209. See *Butler*, 297 U.S. at 66; see also *supra* Section II.A.

210. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

211. See *id.*; see also *Kansas v. United States*, 214 F.3d 1196, 1199 (2000) (noting the four *Dole* requirements Congress must meet to condition federal funds and using these four requirements in the court's analysis).

212. See *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937) (arguing that drawing the line between what is and is not covered under the general welfare “cannot be known through a formula in advance of the event” because the concept of general welfare is not static and changes with the times); see also *Davisson*, *supra* note 44, at 91 (arguing that the General Welfare Clause in the Taxing and Spending Clause “empowers Congress to tax and spend in order to combat profound economic inequality”).

213. Hamilton, *supra* note 38.

214. See *id.*



Furthermore, the Supreme Court has noted that “[i]n considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgement of Congress.”<sup>215</sup> Currently, Congress utilizes the Taxing and Spending Clause to carry out the ESSA, which provides federal funds to states, conditioned on the states’ adoption of certain education-centered provisions meant to reduce the educational-achievement gap between socioeconomic classes.<sup>216</sup> Congressional spending to incentivize states to adopt better dual enrollment practices would similarly reduce the educational-achievement gap between socioeconomic classes, and therefore, such spending also constitutes spending for the general welfare.

Once it has been established that Congress’s spending is for the general welfare, the second requirement is that Congress must unambiguously state any conditions attached to federal funds, such that states are able to knowingly make a choice about whether to accept Congress’s funds.<sup>217</sup> The Supreme Court has since expanded on this second requirement, stating that Congress cannot apply conditions to funds retroactively.<sup>218</sup> Fortunately, this Comment’s recommendation would satisfy this requirement. Rather than attaching new conditions to old funds, this Comment advocates for Congress to incentivize states to adopt better dual enrollment practices<sup>219</sup> with new federal funding.<sup>220</sup>

The third requirement that Congress must meet to attach conditions to federal funds is that the conditions must be rationally related to the federal interest in a national project or program.<sup>221</sup> For conditions to be rationally related, there must be mere reasonableness or minimum rationality between the conditions and the federal interest.<sup>222</sup> Similar to *South Dakota v. Dole*,<sup>223</sup> where increasing the drinking age from 19 to 21 was considered rationally related to creating safer highways,<sup>224</sup> encouraging states to adopt better dual enrollment practices is rationally

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215. *Dole*, 483 U.S. at 207 (citing *Helvering*, 301 U.S. at 640).

216. See generally Quick, *supra* note 134 (discussing whether NCLB—the re-authorization of the ESEA before the ESSA—goes beyond Congress’s spending powers under the Taxing and Spending Clause); *supra* notes 115–31 and accompanying text.

217. See *Dole*, 483 U.S. at 207 (1987) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); see also *Kansas v. United States*, 214 F.3d 1196, 1199 (2000).

218. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 584 (2012).

219. See *infra* Section III.B (discussing what better dual enrollment practices should entail).

220. See *Sebelius*, 567 U.S. at 584; see also *supra* note 70 and accompanying text.

221. See *Dole*, 483 U.S. at 207–08; see also *Kansas*, 214 F.3d at 1199.

222. See *Kansas*, 214 F.3d at 1199 (citing *New York v. United States*, 505 U.S. 144, 167 (1992)) (stating that Congressional conditions must “bear some relationship to the purpose of the federal spending”).

223. *Dole*, 483 U.S. 203.

224. See *id.* at 208–09.

related to reducing the educational-achievement gap and providing equal education access, regardless of socioeconomic status.<sup>225</sup> Because reducing the educational-achievement gap and providing equal education access currently is and has been a national project,<sup>226</sup> this third requirement is satisfied.

Fourth and finally, for Congress to properly condition federal funding, no other constitutional provision can bar the conditional funds.<sup>227</sup> As applied to dual enrollment, and to education generally, no constitutional provision bars Congress from offering federal funds to the states conditioned upon the states adopting better dual enrollment practices.<sup>228</sup>

In summary, Congress can and should use its Taxing and Spending Clause powers to financially incentivize states to adopt better dual enrollment practices as a way to reduce the educational-achievement gap between high- and low-income individuals. Congress can provide conditioned federal funds for dual enrollment because spending to reduce the educational-achievement gap between high- and low-income individuals is spending for the general welfare of the United States.<sup>229</sup> Congress can condition these federal funds clearly and unambiguously by expressing that the states can receive the federal funds only after adopting specific better dual enrollment practices.<sup>230</sup> Better dual enrollment practices are rationally related to the federal government's interest in reducing the educational-achievement gap, and there are no constitutional provisions barring Congress from placing dual enrollment related conditions on federal funds.<sup>231</sup> Thus, Congress has the power to provide the states with federal funds that are conditional on the states adopting better dual enrollment practices.

