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The “Right” to Education

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INTRODUCTION

The “right to education” is one of the building blocks of our democratic society. Justice Cardozo once said: “There is no choice without knowledge... Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and to beget.”¹ At a Republican Presidential Convention, Senator John McCain said that “education is the civil rights issue of this century.”² This statement may seem obvious, but only if one assumes, as many do, that a “right of education” is already a constitutional or civil right that is protected by the federal government.³ Indeed, in 1983, the Secretary of Education, Terrel Bell, commissioned a National Commission on Excellence in Education. The opening of the report defined the nature of this right:

All, regardless of race or class or economic status, are entitled⁴ to a fair chance and to the tools for developing their individual powers of mind and spirit to the utmost. This promise means that all children by virtue of their own efforts, competently guided, can hope to attain the mature and informed judgment needed to secure gainful employment, and to manage their own lives, thereby serving not only their own interests but also the progress of society itself.⁵

¹ Cardozo, THE PARADOXES OF LEGAL SCIENCE 104 (1928).

² *Sen. John McCain, Acceptance Speech at the Republican National Convention*, THE N.Y. TIMES (May 23, 2012), http://elections.nytimes.com/2008/president/conventions/videos/transcripts/20080904_MCCAIN_SPEECH.html.

³ *News & Notes: Algebra Project Teaches Math Skills That Pay*, NPR radio broadcast Feb. 20, 2007, 9:00 a.m., <http://www.npr.org/templates/story/story.php?storyId=7495586> (asserting that most people assume they have a right to education)

⁴ Obviously, this is not to suggest that the Commission were under the impression that education was a federally guaranteed right. Rather, this was expressed as an *entitlement* that people need to have for a chance at being successful in society.

⁵ *The National Commission On Excellence In Education, A Nation At Risk: The Imperative for Educational Reform* (April, 1983) http://datacenter.spps.org/uploads/sotw_a_nation_at_risk_1983.pdf (hereafter “Commission”, or “Commission report”).

Education as a right, however, does not exist in the Federal Constitution of the United States. Rather, education is left to the states to enact laws that mandate the education of children within certain age ranges. Indeed every state has enacted such laws, including structures that provide for a free public elementary and secondary school system.⁶

However, this system is not working the way it should. Until the 1970's, the United States was considered a model of all that is right with education.⁷ Since then, the United States has been in a steady decline in many international ratings pertaining to major categories of education.⁸ The 1983 report from the National Commission on Excellence in Education⁹ shocked the American public by revealing that a significant percentage of public school students had not acquired some of the most basic educational knowledge and skills, and many were growing to be illiterate adults.¹⁰

⁶ See Richard J. Stark, EDUCATION REFORM: JUDICIAL INTERPRETATION OF STATE CONSTITUTIONS' EDUCATION FINANCE PROVISIONS-ADEQUACY VS. EQUALITY, 1991 ANN. SURV. AM. L. 609, 669. The States' constitutional provisions for education are as follows: Ala. Const. art. XIV § 256 (?YEAR?); Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 1; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1, para. 1; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, 2d, § 3; Kan. Const. art. VI, § 1; Ky. Const. art. § 183; La. Const. art. VIII, §§ 1, 13(B); Me. Const. art. VIII, pt. 1, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. 2, ch. 5, § 2; Mich. Const. art. VIII, § 2; Minn. Const. art. XIII, § 1; Miss. Const. art. VIII, § 201; Mo. Const. art. IX, § 1(a); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 1; Nev. Const. art. XI, §§ 1-2; N.H. Const. pt. 2, art. LXXXIII; N.J. Const. art. VIII, § 4, para. 1; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; N.D. Const. art. VIII, §§ 2-4; Ohio Const. art. VI, § 2; Okla. Const. art. I, § 5, art. XIII, § 1; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1; S.C. Const. art. XI, § 3; S.D. Const. art. VIII, § 1, art. XXIII; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. III, art. X, § 1; Vt. Const. ch. II, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 1, art. XXVI; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art. I, § 23, art. VII, §§ 1, 9, art. XXI, § 28.

⁷ Linda Darling-Hammond, *What we can learn from Finland's successful school reform*, NATIONAL EDUCATION ASSOCIATION (Nov. 2010) <http://www.nea.org/home/40991.htm> (Dec. 1, 2013, 1:09 p.m.).

⁸ *Id.*

⁹ Note 5 *supra*. Interestingly, the Commission chose to portray the urgency of the matter by framing it in the historically-appropriate cold-war context: "If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war... We have, in effect, been committing an act of unthinking, unilateral educational disarmament."

¹⁰ *Id.* The Commission's report attempted to detail possible solutions to the education problem. However, while some of those changes have been implemented, the state of education has not improved in those 30 years, and in many ways has gotten worse. At that time, over 23 million adults, 13% of seventeen-year olds were found to be illiterate, with the number among minorities at nearly 40%.

The United States has not regained its illustrious status and reputation for education since then. In a 2009 report on the state of education of its 33 member nations, OECD (Organisation for Economic Co-operation and Development) ranked the United States 33rd in reading, 27th in math, and 22nd in science.¹¹ Countries like Korea, Finland and Canada consistently came in at the top of those rankings across all categories.

Much ink has been spilled to try to figure out the root of the rot in our education system. Much of the problems arise from inequality among school districts.¹² Additional factors like gaps in school finance, inadequacy of curriculums, poorly trained, improperly compensated, and in some cases just “bad” teachers, and inflated teachers’ unions, have all taken their share of the blame.¹³

If the United States wishes to reclaim its status as top of the education world, something needs to be done. In this paper, we will endeavor to separate the educational systems that work from the systems that clearly don’t. Constitutional provisions will be analyzed, and comparisons will be made between our states among themselves, and between our states and Finland. In Part I we will discuss the current state of the “right to education” jurisprudence in the United States from a federal (United States Supreme Court) standpoint; we will show that perhaps a “fundamental right” to education is not a practical solution for our education woes; and we will look to federally mandated education programs to see if there is potential of success in that route. Part II will look at the right to education globally, tracking the meteoric progress that Finland is making in the world of education; compare some of the most successful and least successful

¹¹ *PISA 2009 Results: Executive Summary*, OECD (2010), <http://www.oecd.org/pisa/pisaproducts/46619703.pdf>.

¹² This is evident from the U.S. Supreme Court jurisprudence, as will be discussed below.

¹³ All of these issues will be addressed, to some extent, later in this note.

models of education among the states, and finally propose a model that states should follow, independent of Federal activity,¹⁴ based on components of successful systems.

