

2019

Breaking the Norm of School Reform

Derek Black

University of South Carolina - Columbia, blackdw@mailbox.sc.edu

Follow this and additional works at: https://scholarcommons.sc.edu/law_facpub



Part of the [Education Law Commons](#)

Recommended Citation

Derek Black, *Breaking the Norm of School Reform*, 72 *ARK. L. Rev.* 307 (2019).

This Article is brought to you by the Law School at Scholar Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.

Breaking the Norm of School Reform

Derek W. Black

Major school improvement efforts have failed in recent decades for two reasons. First, the endless pursuit of reform for reform's sake over the last few years undermines school improvement.¹ Second, we have abandoned or, at least, lost our focus on the fundamental educational goals that animated education policy decades—and sometimes centuries—ago. Those goals, while never fully attained, have always sought to move us to a more just system of public education. By losing that focus, our education systems remain wedded to practical norms that consistently undermine equal and adequate educational opportunities.

The modern policy conversation is too quick to throw out overgeneralized claims that “[public] schools are failing.”² If they are failing, we have to reform them, they say.³ But the term “failing” is rarely defined in any meaningful way. Does failing mean that students’ standardized tests scores are not high? All students? Does failing mean that schools are not providing students with the opportunities they need, that schools are not equal, or that schools simply are not living up to our expectations on some particular metric? Any number of norms are embedded in the concept of failing and when we do not define the term, we skip a lot of complicated questions about what it means for a school to succeed. Equally important, we also open the policy conversation to proposals that purport to fix the “failure,” but

1. See Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 257–60 (1999).

2. See generally Valerie Strauss, *How Are America's Public Schools Really Doing?*, WASH. POST (Oct. 15, 2018), <https://www.washingtonpost.com/education/2018/10/15/how-are-americas-public-schools-really-doing/> [<https://perma.cc/QW83-REFB>] (discussing and rebutting the common notion that schools are failing).

3. See, e.g., Press Release, The White House, Office of the Press Sec'y, President Outlines Education Reform in Boston Speech (Jan. 8, 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020108-5.html> [<https://perma.cc/R247-RVQQ>] (“It is important to free families from failure in public education. And that’s what this bill does.”).

which are designed to further agendas that we do not fully recognize.⁴ Those agendas may promote values and concepts of education that are entirely inconsistent with what the broader public would prefer had the value-based conversation occurred.⁵ These agendas have opened our schools to reforms that are quite simply small, petty, and misdirected.

TWO DECADES OF POINTLESS REFORM

In just the past two decades alone, public education policy has been on a merry-go-round and, from my perspective, has been largely pointless other than for its rhetorical value. Policymakers have argued that schools need more accountability, more rigorous curriculum, and highly qualified teachers.⁶ The meaning of each of these concepts requires further explanation. Federal policymakers have not even been unable to settle on the appropriate persons to make these decisions and who to hold accountable for failures. Instead, federal policy has simply shifted responsibility and accountability from one party to another.⁷

Federal policy has attempted to change who decides what schools teach, how to measure whether teachers are qualified, how to measure student achievement, what level of student achievement is sufficient, and how schools and teachers will be accountable for any potential shortcomings on these measures.⁸ In the 1990s, the problem, we were told, was that there was no accountability for low performing schools. So the No Child Left Behind Act held all schools, not just low performing schools,

4. SCHOTT FOUND. FOR PUB. EDUC. & THE NETWORK FOR PUB. EDUC., GRADING THE STATES: A REPORT CARD ON OUR NATION'S COMMITMENT TO PUBLIC SCHOOLS 2 (June 2018), <http://schottfoundation.org/sites/default/files/grading-the-states.pdf> (“[O]ur nation has embarked on a troubling course that steers us toward school privatization, exclusivity and division. The present Department of Education under the leadership of Secretary of Education Betsy DeVos, promotes privatized programs and choice, and has a decidedly hostile view towards the support of students attending public schools.”).

5. *Id.*

6. See Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309, 1332–36 (2017) (summarizing changes in federal policy through the reauthorizations of the Elementary and Secondary Education Act).

7. *Id.* at 1333–35.

8. *Id.* at 1331–40.

accountable for the achievement of all students.⁹ When that strategy faltered, the Department of Education was forced to waive widespread failure.¹⁰ By 2011, roughly eighty percent of the nation's schools were set to be labeled as failures under the Act.¹¹ Rather than admit the flawed premise, the Department attempted to shift responsibility to teachers. Teachers, rather than schools, would suffer harsh consequences when their students underperformed expectations.¹² That new accountability strategy, however, soon faced more challenges than had the No Child Left Behind Act. The teacher accountability measures proved to be too complicated, unreliable, and thus controversial.¹³ Congress passed legislation just three years later that shifted accountability and expectations yet once again.¹⁴ The Every Student Succeeds Act moved back to an unpredictable accountability system that also left the consequences for failure entirely up to the states.¹⁵

Academic standards and curriculum followed a similar pattern. Local school districts have traditionally made the vast majority of education policy decisions about how and what they teach for themselves. School districts purported academic failures and uneven approaches, however, suggested that policymakers could not trust school districts with these decisions. No Child Left Behind's solution was to require that states set "challenging" academic standards and administer standardized

9. No Child Left Behind Act (NCLB) of 2001, Pub. L. No. 107-110, § 1111(b)(2)(F), 115 Stat. 1425, 1447-48 (2002) (codified at 20 U.S.C. § 6311) (requiring that all students reach a specific, proficient level of academic achievement).