### *B. Better Dual Enrollment Practices*

When Congress uses its power to condition funds as a means of incentivizing the states to adopt better dual enrollment practices, better dual enrollment practices need to include: mandatory dissemination of

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225. *See generally* GELSEY MEHL ET AL., *THE DUAL ENROLLMENT PLAYBOOK: A GUIDE TO EQUITABLE ACCELERATION FOR STUDENTS* (2020), <https://bit.ly/30HGePD> (explaining specific principles to make dual enrollment programs accessible to all).

226. *See* The Every Student Succeeds Act (“ESSA”), Pub. L. No. 114-95, 129 Stat. 1802, (codified at 20 U.S.C. §§ 6301 et seq.); The Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27, (codified as amended at 20 U.S.C. §§ 6301 et seq.); *see also supra* notes 109–35 and accompanying text.

227. *Dole*, 483 U.S. at 208; *see also Kansas*, 214 F.3d at 1199.

228. *See* Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 (2015).

229. *See supra* notes 212–16 and accompanying text.

230. *See supra* notes 217–20 and accompanying text.

231. *See supra* notes 221–28 and accompanying text.

dual enrollment information to students and their parents, funding that allows dual enrollment to be free of cost for students, and no restrictive credit caps. Other practices that would improve dual enrollment programs should also be considered as better dual enrollment practices.<sup>232</sup> However, without dissemination of information, students that come from lower-income areas may be unaware of dual enrollment and thus unable to take advantage of the program;<sup>233</sup> without proper funding, students from low-income areas are forced to slow their educational advancement, despite their ability to achieve;<sup>234</sup> and without removing low credit caps, students are hindered from reaching their full potential in dual enrollment.<sup>235</sup>

### 1. Mandatory Dissemination of Information

Mandatory dissemination of dual enrollment information is an absolutely essential better dual enrollment practice.<sup>236</sup> Mandatory dissemination of information, on its face, appears fairly logical: students cannot take advantage of opportunities that they do not know about.<sup>237</sup> Requiring mandatory dissemination of information, however, is also essential to fixing the core issue with current dual enrollment systems: their unintentional expansion of the educational-achievement gap between high- and low-income individuals.<sup>238</sup> Similar to how low-income students struggle to prepare for college, apply to the best-fit colleges, apply for financial aid, and ultimately graduate due to a lack of

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232. For example, Minnesota extended dual enrollment to trade schools and other two-year colleges. See MINN. STAT. ANN. § 124D.09 (West 2020) (stating that an eligible institution includes “a Minnesota public postsecondary institution, a private, nonprofit two-year trade and technical school granting associate degrees, an opportunities industrialization center accredited by an accreditor . . . or a private, residential, two-year or four-year, liberal arts, degree-granting college or university”). By expanding dual enrollment to include trade schools and other two-year colleges, states like Minnesota expand dual enrollment access geographically and afford dual enrollment students further degree-granting opportunities. See generally *Fast Facts: Educational Institutions*, NAT’L CTR. FOR EDUC. STAT., <https://bit.ly/3rOOURm> (last visited Feb. 14, 2021) (showing that for the 2016–2017 school year, there were 1,528 two-year colleges in the United States).

233. See *infra* Section III.B.1.

234. See *infra* Section III.B.2.

235. See *infra* Section III.B.3.

236. See MEHL ET AL., *supra* note 225 at 22 (“Educators should not wait until students are in high school to plant the seed about dual enrollment.”).

237. See *id.* at 2, 22.

238. See Gilbert, *supra* note 5; see also Catherine Gewertz, *Study Finds Gender, Race, Income Gaps in Dual-Enrollment Programs*, EDUC. WK. (Mar. 10, 2017), <https://bit.ly/2FCzlol> (discussing a study that found “high-achieving white girls from financially secure homes are more likely to enroll in [dual enrollment programs] than minority, male, or low-income students”).

adequate guidance,<sup>239</sup> low-income students struggle to access dual enrollment opportunities<sup>240</sup> and will continue to struggle until properly informed about dual enrollment programs.<sup>241</sup> If dual enrollment information dissemination is not required, low-income students will have reduced access to dual enrollment programs, similar to how low-income students often have reduced access to informational resources about college.<sup>242</sup> Thus, mandatory dissemination of dual enrollment information to students is essential to fixing this disparity and reducing the educational-achievement gap between socioeconomic classes.<sup>243</sup>

