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# With Liberty and Education for All: Using Law to Depoliticize Public Policy in Education

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## WITH LIBERTY AND EDUCATION FOR ALL: USING LAW TO DEPOLITICIZE PUBLIC POLICY IN EDUCATION

*Zach Simons and Brady Earley<sup>1</sup>*

**T**he difficult experience of a young high schooler, Jameria Miller, is representative of a larger problem in public education funding. Each day she runs to school early in order to get a “good blanket” to stay warm in the uninsulated classrooms. Living in an “inner-ring suburb of Philadelphia,” Jameria says of students at other schools that “they’re always going to be a step ahead of us. They’ll have more money than us, and they’ll get better jobs than us, always.”<sup>2</sup>

Not enough has been done in the United States to protect equality for educational opportunities. Despite the landmark case of *Brown v. Board of Education*, which reinforced the constitutional guarantee that no state can deny “equal protection of the laws”<sup>3</sup> to its citizens, unequal funding for education continues to create unequal opportunities for children in lower socioeconomic classes.

According to a study by the National Bureau of Economic

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  - 2 Cory Turner ET. AL., *Can More Money Fix America’s Schools?*, NPR ED (Apr. 25, 2016), <https://www.npr.org/sections/ed/2016/04/25/468157856/can-more-money-fix-americas-schools>.
  - 3 U.S. Const. amend. XIV, § 1.

Research, “a 10 percent increase in per-pupil spending each year for all twelve years of public school leads to 0.27 more completed years of education, 7.25 percent higher wages, and a 3.67 percentage-point reduction in the annual incidence of adult poverty.”<sup>4</sup> This research demonstrates the correlation between funding for education and outcomes of education. Unfortunately, “systematic economic and racial isolation looms as a huge obstacle for efforts to make a quality education available to all American students.”<sup>5</sup> Poor school districts lack the funds necessary to provide a quality education to all students, and, in addition, often lack the knowledge of how to effectively use funding.

This paper proposes a possible solution to the problem of education funding inequality. One goal of a state should be to reduce social issues, especially those derived from unequal education opportunities. To that end, this paper will: (1) review the legal history of education in the United States, (2) argue that, ideally, education should be a right awarded by the federal constitution through amendment, and (3) due to the arduous process of amending the constitution, will outline a federal funding incentive plan with legal federal standards that states can adopt in order to qualify, which are aimed at providing equal opportunity for all children.

## I. BACKGROUND

Since the landmark case *Brown v. Board of Education*, there have been notable efforts on the federal level to equalize funding for public education through both legislation and

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4 C. Kirabo Jackson, Rucker C. Johnson, and Claudia Persico, *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, NBER WORKING PAPER SERIES (Jan. 2015), <http://www.nber.org/papers/w20847.pdf>.

5 Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, THE ATLANTIC (Feb. 29, 2016), <https://www.theatlantic.com/education/archive/2016/02/concentration-poverty-american-schools/471414/>.

judicial action. Among the many laws passed, most are consistent to that of the Elementary and Secondary Education Act (ESEA) of 1965, which aimed to improve educational opportunities for children of low income families by “providing federal funds to school districts serving poor students.”<sup>6</sup> Eight legislative changes have followed the ESEA of 1965 leading up to the ESSA of 2015 (Every Student Succeeds Act). Though each proposal differs slightly from the previous, they all build off of the ESEA and essentially say the same thing. These changes demonstrate the political ‘back-and-forth’ that has accompanied education policy and the politicized nature of the debate.

What have these numerous acts actually accomplished in the way of equalizing funding? To answer this question, it is imperative to understand where funding for schools comes from in the US. There are three main sources of funding for schools: federal-level funding, state-level funding, and local-level funding. In 2012-13, roughly 10% of funding came from the federal government, with the rest of funding split between state and local funding (about 45% each)<sup>7</sup>. This method is problematic because local funding comes from property taxes. This leads to lower funds for poorer communities. This is evidenced by a 1972 report commissioned by Richard Nixon, which found that “over-reliance on property tax led to inequitable schools. It found that money was not being ‘collected equitably or spent according to the needs of children.’”<sup>8</sup>

Aside from these previously mentioned acts, not much

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6 *The ABC's of ESEA, ESSA and No Child Left Behind*, EDUCATION POST, <http://educationpost.org/the-abcs-of-esea-essa-and-no-child-left-behind/> (last visited Feb. 22, 2018).

7 Lauren Musu-Gillette & Stephen Cornman, *Financing education: National, state, and local funding and spending for public schools in 2013*, NCES BLOG (Jan. 25, 2016), <https://nces.ed.gov/blogs/nces/post/financing-education-national-state-and-local-funding-and-spending-for-public-schools-in-2013>.

