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**AMERICAN EDUCATION REFORM: WHAT IS NEEDED IS
“NATIONAL” NOT FEDERAL**

JAMES W. GUTHRIE*

America’s education “system” was designed in the seventeenth century to serve an agrarian society. In the nineteenth century through the mid-20th century, it wrenchingly adapted to the nation’s industrial economy. Today, America’s education system is again in need of reform. There are many fewer and, therefore, more populous, school districts than was the case one hundred years ago, and state governments are playing an ever more important role in governing schooling.¹ However, the evolving changes are insufficient. The nation’s education system needs simultaneously to become even more national and more local.

In order to suit an emerging knowledge society, the nation’s education needs a rebalancing of governmental responsibilities. The currently intensifying centralization of authority into larger districts and into state governments does not go far enough. Some more overarching, national, mechanisms are necessary. Conventional wisdom would insert the federal government in this more centralized role. However, the federal government’s track record in education is mixed. On one hand, it has proven to be an adroit instrument for identifying important policy issues. On the other hand, it has been a failure in designing and implementing solutions to these issues.

The thesis of this article is severalfold. First, I contend that the existing emphasis on local and state authority stops short of needed change, and a major redistribution of education decision making authority is needed. Second, such a change should include a more overarching, nationwide perspective. Third, the federal government is not suitable, at least presently, for performing this function. Thus, what is needed is a new institution capable simultaneously of identifying important issues, cooperating with states in seeking their solution, and doing so in a minimally intrusive, nonpartisan administratively effective manner.

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1. See *Voters Want Schools Improved, But How – And By Whom?*, USA TODAY, Nov. 6, 1998, at 14A (noting that state and local governments pay for 93% of public school costs with the federal government “limiting itself to a supporting role”).

WHY A MORE "NATIONAL" PERSPECTIVE IS NOW NECESSARY

A local education perspective once served America well. In an earlier era, what a student had to know to earn a living and participate in government was tied tightly to local conditions. If banks failed in Indonesia, Japan, and Korea, that was someone else's problem, someone else far away. Today, however, given an economy which is increasingly interdependent and export oriented, where capital has the capacity to move across national boundaries at close to the speed of light, and where there is a growing propensity of manufacturing and service tasks to be assumed by workers regardless of specific geographic location, only a global perspective will suffice. The lifelong satisfaction and success of individuals, and that of an entire society, now depend more upon the development of human than physical capital.² Standards for this development of human capital are no longer local, they are global.

Meeting the world's higher new standards cannot be achieved by building simply upon the carcass of an agrarian school system. It necessitates an intensified national presence for setting standards, measuring progress, ensuring resource adequacy, and conducting research.

When America's education "system" was devised in the seventeenth century, most youth were reared and worked within a reasonable radius of their birthplace. Certainly, there were episodic migrations, otherwise the West would never have been settled. However, rootlessness and nomadic wanderlust were not major components of America's agrarian society. Nineteenth century commercialization was made possible by huge migrations from farms and from overseas to America's cities. Nevertheless, once city situated, these new urban dwellers were seldom vagabonds; they were generally stable within their local neighborhood. Until the latter part of the 20th Century what mattered most to both farmers and factory workers was local in perspective. One's reference groups, family, friends, and coworkers were nearby. A locally controlled and locally oriented system of schooling was fitting. Whatever knowledge and values were to be transmitted should be the decision of local officials. After all, who knew better the interests of a family, a child, and a community than those in the immediate community.

To be sure, in these agrarian and early industrial epochs, elites were needed. However, in the colonial period, a classical education for a few filled the new nation's narrow needs, and later a few prominent, generally Ivy League, universities produced a sufficient, even if slender, number of graduates to keep

2. Cathy E. Minehan, *Current Conditions and Future Economic Growth: The Potential of Technology and Education*, BUSINESS ECONOMICS, January 1997, at 21 (discussing the importance of investment in human capital).

America's governmental and financial engines operating smoothly.³ To be successful locally, and that is where most Americans sought "success," did not require knowledge of a global nature. If there was job competition, it was with the immigrant kids in nearby neighborhoods of the same city. It was not with individuals overseas in non-English speaking nations using cable modems and satellite communication devices. In this bygone period, Wall Street probably exercised greater influence over the lives of our ancestor farmers and factory workers than they themselves consciously realized. However, the influence of remote institutions was not as evident to America's then locally oriented populous as has been made clear today by international arrangements such as the North American Free Trade Agreement (NAFTA),⁴ the General Agreement on Tariffs and Trade (GATT),⁵ and recent UNESCO⁶ agreements on the international flow of capital.