Additionally, currently eligible students should not be the only recipients of information about available dual enrollment opportunities.<sup>244</sup> Rather, Congress's better dual enrollment practices should reflect Ohio's statutes<sup>245</sup> on dissemination of dual enrollment information. Dual enrollment information should be disseminated to all students and their parents, starting in the sixth grade at the latest.<sup>246</sup> Disseminating dual enrollment information to students and their parents long before students reach high school allows students adequate time to ensure they meet all of the requirements for dual enrollment, which gives students a better chance of being able to reap the benefits that dual enrollment can provide.<sup>247</sup> Requiring dissemination of dual enrollment information, however, is simply one of three necessary steps in making dual enrollment accessible to all qualified students, regardless of socioeconomic status. The second step is providing a funding system that

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239. See THE EXEC. OFFICE OF THE PRESIDENT, INCREASING COLLEGE OPPORTUNITY FOR LOW-INCOME STUDENTS 2 (Jan. 2014), <https://bit.ly/36UWmip>.

240. See *New Report: Dual Enrollment Can Help Poor and Minority Students – If They Gain Access*, TEACHERS C. COLUMBIA U. (Oct. 15, 2020), <https://bit.ly/2MXQakZ> (“[L]ow-income students and those in underrepresented racial and ethnic groups have far less access to [dual enrollment] programs.”).

241. See *id.*; see also MEHL ET AL., *supra* note 225, at 2–3.

242. See *Education and Socioeconomic Status*, AM. PSYCHOL. ASS'N, <https://bit.ly/31QC9IH> (last visited Feb. 12, 2020) (noting that “prospective college students from [low-income] backgrounds are less likely to have access to informational resources about college”).

243. See MEHL ET AL., *supra* note 225, at 2–3, 22.

244. See, e.g., 105 ILL. COMP. STAT. ANN. 5/34-18.55 (West 2018) (“The board shall require the district’s high schools to inform all 11th and 12th grade students of dual enrollment and dual credit opportunities at public community colleges for qualified students.”).

245. OHIO REV. CODE ANN. § 3365.04 (West 2020) (“Each public and participating nonpublic secondary school shall . . . [p]rovide information about the program prior to the first day of February of each year to all students enrolled in grades six through eleven.”).

246. See *id.* (requiring dissemination of dual enrollment information beginning in sixth grade).

247. See MEHL ET AL., *supra* note 225, at 4–5.

does not discriminate against students based on their socioeconomic class.

## 2. Funding That Does Not Discriminate

Ensuring that states fund dual enrollment programs so students and their parents do not have to pay out of pocket to participate is another essential better dual enrollment practice.<sup>248</sup> The federal government is supposed to provide “equal educational opportunities”<sup>249</sup> regardless of race, sex, and disability,<sup>250</sup> and the history of the federal government’s involvement in education supports that the federal government can spend to reduce educational-achievement gaps between socioeconomic classes.<sup>251</sup> However, dual enrollment programs that require participating students and their parents to pay out of pocket<sup>252</sup> for college credits taken through dual enrollment discriminate against students who cannot afford to pay for these credits out of pocket.<sup>253</sup> Requiring students and their parents to cover dual enrollment program costs out of pocket increases the educational-achievement gap between high- and low-income individuals by effectively providing dual enrollment exclusively to students from higher socioeconomic classes.<sup>254</sup> Ensuring dual enrollment is offered to eligible students free of cost reduces this implicit discrimination, which in turn helps reduce the educational-achievement gap between socioeconomic classes.<sup>255</sup>

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248. See JENNIFER DOUNAY ZINTH, INCREASING STUDENT ACCESS AND SUCCESS IN DUAL ENROLLMENT PROGRAMS: 13 MODEL STATE-LEVEL POLICY COMPONENTS 2, 9 (2014), <https://bit.ly/3tgLPbU> (stating that programs requiring students and their parents to pay tuition up front preclude low-income students).

249. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

250. See *The Federal Role in Education*, *supra* note 89 (stating that “[t]he passage of laws such as Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1973 which prohibited discrimination based on race, sex, and disability, respectively made civil rights enforcement a fundamental and long lasting focus of the Department of Education”); see also *supra* Section II.B.

251. See Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 (2015) (stating that the purpose of the Act “is to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps”); see also *supra* Section II.B.