I. SHOULD THERE BE A FEDERAL “RIGHT TO EDUCATION”?

A. Support in the Provisions of the United States Constitution, and Supreme Court Jurisprudence

1. The Due Process Clause of the Fourteenth Amendment

In 1923, the Supreme Court in *Meyer v. Nebraska*¹⁵ first recognized that to seek knowledge was an endeavor that had constitutional ramifications under the Due Process clause of the Fourteenth Amendment¹⁶: “(the Due Process clause of the Fourteenth Amendment) denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge...”¹⁷ However, the Due Process Clause has not been construed as an expression of a positive right, rather as a negative right that forbids the government from preventing an individual from attaining certain freedoms, in this case the acquisition of knowledge. In fact, in that case, the Court stated: “The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.”¹⁸ The case involved a challenge to a Nebraska law that made it illegal to teach students who had not completed the eighth grade in any language other than English. The Court found the law to be unconstitutionally at odds with the substantive due process of that time. However, the Court did not make any mention in the

¹⁴ Although any positive input by the Federal government in the form of funding would obviously be helpful, if only in a supportive role.

¹⁵ *Meyer v. Nebraska*, 262 U.S. 390 (U.S. 1923).

¹⁶ The Due Process clause of the Fourteenth Amendment reads as follows: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XI, §1.

¹⁷ *Id.*, at 399.

¹⁸ *Id.*

decision that indicated that education should receive positive Constitutional protection on a federal level.¹⁹

2. The Equal Protection Clause of the Fourteenth Amendment

The Supreme Court came close to addressing education as a fundamental right in 1954 in the famous *Brown v. Board of Education* decision.²⁰ In that case, the court consolidated four different cases in which African-American students wished to attend schools in their areas that were previously segregated. The Court overruled their previous decision in *Plessy v. Ferguson*,²¹ which had established the “separate but equal” doctrine that schools had been relying upon until then and declared that “separate educational facilities are inherently unequal.”²² The states’ segregationist laws were ruled as being inconsistent with the Fourteenth Amendment’s equal protection clause, meaning education had to be applied equally among all students.²³

In that case, the Court did recognize education as an essential function of government, but limited the responsibility to the states: “Today, education is perhaps the most important function of *state and local governments*... It is the very foundation of good citizenship. (emphasis added)”²⁴ There too, the Court did not address whether education should be a federally protected right.

¹⁹ The Court in *San Antonio*. (see note 25 *infra*.) highlighted this theme of the vitality of education in our society by listing the cases until *Brown* (see note 20 *infra*.) that dealt with education: *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *People of State of Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Interstate Consolidated Street R. Co. v. Massachusetts*, 207 U.S. 79 (1907).

²⁰ *Brown v. Board of Education*, 347 U.S. 483, (U.S. 1954).

²¹ *Plessy v. Ferguson*, 163 U.S. 537.

²² *Brown*, at 486.

²³ *Id.* at 495.

²⁴ *Id.* at 492

The Court did address this issue in the seminal 1973 case of *San Antonio Independent School District v. Rodriguez*.²⁵ This class-action suit, brought on behalf of children of minority and poor families, claimed that the Texas' education financing system was unconstitutional under the Fourteenth Amendment's equal protection clause.²⁶ The Texas law made funding available to districts based on an *ad valorem* tax, which caused a wide discrepancy in per-student funding between wealthier and poorer areas. Plaintiffs urged the Court to apply strict scrutiny to the state law and find the law unconstitutional, but the Court declined to do so. The majority's opinion stood for four propositions: 1) that strict scrutiny was inapplicable, since there was no evidence of disadvantaging a suspect class; 2) since education was not a right afforded protection under the Constitution, the financing system did not implicate any fundamental right,²⁷ 3) the traditional, intermediate standard of review was applicable, since there were implications to the traditional deference given to state legislatures in the areas of fiscal and educational policies and local taxation, which would also have an impact on the principles of federalism; and 4) even though the system in Texas was imperfect, it did not deny any child a basic education and did not purposely discriminate against anyone in particular, and therefore it rationally furthered legitimate state interests.²⁸

Justice Powell, writing for the majority, seemed to echo the court's decision in *Brown*. He found that although everyone agrees that education is a vital function of the government, that fact by itself does not cause that function to become a fundamental right protected under the

²⁵ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (U.S. 1973).

²⁶ "No state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XI, §1.

²⁷ The Court actually punted on this question. The Court stated that even if some part of education should be protected as a meaningful exercise of the right of free speech and the right to vote, the system still did not deny educational opportunities to any child. *Rodriguez*, at 37.

²⁸ *Id.* at 39.

Constitution.²⁹ Instead, the test for deciding whether something should be a protected right is whether the right is “explicitly or implicitly guaranteed by the Constitution.”³⁰

Next, the Court addressed education as a right in the 1982 case of *Plyler v. Doe*.³¹ That case was another challenge to a Texas school district policy that withheld state funds for the education of children who were not legally admitted into the United States.³² The majority found that this policy was in violation of the Equal Protection Clause of the Fourteenth Amendment.³³ The Court in that case did say that public education is not a “right” guaranteed by the Constitution, following the precedent it set in *Rodriguez*.³⁴ However, the deprivation of a public school education, although not fundamental right, was not found to be similar to depriving the child of another governmental program.³⁵ Given the importance of education in our country, the Court here did not afford deference to the state law, and went beyond a “rational basis” standard of review, instead using a “heightened” standard. As applied, the classification of the illegal immigrants had to be “reasonably adapted to ‘the purposes for which the state desires to use it.’”³⁶ This case did not bring the Court any closer to recognizing education as a fundamental right.

The next case of *Papasan v. Allain*,³⁷ in 1985, recognized this lack of forward movement in attaining a fundamental right of education.³⁸ There, the petitioners challenged a Mississippi distribution of school funds, claiming, in part, that the law denied the petitioners the right to a

²⁹ Id. at 37.

³⁰ Id.

³¹ *Plyler v. Doe*, 457 U.S. 202 (1982).

³² Id. at 207.

³³ Id.

³⁴ Id. at 221.

³⁵ This seems to be out of sync with the decision in *Rodriguez*, which predicted a floodgate reaction if they were to allow for education to become a federal right under an argument that denying education is in violation of the First Amendment’s protection of speech and the right to vote: “How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter?” *Rodriguez*, at 37.

³⁶ *Plyler*, at 226, quoting *Oyama v. California*, 332 U.S. 633, 664-65 (1948) (Murphy, J., concurring).

³⁷ *Papasan v. Allain* 478 U.S. 265 (1986).