10. See Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607, 647-48, 652-57 (2015).

11. Sam Dillon, *Overriding a Key Education Law*, N.Y. TIMES (Aug. 8, 2011), <http://www.nytimes.com/2011/08/08/education/08educ.html> [https://perma.cc/796U-7JUB].

12. U.S. DEP'T OF EDUC., ESEA FLEXIBILITY 6 (June 7, 2012), <https://www.ed.gov/sites/default/files/esea-flexibility.doc> [https://perma.cc/J88H-RH5W] (requiring teacher evaluation systems) [hereinafter ESEA FLEXIBILITY].

13. Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75, 91-92 (2016).

14. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified at 20 U.S.C. § 6301).

15. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1111(b)(1)(G), 129 Stat. 1802 (2015) (codified at 20 U.S.C. § 6311); Andy Smarick, *Accountability and The Every Student Succeeds Act*, THOMAS B. FORDHAM INST. (Dec. 1, 2015), <https://edexcellence.net/articles/accountability-and-the-every-student-succeeds-act> [https://perma.cc/DZ9W-AWXC] (characterizing the wide discretion left to the states).

tests to determine whether schools were adequately teaching those standards.¹⁶

Within a few years, the data did appear to validate one troubling lesson: states cannot be trusted either.¹⁷ States manipulated their standards and tests to show that their schools and students were either already proficient or rapidly moving in that direction.¹⁸ Yet, national tests showed nothing could be further from the truth.¹⁹ Secretary Arne Duncan's solution was for the federal government to play a much larger role in academic standards and testing regimes.²⁰ The Department heavily encouraged the development of the "Common Core" and its companion testing systems.²¹ It used competitive grants and the threat of sanctions to force states to adopt the Common Core.²² The controversy and backlash that followed was intense, begging the question of whether the federal government was any better situated to set education standards and hold schools accountable than states and localities. Once Congress fully appreciated what the Secretary had done, it was incensed. The Every Student Succeeds Act stripped the Secretary of virtually all power to do anything even remotely close in the future and made it clear that states would begin making these decisions for themselves again.²³

16. No Child Left Behind Act (NCLB) of 2001, Pub. L. No. 107-110, § 1111(b)(1), 115 Stat. 1425, 1444-45 (2002) (codified at 20 U.S.C. § 6311).

17. See, e.g., Paul E. Peterson & Frederick M. Hess, *Few States Set World-Class Standards*, 8 EDUC. NEXT 70, 71-73 (2008).

18. See *id.* (finding many states had lowered their standards).

19. See generally VICTOR BANDIERA DE MELLO, NAT'L CTR. EDUC. STATS., MAPPING STATE PROFICIENCY STANDARDS ONTO THE NAEP SCALES: VARIATION AND CHANGE IN STATE STANDARDS FOR READING AND MATHEMATICS, 2005-2009 2 (2011), <https://nces.ed.gov/nationsreportcard/pdf/studies/2011458.pdf> [<https://perma.cc/4N5N-CPQ9>].

20. Black, *supra* note 10, at 650.

21. See *College- and Career-Ready Standards*, U.S. DEP'T OF EDUC., <https://www.ed.gov/k-12reforms/standards> [<https://perma.cc/8PSQ-EG2U>] (last visited Mar. 7, 2019).

22. The Common Core was funded through a variety of state, federal, and private funds. Valerie Strauss, *Following Common Core Money: Where Are the Millions of Dollars Going?*, WASH. POST (Nov. 24, 2013), <https://www.washingtonpost.com/news/answer-sheet/wp/2013/11/24/following-the-common-core-money-where-are-millions-of-dollars-going> [<https://perma.cc/5VL5-MTR2>]. The U.S. Department of Education, however, put the program over the top by making its adoption an obvious means by which to qualify for Race to the Top grant funds and for No Child Left Behind Waivers. Black, *supra* note 10, at 650.