Modern economic forces are rapidly contributing to a global perspective, and, in the process, are intensely reshaping the significance of schooling.⁷ This phenomenon is occurring across national boundaries and is occurring primarily because nations no longer can easily protect their domestic producers from international economic forces. To remain competitive nationally means meeting educational standards internationally.

The failure to respond quickly to technological and organizational inventions can rapidly jeopardize a people's standard of living and a government's political future. Increasingly, even Eastern Bloc or Communist nations find that they are no longer immune to or can wall themselves off from the rapid ebb and flow of international trade, monetary, technological, and financial developments.⁸

The following quotation from an October 1989 Atlantic article on economic development crystallizes the complex, intertwined, and rapidly evolving nature of international manufacturing and services industries.

Ford, with one third of its sales from outside the United States, owns 25 percent of Mazda. Mazda makes cars in America for Ford; Ford will reciprocate by making trucks for Mazda; and the two companies trade parts. Each owns a piece of Korea's Kia Motors, which produces the Ford Festiva for export to the

3. See, e.g., Stanley Rothman & Amy E. Black, *Who Rules Now? American Elites in the 1990's*, SOCIETY, Sept. 1, 1998, at 17 (noting that America's "overclass" have traditionally graduated from Ivy League Schools).

4. NAFTA

5. GATT

6. UNESCO

7. See Mortimer B. Zuckerman, *American Economic Stability*, CURRENT, July 1, 1998, at 3 (discussing the effect of global competition on domestic producers).

8. Alejandro Portes, *Neoliberalism and the Society of Development: Emerging Trends and Unanticipated Facts*, POPULATION AND DEVELOPMENT REVIEW, June 1, 1997, at 229 (noting the economic changes in the Eastern Bloc countries in the last quarter-century).

United States. Ford and Nissan, Japan's No. 2, swap vehicles in Australia and are planning a joint minivan program in America. Ford and Volkswagen have merged into a single company in Latin America, which exports trucks to the United States.

General Motors holds a 41.6 percent stake in Isuzu, which is starting a joint venture in America with Suburu, which is partly owned by Nissan. GM also owns half of Daewoo Motors, Hyundai's major competitor in Korea. Daewoo makes Nissan cars for Japan and Pontiacs for America; soon it will be selling cars that were primarily designed by GM-Europe to Isuzu in Japan. GM has also teamed with Japan's No. 1, Toyota, to produce cars under both companies' labels in America and Australia."⁹

In the succeeding ten years since the above was written, global competition and the consequent significance of education have only intensified.¹⁰ Local standards derived by local decisionmakers are no longer sufficient. For America to remain competitive necessitates a world-oriented education system. Such a system depends upon four activities which local school districts and states, by themselves, are incapable of achieving.

WHAT THE NATION NEEDS: THAT LOCAL CONTROL CANNOT CONVEY

World Class Standards and a Core of Modern Knowledge. A youngster growing up in Moss Point, Mississippi or Missoula, Montana may quite reasonably expect to compete against a counterpart raised in Minneapolis, Minnesota for a job in Seattle, Washington. Of course, Seattle-based Boeing will itself be competing against the European conglomerate, Airbus, and, thus, will not be satisfied even with provincial Seattle standards for labor quality.¹¹ If Mobile's school district does not have sufficient funding to employ able algebra teachers, or Alabama adheres to 20th (or even 19th) century education standards, then an Alabama youth is disadvantaged relative to his Minneapolis job competitor. By extrapolation, if the United States as a nation cannot find more effective means for ensuring higher standards in math. Boeing may either be outsourcing its engineering to India, pressing for exceptions to U.S. immigration rules, or losing contracts to Airbus.¹²

9. Charles R. Morris, *The Coming Global Boom*, THE ATLANTIC, October 1989, at 53-54; David B. Hilder, *Year-End Review of Markets and Finance*, WALL ST. J., January 2, 1990, at R8.

10. See *Clinton Calls for Smaller Classes*, THE NEWS & OBSERVER, May 9, 1998, at A7 (discussing President's Clinton's view on global competition in America's schools).

11. See, e.g., Vago Muradian, *Transatlantic Competition May Help Grow U.S. Earnings*, DEFENSE DAILY, Mar. 31, 1998, 1998 WL 7193664 (noting the global competition between Boeing and Airbus).