³⁸ Id. at 283.

minimally adequate education.³⁹ This, they argued, was guaranteed under the Fourteenth Amendment's Equal Protection Clause.⁴⁰ The Court, however, declined to decide upon this issue. Instead, the Court ruled that the lower court did not address the equal protection issue properly since it held that *Rodriguez* was controlling, which the Court held was incorrect.⁴¹ The Court remanded the equal protection claim, and held another part of the claim barred by the 11th Amendment.⁴²

Three years later, the Court faced its next decision, *Kadramas v. Dickinson Public Schools*.⁴³ The appellants in that case argued that their district decision not to reorganize caused them to have to pay for transportation to school.⁴⁴ This, they felt, was in violation of the Equal Protection Clause of the Fourteenth Amendment.⁴⁵ The Court first discussed the current state of education jurisprudence, stating that they had not accepted education as being a “fundamental right” that would trigger strict scrutiny.⁴⁶ The opinion then distinguished this case from the Court's decision to use a heightened scrutiny standard used under *Plyler*: the child in this case was not penalized for the wrongdoing of her parents; rather she was being denied bus service due to her mother's unwillingness to pay the fee that the rest of the parents in the district were paying.⁴⁷ Education has thus remained a fundamental part of our society that has not been recognized by the Court as a fundamental, constitutionally protected right.

³⁹ Id. at 274.

⁴⁰ Id. at 286.

⁴¹ The Court of Appeals in that case held that *Rodriguez* validated all funding structures made by the State, which the Court here said was limited to the facts in that case. Id. at 287-288.

⁴² Id. at 289.

⁴³ *Kadramas v. Dickinson Public Schools*, 108 U.S. 450 (1988).

⁴⁴ Id. at 455. The appellants contended that the applicable standard of review should be the “intermediate” standard used in *Plyler*.

⁴⁵ Id.

⁴⁶ Id. at 458.

⁴⁷ Id. at 459.

In the end, there seems little support for making the “right to a minimal education” a constitutionally protected right. Nothing from the current Supreme Court jurisprudence seems to indicate that the Court is going to be willing to change the status quo, namely that the states will retain the ability to make all decisions regarding education. The Court seems to be willing to grant them latitude in this regard, as the strictest standard of review for challenged law will be some sort of “heightened” standard of review, as narrowly applied in *Plyler*. Since the judicial trend, or lack thereof, is pointing to a lack of a future for Constitutional protection for a right of a minimal education, the question then arises whether this is proper. Should there be a political drive to have education taken under the auspices of the Federal Government? Should it be left solely to the states? The issue of a federal right to education has significant policy implications.

B. Policy Arguments: Whether there should be More or Less Federal Involvement in Education

1. Proponents for Federal Involvement

The argument has been made that the federal government is already responsible for education, even if only in a supportive role as compared with the states.⁴⁸ State efforts have been distinctly unable to rehabilitate failing schools and school districts.⁴⁹ The argument is, then, that if the federal government were charged with a fundamental right to education, the states would be forced to take action and assure a quality of education for all children.⁵⁰ The federal government would then be able to provide financial support, leadership, and a national focus for education.

⁴⁸ See Susan H. Bitensky, 86 Nw. U. L. Rev. 550 (1992), *Theoretical Foundations For A Right To Education Under The U.S. Constitution: A Beginning To The End O F The National Education Crisis*.

⁴⁹ *Id.*

⁵⁰ *Id.*

Additionally, there has been a movement towards enactment of federal legislation that proposes to provide for adequate and equitable educational opportunities in all state public school systems. This “Student Bill of Rights” has been floating around Congress since the 107th Congress. The current form of this bill is H.R. 378, sponsored by Rep. Chaka Fattah.⁵¹ The provision in this bill that perhaps separates it from other legislation is Subtitle B, which holds states accountable for very broad and comprehensive standards.⁵² However, the likelihood of H.R. 378 becoming law is very small, at best.⁵³

2. A Brief History of Federal Education Programs, Their Successes and Failures

This country has a long and storied history when it comes to the enactment of federal programs in the education field. The successes of these laws in general are debatable, as shown in the collective decline in the country’s education rankings.⁵⁴ The first Department of Education was created in 1867, with the purpose of collecting information in order to help the efficacy of State’s school systems.⁵⁵ Congress then enacted the Second Morrill Act in 1890, giving this department the responsibility for the oversight of land-grant colleges and universities.⁵⁶ Until then, the role of the federal government in education was largely an organizational role, there only to help.⁵⁷

⁵¹ H.R. 378, 113th Cong. (2013).

⁵² One of the consequences for non-remediation is to withhold 2.75% of federal funding for that state’s education. Perhaps this is not the best of remedies, as funding is one of the central issues that states are citing as being the cause of their systemic failure. To withhold funding from them for failure seems a bit of a self-fulfilling prophecy.

⁵³ The prognosis for this bill getting past committee is 1%, with a 0% chance of it being enacted. See <https://www.govtrack.us/congress/bills/113/hr378>.

⁵⁴ See Part I, *supra*.

⁵⁵ *Overview: The Federal Role in Education*, U.S. DEPARTMENT OF EDUCATION, <http://www2.ed.gov/about/overview/fed/role.html> (Dec. 1, 2013, 1:49 p.m.).

⁵⁶ *Id.*

⁵⁷ *Id.*

After World War II, the government started to fund discreet school systems, mainly those who were adversely or otherwise affected by the war effort.⁵⁸ Similarly, the next push in education legislation came as a result of the Cold war, when Congress passed the National Defense Education Act (NDEA). At the time, the concern was that the United States should be able to compete with the Soviet Union in scientific and technical fields.⁵⁹ This law included loans to college students, improvements of science, math, and foreign language instruction, among others.⁶⁰ In 1965, Congress passed the Elementary and Secondary Education Act (ESEA),⁶¹ which included giving Federal aid to students from poorer and urban areas, and the Higher Education Act, providing funds for postsecondary students.⁶² It was not until 1980 that the Department of Education was made into a Cabinet-level agency,⁶³ which currently has a discretionary budget of \$68.4 billion.⁶⁴

One of the recent major education initiatives, on a national level, was the No Child Left Behind Act signed into law by President George W. Bush in January of 2002.⁶⁵ This act sought to make extensive funding to states dependent on strict standardized testing schemes and to rate yearly progress of schools as to those testing goals.⁶⁶ Proponents of the Act pointed to studies showing seemingly immediate improvement in reading and math skills, as shown in a National

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ This act included the Title I provision, which was the government's primary aid program for disadvantaged children.

⁶² Id.

⁶³ Id.

⁶⁴ Id.

⁶⁵ 107 P.L. 110, 115 Stat. 1425, 2002 Enacted H.R. 1, 107 Enacted H.R. 1.

⁶⁶ Id. §1119 (b).