23. Alyson Klein, *ESSA Architect Q&A: Sen. Lamar Alexander, R-Tenn.*, EDUC. WK (June 13, 2016, 8:40 AM), http://blogs.edweek.org/edweek/campaign-k-12/2016/06/essa_architect_q_a_sen_lamar_a.html [<https://perma.cc/32RS-8R2Y>] (quoting

The anti-federal sentiment was so strong that the Act provided that states need not even send their academic standards to the Secretary.²⁴ Rather, states would simply self-certify that their academic standards are challenging.²⁵

Teacher policy has followed a similar carousel approach. Local districts traditionally controlled teacher quality, but evidence that many schools struggled to hire and retain quality teachers prompted Congress, in the No Child Left Behind Act, to demand that states exert more control.²⁶ States, however, did almost nothing to improve access to quality teachers in disadvantaged communities. In fact, state failures on this measure were almost immediately obvious.²⁷ As with academic standards and testing, the Secretary Duncan's solution was to exert federal power, requiring schools to hire, fire, and promote teachers based on how their students performed on standardized exams.²⁸ But when it became apparent that rating teachers based on their students was more of an art than science, Congress told states that they should take control of teacher quality again.²⁹ Embedded in each of these changes were also entirely distinct concepts of what it means to be a good teacher—from certified to highly qualified to high performing to a point where we are no longer sure.

Senator Alexander as saying, “the law is the most significant devolution of power to the states in a quarter century, certainly on education”).

24. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1111(b)(1)(A), 129 Stat. 1802, 1823-24 (2015) (codified at 20 U.S.C. § 6311) (“Each State . . . shall provide an assurance that the State has adopted challenging academic content standards and aligned academic achievement standards . . .” and indicating that states “shall not be required to submit such challenging State academic standards to the Secretary.”).

25. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1111(b)(1)(A), 129 Stat. 1802, 1823-24 (2015) (codified at 20 U.S.C. § 6311).

26. No Child Left Behind (NCLB) Act of 2001, Pub. L. No. 107-110, §§ 1119(a)(1)-(2), 9101(11), 9101(23), 115 Stat. 1425, 1505-06, 1958-59 (codified at 20 U.S.C. §§ 6319, 7801) (requiring “highly qualified” teachers).

27. EDUC. COMM'N OF THE STATES, ECS REPORT TO THE NATION: STATE IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT RESPECTING DIVERSITY AMONG STATES 63 (2004) (“In March 2004, 23 states appeared to be on track to meet the Highly Qualified Teachers Definition requirement, compared with 10 in March 2003.”).

28. ESEA FLEXIBILITY, *supra* note 12, at 2–3.

29. Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, §§ 2101(e)(1)-(3), 129 Stat. 1802, 1924-25 (2015) (codified at 20 U.S.C. § 6611) (prohibiting the Department from “mandat[ing], direct[ing], or control[ing]” any state’s teacher “evaluation system,” “definition of teacher . . . effectiveness,” and teacher “professional standards, certification, or licensing”).

In a nutshell, the above changes in accountability, standards, testing, and teachers describe the national transition from the Improving America's School Act to the No Child Left Behind Act to the statutory waivers of No Child Left Behind to the Every Student Succeeds Act. Each statute raised difficult empirical and policy questions. What is the best measurement of student achievement, of teacher quality? What is the best strategy to encourage schools to improve? Student achievement might be measured by classroom grades, proficiency on standardized tests, growth on standardized tests, achievement in relation to the average, graduation rates, or something else. Teacher quality might be captured by academic credentials, years of experience, their students' performance, principal observations, national board certification, or some combination of all of the above. Schools might be encouraged to change through carrots or sticks. The most typical sticks are those that label schools as failing and potential sanction, close, or remediate them.³⁰ A carrot might be to provide schools with more resources and money, but exactly which resources and how much money are subjects of intense debate.³¹

Surely there are answers to these policy questions. Surely there are reforms and strategies that would work to improve educational opportunity. But from afar, these policies strike me as analogous to attempts to rearrange the deckchairs on the *Titanic*. These policies ignore fundamental problems in our public schools that require fundamental changes. When the *Titanic* was sinking, no amount of logistical ingenuity was going to fix the fundamental problem—water was uncontrollably gushing into the hull of the ship. No ingenuity was going to change the fundamental limitation on how many people would survive: the *Titanic* set sail with an insufficient number of life boats.

30. See, e.g., Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1111(c)(4)(D), 129 Stat. 1802, 1834-37 (2015) (codified at 20 U.S.C. § 6311) (subjecting schools in the bottom 5% of performance to intervention); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 933 (2004) ("Schools that receive federal funding and fail to meet their targets face increasingly harsh sanctions for every year that they fail.")

31. See generally Cory Turner, *Can More Money Fix America's Schools?*, NPR (Apr. 25, 2016, 6:00 AM), <https://www.npr.org/sections/ed/2016/04/25/468157856/can-more-money-fix-americas-schools> [<https://perma.cc/2F7G-PV6S>].