12. See, e.g., *High Tech Firms Urge Smith To Abandon Visa Attestations*, CONGRESS DAILY, July 13, 1998, 1998 WL 13130762 (discussing the push of high tech firms to attract qualified engineers).

It is insufficient for Palo Alto, Scarsdale, Edina, Evanston, and a select few other suburban districts to hold high education standards. A few pinnacles of local excellence are insufficient. Equal opportunity for individuals and success for the nation now demand high standards across local school districts and across state boundaries.

Moreover, it is not simply high performance or academic achievement standards that matter. There is a common core of modern knowledge that itself is important to be taught nationally. Algebra is no longer an elite subject, needed in only selected local settings. Neither is knowledge of computer use, problem solving, or information access. For large numbers of students to be denied access to important kinds of knowledge or misled into believing that their local standards of performance are sufficient to compete with students from other nations can no longer be tolerated. Such is neither personally fair nor economically sensible.

Measuring Performance is Not Simply a Local or State Function. The state of Kentucky is known in educational policy circles for attempting one of the most far reaching and politically wrenching reforms of its schooling system ever undertaken in the nation's history.¹³ Kentucky relies upon a statewide examination system for determining the academic performance of students in local school districts and schools.¹⁴ Kentucky's ever rising test results have been encouraging year after year, since the 1989 onset of the reform effort.¹⁵ Ironically, however, when Kentucky students are measured against national performance on independently administered, nationally normed examinations, they display little or no improvement.¹⁶ What is going on here?

Test experts acknowledge that the corruption of locally and state administered performance examinations is scandalous.¹⁷ If there is not an objective, professional, independent third party responsible for administering examinations, the opportunity and reality of test corruption is unusually high.¹⁸ The higher the stakes and the higher the consequences to local schools and dis-

13. Lee Mitgang, *Kentucky School Bill Turns State Into Laboratory of Reform*, THE ASSOCIATED PRESS, March 30, 1990, 1990 WL 5998387.

14. *Kentucky Pupils Improve Scores: Students Shine on Basic Skills*, THE CINCINNATI ENQUIRER, Sept. 5, 1990, at E4.

15. Michael Jennings, *Kentucky Pupils Beat U.S. Sample in all Skills, Levels*, THE COURIER JOURNAL, Sept. 5, 1990, at 1A.

16. Elizabeth Levitan Spaid, *Kentucky Rethinks Learning, Classroom by Classroom Test Scores are Up, More Kids Have Computers, but Seven Years After A Court-Ordered Reform, Problems Still Remain*, CHRISTIAN SCIENCE MONITOR, Apr. 3, 1997, at 10.

17. See, e.g., Wade W. Nelson, *The Naked Truth About School Reform in Minnesota*, PHI DELTA KAPPAN, May 1, 1998, at 679 (noting the inefficiency and scandal involving certain standardized exams).

18. See, e.g., Drew Lindsay, *Whodunit?*, EDUC. WK., October 2, 1996, at 25-29 (referring to a notable exam controversy in a Connecticut school).

tricts, the greater the likelihood of test corruption.¹⁹ There is a reason why businesses rely upon external auditors to ensure and validate performance.²⁰ Local school districts, and statewide systems, need to be “audited” by outside agencies, also. For them to monitor themselves is like having the “fox guard the henhouse.” It takes an objective third party and that third party needs a national perspective. It is no longer sufficient, given the previously described global environment, to let districts and states select and administer their own performance examinations.²¹ Some kind of national presence is necessary. The United States is the only major industrial nation that lacks a major national performance examination.²² This cannot last.

Standards are Unrealistic (and Unfair) When Resources are Uneven. Determining an adequate resource level for ensuring delivery of a world class education is not easy. Experts reasonably disagree on the dollar levels necessary, and law suits are triggered by the controversy.²³ However, even acknowledging that the specific dollar level constituting “adequate” is controversial, there are a set of states which, despite making a higher than average tax effort, are incapable of spending the national average amount per pupil. These states cannot now ensure that their students have an adequate opportunity to learn whatever national curriculum components are deemed important to whatever standards are deemed high. Moreover, these states are generally low spending, not because their tax rates are relatively feeble, but because their wealth base is insufficient. Figure One below displays the status of these states. New Jersey, the nation’s highest per pupil spending state is included, as is the national average, for comparison purposes.

19. *Id.*

20. *See, e.g.,* Karen M. Kroll, *Auditors: No Longer Shooting The Wounded?*, INDUS. WK., Apr. 20, 1998, at 42 (noting that a company’s fundamental purpose of an external audit is to produce accurate financial statements for decision-making by banks and outside investors).