252. See, e.g., *Dual Enrollment – All State Profiles*, *supra* note 14. Students and their parents end up having to pay out of pocket because the FAFSA does not provide federal assistance until a student has earned their high school diploma or GED, passed an approved “ability-to-benefit” test, or completed six college credits for which the student did not receive federal assistance. See *Eligibility Requirements*, STUDENTAID.GOV, <https://bit.ly/2QHlQc7> (last visited Jan. 11, 2020).

253. See Gilbert, *supra* note 5.

254. See *id.*

255. The alternative to offering dual enrollment to eligible students free of cost would be to expand federal assistance to dual enrollment. See *Fact Sheet: Expanding College Access Through the Dual Enrollment Pell Experiment*, U.S. DEP’T EDUC. (May

The federal government can help ensure that dual enrollment is free of cost for students by crafting better dual enrollment financing practices based on Wyoming's<sup>256</sup> and Iowa's<sup>257</sup> dual enrollment statutes.<sup>258</sup> However, how states fund their dual enrollment programs beyond not having students and their parents pay out of pocket is a decision that should be left to the states.<sup>259</sup> As long as students and their parents are not forced to pay out of pocket, states can likely avoid the implicit discriminatory effects currently seen in some funding systems for dual enrollment programs.<sup>260</sup> If there are no implicit discrimination concerns, then the Constitution favors the states retaining control over decisions regarding education financing.<sup>261</sup> States concerned about financing the implementation of these better dual enrollment practices<sup>262</sup> should remember the federal funds that will be given to them in exchange for adopting the better dual enrollment practices.

Although making dual enrollment free of cost is a second necessary step to making dual enrollment accessible to all qualified students regardless of socioeconomic status, there is still a third necessary step: ensuring states do not have low credit caps.

### 3. No Low Credit Caps

Removing credit caps that prevent dual enrollment students from taking a full college course load each semester is the third and final

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16, 2016), <https://bit.ly/2TFwdjG> (discussing an experiment where 44 postsecondary institutions were given permission to allow dual enrollment students access to Federal Pell Grants). However, this would likely entail students under the age of 18 taking on federal loans. *See Loans*, STUDENTAID.GOV, <https://bit.ly/2RcY7BU> (last visited Jan. 20, 2020) (noting that college students may be offered loans as part of their school's financial aid offer).

256. *See* WYO. STAT. ANN. § 21-20-201(d) (West 2020) ("The university or community college shall not directly assess and collect any fee from the participating student for textbooks, materials, student services or any other fees otherwise assessed and collected from students attending the institution.").

257. *See* IOWA CODE ANN. § 261E.7 (West 2020) ("An eligible postsecondary institution that enrolls an eligible student under this section shall not charge that student for tuition, textbooks, materials, or fees directly related to the course in which the student is enrolled except that the student may be required to purchase equipment that becomes the property of the student.").

258. *See supra* Section II.C.2.

259. *See supra* notes 79–80 and accompanying text. *See generally* Jennifer Zinth, *State Approaches to Funding Dual Enrollment*, in ECS EDUC. POL'Y ANALYSIS (May 2015), <https://bit.ly/2SlffGg> (analyzing different dual enrollment funding methods).

260. *See* Zinth, *supra* note 259, at 1–2.

261. *See* U.S. CONST. amend. X; *see also supra* notes 79–80 and accompanying text.

262. *See generally* Zinth, *supra* note 259 (pointing out that under-resourced school districts can struggle to absorb dual enrollment costs).

absolutely essential better dual enrollment practice.<sup>263</sup> Credit caps that are funding-focused require participating students or their parents to pay out of pocket for any college credits taken after a student has reached the predetermined cap.<sup>264</sup> Funding-focused credit caps, therefore, limit the number of credits low-income individuals can obtain while in dual enrollment.<sup>265</sup> Limiting the number of college credits a student can complete while in high school extends the time necessary for that student to complete his or her post-secondary education, which can yet again contribute to an increase in the educational-achievement gap between socioeconomic classes.<sup>266</sup> Funding-focused credit caps are thus another barrier to low-income students' access to dual enrollment's benefits.

Facially neutral credit caps, which are not funding-focused, pose a less severe threat to lower-income students, unless they are overly restrictive.<sup>267</sup> For example, the neutral credit cap in Ohio<sup>268</sup> allows a dual enrollment student to take no more than 15 college credits each semester.<sup>269</sup> While credit caps of this sort are still limiting, students with more funding cannot simply exceed the limit of the cap by paying for additional credits. Furthermore, a 15-credit cap is still a full-time course load at most universities.<sup>270</sup> Thus, a credit cap of this caliber is unlikely to widen the educational-achievement gap between socioeconomic classes and should be allowed.