Our public schools are not the *Titanic*. They are not destined for failure. But they do labor under entrenched practices and policies that inevitably produce inequitable and inadequate educational opportunities. These policies and practices include state budgets that are based on how much legislators are willing to spend on education rather than student need;³² funding formulas that distribute those inadequate resources unequally among schools;³³ student assignment policies that segregate students both between and within schools;³⁴ and teacher assignment policies that reserve the most qualified teachers and most rigorous curriculum for the privileged few.³⁵

These are the facts. We do not spend enough on our schools.³⁶ We do not assign students to schools in ways that make them more diverse.³⁷ We do not distribute funds or teachers equitably.³⁸ Rather than adopt policies that would cause education tides to rise in a way that would lift all boats, states and the federal government adopt policies that protect and entrench a status quo. Privileged communities largely pursue education on their own and others are left with education reforms that rearrange deck chairs.

32. See, e.g., Michael Leachman et al., *Most States Have Cut School Funding, and Some Continue Cutting*, CTR. BUDGET & POL'Y PRIORITIES (Jan. 25, 2016), <https://www.cbpp.org/research/state-budget-and-tax/most-states-have-cut-school-funding-and-some-continue-cutting> [<https://perma.cc/64V3-B7Q7>].

33. See generally BRUCE D. BAKER, *IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 1* (4th ed. 2015).

34. See, e.g., GARY ORFIELD ET AL., *BROWN AT 62: SCHOOL SEGREGATION BY RACE, POVERTY AND STATE 3* fig.2 (2016), <https://escholarship.org/uc/item/5ds6k0rd> [<https://perma.cc/AC73-6RZC>] (“... African American and Latino students are increasingly isolated, often severely so.”).

35. See, e.g., Frank Adamson & Linda Darling-Hammond, *Funding Disparities and the Inequitable Distribution of Teachers: Evaluating Sources and Solutions*, 20 EDUC. POL'Y ANALYSIS ARCHIVES 1 (Nov. 19, 2012); Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1 (2008).

36. See generally BRUCE D. BAKER ET AL., *THE REAL SHAME OF A NATION: THE CAUSES AND CONSEQUENCES OF INTERSTATE INEQUITY IN PUBLIC SCHOOL INVESTMENTS 1* (Apr. 2, 2018), <https://drive.google.com/file/d/1cm6Jkm6ktUT3SQplzDFjJIy3G3iLWOtJ/view> [<https://perma.cc/GW45-NKU4>].

37. See Alvin Chang, *The Data Proves that School Segregation Is Getting Worse*, VOX (Mar. 5, 2018), <https://www.vox.com/2018/3/5/17080218/school-segregation-getting-worse-data> [<https://perma.cc/9MZ6-LH6K>].

38. See e.g., BAKER ET AL., *supra* note 33; Adamson & Darling-Hammond, *supra* note 35.

A RICH HISTORY OF EDUCATION GOALS

The last two decades of education reform is obscene because we know better. We have been better. History proves that we know the goals that the education system ought to aspire to. History shows just how much we can achieve if we commit ourselves to meaningful goals. These goals are much bigger than the types of tests we administer, the types of books and curricula we buy, or the way we evaluate teachers. But none of this is to suggest public schools have ever fully lived up to any of our goals—or rather that we have been willing to live up to our commitments to public schools. They—we—have not.

Resistance, even to our best ideas, has always existed. Resistance does not fade away just by ensconcing goals in constitutions, Supreme Court decisions, or legal codes. The story of public education is really a story of struggling to live up to our highest ideas. The difference between the past and present is not our failures. We have failed too often to try to make that distinction. The difference is in the height of our education goals and the depth of the norms that those goals were meant to unseat.

Take the very founding of our nation—an experiment away from autocratic and elite rule toward a democracy accountable to common citizens. To succeed, those exercising political power needed to be informed well enough to make smart decisions.³⁹ Our founders—the people who wrote the federal and state constitutions under which we live—firmly believed the only solution was to make sure the country had public schools that cultivate the skills that citizens need to participate in democracy.⁴⁰ At each major turning point in our nation's development, the founders and leaders who followed them set education goals and took concrete steps to achieve them.

In the earliest years of the Republic, people like George Washington, John Adams, and Thomas Jefferson made impassioned pleas for the young nation to support public education. John Adams, in fact, authored the Massachusetts constitution and put our nation's first education clause in it before

39. See Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1082–83 (2019).

40. See *id.* at 4.

the nation even penned the U.S. Constitution.⁴¹ The Massachusetts Constitution explained, or warned, that “[w]isdom and knowledge . . . diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties”⁴² Thus, it declared that “it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the . . . public schools”⁴³ As president, Washington and Jefferson both specifically called on the nation to invest in public education.⁴⁴ Its success, and that of the nation, were intertwined. In an annual address to Congress, President Jefferson actually argued that education was so important to the nation that Congress should, if necessary, amend the United States Constitution to allow for further support of education.⁴⁵

The goal was simple: to make educational opportunity as quickly and widely available as possible. At the time, public education, as we think of it, was largely unknown to the nation. Education was primarily a private or community affair with very little, if any, formal state involvement.⁴⁶ A system of public education simply did not exist.