21. *See, e.g.,* Editorial, *Main Should Join in National Testing: The President’s Proposal Makes Sense for a State Seeking its Place in the Global Economy*, PORTLAND PRESS HERALD, Sept. 14, 1997, at 4C.

22. *See Mired in Mediocrity, U.S. Education System Needs New Direction*, THE SAN DIEGO UNION-TRIBUNE, December 15, 1992, at B8.

23. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-53 (1975).

FIGURE ONE

State	\$/PP ²⁴	Tax Effort ²⁵
West Virginia	5,742	5.1
Montana	5,202	4.9
Utah	3,645	4.3
Idaho	4,287	4.2
New Mexico	5,533	4.0
New Jersey	9,644	4.4
National Average	5,787	4.0

Research & Development is Simply Inadequate. The growing importance of education necessitates a far better understanding of learning and teaching. However, United States expenditures for research on these topics are simply inadequate. Too little is spent for education research and development to come even close to the needed understanding of means for rendering instruction more effective.

For Fiscal Year 1995, RAND reports the United States federal government allocated \$70 billion to research and development activities.²⁶ Of this total, \$39 billion was spent on defense related activities.²⁷ Twenty nine billion dollars were spent on domestic research and development, unrelated to children or youth.²⁸ Two billion dollars were spent on children and youth related research.²⁹ Half of this amount, under the most generous of definitions, was allocated for education research and development.³⁰ RAND estimates private sources and philanthropic foundations allocated another \$300- \$400 million to education research and development.³¹ Thus, it is possible that the aggregate of research and development equals \$1.4 billion. To forcefully improve an approximate \$400 billion annual operation, such sums seem insufficient.³²

24. Measured in 1996 nominal dollars.

25. Percent of a state's total taxable resources spent on education in 1995.

26. David Grissmer, *National Investment in Research on Children* (RAND Corporation, Santa Monica, forthcoming 1999)

27. *Id.*

28. *Id.*

29. *Id.*

30. *See supra* note 26.

31. *Id.*

32. Thomas Toch, et al., *The Case for Tough Standards: Governors and Corporate Leaders Launch a New Drive to Demand More from Students. History's Lesson: Enemies are Everywhere*, U.S. NEWS AND WORLD REPORT, April 1, 1996 at 52-56.

WHAT THE 'SYSTEM' IS LIKE NOW (AND WHY IT WILL NO LONGER SUFFICE)

Why cannot the United States have a common core of courses or knowledge expectations for its school curriculum? Why cannot there be high standards for student performance, whether in Mobile or Missoula? Why cannot every child be assured an adequate level of school resources to ensure a good education? Why do not states and local school districts spend more on education research and development? There are detailed answers to all of these questions, and they will be explained in this section. However, the summary answer is that the United States does not have a "system" of education. It has, under the best interpretation, fifty state systems and, for some purposes it more realistically must be described as having 15,000 local school systems.³³ There is little authorization for a coordinated system which can enable the United States to construct a national system of education.

There is a crazyquilt pattern of decisionmaking and accountability about American education. It is a "system" only in the most abstract, theoretical sense of the term. In fact, its construction guarantees that virtually no one has an overall view, no individual or institution can realistically be held accountable for results, and no one is responsible for ensuring that reform really takes place. Here is how it works. A description of sausage making is prettier.

In 1647, the Massachusetts Commonwealth enacted "Ye Olde Deluder Satan Act."³⁴ This historic statute contained three provisions which established a foundation for school governance and accountability that exists to this day.³⁵ The Commonwealth legislators determined that each township would be responsible for establishing a school.³⁶ Here is the beginning in American education of "Local Control." The notion that local citizens control their schools, even if less and less true every day, is nevertheless an article of political theology in America.³⁷ Elected officials at every level feel compelled to pay obeisance to this scripture, even if they know it is not true, even if they know it is not even a good idea, and even if they routinely violate the principle in their own political actions.

Ye Olde Delude Satan Act proceeded to specify that the local school system would be separate from the remainder of local government.³⁸ In effect,

33. See CONSORTIUM ON RENEWING EDUCATION, 20/20 VISION: A STRATEGY FOR DOUBLING AMERICA'S ACHIEVEMENT BY THE YEAR 2020 58 (1998).

