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## Foreword

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## FOREWORD

Robert E. Scott\*

The Equal Education Under the Law Symposium continues a conversation among legal and educational professionals that seeks to advance and perhaps refocus the rather dramatic debate over the future of public education in our country. The good news for this debate is that we start with a clear consensus on goals. Few, if any, would dissent from the following statement of principle: the future success of this nation depends in large measure on the requirement that every citizen have the chance to share in the country's good fortune, and the key to providing that chance, for all citizens, lies in preserving effective and quality public education.

This simple principle, or some manifestation of it, has an honored pedigree, a pedigree that can appropriately enough be traced to Thomas Jefferson. Jefferson, among many other more publicly commended achievements, was the author of Virginia's first legislation on public education: A Bill for the More General Diffusion of Knowledge,<sup>1</sup> and his views on the importance of public education in a democracy are well known. Jefferson believed that through public education we could cultivate civic leaders who were educated "without regard to wealth, birth or other accidental condition or circumstance."<sup>2</sup> That commitment to public education is now repeated almost reflexively by each generation. Thus, for example, Chief Justice Earl Warren observed, "Today, education is perhaps the most important function of state and local govern-

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\* Dean and Lewis F. Powell, Jr. Professor of Law and Arnold H. Leon Professor of Law, University of Virginia School of Law. This Foreword is an abridged version of the opening remarks given at the Equal Education Under the Law Symposium, which was held in the Caplin Pavilion of the Harrison Law Grounds at the University of Virginia on February 6-7, 1998.

<sup>1</sup> Thomas Jefferson, A Bill for the More General Diffusion of Knowledge, in 2 *The Papers of Thomas Jefferson* 526 (Julian P. Boyd ed., 1950).

<sup>2</sup> *Id.* at 527.

ments”<sup>3</sup> because “[i]t is the very foundation of good citizenship.”<sup>4</sup> Even though education is not legally recognized as a fundamental right,<sup>5</sup> few would quarrel with the proposition that as a nation we have a moral obligation and as well a profound self interest to make high quality education available to every individual.

If that is the good news, what is the bad news? The bad news on which we also have a remarkable consensus is that the reality falls so short of our ideals. Not only have we fallen short of those goals, but at least in our common perception the gap appears to be widening. So against the broad and ennobling statements of principle, it is important at the outset of this conversation to have an equally clear statement of reality.

I will make five claims, and I do not want to make them as contestable claims; I want to make them as dogmatic assertions that describe the current reality:

- (1) Educational opportunities today remain unequally available.
- (2) Access to quality education is largely determined by a person’s socioeconomic status.
- (3) Low income children suffer more relative to the rest of the population from a pervasive and systemic decline in educational quality since they come to school with greater needs and lack options for extracurricular education.
- (4) Low income children also bear the burden of an unequal distribution of resources. They consistently receive fewer educational resources than their economically advantaged counterparts.
- (5) This inequality continues despite the fact that low

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<sup>3</sup> *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

<sup>4</sup> *Id.*

<sup>5</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez* 411 U.S. 1, 35 (1973) (holding that education is not among the rights afforded explicit protection under our Federal Constitution).

income communities, rather paradoxically, commonly tax themselves at higher rates than their more privileged counterparts.

Scores on the well respected National Assessment of Educational Progress reveal that, even in the highest scoring states, over half of our children do not demonstrate proficiency in basic reading, writing, science and mathematics skills.<sup>6</sup> So if we take the ideal, on which we have agreement, and place it against reality, upon which we also have agreement, the question that confronts us all is: Where do we go from here?

The traditional reform strategy has been equity funding. Educational opportunity has been historically defined primarily in terms of inputs, in terms of resources invested. It is, therefore, unsurprising that the fight for educational equality began with a struggle for equal resources for all students.<sup>7</sup> Under this rubric, applicants have pushed for fiscal reform, both in state legislatures<sup>8</sup> and through litigation under state constitutions.<sup>9</sup> This fight for fiscal equality has taught us some valuable lessons. Among others, we have learned that equal inputs do not necessarily generate equal

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<sup>6</sup> See generally, National Center for Education Statistics, Report in Brief: NAEP 1994 Trends in Academic Progress (1996).

<sup>7</sup> See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 99-101 (1995) (holding that an order requiring across-the-board salary increases for teachers and staff in pursuit of desegregative attractiveness was beyond the scope of the court's remedial authority); *Milliken v. Bradley*, 433 U.S. 267, 283-88 (1977) (holding that the district court properly ordered remedial educational programs and other educational improvements as a remedy for segregation); *Rodriguez*, 411 U.S. at 55-56 (rejecting an equal protection challenge to state property taxes financing local education, despite the fact that children in wealthy areas received greater benefits).

<sup>8</sup> See, e.g., Doug Finke, Education Bill Passed One Hurdle: Illinois Senate Gets Next Vote on Edgar's Controversial Plan, *State J.-Reg.* (Springfield, Ill.), May 30, 1997, at 1; Robert Salladay, Wilson to Push for Longer School Year: Seeks \$400 Million for Plan Without More Pay for Teachers, *S.F. Examiner*, Jan. 4, 1998, at A1; The Education of Pete Wilson: The Governor Continues His Strong Advocacy of California Schools, and He's Joined by Others in Seeking a Return to Excellence, *S.F. Examiner*, Jan. 7, 1998, at A14.

<sup>9</sup> See *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996); *Weinbaum v. Cuomo*, 631 N.Y.S.2d 825 (N.Y. App. Div. 1995); *Leandro v. North Carolina*, 488 S.E.2d 249 (N.C. 1997); *Pennsylvania Hum. Rel. Comm'n v. School Dist. of Philadelphia*, 681 A.2d 1366 (Pa. Commw. Ct. 1996).

opportunity. Thus, there has been a movement in recent years for standards-based reform.

Standards-based reform seeks to achieve equality by identifying the educational goals and then ensuring that all students actually reach those goals. This strategy is based on the premise that students can reach a higher level of achievement, but only if the following are true:

- (1) Those levels are clearly defined.
- (2) Students know in advance the criteria for meeting a higher level of achievement.
- (3) Teaching, learning and assessment are designed in ways that support the achievements of students who work hard.

Described in that broad brush, the standards movement has widespread appeal. But examined in greater particularity, some of its applications have generated significant controversy.

Finally, there has been a push for school choice reform. School choice seeks to attain educational equity through a mechanism that allows students to transfer away from inadequate schools and thus improves the quality of all schools through the introduction of a market dynamic into the provision of educational services. Proponents of school choice assert that giving parents more options will revitalize the public school system. Free market pressures will force schools to streamline their operations so that public schools can compete with the more decentralized private schools. On the other hand, opponents of school choice fear that the long cherished ideal of offering every child equal access to quality public schools may, in fact, be fundamentally jeopardized if we start treating learning and education as a commodity, rather than as a public good.

The debate over equity funding, standards and school choice is the focus of this symposium. One lesson, at least, is clear from the ongoing debate over competing solutions to the crises in public education. At a minimum, successful reform requires a cross-disciplinary and interdisciplinary exercise, a collaboration such as we have not yet fully seen between educational experts, social sci-

entists, political actors, as well as legal scholars and legal professionals. That collaboration must continue to push for new insights into the problems burdening our educational systems and, perhaps more importantly, to subject existing proposals for reform to critical scrutiny. It is for this reason that we assembled this unique interdisciplinary symposium. I hope that all are enriched by this collegial exchange and, most importantly, that all of us profit from this search for truth.