The most salient national response to the problem was the Northwest Ordinances of 1785 and 1787.⁴⁷ Before the nation had even adopted the U.S. Constitution, these foundational laws

41. See *John Adams & the Massachusetts Constitution*, COMMONWEALTH OF MASSACHUSETTS, <https://www.mass.gov/guides/john-adams-the-massachusetts-constitution#john-adams-drafts-the-massachusetts-constitution> [https://perma.cc/4H8B-3HV8] (last visited Mar. 7, 2019).

42. MASS. CONST. of 1780, pt. II, ch. V, § 2.

43. *Id.*

44. *Eighth Annual Message of George Washington* (Dec. 7, 1796), LILLIAN GOLDMAN LAW LIBRARY, http://avalon.law.yale.edu/18th_century/washs08.asp [https://perma.cc/563Z-LRKD].

45. *Thomas Jefferson, Sixth Annual Message to Congress* (Dec. 2, 1806), LILLIAN GOLDMAN LAW LIBRARY, http://avalon.law.yale.edu/19th_century/jeffmes6.asp [https://perma.cc/A9U5-MNVA].

46. See generally JOHANN N. NEEM, *DEMOCRACY’S SCHOOLS: THE RISE OF PUBLIC EDUCATION IN AMERICA 2* (2017).

47. See An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio (July 13, 1787), available at <https://www.ourdocuments.gov/doc.php?flash=false&doc=8&page=transcript> [https://perma.cc/2RTP-H8U4] [hereinafter Land Ordinance of 1787]; An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory (May 20, 1785), reprinted in 28 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 375–81 (John C. Fitzpatrick ed., 1933) [hereinafter Land Ordinance of 1785].

established the rules for dividing up and developing the nation's vast territories and eventually recognizing them as new states. The Northwest Ordinances broadly announced that "schools and the means of education shall forever be encouraged" and specified that every new town would set aside one-ninth of its land and one-third of its natural resources for the financial support of public education.⁴⁸ And every town would reserve one of its lots for the operation of a public school. Congress even specified the precise lot for the construction of schools. In towns divided up into 36 equal-sized squares, four lots touched the exact center of town.⁴⁹ One of these was lot 16—the one on which towns were to build their schools.⁵⁰

This plan was not without flaw. Territories and states mismanaged these land grants in many instances, and even when they did not, the land did not generate the resources necessary to operate the schools.⁵¹ Notwithstanding these limitations and failures, the story of public education's development in these early years is incredibly impressive. The overall commitment and effort in education paid off in ways that would have been hard to predict for a fledging nation. The proof is in the pudding. By the mid-1800s, only Prussia enrolled a higher percentage of students in school than the United States.⁵² In the North and Midwest, for instance, school enrollment rates in urban areas that had once been well below 50 percent had risen to 85 to 90 percent.⁵³ And this growth was accompanied by a transition from private to public education. As Carl Kaestle summarized, "Private schools [became] more rare . . . and [c]hildren who earlier might have gone to less expensive pay schools now went to public schools."⁵⁴

Yet even while these public schools expanded, the nation was failing to live up to the democratic ideas that these school systems were meant to serve. Throughout the first half of the

48. Land Ordinance of 1787, *supra* note 47; Land Ordinance of 1785, *supra* note 47, at 378.

49. Land Ordinance of 1785, *supra* note 47, at 376, 378.

50. *Id.* at 378.

51. CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860*, at 183–85 (1983).

52. Sun Go & Peter Lindert, *The Uneven Rise of American Public Schools to 1850*, 70 *J. ECON. HIST.* 1, 3 (2010).

53. KAESTLE, *supra* note 51, at 106.

54. *Id.* at 220.

nineteenth century, the nation still excluded a lot of people from the most basic rights of citizenship. For instance, women and people with land were still excluded from the ballot box. Southern states still held millions of African Americans in slavery. Teaching African Americans to read and write in the South was a crime.⁵⁵ Access to formal schooling and the ballot box were not even faint dreams. But even poor whites had limited access to public school in the South.⁵⁶ Southern elites saw public education a challenge to their way of life and political power.⁵⁷

The Civil War brought the tension between reality and our democratic ideas to a head and marked the second major period of educational goal setting. The South, and many other states for that matter, were not operating as real democracies. At the close of the Civil War, Congress needed to bring millions of new people into our democracy and rebuild the nation, what we might call our nation's second founding. A key ingredient, just as it had been at the nation's first founding, was public education.

Congress told Southern states that if they were going to reenter the Union, they had to get serious about democracy.⁵⁸ This meant extending the right to vote to African Americans and radically expanding their public education systems.⁵⁹ This time education was not just to be encouraged; it was to be constitutionally guaranteed.⁶⁰ All of the Southern states still seeking readmission after the War amended their state constitutions to mandate the provision of public education.⁶¹ This created an irony, as some Northern states did not guarantee education in their constitutions, but they would follow the South's

55. Jenny Bourne Wahl, *Legal Constraints on Slave Masters: The Problem of Social Cost*, 41 AM. J. LEGAL HIST. 1, 17 n.51 (1997).