34. See GEORGE LEROY JACKSON, THE DEVELOPMENT OF SCHOOL SUPPORT IN COLONIAL MASSACHUSETTS (Arno Press, New York 1969).

35. *Id.*

36. *Id.*

37. As recently as 1997, a NBC/Wall Street Journal Poll revealed that forty-seven percent of sampled respondents stated that local school districts should be the seat of education reform. Twenty-five percent thought states should be at the center and only thirteen percent were willing to empower the federal government for education reform purposes.

38. See JACKSON, *supra* note 34.

Massachusetts's officials established education as a special government.³⁹ "General Governments," such as Congress, state legislatures, county councils and city councils, have general authority.⁴⁰ Special government, such as mosquito abatement control districts, airport authorities, fire and flood control districts, and recreation districts have limited authority.⁴¹ School districts have such limited authority.⁴² However, in many jurisdictions, particularly in the Northeast, Midwest, and Northwest, they also have taxing authority.⁴³ (In the southern states and in many large cities, taxing authority does not reside with a local school board.⁴⁴ The board is dependent upon a city council or county board of supervisors to generate revenues.)⁴⁵

The third leg of Ye Olde Deluder Satan Act was a specification that a local governing board be comprised of laypersons.⁴⁶ Neither the church, militia, nor professional educators were to control the school system.⁴⁷ It was intended to be controlled by publicly representative laypersons.⁴⁸

This New England form of school governance spread West through the Northwest Territories, through most of the Louisiana Purchase, and became the dominant pattern for American school governance.⁴⁹ It was reinforced by other events, including the constitutional treatment of education.

When the Constitution was framed in Philadelphia, education was not a principal component. Madison's diary of the convention's deliberations suggests that the only education debate was whether or not to have a national university.⁵⁰ This was decided in the negative. Thus, the Constitution is silent regarding education. Neither "education" nor "schooling" appear in the text of the Constitution or the Bill of Rights. However, the Tenth Amendment, embodying the social contract theory of government, specifies that any authority not specifically allocated to the federal government, nor specifically denied to

39. See JACKSON, *supra* note 34.

40. *Id.*

41. *Id.*

42. *Id.*

43. See JACKSON, *supra* note 34.

44. *Id.*

45. *Id.*

46. *Id.*

47. See generally WILLIAM M. FRENCH, AMERICA'S EDUCATION TRADITION – AN INTERPRETIVE HISTORY (1964).

48. *Id.* at 12-13

49. See, e.g., WILLIAM R. HAZARD, EDUCATION AND THE LAW: CASES AND MATERIALS ON PUBLIC SCHOOLS 206 (1971).

50. JAMES MADISON, THE PAPERS OF JAMES MADISON: PURCHASED BY ORDER OF THE CONGRESS, BEING HIS CORRESPONDENCE AND REPORTS OF DEBATES DURING THE CONGRESS OF THE CONFEDERATION, AND HIS REPORTS OF DEBATES IN THE FEDERAL CONVENTION, Vol. III, 1577-1578. (Washington: Langtree and O'Sullivan, 1840).

state government, is to be reserved to the states and to the people.⁵¹ Education is left to the states, and the constitutions of all fifty states affirmatively accept this responsibility.⁵² It is widely stated that education is a plenary, meaning ultimate, authority of state government.

State governments are gradually assuming greater responsibility for education, and local control, while still important when the public is polled, is less and less a reality.⁵³ State governments are assuming greater responsibility for financing schools, where the revenues stem from property taxation.⁵⁴ More and more states have enacted content standards or curriculum expectations for K-12 schools.⁵⁵ Additionally, states have developed uniform, statewide examination systems.⁵⁶ In effect, local school districts are far from the virtually autonomous governments, which they claimed to be one hundred, even fifty years ago.

The so-called school district consolidation movement has aided this transition to greater centralized decisionmaking. Near the beginning of the 20th century, the United States had 129,000 local school districts.⁵⁷ As the nation reaches the 21st century, this number has been reduced more than ninefold.⁵⁸ There are only 15,000 local school districts now.⁵⁹ This is one of the largest alterations in the history of our nation's governance system. While a school board member once represented every two hundred citizens, the number today is close to one for every three to four thousand citizens.⁶⁰ Of course, there is wide variation around this mean. Each single central city school board member represents one million citizens in New York City.⁶¹ Los Angeles is of a

51. U.S. CONST. amend. X states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

52. HAZARD, *supra* note 49, at 2.

53. Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 173 n.11 (1996).