8 Alana Semuels, *Good School, Rich School; Bad School, Poor School*, THE ATLANTIC (Aug. 25, 2016), <https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333/>.

change has occurred at the federal level to resolve education inequality. The Supreme Court case of *San Antonio Independent School District v. Rodriguez* is one example of significant change, however. This case, originating in Texas, challenged the way in which the funding scheme in Texas school systems worked, as it caused severe inter-district disparities in per-pupil expenditures. At the Supreme Court level, it was decided that Texas did not violate the Equal Protection Clause of the 14<sup>th</sup> amendment, which, as previously stated, requires equal protection of citizens under the law. In addition, it stated that “the Equal Protection Clause does not require absolute equality or precisely equal advantages.”<sup>9</sup>

As not much change has occurred at the federal level, a more realistic solution might be found at the state level. State constitutions vary in their descriptions of how education should be administered. These variances can be divided into four categories: (1) “merely mandate a system of free public schools,” (2) “mandate that the system of public schools meet a certain minimum standard of quality,” (3) “distinguished from the Category I and II clauses by both a ‘stronger and more specific education mandate’ and ‘purposive preambles,’” and (4) “impose the greatest obligation on the state legislature... provide that education is ‘fundamental,’ ‘primary’ or ‘paramount.’ ”<sup>10</sup> Due to the uniqueness of each state constitution, each state may decide how funds best be allocated to schools within their borders.

Even with state constitutions guiding funding decisions, there remain many communities, schools, and families lacking the necessary funding to succeed in the US educational system. As of December 2014, “at least seven states” are involved in unresolved education finance cases where it is argued that “state school finance systems or the foundation level funding for those systems violates their states’ respective constitutional

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9 *San Antonio Independent School District v. Rodriguez*, 411 US 1 (1973).

10 *State Role in Education Finance*, NCSL, <http://www.ncsl.org/research/education/state-role-in-education-finance.aspx> (last visited Dec. 19, 2017).

education clauses.”<sup>11</sup> Each of these cases address unique issues within the seven different states, and make up a part of the larger issue of education inequality in the United States.

## II. EDUCATION AS A FEDERAL RIGHT

In the opening sentence of the ESEA of 1965 (as amended by the ESSA), it states “the purpose of this title is to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.”<sup>12</sup> This sentiment reflects the reaffirmation made in *Brown v. Board of Education* to the 14<sup>th</sup> Amendment’s “Equal Protection Clause” as it relates to education, though even in that case “the Supreme Court did not immediately try to give direction for the implementation of its ruling.”<sup>13</sup>

There has been a lot of back and forth over the role of the Federal Government in education, weakening the effect of the ESSA. President Trump signed an executive order which states “no provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system.”<sup>14</sup> This quote does not demonstrate a change in legal practice relating to education, however, it does demonstrate the political swing back towards a focus on State control of education. Education has been caught in a political pendulum for decades. This political game demonstrates the ineffectiveness of these

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11 *Id.*

12 *Elementary and Secondary Education Act of 1965*, 20 U.S.C. § 70 (1965).

13 *History – Brown v. Board of Education Reenactment*, UNITED STATES COURTS, <http://www.uscourts.gov/educational-resources/educational-activities/history-brown-v-board-education-re-enactment> (last visited Dec. 19, 2017).

14 20 U.S.C. § 1232a (2017).

federal acts in solving funding inequality problems in education.

Education is not and should not be a political issue, as a better education for all children will improve a society regardless of party lines. It is for this reason that the Universal Declaration of Human Rights declares “everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages... education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.”<sup>15</sup> Other nations have adapted this declaration into their constitutions. “Each has constructed law around education as a fundamental right of citizens, at least until the age of adulthood. Finland, ranked to have the best education system in the world, succinctly asserts, ‘Everyone has the right to basic education free of charge.’”<sup>16</sup> The US, on the other hand, has not chosen to adopt such a constitutional amendment.

A report titled “the Learning Curve” ranked the United States’ education system in 17<sup>th</sup> place out of 40 countries in 2012.<sup>17</sup> This rating index, published by Pearson, “uses global data sets such as PISA, TIMSS and PIRLS together with individual country data such as literacy and graduation rates”<sup>18</sup> in order to rate and rank school systems. While these comparisons are not always as telling as we might think, seeing as many factors contribute to making an education system successful, one thing is clear: making education an explicit right in a nation will help this issue become depoliticized and a more focused effort for equality will be made.

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15 *Universal Declaration of Human Rights*, UNITED NATIONS, <http://www.un.org/en/universal-declaration-human-rights/> (last visited Dec. 19, 2017).

16 Stephen Lurie, *Why Doesn't the Constitution Guarantee the Right to Education?*, THE ATLANTIC (Oct. 16, 2013), <https://www.theatlantic.com/education/archive/2013/10/why-doesnt-the-constitution-guarantee-the-right-to-education/280583/>.