56. In 1853, North Carolina enrolled less than half of eligible children, which did not include African Americans, and by the end of the war the "rudimentary Southern school systems disintegrated." WILLIAM PRESTON VAUGHN, *SCHOOLS FOR ALL: THE BLACKS & PUBLIC EDUCATION IN THE SOUTH, 1865-1877*, at 51-52 (1974).

57. See generally Susan P. Leviton & Matthew H. Joseph, *An Adequate Education for All Maryland's Children: Morally Right, Economically Necessary, and Constitutionally Required*, 52 MD. L. REV. 1137, 1155 (1993); WYTHE HOLT, *VIRGINIA'S CONSTITUTIONAL CONVENTION OF 1902*, at 254 (1990) (describing the Virginia elite's perception of the state's Reconstruction-era constitution as threatening and dangerous).

58. Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STANFORD L. REV. 735, 742 (2018).

59. *Id.* at 742-43.

60. *Id.* at 743.

61. *Id.*

lead in the coming years.⁶² In fact, following the Civil War, no state would ever again enter the Union without a provision in their state constitution mandating public education.

These state constitutions provided for a new radical set of norms—norms that were designed to resolve the shortcomings of the prior era. States constitutionalized their common school funds, ensuring that those resources would be spent only on schools.⁶³ Other states were even more specific, setting a precise floor for education funding and requiring that education be funded prior to anything else.⁶⁴ State constitutions also spoke to the structure and governance of schools, requiring that the system of schools be uniform and administered by state superintendents and school board members whose authority is not subject to the normal political process.⁶⁵ The schools were also to be “open to all”—an antidiscrimination concept—and provide some particular quality of education.⁶⁶

62. *Id.* at 790.

63. *See, e.g.*, ALA. CONST. of 1868, art. XI, § 10 (1863) (providing that proceeds from new and old state lands would be funneled into a “perpetual fund, which may be increased but not diminished, and the interest and income of which” along with other funding sources would “be inviolably appropriated to educational purposes”); *see also* JOHN MATHIASON MATZEN, STATE CONSTITUTIONAL PROVISIONS FOR EDUCATION: FUNDAMENTAL ATTITUDE OF THE AMERICAN PEOPLE REGARDING EDUCATION AS REVEALED BY STATE CONSTITUTIONAL PROVISIONS, 1776–1929, at 129–39 (1931) (identifying common school funds in state constitutions).

64. *See, e.g.*, PENN. CONST. of 1874, art. X, § 1 (1874) (setting aside “at least one million dollars each year” for public schools).

65. FLA. CONST. of 1868, art. VIII, § 3 (1868) (establishing a state superintendent of public education); N.C. CONST. of 1868, art. IX, §§ 7–15 (1868) (establishing and detailing the operation of a state board of education); *see also* MATZEN, *supra* note 63, at 5–12 tbl. II, 13–14, 37–51 tbl. VIII, 52–53.

66. ALA. CONST. of 1868, art. XI, § 6 (1868) (establishing education for “all the children of the State”); ARK. CONST. of 1868, art. IX, § 1 (1868) (requiring the state legislature to “establish and maintain a system of free schools, for the gratuitous instruction of all persons in this State” of suitable age); FLA. CONST. of 1868, art. VIII, § 1 (1868) (obligating the state to “provi[de] for the education of all the children residing within its borders”); GA. CONST. of 1868, art. VI, § 1 (1868) (mandating that public education “be forever free to all children of the State”); LA. CONST. of 1868, tit. VII, art. 135 (1868) (“[a]ll children of this State [of suitable age] shall be admitted to the public schools . . . without distinction of race”); N.C. CONST. of 1868, art. IX, § 2 (1868) (mandating an education system “free of charge to all the children of the State”); S.C. CONST. of 1868, art. X, § 4 (1868) (requiring the state legislature to provide for compulsory education of “all children”). Senator Sumner had earlier argued for this provision in the U.S. Senate to ensure integrated schools. CONG. GLOBE, 40th Cong., 1st Sess. 165 (1867) (statement of Sen. Sumner) (suggesting an amendment to require that states “establish and sustain a system of public schools open to all”). South Carolina delegates also understood the phrase to be anti-

These constitutional commitments propelled another bold, yet imperfect, era in public education. Public schooling expanded and improved in quality.⁶⁷ The failures arose not due to flawed goals, but because many people continued to contest the more inclusive form of democracy the schools were intended to secure. In fact, these detractors would eventually regain political power and use public education as a tool for retracting democracy.⁶⁸ Segregation would show its most pernicious face in the public schools, as they became both a practical and symbolic centerpiece of African Americans' second-class citizenship.⁶⁹ Later, curing that second-class citizenship would then necessarily involve an education movement and set of progressive goals.