54. Jim Hilton, *Local Autonomy, Educational Equity, and Choice: A Criticism of a Proposal to Reform America's Educational System*, 72 B.U.L. REV. 973, n.3, 6 (1992).

55. See generally Salomone, *supra* note 53, at 224.

56. Gary Orfield, *Forum: In Pursuit of a Dream Deferred: Linking Housing and Education: Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 837 (1996).

57. [Please provide the background resource for notes 14-20]

58. See *supra* note 29.

59. OFFICE OF EDUCATIONAL RESEARCH & IMPROVEMENT, U.S. DEP'T OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 1993-94 2 (1996).

60. James W. Guthrie, *Organizational Scale and School Success*, EDUCATIONAL EVALUATION & POLICY ANALYSIS, Winter 1979.

61. The largest school district in the country is New York City Public Schools, with 1, 005, 521 students. OFFICE OF EDUCATIONAL RESEARCH & IMPROVEMENT *supra* note 59, at 2.

similar magnitude.⁶² Conversely, there remain some extremely small school districts with more board members than students. However, the general trend has been to ever-larger districts, enrolling ever-larger numbers of students. Presently, fifty percent of the nation's students attend school in only five percent (750) of the nation's school districts.⁶³ Even more surprising, twenty-five percent of our students attend school in only one percent (150) of our largest school districts.

The trend toward larger districts and added state authority has not solved several fundamental problems. Having less academic rigor expected of one in Mobile when compared to Minneapolis does not go away because of added state authority. Knowing how a student scores in reading and mathematics proficiency in Missoula relative to one in Montclair is not obviated because of larger districts or more powerful states. Similarly, taxing and spending inequities displayed in Table One, do not succumb to the centralizing changes that have taken place so far. Finally, virtually no state takes responsibility for basic research and development about instructional processes and education in general. In short, the problems remain, even if school governance has changed over the last century.

The United States needs a new institution, one that simultaneously offers national perspective and encourage national solutions while balancing local and state interests.

WHY THE FEDERAL GOVERNMENT IS NOT THE ANSWER

When it comes to education reform, the federal government has proved to have too heavy an administrative hand. Congress and the Presidency have a good track record in identifying and illuminating important education issues and placing them on the policy agenda.⁶⁴ For example, federal officials responded to racially segregated schools, Sputnik's technological threat, a need for added education opportunity for low income children, and the long-standing schooling exclusion of disabled students.⁶⁵ In each of these instances, the political process operated successfully, even if slowly, to gain or re-

62. *Id.* The second largest school district is Los Angeles Unified School District, with 639,129 students.

63. NATIONAL CENTER FOR EDUCATION STATISTICS, CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 1993-94. UNITED STATES DEPARTMENT OF EDUCATION WASHINGTON, D.C. REPORT NUMBER: NCES 96-212 (1996).

64. *See infra* text accompanying note 20-2.

65. *See* *Brown v. Bd. of Education*, 349 U.S. 294 (1954); National Defense Education Act of 1958, codified as 20 U.S.C. § 401, but subsequently repealed; Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1400; Jeffrey S. Lehman, *Review Essay: To Conceptualize, to Criticize, to Defend, to Improve: Understanding America's Welfare State*, 101 YALE L.J. 685, 695 (1991).

spond to public recognition of a major education problem. However, in each of these instances, once the problem was acknowledged, the actual operation of federal government reforms either wasted billions of tax dollars, or rendered public schools more ineffective.

Here is the federal government's education track record. It is not pretty. In the mid 1950's, the federal judiciary and Congress began to desegregate southern states with legally-created, racially segregated school systems.⁶⁶ The goal was long overdue. As long as the objective was dismantling legally empowered dual school systems, the federal strategy was a success.⁶⁷ However, when *de facto* segregation, racial separation resulting from residential patterns, became the policy target, the effort failed.⁶⁸ The method chosen, busing, generally has proven to be counterproductive.⁶⁹ Since the late 1970's, when the *de facto* desegregation efforts assumed a higher priority, America's large city school systems have evolved into segregated ghettos.⁷⁰ Worse yet, the preferred strategy, busing, breaks apart the crucial links between parents, community, and school. Busing programs have always been unpopular politically and insulting to many nonwhites as well.⁷¹ Moreover, white suburban flight has exacerbated racial segregation, albeit now *de facto*, not *de jure*, and has broken the needed nexus of home-school relationships in the process. Numerous large city systems are now contemplating strategies for obtaining court permission to end their busing programs so that schools and their parent communities can be stitched back together.