Assessment of Educational Progress (NAEP) study in 2005.⁶⁷ More progress was made in some categories in those four to five years than had been made in the last 28 years.⁶⁸

However, many criticisms of NCLB have surfaced. Some argue that the focus on standardized testing does not focus on a deeper understanding of the material being taught, and in fact encourages teachers to maintain such a view by requiring them to focus mainly on the skills that are subject to federal review.⁶⁹ The pressure is then put on the schools and the teachers to maintain the testing level that is required for this narrow skill set forward by the government, to the detriment of programs such as arts, sports and other optional subjects.⁷⁰ Additionally, Nobel laureate economist James Heckman has criticized NCLB as being an indirect encouragement to graduate students who before the Act would never have graduated.⁷¹

Another large concern is that NCLB sets an untenable precedent that allows for the federalization of education, eroding state and local control.⁷² In fact several states, including Utah, Colorado, and Connecticut have passed resolutions seeking to bypass NCLB.⁷³

Connecticut was the first state that directly challenged NCLB in a lawsuit, *Connecticut v.*

⁶⁷ Available at: <http://eric.ed.gov/?id=ED486444>.

⁶⁸ Some said that this information was misleading, as the study included data from the year 2000, a full three years before NCLB went into effect. See Linda Perlstein, *TESTED: ONE AMERICAN SCHOOL STRUGGLES TO MAKE THE GRADE* (Henry Holt And Co., 2007).

⁶⁹ This so-called “high-stakes testing” system is vigorously contested by organizations like the International Reading Association, who believe that conceptual, practical, and ethical issues must be taken into consideration in implementing the testing programs. See <http://www.reading.org/General/AboutIRA/PositionStatements/HighStakesPosition.aspx>.

⁷⁰ Indeed, as will be made clear below in this Section, one of the areas where countries such as Finland point to for their success is the *lack* of standardized testing, focusing on the education of the students as a whole, not just on subjects that have apparent economic value.

⁷¹ See James J. Heckman, Paul A. LaFontaine: *The American High School Graduation Rate: Trends and Levels* (2007), available at: <http://ftp.iza.org/dp3216.pdf>, p.19. This assessment was garnered from statistics showing a falling graduate rate between the 1960’s and 2002, the year the act was passed, when there was suddenly a drastic uptick in graduation rates.

⁷² See Nicole Liguori (2006) Note: *Leaving No Child Behind (Except In States That Don't Do As We Say): Connecticut's Challenge To The Federal Government's Power To Control State Education Policy Through The Spending Clause*, 46 B.C. L. Rev 1033 at 1039.

⁷³ See Jeff Archer, *Connecticut Files Court Challenge to NCLB*, EDUC. WEEK, Aug. 31, 2005, at 23. In Utah, the legislature passed a resolution that gave state education law preference over federal law. H.J.R. Res. 3, 56th Leg., Gen. Sess. (Utah 2005). Colorado passed a law that protected districts that wished to opt out of NCLB requirements and the sanctions that came with them. 2005 Colo. Sess. Laws 487.

Spellings,⁷⁴ arguing that §7907 of NCLB mandates, directs, and controls the allocation of state resources.⁷⁵ Instead of having a huge bureaucracy dictate the way children should be educated, a smaller, more localized effort is a better way to educate children based on need, not national standards.⁷⁶

Another recent program, the “Race to the Top” initiative, was forwarded by the Obama Administration. This was part of the American Recovery and Reinvestment Act (ARRA) that was signed into law on February 17, 2009, and allotted \$4.35 billion for the initiative.⁷⁷ The stated goal of the law was to “reward States that have demonstrated success in raising student achievement and have the best plans to accelerate their reforms in the future. These States will offer models for others to follow and will spread the best reform ideas across their States, and across the country.”⁷⁸ The plan was to be implemented through a complicated points system, with some states only being eligible for a maximum amount of the funding that was up to ten times less than the top receiving states.⁷⁹ Some have argued, however, that this program just furthers what is called the “standards-and-accountability era,” which has not boosted achievement any more than in the previous decades.⁸⁰ Race-based gaps have narrowed, while income-based gaps have not.⁸¹

This section has highlighted the limited likelihood of any lasting changes coming from Washington that would impact our education system in any real way. The Supreme Court has

⁷⁴ *State of Connecticut v. Spellings*, 453 F. Supp. 2d 459, 2006 U.S. Dist. LEXIS 69552 (D. Conn. 2006).

⁷⁵ See 20 USCS § 7907.

⁷⁶ See Andrew Coulson, *Has Federal Involvement Improved America's Schools?* (2009), available at <http://www.cato.org/publications/commentary/has-federal-involvement-improved-americas-schools>.

⁷⁷ Race to the Top Program, Executive Summary, U.S. Department of Education (November 2009), <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf> (last visited Nov. 27, 2013).

⁷⁸ *Id.*

⁷⁹ Elaine Weiss, *Mismatches in Race to the Top Limit Educational Improvement: Lack of Time, Resources, and Tools to Address Opportunity Gaps Puts Lofty State Goals Out of Reach*, ECONOMIC POLICY INSTITUTE (Sep. 12, 2013), <http://www.epi.org/publication/race-to-the-top-goals/>.

⁸⁰ *Id.*

⁸¹ *Id.*

shown reticence to interpret the Fourteenth Amendment to include a “fundamental right to education” among the “penumbra of rights”⁸² anytime in the near future. Congress’ attempts to shake things up have not proven sufficient enough to raise the ranking of the United States’ education system as compared with many other countries. Only time will tell if initiatives such as these will have a significant effect on the way things are. This leaves it to the states to come up with solutions for themselves, perhaps taking suggestions from foreign education systems.

II. HOW CAN STATES LEARN FROM THE SUCCESSES OF FOREIGN EDUCATION SYSTEMS IN ORDER TO IMPROVE THEIR OWN?

A. Foreign and International Provisions for the Right to Education

1) United Nations Treaties with Provisions for Education

The international community has recognized the right to a basic education in several human rights instruments. The first was the Universal Declaration of Human Rights (UDHR) in 1948,⁸³ of which Article 26 provides, in part:

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.

Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote

⁸² Referring, of course, to Justice Douglas’ assertion in *Griswold v. Connecticut*, 381 U.S. 479 (U.S. 1965) that the Bill of Rights has “penumbras” that include certain rights not specifically mentioned in the Bill of Rights.

⁸³ Universal Declaration of Human Rights, G.A. Res. 217A (III), 3 U.N. GAOR, U.N. Doc. A/810 (1948), ratified and adopted by the United States in 1948.

understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.⁸⁴

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was opened for signature in the United Nations in 1966,⁸⁵ echoing, in Article 13, much of what was said in the UDHR⁸⁶:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.⁸⁷

Most recently, the United Nations Convention on the Rights of the Child (UNCRC) reiterated the desire to make education compulsory and free for everyone, to encourage development of various forms of secondary education, and to take measures to encourage the reduce the drop-out rate.⁸⁸

As admirable as these treaties are, there has been a general reluctance to adopt them as law in the United States, specifically the UNCRC. The main reason for this reticence appears to be political, as different administrations have reacted differently to the question of whether

⁸⁴ Id., Article 26, ¶¶ 1-2.