17 *Index – Which countries have the best schools?*, PEARSON, <http://thelearningcurve.pearson.com/index/index-ranking/overall-score-highest/> (last visited Dec. 19, 2017).

18 *Index – Which countries have the best schools?* *supra* note 17.

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In reference to the index published by Pearson we know that “each of the countries ahead of the US has a fundamental commitment in common, one that America doesn’t: a constitutional, or statutory, guarantee of the right to education.”<sup>19</sup> The US should follow suit by making the receipt of an education a right afforded to all children, protected by constitutional amendment. This has happened elsewhere and has proven effective as “by centralizing education as a key focus of the state, these countries establish baseline requirements that set the frame for policy and judicial challenges.”<sup>20</sup> In essence, these countries have made themselves accountable by law to make education a priority as a right, and it has proven effective, at least according to Pearson’s “Learning Curve” Index. A similar move in the US would likely have a similar effect, by increasing accountability nationwide, ensuring that funding for school districts is more balanced across the board and by providing equal opportunities within each district for all children, regardless of socioeconomic classes.

What has prevented the US from making this move? Constitutional amendments have been notoriously hard to pass, and “of the over 11,000 proposed amendments to the Constitution, there have only been a couple that directly address the right of an education.”<sup>21</sup> This reluctance is only supported by the political nature of the issue. In addition, in the case of *San Antonio Independent School District v. Rodriguez* the Supreme Court declared that “though education is one of the most important services performed by the State, it is not within the limited category of rights recognized by this Court as guaranteed by the Constitution.”<sup>22</sup> In other words, the Supreme Court has ruled that education is not a right protected by the Constitution, even under the Equal Protection Clause. Because of the

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19 Lurie, *supra* note 16.

20 *Id.*

21 *Id.*

22 *San Antonio Independent School District v. Rodriguez*, 411 US 1 (1973).

complexities involved in amending the constitution, this kind of solution to the education problem, though ideal, is not probable. We propose a different kind of solution to work at the state level.

### III. A SOLUTION FOR THE STATES

Each state outlines in its constitution the legal guidelines for how public education is to be administered. As previously described, the constitutional language regarding education varies widely state by state, but it can ultimately be divided into four categories.<sup>23</sup> Even in the category with the strongest language, mandating that education be fundamental or paramount, only two states (Arkansas and Montana) include language that requires their state education system to give equal opportunity for each student to have academic success.

Current state constitutional language lacks the precedent necessary to afford equal opportunity through funding for individual students. Therefore, we would propose a federal legislation allowing states to increase federal education funding to states who meet certain requirements. In essence, the federal government would provide incentives for states to equalize education (through funding and education standards). This type of incentive program is not unprecedented as the US government has provided these types of programs in the past.<sup>24</sup>

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23 *State Role in Education, supra* note 10.

24 Many programs have been implemented to incentivize state and local governments to improve environmental efforts. One of many examples is the Biomass Assistance Program, which, according to the US Department of Energy, “provides financial assistance to landowners and operators that establish, produce, and deliver biomass feedstock crops for advanced biofuel production facilities.” This incentive system may last “for up to two years” for crop producers and is funded “through fiscal year 2018” and therefore will be assessed in early 2018. Alternative Fuels Data Center, *Advanced Biofuel Feedstock Incentives*, US Department of Energy, <https://www.afdc.energy.gov/laws/10292/>. (last visited Dec. 19, 2017).

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We propose an act called the Equitable Allocation and Use of Educational Funding Act. This Act would promise financial aid to states that provide a budget plan for equalizing funding across school districts and demonstrate effective implementation of funding as well as improvement in educational achievement. The federal government would promise a predetermined amount of money for five years to each state which successfully presents a budget plan to equalize funding across school districts. An additional term of funding will be provided at the end of the initial five years. This second incentive will be awarded to states who successfully meet a set of federal standards as established in this act. This period of funding will last four years to ensure the state can maintain the changes made.

Standards for this proposed act would be focused on closing the education opportunity gap within states. As states meet the required level of need in educational opportunity (further described below), they will be subsidized by federal funding to meet the needs of low income districts. The result will be a reallocation of funds going to places in the state where they can have the greatest impact such as inner-city schools. Furthermore, the aforementioned legislation is flexible enough to address the multiple dimensions of the issue over education according to state needs.

This legislation would be an available option to those states with largely diverse income levels. It is also available to states which have much less variation in socioeconomic conditions across the state. These states would be welcome to use their own state funding if the system they employ already affords equal educational opportunity through the state. Thus, the incentive stands as a way to benefit all states without enforcing a “constitutional straightjacket” on the states<sup>25</sup>.