In the late 1950s, the President and Congress reacted to perceived Soviet technological dominance by enacting the National Defense Education Act (NDEA).⁷² This was really a waste of money. To begin with, there was no real Soviet technology threat. However, that did not stop schools from accepting the federal money for added, and frequently unused, new equipment and prospective teachers from accepting the easily obtained low interest college tuition loans. Everyone took the federal money and did what they were otherwise

66. *Brown*, 349 U.S. 294 (1954).

67. *See, e.g.*, *Green v. County School Board*, 391 U.S. 430, 438 (1968)(Decreeing that delays by a school board in dismantling an unconstitutional dual, racially segregated school system as required by a decision of the United States Supreme Court, was no longer tolerable).

68. *See, e.g.*, David Chang, *The Bus Stops Here: Defining the Constitutional Right of Equal Educational Opportunity and an Appropriate Remedial Process*, 63 B.U. L. REV. 1, 6-7 (1983) (These demographic patterns linger even after the offending governmental entity ceases its affirmative discriminatory practices).

69. *See generally* William Bradford Reynolds, *In Honor of Brown v. Board of Education: Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 999-1000 (1984).

70. Alexander Polikoff, *The Seventh Circuit Symposium: The Federal Courts and the Community: Gautreaux and Institutional Litigation*, 64 CHI.-KENT. L. REV. 451, 471-472 (1988).

71. *See* Hochschild and Kolarick (forthcoming).

72. National Defense Education Act of 1958, Pub. L. No. 85-864, Title I, § 101, 72 Stat. 1580, 1581 (repealed 1970).

going to do regardless of the purposes of the legislation. Millions of taxpayer dollars later, the NDEA leaves no legacy.⁷³

In the mid 1960s, Lyndon B. Johnson's War on Poverty kicked in with billions for education, money intended to enhance the schooling of low income children.⁷⁴ Evaluation after evaluation of this three decade old federal program are hard pressed to identify any positive results (other than Head Start) for poor children.⁷⁵ It has resulted principally in the employment of more educators and higher salaries for education administrators. If these billions were only wasted, one might merely complain. Actually, the problem is worse. By insisting on unproductive student pullout programs and overly rigid audit rules, federal regulations stigmatized low income children and constituted a major dysfunctional intrusion in the instructional integrity of American schooling.

In the mid 1970s, Congress responded to court decisions and enacted the Education for All Handicapped Children Act.⁷⁶ Here, for the first time, funding was made available to ensure that hundreds of thousands of previously excluded disabled children would have access to schooling.⁷⁷ Recognition of the problem was sorely needed. However, what was established was not a cooperative professional model of solving problems but an adversarial model, one

73. See 20 U.S.C. § 401 (repealed).

74. The legislative War on Poverty included passage of: (1) the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified as amended in scattered titles of the United States Code); (2) the Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451 (codified as amended in scattered sections of 12 U.S.C. and 42 U.S.C.); (3) the "Model Cities" program, formally known as the Demonstration Cities and Metropolitan Development Act of 1966, Pub. L. No. 89-754, 80 Stat. 1255 (codified as amended in scattered titles of the United States Code); and (4) the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in 20 U.S.C. § 236 (1988)). Lyndon Johnson's 1964 State of the Union Address, declaring war on poverty and kicking off his campaign for the Great Society programs. OFFICE OF THE FEDERAL REGISTER, GENERAL SERVICES ADMINISTRATION, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 112 (1965).

75. In recognition of the role of "Head Start Programs," authority for continued funding has been extended under 42 U.S.C. § 9831 (1990), whereas a number of studies have reported positive educational effects among children who participate in Head Start programs. See, e.g., RUTH HUBBLE MCKEY ET AL., THE IMPACT OF HEAD START ON CHILDREN, FAMILIES AND COMMUNITIES: FINAL REPORT OF THE HEAD START EVALUATION, SYNTHESIS AND UTILIZATION PROJECT 63-64 (1985)(summarizing the studies of Head Start's impact on a child's cognitive development); Edward Zigler, *Assessing Head Start at 20: An Invited Commentary*, 55 AM. J. ORTHOPSYCHIATRY 603, 603 (1985)(stating that Head Start deserves "credit for the part [it] plays as a national laboratory for early childhood intervention").

76. 20 U.S.C. § 1400 (1975). In 1990, the Education for All Handicapped Children Act was amended and renamed the Individuals with Disabilities Education Act (IDEA), (Act of Oct. 30, 1990, Pub. L. No. 101-476, Title IX, § 901(a)(2), 104 Stat. 1142) 20 U.S.C. § 1400 (1993).