⁸⁵ 993 U.N.T.S. 3. This convention has been signed but not been ratified by the United States, due to a number of political reservations.

⁸⁶ “The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.” §II, Art. 13, ¶ 1.

⁸⁷ Id. ¶ 2, (a-c).

⁸⁸ The United Nations Convention on the Rights of the Child of November 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (1989), see <http://www.unicef.org/crc>.

UNCRC should be ratified by the United States.⁸⁹ The Carter Administration, although enthusiastic about signing the treaty, never pushed for it to be ratified by the Senate; the Regan and George W. Bush administrations did not feel this should be the object of a treaty, as these “rights” are not actually rights, rather admirable goals; the Clinton administration did not want to get its political hands dirty to try to push it through Congress; the George W. Bush administration followed the previous Bush’s;⁹⁰ and the Obama administration has called this failure to ratify “embarrassing” and has promised to look into the matter.⁹¹ As of yet, nothing has been done.

2) Finland’s Constitutional Provisions for Education and Education System

Finland has been touted as having one of the best education systems in the world,⁹² as highlighted in the 2010 award-winning documentary film, “Waiting for ‘Superman.’”⁹³ Many reasons have been given for Finland’s success. Its constitutional provisions for education recognize that it is a fundamental right. As Section 16 of The Constitution of Finland states⁹⁴:

- Everyone has the right to basic education free of charge. Provisions on the duty to receive education are laid down by an Act.

⁸⁹ See, *Economic, Social, and Cultural Rights, Questions and Answers*, Amnesty International (1998), http://www.amnestyusa.org/pdfs/escr_qa.pdf.

⁹⁰ Id.

⁹¹ In comments made at the Presidential Youth Debate, October 2008 in Walden University, available at: www.debate.waldenu.edu.

⁹² See Lewis Humphries, *Top 3 Education Systems in the World*, INVESTOPEDIA (May 31, 2013), <http://www.investopedia.com/articles/professionaleducation/12/top-educational-systems.asp>; *Educational Score Performance - Country Rankings*, http://www.geographic.org/country_ranks/educational_score_performance_country_ranks_2009_oecd.html; Center on International Education Benchmarking, *Top Performing Countries*, <http://www.ncee.org/programs-affiliates/center-on-international-education-benchmarking/top-performing-countries>.

⁹³ The film won a total of thirteen awards, including: Black Reel Awards, Best Documentary (2011); Broadcast Film Critics Association Awards, Best Documentary Feature (2011); Directors Guild of America, Outstanding Directorial Achievement in Documentary (2011), among others. http://www.imdb.com/title/tt1566648/awards?ref_=tt_awd.

⁹⁴ Or *Suomen perustuslaki* in Finnish. The current Finnish constitution was originally enacted in 1919, and the current version was drafted in 1999, coming into force in 2000. Available at: Ministry of Justice, Finland website, <http://oikeusministerio.fi/en/index/basicprovisions/legislation/constitution.html>.

- The public authorities shall, as provided in more detail by an Act, guarantee for everyone equal opportunity to receive other educational services in accordance with their ability and special needs, as well as the opportunity to develop themselves without being prevented by economic hardship.
- The freedom of science, the arts and higher education is guaranteed.⁹⁵

The Act that the Constitution is referring to is a series of acts on education, including Basic Education Act (1998) and Decree (1998), Government Decree on the General National Objectives and Distribution of Lesson Hours in Basic Education (2001, renewed in 2011) and National Core Curriculum for Basic Education (2004, set to be renewed in 2014).⁹⁶

In terms of the political hierarchy, the Finnish Parliament has the responsibility for setting the general principles of education policy, and the Ministry of Education and Culture and the Finnish National Board of Education (FNBE) are both tasked with the preparation of education policy.⁹⁷

A condensed version of the Finnish education system is as follows⁹⁸: a nine-year basic education, with one year pre-primary education; an upper secondary education, which includes vocational and general education; and higher education.⁹⁹ As of 2008, there were 3,170 comprehensive schools in Finland, totaling 561,000 students.¹⁰⁰

⁹⁵ Unofficial Translation of The Constitution of Finland, §16, ¶¶ 1-3, <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>.

⁹⁶ Executive Summaries: *Building Blocks for Education: Whole System Reform, Education System Overview, Australia, Finland, Ontario, Singapore, United States* (2012), hereafter “Executive Summaries,” http://www.edu.gov.on.ca/bb4e/executive_summaries_en.pdf.

⁹⁷ FNBE decides on the national core curriculum for most stages of education. There are regional-level agencies as well, such as Centres for Economic Development Transport and the Environment (AVI), State Administrative Agencies (ELY), that deal with the follow-up of education services. Id.

⁹⁸ For a complete chart of the Finnish education system, see http://www.minedu.fi/export/sites/default/OPM/Koulutus/koulutusjaerjestelmae/liitteet/finnish_education.pdf

⁹⁹ Executive Summaries, note 94 supra.

¹⁰⁰ Id.

Coincidentally, around the same time that Finland's international ratings started to climb, the United States' started to fall.¹⁰¹ Linda Darling-Hammond, the co-director of the Stanford Center for Opportunity Policy in Education, said in a lecture that until that point, Finland had been considered the most under-achieving of the Scandinavian countries in education, and one of the lowest in Europe.¹⁰² That all started to change about 40 years ago. According to Pasi Sahlberg, a Finnish education expert and the director of the Center for International Mobility and Cooperation in Finland's Ministry of Education and Culture and author of *Finnish Lessons: What Can the World Learn from Educational Change in Finland?*,¹⁰³ Finland never intended to become the top in the world in education.¹⁰⁴ Stahlberg maintains that the change came not from pumping more and more money into the system. In fact, Finland spends less on education than most developed countries, and far less than the United States.¹⁰⁵ Instead of being "rewarded" for high performance with more education money, as is the case in the U.S., Finnish schools are funded based on the number of students, with additional funding being provided for schools that have a higher proportion of immigrants or students from uneducated or unemployed families.¹⁰⁶

There are several factors Sahlberg points to for Finland's success. The first is the professional reverence that teachers are held in Finland. Unlike the United States, where teachers require lower professional training, and are accordingly viewed as lower in the professional totem pole, Finland views its teachers like doctors, lawyers, and architects.¹⁰⁷ Teachers are

¹⁰¹ See Stephen Tung: *How the Finnish School System Outshines U.S. Education*, Stanford Report (2012), <http://news.stanford.edu/news/2012/january/finnish-schools-reform-012012.html>.