In contrast, facially neutral credit caps such as those in Michigan,<sup>271</sup> Pennsylvania,<sup>272</sup> or South Dakota,<sup>273</sup> which prohibit students from taking

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263. See generally ZINTH, *supra* note 248, at 2, 5–6.

264. See UTAH STATE BOARD OF EDUCATION, UTAH CONCURRENT ENROLLMENT 2020–21 HANDBOOK 17 (2020), <https://bit.ly/38C56wu> (“Credits in excess of 30 must be on a non-contractual basis, and the student is responsible for tuition and fees.”); see also KHEAA-Administered Programs, KHEAA, <https://bit.ly/2RmfZKH> (last visited on Mar. 14, 2021) (limiting Kentucky dual enrollment students to financial assistance for a maximum of two dual credit classes).

265. See ZINTH, *supra* note 248, at 2, 5–6, 9.

266. See Peggy Anne Westcott, The Impact of Dual Enrollment Participation on Degree Attainment (Winter 2009) (unpublished Ph.D. dissertation, Old Dominion University) (on file with ODU Digital Commons), <https://bit.ly/2Sp9NIS> (finding that “students with prior dual enrollment coursework . . . took a shorter time to complete a bachelor’s degree”).

267. See ZINTH, *supra* note 248, at 2, 5–6.

268. See OHIO ADMIN. CODE 3333-1-65.2(B)(4) (2020).

269. See *Dual Enrollment – All State Profiles*, *supra* note 14; see also *supra* Section II.C.3.

270. See Paul Fain, *Full-Time Finishers*, INSIDE HIGHER ED (Apr. 19, 2017), <https://bit.ly/3aB6uyQ>.

271. See MICH. COMP. LAWS ANN. § 388.513(d) (West 2020) (“[A] course . . . is not an eligible course if the eligible student’s enrollment in, and the payment of eligible charges under this act for, the course would exceed the following limits: Not more than 10 courses overall.”).

a full-time course load,<sup>274</sup> defeat the purpose of dual enrollment programs. The intent of dual enrollment is to shorten the length of time it takes a student to graduate from post-secondary school and reduce post-secondary tuition costs,<sup>275</sup> which helps close the educational-achievement gap between socioeconomic classes. However, when a funding cap limits a dual enrollment student to participating in a total of only ten dual enrollment courses, or roughly 30 college credits, over four years of high school,<sup>276</sup> the dual enrollment program fails to meet its goals.

#### IV. RECOMMENDATION

Although dual enrollment in its current form has the ability to expand the educational-achievement gap between socioeconomic classes,<sup>277</sup> dual enrollment also benefits participating students.<sup>278</sup> To prevent dual enrollment from expanding the educational-achievement gap between socioeconomic classes without eradicating dual enrollment programs entirely, Congress should use its power under the Taxing and Spending Clause to incentivize states to adopt better dual enrollment practices.<sup>279</sup> For these better dual enrollment practices to fix the expansion of the educational achievement gap, better dual enrollment practices need to include: mandatory dissemination of dual enrollment information, funding that does not discriminate against low-income students, and elimination of low credit caps.<sup>280</sup>

Congress should look to Ohio<sup>281</sup> when creating a rule on mandatory dissemination of information and require dissemination of dual enrollment information to all students and their parents no later than sixth grade.<sup>282</sup> When crafting non-discriminatory funding practices,

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272. See 24 PA. STAT. AND CONS. STAT. ANN. § 16-1615-B(e) (West 2020) (“A concurrent student’s concurrent course enrollment may not exceed 24 postsecondary credits in any school year.”).

273. See SOUTH DAKOTA BOARD OF REGENTS, *supra* note 186, at Section 4.6.3 (“Student enrollment is limited to no more than 10 credit hours in any given academic term.”).

274. See *supra* Section II.C.3.

275. See *Nine Reasons Why Dual Enrollment Is a Great Choice*, CARROLL COMMUNITY C. (Jan. 29, 2018), <https://bit.ly/3lfkRyu>.