77. H.R. REP. No. 332 at 7 (1975).

which empowers parents through payments of their legal fees.⁷⁸ The EHCA, unquestionably, has aided handicapped children.⁷⁹ Just as unquestionably, it has contributed to unnecessary and unproductive tensions in schools.

What is needed is a mechanism, which can accurately sense national education problems, but not thereafter impose a heavy and unproductive administrative hand. The nation's education problems are becoming more clear, e.g., the need for more rigorous school and student performance standards, more adequate provision of education funding in poor but high taxing states and districts, more accurate measurement of pupil achievement, and the extension of schooling to three and four year old children from low income families. The balanced solution is not to be found within the existing federal structure. What is needed is a national, but not a federal structure.

WHAT MIGHT BE A BETTER ANSWER?

What can be done when existing institutions are insufficient? Of course, there is always the prospect of altering existing institutions, and America's governmental template is remarkably pliable in this regard. Numerous examples exist of alterations in balances of power from colonial times to the present. Compare the differences between George Washington having to cajole recruits from various colonies into serving in the Continental Army to the rather remarkable command and control presence of today's modern American military. Over time a nation has been forged from a loosely formed federation of equal status colonies. Similarly, through constitutional amendments, we have undertaken dramatic changes such as an expanded right to vote⁸⁰ and an enhanced federal government's ability to collect revenue.⁸¹

We do not need a constitutional amendment for the federal government to be an active partner in the nation's education system. Presumably, broad interpretation of the General Welfare clause⁸² permits the federal government to act in areas such as added funding for disadvantaged students and added rights for handicapped students. Thus, the problem is not the absence of federal au-

78. Under 20 U.S.C. § 1415(i)(3)(B), "the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party."

79. See 20 U.S.C. § 1400(c)(3), where Congress found: the Education of Individuals with Disabilities Act "has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities."

80. U.S. CONST. amend. XV, § 1 (providing the right of citizens of the United States to vote regardless of race); amend. XIX (providing the right of citizens of the United States to vote regardless of gender); amend. XXVI, § 1 (providing the right to vote to of citizens of the United States who are eighteen years of age or older).

81. U.S. CONST. amend. XVI (empowering the Congress to lay and collect income taxes).

82. U.S. CONST. art. 1, § 8, cl. 1.

thority. Rather, the problem is that federal authority when invoked for education is too clumsy, too heavy handed. The apparent need for one-size-fits-all regulations is harmful when applied to the extraordinary span and diversity of America's 100,000 schools. There are too many individual settings and varying community expectations to permit a set of standardized decision rules adequately to assist American education. A more sensitive, flexible, and less politicized institution is now needed.

There are at least two models, which present themselves for consideration. Each offers the prospect of providing states and school districts with inducements for change without imposing a heavy regulatory hand which, in the past, has proved counter productive. Each of these alternative institutional strategies can be patterned after an existing model. One model is the National Science Foundation. The other is the Federal Reserve Board.

A National Education Foundation

Congress could charter and establish a national education foundation capable of inducing school reform through grants to states and local districts. States and local districts would not have to apply for grants, and thus would not be subjected to heavy regulation. However, by offering financial inducements, this national education foundation could encourage states to develop a common core of curriculum content, overarching examinations results of which can be interpolated across states, revenue equalization efforts for below adequate resource states, and enhanced and rigorous education research.

A National Education Trust

A national education trust, when supplied with a set of dedicated revenues, perhaps from telecommunication and Internet tax receipts, might serve such a more national purpose. The national education trust would be empowered to facilitate solutions to the aforementioned four goals of interstate financial equity, cooperative development of national content standards, construction of calibrating systems whereby individual state examination results could be compared fairly, and assume the operation of an expanded education research and development system.

For such a new institution to succeed, it would have to be governed in a manner which simultaneously preserved the confidence of elected officials and the general electorate. It would, at once, have to be accountable, and nonpartisan. The Federal Reserve Board offers a possible model. Here, a Presidentially appointed and Senate-approved director would serve a six-year term, once renewable. A board of directors representative of regions, but not states, would supplement the judgment of the director.

Such a body, equipped with a Congressionally-generated charter, would be empowered to begin the transition from a fragmented system of education, es-

tablished to serve an agrarian society, to a more streamlined, but flexible system suitable for a knowledge society.