¹⁰² Id.

¹⁰³ Pasi Sahlberg, *FINNISH LESSONS: WHAT CAN THE WORLD LEARN FROM EDUCATIONAL CHANGE IN FINLAND?* (Teachers College Press, 2011)

¹⁰⁴ *Finnish Lessons*, p. 41

¹⁰⁵ Id.

¹⁰⁶ Id.

¹⁰⁷ Id.

required to obtain a state-funded, three-year master's degree before teaching, and education positions are highly coveted, as only one in ten primary-school teacher applicants is accepted.¹⁰⁸

But perhaps the biggest difference, says Sahlberg, between the education systems of the United States and Finland, is the divergence in standardized testing policies.¹⁰⁹ Instead of relying on standardized testing that is so heavily weighted in the U.S.,¹¹⁰ Finland relies on independent expert organizations under the Ministry of Education and Culture for national assessments of learning outcomes in education.¹¹¹ The *only* time a student takes a standardized test is at the end of general upper secondary education, when students take a Matriculation Examination.¹¹² The culture of competition in regard to education is a foreign idea in Finland.¹¹³ As Kari Louhivuori, a veteran teacher and a Finnish school principal said, “Americans like all these bars and graphs and colored charts... We know much more about the children than these tests can tell us.”¹¹⁴

In contrast, there are multitudinous state practices in the United States regarding the quality of teachers in the public school system that bog down their education systems, and should ideally be terminated, or at least revised. One such practice is the problem of “good versus bad teachers.”¹¹⁵ A “bad teacher” covers up to 50% of the given curriculum, while a “good teacher” can cover up to 150%. The price for both is the same. The question is, then, why are there “bad teachers”? Why have they not been disciplined or fired? There are a few possible answers to that question. One answer is that many have been awarded tenure. The concept of tenure was

¹⁰⁸ Id.

¹⁰⁹ Id. p.39

¹¹⁰ Such as in programs such as NCLB, and President Obama’s Race to the Top initiative. See Part I, supra.

¹¹¹ Executive Summaries, p. 7

¹¹² Id.

¹¹³ See LynNell Hancock, *Special Report: Educating Americans for the 21st Century: Why are Finland’s Schools Successful?*, SMITHSONIAN MAGAZINE, Sept. 2013, <http://www.smithsonianmag.com/people-places/Why-Are-Finlands-Schools-Successful.html>.

¹¹⁴ Id.

¹¹⁵ These “teacher problems” questions and solutions have largely been taken from the documentary “Waiting for ‘Superman.’”

originally saved for universities as a protection for professors who were concerned with arbitrary or political firing, not performance-related. According to many, tenure has become a shield that protects under-performing teachers.¹¹⁶ Teachers who have tenure can still get fired,¹¹⁷ but the process is deliberately slow and cumbersome, often having to wait for charges to be filed and then wait months for evaluations.¹¹⁸ Ironically, some of the teachers under review who had not been tenured before then will have waited the requisite time and become tenured while under review.¹¹⁹ The tenure problem is intertwined with the next “teacher problem,” teachers’ unions.

Although teachers’ unions provide for protection of teachers and also provide teacher evaluations, many feel that they are more of a threat to the progress of education in our country than a help. The two biggest teachers’ unions in the United States are the National Education Association (NEA) and the American Federation of Teachers (AFT).¹²⁰ The unions’ position has always been that there is no distinction between teachers, meaning that they protect poor teachers and good teachers alike.¹²¹ One of their biggest accomplishments is the teachers’ contract, which does not allow a school to recognize or reward good teachers with more money, and it contains the tenure provisions. This causes what is called in Milwaukee “the dance of the lemons,” or “pass the trash” in other jurisdictions.¹²² This means that each school is stuck with their bad crop of teachers for that year that they cannot get rid of, due to one provision of the teacher’s contract

¹¹⁶ Every state has its horror stories. “A Connecticut teacher received a mere 30-day suspension for helping students cheat on a standardized test; one California school board spent \$8,000 to fire an instructor who preferred using R-rated movies instead of books; a Florida teacher remained in the classroom for a year despite incidents in which she threw books at her students and demanded they referred to her as “Ms. God.” M.J. Stephey, *A Brief History of Tenure*, TIME U.S.A. (Nov. 17, 2008), <http://content.time.com/time/nation/article/0,8599,1859505,00.html>.

¹¹⁷ In 1998, Oregon abolished tenure, replacing it with two year renewable contracts. Other states like New York and Michigan merely abolished the *word* tenure from their manuals, while still retaining the due-process that is the effect of tenure. Id.

¹¹⁸ Id.

¹¹⁹ Waiting for ‘Superman.’

¹²⁰ These unions have contributed over \$55 million in political contributions, more than any other special interest, with 90% going to the Democratic Party. Id.

¹²¹ Id.

¹²² Id.

or another. That school passes the bottom segment of their teachers to another school, and gets a different school's "lemons," each school hoping the bad crop they get is better than the last year's.¹²³ New York had a different system. A "reassignment center," popularly known as "the rubber room," was set aside for the over 600 teachers awaiting disciplinary hearings for anything ranging from incompetence to student abuse. The period of time before the teachers have their hearing can be over 3 years. During that time, the teachers collected full salary and benefits, costing the state over \$100 million per year.¹²⁴ This is money that could be spent hiring experienced teachers, or incentivizing the good teacher already in the system which is prevented by the ubiquitous teacher's contracts promulgated by the unions.

This paper is not suggesting that wholesale mimicry of Finland's education system is the only solution for our country. In fact, ironically, Sahlberg has stated that much of the inspiration and ideas for change in the Finnish context were learned from the United States' research, which constitutes over 80% of the world research in education.¹²⁵

There are obvious practical differences between the two countries when it comes to education. For example, in 2013, Finland had a population of 5,445,883,¹²⁶ while the population of the State of New Jersey was 8,864,590 in 2012.¹²⁷ In 2010, there were 342 municipalities in Finland, while there are currently 22 municipalities just in Essex County, New Jersey, and a total of 565 in the State.¹²⁸ To suggest that the United States, as a nation, would be able to adopt the entire Finnish system is but a dream. However, we would like to suggest that individual State Constitutions and local agencies can strive to adopt certain attainable aspects of the Finnish

¹²³ Id.

¹²⁴ Id. This practice has since been abolished, perhaps due to the bad press from this film. However, many of the problems still exist, as New York still pays over \$22 million to teachers for not teaching.

¹²⁵ *Finnish Lessons*.

¹²⁶ Statistics Finland, https://www.stat.fi/til/vrm_en.html.

¹²⁷ United States Census Bureau, <http://quickfacts.census.gov/qfd/states/34000.html>.