276. See MICH. COMP. LAWS ANN. § 388.513(d) (West 2020).

277. See Gilbert, *supra* note 5.

278. See *supra* notes 6–13 and accompanying text.

279. See *supra* Section III.A.

280. See *supra* Section III.B.

281. See OHIO REV. CODE ANN. § 3365.04 (West 2020) (“Each public and participating nonpublic secondary school shall . . . [p]rovide information about the program prior to the first day of February of each year to all students enrolled in grades six through eleven.”).

282. See *id.*



Congress should look to Wyoming and Idaho for inspiration<sup>283</sup> and make sure that students and their parents do not have to pay out of pocket for dual enrollment college credits. Finally, regarding credit caps, Congress should look to Nevada and Texas for guidance.<sup>284</sup> Congress should require states to eradicate funding-focused credit caps and eliminate facially neutral credit caps, which prevent dual enrollment students from taking full-time college course loads.

## V. CONCLUSION

Student debt is a rising problem.<sup>285</sup> The educational-achievement gap between socioeconomic classes is a continuing problem.<sup>286</sup> Dual enrollment has the potential to fix both of these issues,<sup>287</sup> but only if dual enrollment programs in each state are carried out appropriately.<sup>288</sup> To ensure that dual enrollment is being carried out appropriately across the United States, Congress should use its power under the Taxing and

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283. See WYO. STAT. ANN. § 21-20-201(d) (West 2020) (“The university or community college shall not directly assess and collect any fee from the participating student for textbooks, materials, student services or any other fees otherwise assessed and collected from students attending the institution.”); see also IOWA CODE ANN. § 261E.7 (West 2020) (“An eligible postsecondary institution that enrolls an eligible student under this section shall not charge that student for tuition, textbooks, materials, or fees directly related to the course in which the student is enrolled except that the student may be required to purchase equipment that becomes the property of the student.”); *supra* Section II.C.2.

284. See NEV. REV. STAT. ANN. § 389.160(3) (West 2020) (“The State Board must not unreasonably limit the number of dual credit courses in which a pupil may enroll or for which a pupil may receive credit.”); see also TEX. EDUCATION CODE ANN. § 28.009(b) (West 2019) (“A rule may not limit the number of dual credit courses or semester credit hours in which a student may enroll while in high school or limit the number of dual credit courses or semester credit hours in which a student may enroll each semester or academic year.”).

285. See Maldonado, *supra* note 1 (noting that the cost of attending a university doubled from 1989 to 2016 after accounting for inflation and determining that “the cost to attend a university increased nearly eight times faster than wages did”); see also Healey, *supra* note 1 (pointing out that “[o]ver the past 20 years, college costs have grown at over three times the rate of inflation” and stating that as a result “70% of college graduates have student debt”).

286. See Anna K. Chmielewski, *The Global Increase in the Socioeconomic Achievement Gap, 1964 to 2015*, 84 AM. SOC. REV. 517, 517 (2019) (“The ‘socioeconomic achievement gap’ – the disparity in academic achievement between students from high- and low-socioeconomic status (SES) backgrounds – is well-known in the sociology of education.”); see also *supra* notes 123–36 and accompanying text.

287. See Steer, *supra* note 6 (noting that Ohio’s dual enrollment program has saved families more than \$569 million in college tuition); see also An, *supra* note 13 (concluding that low-income students that are able to participate in dual enrollment programs in their state have boosted rates of college degree attainment).

288. See Gilbert, *supra* note 5 (noting that dual enrollment programs that require students to pay out of pocket for their college credits create additional barriers to college degree attainment for low-income students).

Spending Clause to incentivize states to adopt better dual enrollment practices. Congress can use its power under the Taxing and Spending Clause to improve dual enrollment as long as Congress offers new funding to the states and clearly and unambiguously states that the new funding will be provided only after states adopt better dual enrollment practices.<sup>289</sup> These better dual enrollment practices, at a minimum, must include: mandatory dissemination of information, a funding structure that does not discriminate, and no low credit caps. When Congress is writing the specifics of these better dual enrollment practices, Congress should look to Ohio for guidance on mandatory dissemination of information,<sup>290</sup> to both Wyoming and Idaho for guidance on non-discriminatory funding,<sup>291</sup> and to Nevada and Texas for guidance on eliminating low credit caps.<sup>292</sup> In using its Taxing and Spending Power to incentivize states to adopt these better dual enrollment practices, Congress can combat the educational-achievement gap between socioeconomic classes and the rising student debt problem, all at once.

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289. *See supra* Sections II.A, III.A.

290. *See supra* Section III.B.1.

291. *See supra* Section III.B.2.

292. *See supra* Sections II.C.3, III.B.3.

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