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25 San Antonio Independent School District v. Rodriguez, 411 US 1 (1973).

#### IV. FEDERAL STANDARDS TO MEET FOR INCENTIVES

The standards required to obtain federal funding will consist of significant financial need and planned community involvement. Significant financial need is determined based on the same metric used by the National Center for Children in Poverty to classify low income families.<sup>26</sup> If over fifty percent of the students in the district come from low income families, then they will qualify under the financial need portion.

The second requirement is based upon a plan that will be drafted by a board of parents and teachers that live within the school district to determine how the funds will be used. This board will be advised by an administrator from each school but will largely consist of the parents and teachers of students that are or will be attending affected schools. This follows the same principle of allowing state constitutions to adapt educational requirements to what best fits the educational needs of the children in their jurisdiction. Furthermore, community involvement by parents of children in public schools has been shown to significantly increase the success of the child in school.<sup>27</sup>

A state representative will determine which school districts meet these two standards and will review each district's plan for the use of funds. A state budget plan can then be created in order to meet the needs of these districts and raise their funding to the state average. In meeting these two standards, districts will ensure their need for funding and their ability to properly implement these funds. The state will then be ready to submit this evaluation and budget plan to the federal Department of Education. After review, the Department of Education will be able to award funding to the state in order to assist those school districts where plans were approved and the

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26 *Explanations of Terms and Data Sources*, NCCP, <http://www.nccp.org/tools/demographics/definitions.php>. (last visited Dec. 19, 2017).

27 *Parent, Family, Community Involvement in Education*, AN NEA POLICY BRIEF, [http://www.nea.org/assets/docs/PB11\\_ParentInvolvement08.pdf](http://www.nea.org/assets/docs/PB11_ParentInvolvement08.pdf). (last visited Dec. 19, 2017).

plan can be implemented to increase funding across the state.

After funding is awarded, performance will be evaluated five years from the time the funding is given and the plan implemented. This five year period allows sufficient time for different teachers, students, and families to take part in the funds awarded and reveal key changes that can be made based on a significant amount of data from the five-year trial. Further funding will be evaluated on changes that have taken place in test scores in addition to community satisfaction with education in the school district—the former will be undertaken by the school board in evaluating success and providing a report to the Department of Education.

The federal funding allotted to these qualifying schools will come as a result of increased government spending, not taxes to any specific group. The idea behind this economic strategy is essentially an investment toward our low-income students in the United States. The government will buy treasury bills (a secure, long-term investment) which they will be required to pay back after a 10-year period in addition to interest.

When time comes to pay these bills in future years, the investment is that a portion of students will begin to be a part of the work force or will be preparing, through post-high school degrees, to enter their chosen field. The desired result of the policy, over time, would be an economy with less crime and a greater workforce to pay off the debt the government made towards their education twenty or thirty years earlier. An even greater reward would be in enabling individuals to use education as a ladder to pull themselves out of the socioeconomic hole of poverty they could not otherwise escape.

This policy, like any other, would likely involve politics as part of the process to pass this legislation. However, it is important to note that this policy is not mandatory, but simply an economic incentive available to states where schools and families are ready for change to their public education and who are willing to demonstrate how that change can occur. As these schools and the people within them respond, the Department of Education will

be able to quickly identify schools in need of funds. This solution may seem impractical, and like there are too many obstacles to overcome. However, even though the financial investment into these schools may not guarantee results, it will enable opportunity which will ultimately have a positive effect on society.

In the end, the most concrete solution to the problem of inequality in education opportunity in the US would be a right to the receipt of a good education guaranteed through constitutional amendment. Our proposal is one step behind that ideal, albeit impractical, goal. The history of education in the US evidences this impracticality. State constitutions each outline different criteria for the education system of their respective state. However, only two actually contain wording that is close to the guarantee of equal opportunity among K-12 public school students, let alone enforce this standard. There has been significant effort over the past five decades to establish legislation that aims to improve educational opportunity for students that come from a disadvantaged socioeconomic background. Due to political affiliation, the legislators have yet to see any real change in education reform because it continues to be a politically charged cycle of approval followed by appeal.

Our proposal accomplishes the desired result of equal education opportunity through a federal means while largely removing the politics from the process. Each state will be endowed with federal funding as a result of their compliance to the federal standards required by the act. This additional federal funding will provide an incentive to the states with significant gaps in educational opportunity. This funding will allow states to place greater investment into resources for those lacking opportunity to succeed in school. As the overall effects of this act are evaluated in the coming years, the result will allow both judicial and legislative officials to observe the change in the education opportunity gap. Subsequently, the results themselves may provide the needed incentive to adopt education as a constitutional right—but the most valuable outcome will not be measurable. The greatest result will be the progress of the nation as improved educational

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opportunity raises the quality and character of its future leaders.