¹²⁸ USA Today Census, 2010, <http://usatoday30.usatoday.com/news/nation/census/profile/nj#locality-tab>.

system. If enough states can change their culture of education, perhaps the country as a whole would be well on its way to change for the better regarding education.

B. State Constitutional Provisions for Education

1) In General

All fifty states have constitutional clauses that guarantee the right to education.¹²⁹ Additionally, and perhaps more importantly, many state courts, since the Supreme Court case *Rodriguez*, have further defined and specified this right. Prior to *Rodriguez*, states had not yet established significant qualitative education standards.¹³⁰ This may have caused the U.S. Supreme Court to be reticent to establish such standards, as it felt that it would be called upon to make policy decisions for the states.¹³¹ Since then, state courts have been defining education rights more specifically. For example, the ambiguous education provision in the Constitution of Kentucky states: “The general assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state.”¹³² In 1989, the Kentucky Supreme Court enumerated seven specific student capacities that are included in an “efficient” system, namely oral and written communication skills, knowledge of economic, social, and political systems, understanding of governmental processes, knowledge of his or her mental and physical wellness, grounding in the arts, and vocational training.¹³³ This decision shows that although provisions in state constitutions may be lacking, the judicial systems of the states are adequately equipped to formulate and articulate a system that works the best.

¹²⁹ See note 7, *supra*.

¹³⁰ See Derek Black, Article: *Unlocking The Power Of State Constitutions With Equal Protection: The First Step Toward Education As A Federally Protected Right*, 51 Wm. & Mary L. Rev. 1343 (2010).

¹³¹ See *Rodriguez*, 411 U.S. 1, at 23-24, 36-37 (1973).

¹³² Ky. Const. § 183, ¶ 1.

¹³³ *Rose v. Council for Better Education*, 790 S.W.2d 186, 212 (Ky. 1989).

Some states have rather specific enumerated education rights in their constitutions, while others seem rather sparse. Some of the states with more enumerated rights are Florida,¹³⁴ Montana,¹³⁵ New Mexico,¹³⁶ North Dakota,¹³⁷ and West Virginia.¹³⁸ Among the states with relatively few specified rights include: Connecticut,¹³⁹ Kentucky,¹⁴⁰ Mississippi,¹⁴¹ Nebraska,¹⁴² New Jersey,¹⁴³ and New York.¹⁴⁴

Rutgers professor Paul Tractenberg¹⁴⁵ has suggested that there may be little correlation between “strong” education provisions in state constitutions and practical “best practices” actually engaged in by the states.¹⁴⁶ He lists Kentucky and New Jersey as both having among the “weakest” education clauses, while having some of the boldest judicial rulings in favor of education rights.¹⁴⁷ Perhaps if states had a stronger education provisions in their constitutions there would be less variation among districts and ultimately among the states.

¹³⁴ Fla. Const., art. IX, § 1.

¹³⁵ Mont. Const., art. X, § 1.

¹³⁶ N.M. Const., art. XII, § 1.

¹³⁷ N.D. Const., art. VIII, § 1.

¹³⁸ W. Va. Const., art. XII, § 1.

¹³⁹ Conn. Const., art. VIII, § 1.

¹⁴⁰ Ky. Const., § 183.

¹⁴¹ Miss. Const., art. VIII, § 201.

¹⁴² Neb. Const., art. VII, § 1.

¹⁴³ N.J. Const., art. VIII, § 4, para. (1).

¹⁴⁴ N.Y. Const., art. XI, § 1.

¹⁴⁵ Board of Governors Distinguished Service Professor and Alfred C. Clapp Distinguished Public Service Professor of Law in Rutgers School of Law, Newark, New Jersey, founder and director of Education Law Center.

¹⁴⁶ See Paul L. Tractenberg, *Education*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 258, 259 (G. Alan Tarr, Robert F. Williams, Eds. 2006) (hereafter “*Education*”).

¹⁴⁷ *Id.* p. 262.

C. Future Strategies: A Model State Constitutional Provision for Education, With the Adoption of Some “Best Practices.”

There have been several attempts at developing a model constitution for the states. The best-known model, published by the National Municipal League in 1921, was revised in 1968.¹⁴⁸ However, this model merely provides for “the maintenance and support of a system of free public schools open to all children in the state,” and does not require state legislatures to organize or support higher education institutions.¹⁴⁹ Additionally, Professor Tractenberg posits, its lack of updates in equity/adequacy litigation of the past 35 renders this model obsolete, perhaps even in the eyes of its drafters.

A more recent model, produced in 1998 by the Campaign for Responsible Government, includes much more substantive education provisions.¹⁵⁰ It provides qualitative descriptors of a state’s system of public schools,¹⁵¹ a funding structure that would allow for thorough and efficient systems of public schools, and a guarantee of permanent school and university funds, among others.¹⁵² The problem with these, says Tractenberg, is that they may be too elaborate, causing courts to split as to the interpretation of various descriptors.¹⁵³

Professor Tractenberg compiled a checklist of ten possible elements of a model state constitution education clause.¹⁵⁴ The list is as follows: 1) a statement of the state’s educational purpose, 2) the scope of the provision’s coverage,¹⁵⁵ 3) specifications of a quality standard,¹⁵⁶ 4)

¹⁴⁸ *Education*, p. 250; see also P. Allan Dionisopoulos, (1958) *Indiana, 1851, Alaska, 1956: A Century of Difference in State Constitutions*, Indiana Law Journal: Vol. 34: Iss. 1, Article 2, <http://www.repository.law.indiana.edu/ilj/vol34/iss1/2>.

¹⁴⁹ *Education*, p. 251

¹⁵⁰ *Id.*

¹⁵¹ Such as “general and uniform,” and “thorough and efficient.”

¹⁵² *Id.*

¹⁵³ *Id.* p. 272.

¹⁵⁴ Paul L. Tractenberg, *Education*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 258, 259 (G. Alan Tarr, Robert F. Williams, Eds. 2006)

¹⁵⁵ In terms of age, education levels, dealing with educational disadvantages, how “free” the education will be, compulsory requirements, the length of the school day/year, and class size limits. *Id.*

specifications of an equality standard,¹⁵⁷ 5) funding assurances,¹⁵⁸ 6) limits in private/sectarian school funding, 7) provisions for services and materials,¹⁵⁹ 8) allocation of governmental responsibility among the state, legislature, and local districts,¹⁶⁰ 9) defining the role of parents and families in education,¹⁶¹ and 10) provisions for enforceability.¹⁶²

It would be presumptuous of this author to devise a perfect constitutional provision for education, as there are those who have devoted their lives' work to such a cause. We do suggest, however, that some of the key elements from the "Tractenberg Ten" should be present in every state's education clause.