A century after the Civil War, public education once again served as the locus of our nation's second democratic reconstruction. The Court's opinion on *Brown v. Board of Education*⁷⁰ offers a poignant explanation. The Court wrote that it would not "turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson*" validated the notion of separate but equal.⁷¹ But the Court would "consider public education in the light of its full development and its present place in American life throughout the Nation."⁷² Through that lens, the Court wrote that:

education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic

discriminatory. James Lowell Underwood, *African American Founding Fathers: The Making of the South Carolina Constitution of 1868*, in *AT FREEDOM'S DOOR: AFRICAN AMERICAN FOUNDING FATHERS AND LAWYERS IN RECONSTRUCTION SOUTH CAROLINA* 1, 13–15 (James Lowell Underwood & W. Lewis Burke Jr. eds., 2000).

67. See generally Derek W. Black, *Education's Elusive Future, Storied Past, and the Fundamental Inequities Between*, 46 GA. L. REV. 557 (2012).

68. See generally DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 12–13 (2004) (indicating the purpose of school segregation was not just to segregate but to subordinate); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 24–25 (2004) (explaining the importance of school segregation relative to other forms of segregation and the lengths states went to enforce it).

69. Joe R. Feagin, *Heeding Black Voices: The Court, Brown, and Challenges in Building a Multiracial Democracy*, 66 U. PITT. L. REV. 57, 68 (2004).

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

71. *Id.* at 691.

72. *Id.*

society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.⁷³

Thus, the Court flatly declared that education, “where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”⁷⁴

The idea of racially equitable and integrated schooling was so bold that it took another full decade before the federal government or the states would begin to implement it in any meaningful way.⁷⁵ Even then, school integration posed such a challenge to the status quo that a backlash ensued in the 1970s.⁷⁶ That backlash is a story unto itself and well-told by countless others. Less studied is the interesting turn that the right to education took following *Brown*. *Brown*’s recognition of education as a foundational governmental function in our democracy helped spawn an independent movement to secure a formal constitutional right to education.⁷⁷ Such a right would draw upon our original commitments to public education and transcend race.

As school desegregation doctrine confronted increasing limitations in the 1970s, civil rights advocates began revisiting the meaning and purpose of the state educational clauses that states had first enacted in the 1860s. Advocates read those state constitutional clauses as imposing an absolute duty on legislatures to create and manage school systems that prepared all students for their future roles as citizens and employees.⁷⁸ Early litigation efforts were met with mixed results, but plaintiffs’ victories mounted in the late 1980s and 1990s.⁷⁹ By the 2000s, a strong majority of state supreme courts had validated plaintiffs’ theories.⁸⁰

73. *Id.*

74. *Id.*

75. See BELL, *supra* note 68.

76. *Id.* at 111–12.

77. *Id.* at 113.

78. See MICHAEL A. REBELL, *FLUNKING DEMOCRACY: SCHOOLS, COURT, AND CIVIC PARTICIPATION* 50–68 (2018).

79. Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1500 (2007).

80. *Id.*

These cases represent the full flowering of the ideas first planted more than a century earlier. While the various cases and court opinions have their idiosyncrasies, they all rest on the same basic principles—principles on which egalitarian democratic education systems must stand. First, these cases reaffirm the principle that the educational opportunities students receive cannot be a function of the place in which they happen to live. Contrary to conventional wisdom, public education is not a function of local government. It is a duty of the state.⁸¹

Second, the cases demonstrate that constitutional education clauses make states' education duty an absolute one.⁸² They have no choice but to establish and maintain a public education system. Moreover, that duty precedes the states' other policy agendas.⁸³ States cannot treat education as the bill it pays after it takes care of its other pet projects. State constitutions may afford legislatures deference on any number of practical education decisions, but some decisions are simply off limits. States cannot, for instance, choose to transform the public education system into a private one, spend public education money on bridges and roads, or leave education to the varied capacities of school districts.⁸⁴ It is the state's obligation—and no one else's—to ensure public education for its citizens. In short, education does

81. See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 205 (1989).

82. See, e.g., N.C. CONST. art. I, § 15 (1971) (“The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”); R.I. CONST. art. XII, § 1 (1986) (“The diffusion of knowledge . . . being essential to the preservation of [the people’s] rights and liberties, it shall be the duty of the general assembly to promote public schools . . . and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education.”).

83. GA. CONST. art. VIII, § 1, para. I (1983) (“primary obligation of the State of Georgia”); FLA. CONST. art. IX, § 1 (1968) (“paramount duty of the state to make adequate provision for the education of all children residing within its borders”); *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 585 P.2d 71, 91 (Wash. 1978) (en banc) (“By imposing upon the State a *paramount duty* to make ample provision for the education of all children residing within the State’s borders, the constitution has created a ‘duty’ that is supreme, preeminent or dominant.”) (footnote omitted); *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1257, 1259 (Wyo. 1995) (“By establishing education first as a right in the Declaration of Rights article and then detailing specific requirements in a separate Education article in the state constitution, the framers and ratifiers ensured, protected and defined a long cherished principle[]” that “was viewed as a means of survival for the democratic principles of the state.”).

84. See Derek W. Black, *Preferencing Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1359 (2018).

not stand on equal footing with other government priorities. It stands above them.

Third, these cases demonstrate that state constitutional education clauses operate as a check on states. The constitutional rights and duties that these education clauses create allow students to seek help from an independent judiciary when states fail to do their job in education. Without this right, nothing restrains states from allowing politics rather than student needs to dictate education policy.

As I survey these three major periods in time—our founding, Reconstruction, and the modern civil rights era—I cannot find a flaw in the goals they set. The goals required evolution over time, but they revolved around ideas that are as true today as they were back then: the legitimacy of our government rests on the provision of public education; public education must be the first priority of government; public schools must be uniformly and equally open to all; public schools must reflect our democratic values—the type of society we want—not our individual interests and biases; and public schools must provide students with the knowledge and skills they need to participate in democracy and succeed in life.

Conclusion

Equal educational opportunity makes straightforward demands. We know what kids need: quality teachers, diverse environments, and appropriate learning supports.⁸⁵ Rather than seriously committing to providing these things, we change the way we measure achievement, teachers, and curriculum, as though changing from a U.S. standard to metric ruler will change the length of the stick we hold in our hands. If constant education reform has shown us anything, it is that changing the ruler or putting it in someone else's hand will not change educational opportunity in a positive way. In some respects, these changes just make matters worse as some states and schools try to stretch the stick or, when they do not, parents desert some schools and flock to others because they believe the new measurements are meaningful.

85. See generally LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA'S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* (2010).

Rather than coming up with another round of “reforms,” we must honestly assess the norms we need to break. Until we break our problematic norms—norms with which we have become all too comfortable—we will reform ourselves into oblivion and our schools will not see much improvement. We need to break at least three norms. First, we have to end the practice of locally funding schools. This norm may have had some genesis in local control,⁸⁶ but it stopped being about local control long ago.⁸⁷ It is about advantaging those communities that do not need state support and leaving the rest behind. Second, we have to stop replicating racial and socioeconomic isolation in our public schools. The idea of public schools has always been one that aspires to our better instincts, not one that settles for our worst ones. Sorting students into homogenous racial and socioeconomic enclaves incentivizes intergroup competition in which every school district and school fights only for its own well-being.⁸⁸ When this happens, we lose the common good that makes public schools public.

Those norms have a long history and breaking them will not be easy, but the task will be easier if we break the newfound norm of viewing schools through the lens of their test scores. Test scores are the lifeblood of researchers and somewhat useful to well-informed teachers. But they are dangerous in the hands of most everyone else. They do not appreciate what the scores really mean, but they act on them anyway. They believe they must exclude students who might damage their school’s scores (and racial demographics),⁸⁹ that schools with lower scores are necessarily bad schools,⁹⁰ and that money spent on these latter

86. See generally *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973).

87. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 154–56 (Tenn. 1993) (rejecting local control as a justification for funding inequities and summarizing other courts that reach the same conclusion).

88. Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 195 (2016).

89. See, e.g., Jack Dougherty et al., *School Choice in Suburbia: Test Scores, Race, and Housing Markets*, 115 AM. J. EDUC. 523 (2009); Wilson, *supra* note 88, at 195 (“[D]ecentralization through localism allows the state to do implicitly what it cannot do explicitly for both legal and political reasons: divide and allocate public education resources on the basis of race and class.”).

90. Jack Schneider, *The Urban-School Stigma*, THE ATLANTIC (Aug. 25, 2017).

schools is wasted.⁹¹ And if we can accept these very simple premises about test scores, we would suddenly realize just how misguided the recent decades of reform have been and how much we need to focus our efforts on those more meaningful aspects of unequal educational opportunity that we have come to accept.

91. BENJAMIN SCAFIDI, EDCHOICE, BACK TO THE STAFFING SURGE: THE GREAT TEACHER SALARY STAGNATION AND THE DECADES-LONG EMPLOYMENT GROWTH IN AMERICAN PUBLIC SCHOOLS (May 2017), <https://www.edchoice.org/wp-content/uploads/2017/05/Back-to-the-Staffing-Surge-by-Ben-Scafidi.pdf> [<https://perma.cc/DHT7-JT4J>] (arguing that increases in teacher staff were a waste); Ethan W. Blevins, *Public Schools Need Reform, Not More Money*, PACIFIC LEGAL FOUNDATION (Jan. 25, 2017), <https://pacificlegal.org/public-schools-fail-theyre-underfunded/> [<https://perma.cc/EA3X-FEWM>]; Kayla Lattimore, *DeVos Says More Money Won't Help Schools; Research Says Otherwise*, NPRED (June 9, 2017), <https://www.npr.org/sections/ed/2017/06/09/531908094/devos-says-more-money-wont-help-schools-research-says-otherwise> [<https://perma.cc/3LVA-HG86>].