1) The Stated Goal

The goal of every state should be, as quoted from Secretary of Education Terrell Bell above,¹⁶³ to grant to all students, regardless of their race and economic situation, an entitlement to a fair chance to develop their potentials as guided by a competent school system. That could be taken to include an education that does not just function to further state objectives such as math, science and reading. Instead, it focuses on the education of the student as a whole, and guarantees the teaching of subjects that aim to improve the knowledge of the person, such as the arts, languages, and physical education.

¹⁵⁶ Defining whether quality should be defined by input or outcome measures or the like. Id.

¹⁵⁷ Providing for freedom from segregation and discrimination, guaranteeing access to comparable schools and funding, etc. Id.

¹⁵⁸ Including guarantees of state funding, priority of services, reliance on local funding, taxpayer equality, caps on taxing/spending levels, and support of higher education/scholarship funding. Id.

¹⁵⁹ Including transportation, textbooks, and teachers. Id.

¹⁶⁰ Including definitions of responsibilities of the state, the legislature, state education officials, superintendents, and school districts. Id.

¹⁶¹ Including funding issues for school-choice initiatives, home schooling, funding issues for non-public schooling. Id.

¹⁶² Including the role of the courts in enforcement, and the power of individuals in terms of rights. Id.

¹⁶³ Pages 1-2 supra.

This provision should be separate from any subsequent quality provisions. The importance of education in each state should be expressed in a way that reflects the state's willingness to devote the proper resources to accomplish its stated goal. Hence, during a time of fiscal restraint, a state legislature may wish to limit its responsibilities and would aim for a provision that is less of a mandate and more a goal. We believe, however, that if there is any hope of enforceability from a constitutional level, every state should make their education provisions mandatory from the start, subsequently defining what is mandatory.

For example, the Florida Constitution, Article IX, §1 states that “The education of children is a fundamental value... It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders.” This provision both delineates the importance of education to the state as well as making its provision mandatory on the state. This is in contrast to the “goal” of the Montana Constitution, Article X, §IV, which says “it is the goal of the people to establish a system of education...”

2) Quality Standards

Although there is little uniformity in the way state supreme courts interpret the quality standards of their education provisions,¹⁶⁴ there have been many cases where courts have overturned state finance systems due to violations of education provisions. Two examples are the 1973 New Jersey cases *Robinson v. Cahill*,¹⁶⁵ and the succession of *Abbott v. Burke*¹⁶⁶ in which the Supreme Court of New Jersey's continuously stepped up its demands for comprehensiveness

¹⁶⁴ Tractenberg, *Education*, p. 263

¹⁶⁵ *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (N.J. 1973).

¹⁶⁶ Starting in 1985 with *Abbott v. Burke*, 100 N.J. 269, 495 A.2d 376, (N.J. 1985), and going through 9 more cases until *Abbott v. Burke*, 172 N.J. 294, 798 A.2d 602, (N.J. 2002).

and specificity for education as a response to failures of state government.¹⁶⁷ This element is essential as it provides a yardstick for the legislature's enforcement of the provision.

3) Enforceability

This element is essential for the success of any education provision. Without the ability to enforce the state's constitution, it becomes much like an empty paper, instead of a roadmap for the state. However, since most state constitutions are written "for the ages," they are generally not specific in terms of who has a positive right to a verifiable quality education that can be enforced by the courts.¹⁶⁸ Even if states were to decide that education is an enforceable right, they seem reticent to include language in their constitutions that would address controversial subsequent questions such as who should have standing for such a right, how is this right to be enforced, and what remedy should be available?¹⁶⁹

However, it can be done. Finland's constitution has several mandatory provisions, such as "everyone has the right to basic education," and "the public authorities shall... guarantee for everyone equal opportunity to receive other educational services..." The Finnish government has taken these mandates to their fullest extent, even though they were often met with resistance along the way.¹⁷⁰ An OECD article quoted from Jukka Surjala, Director-General of the National Board of Education in Finland, saying that when he was charged with implementing Finland's education reform, there were many municipalities that were formerly autonomous for education

¹⁶⁷ See, *Education*, id.

¹⁶⁸ Id., p. 271

¹⁶⁹ Id.

¹⁷⁰ *Strong Performers and Successful Performers in Education: Lessons from PISA for the United States*, OECD (2010), <http://www.oecd.org/pisa/pisaproducts/46581035.pdf> (11/27/2013, 9:15 p.m.).

that were reticent to change. This was the impetus for a legal mandate in order to implement the reform.¹⁷¹

Better Practices for our States

There are several practices that states should be avoiding, and several they should be adopting. States should be focusing less on excelling in select subjects, as in the focus to “Race to the Top,” and instead focus on more of a holistic approach to education that would educate the person as a whole. For example, Finland has “citizen skills” that are multi-disciplinary skills that “support deeper learning and applied knowledge.”¹⁷² Finland’s climb to the top of the rankings was not a purposeful push to be recognized by the world.¹⁷³ Instead, there was a widespread recognition that change needed to be made. Change was effected, and subsequent effects on the rankings were viewed as secondary bonuses.

Additionally, states should seriously consider revisiting the way teachers are viewed. Instead of teachers being held as one of the lower professions in our society, perhaps we should be viewing them, as Finland does, as leaders in society, and instruments for change. This does not have to be through increased salaries, although that would surely help. Rather, increased competition for teaching opportunities coupled with more extensive training for teachers may be a good start. Additionally, public school teachers should not need tenure, just as lawyers and doctors do not need tenure to protect their jobs. Teachers should inform their unions that they will not accept the blanket protection of poor teachers or the unwillingness to incentivize good teachers that degrades their profession. The ultimate concern of the education system must be the students, not for poor teachers to keep their poorly-executed jobs.

¹⁷¹ Id.

¹⁷² *Executive Summary*.

¹⁷³ See note p. 19 supra.

Furthermore, the extensive and ever-increasingly strict structure of standardized tests should be significantly limited, if not abandoned *in toto*. Evaluations of schools, districts, and states should not be confined to numbers and charts. Instead, a state agency analogous to the Finnish National Board of Education should be charged with the assessments of effectiveness, economy, and efficiency of the subjects being studied, how well the state's education goals have been reached, and how successfully available resources have been used. Additionally, the penalty structure for under-achieving schools that has come as a result of the standardized test environment should be re-examined.

CONCLUSION

Having looked at the state of education in our nation, something has to be done. Billions of dollars have been spent to try to propel our schools and students to the next level of success in education, with too little to show for the efforts. The time has come to look beyond our shores to countries like Finland, where there is a different culture of learning. State constitutions should include more thorough and mandatory education standards, and hold their legislatures and judiciaries accountable to enforce those standards. Teachers are to be more respected, there should be little use for standardized tests, and students immersed in an education that teaches the student, not merely the subject matter.