

## JUMP-STARTING K–12 EDUCATION REFORM

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Our K–12 educational system is a national catastrophe. Many, if not most, of the public schools we think of as good or excellent are in fact, by international comparisons, average or poor.<sup>1</sup> When we compare ourselves to the other Organization for Economic Cooperation and Development (OECD) countries that are competitors in the world, we are either at the midpoint or the bottom half of educational performance in every area of education.<sup>2</sup>

The country closest to us in terms of academic performance is Slovakia.<sup>3</sup> I have nothing against Slovakia, but it's Slovakia, and we've got to aspire to be better than Slovakia. The thing about Slovakia is that it spends half as much money on K-12 education per student as the United States, so we pay twice as much to get the same outcome.<sup>4</sup>

Of course, this situation is especially dire for low-income kids. Nearly half of black and Hispanic kids drop out of school

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1. See ORG. FOR ECON. CO-OPERATION & DEV., PROGRAMME FOR INTERNATIONAL STUDENT ASSESSMENT (PISA): RESULTS FROM PISA 2012: UNITED STATES 1–2, 7 (2012), <http://www.oecd.org/pisa/keyfindings/PISA-2012-results-US.pdf> [<https://perma.cc/R95E-HB9Q>] (reporting that fifteen-year-old American students performed below average in mathematics and near average in reading and science in a ranking of thirty-four participating countries).

2. *Id.* at 1–2.

3. See *id.* at 1, 4 (reporting that Slovakia “performs at the same level as the United States”); *id.* at 6, 7 (reporting almost identical mean scores for American and Slovakian students in mathematics).

4. *Id.* at 1, 4.

before they graduate.<sup>5</sup> Think about that: If you don't even have high school graduation, what are your prospects in life? Even kids from affluent suburban public schools go to college, and the first thing they are required to do there is take remedial English because they are barely literate.<sup>6</sup> And we think that we can take care of these problems with programs like Affirmative Action? As a cab driver once told me, the problem is not in college; the problem is in kindergarten.

All of this is especially perverse, given the fact that we have the capacity in this country right now to deliver a high-quality education, customized to every individual child at a fraction of the cost of which we are providing it. And yet we're not doing that. Many of you are probably familiar with the Khan Academy,<sup>7</sup> the school, so to speak, that takes place entirely over the Internet.<sup>8</sup> It offers free classes in mathematics and sciences and so forth.<sup>9</sup> Thousands if not millions of kids, and for that matter, adults, have learned through the Khan Academy.<sup>10</sup> We have charter schools that are absolutely eye-popping in their

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5. See JAY P. GREENE & GREG FORSTER, MANHATTAN INSTITUTE, PUBLIC HIGH SCHOOL GRADUATION AND COLLEGE READINESS RATES IN THE UNITED STATES 2 (2003), <http://www.oecd.org/pisa/keyfindings/PISA-2012-results-US.pdf> [<http://perma.cc/A5UP-6HN3>].

6. See MARY NGUYEN BARRY & MICHAEL DANNENBERG, OUT OF POCKET: THE HIGH COST OF INADEQUATE HIGH SCHOOLS AND HIGH SCHOOL STUDENT ACHIEVEMENT ON COLLEGE AFFORDABILITY 2, 4–5 (2016), <https://edreformnow.org/app/uploads/2016/04/EdReformNow-O-O-P-Embargoed-Final.pdf> [<https://perma.cc/F5HX-W67Z>] (reporting that “nearly half” of first-year college students enrolled in remedial coursework came from middle- to upper-income families); *id.* at 10 (“In 2015, 72 percent of high school graduates taking the ACT failed to meet college readiness benchmarks across English, Reading, Mathematics, and Science.”); Editorial, *Guess Who’s Taking Remedial Classes*, N.Y. TIMES (May 10, 2016), [http://www.nytimes.com/2016/05/10/opinion/guess-whos-taking-remedial-classes.html?\\_r=1](http://www.nytimes.com/2016/05/10/opinion/guess-whos-taking-remedial-classes.html?_r=1) [<https://perma.cc/W9D4-FTXG>] (noting that “the income data [cited in Barry & Dannenberg, *supra*] suggest that many [students enrolled in remedial college courses] come from suburban communities whose schools did not prepare them for college-level work”).

7. See KHAN ACADEMY, <https://www.khanacademy.org/> [<https://perma.cc/MP4N-B7H6>] (last visited Mar. 7, 2017).

8. See *Our Mission*, KHAN ACADEMY, <https://www.khanacademy.org/about> [<https://perma.cc/RYR5-YZEV>] (last visited Mar. 7, 2017).

9. See *Subjects*, KHAN ACADEMY, <https://www.khanacademy.org/library> [<https://perma.cc/XJE8-M354>] (last visited Mar. 7, 2017).

10. See *Donate*, KHAN ACADEMY, <https://www.khanacademy.org/donate?gclid=COjbmDrJ180CFVFZhgodKEAJJg> [<https://perma.cc/TW7E-DLCZ>] (last visited Mar. 7, 2017).

success, not just for high-performing students but for low-income kids as well.<sup>11</sup>

A lot of times good-intentioned people say we just need to lower class sizes.<sup>12</sup> We need to send more money to the classroom to facilitate that.<sup>13</sup> Well, when you think about it, what is the ideal student-teacher ratio? Is it 12:1? 15:1? 18:1? What if you have a teacher like Jaime Escalante, possibly the most gifted math teacher in American history?<sup>14</sup> Should he have 18 kids a class? Twenty kids a class? We have the capacity today to deliver that type of education to millions of kids, and yet we're not doing that. The reason we're not doing that is because our education system is a nineteenth-century education system.<sup>15</sup> If Abraham Lincoln were alive today, he would recognize almost nothing about our country. The one thing he would recognize instantly is our schools because they are structured largely the same way they were in the late 1800s, with rows of kids being talked to by their teachers in school districts where they attend school because of their ZIP Code and so forth.<sup>16</sup>

Given the breadth of our education crisis, we have to start asking not whether a particular reform program is too radical, but rather whether it is radical enough. We need a fundamental reconstruction of our K-12 school system, including a devolution of power and resources to the schools and to the families. For instance, why in the twenty-first century do we have school districts? Some of them are so large that they are impermeable bureaucracies.<sup>17</sup> Some are so small that they could

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11. See Adam Ozimek, *The Unappreciated Success of Charter Schools*, FORBES (Jan. 11, 2015, 7:31 P.M.), <http://www.forbes.com/sites/modeledbehavior/2015/01/11/charter-success/#3f43d29070f4> [<https://perma.cc/HK8T-DRVW>].

12. See, e.g., NAT'L EDUC. ASS'N, CLASS SIZE REDUCTION: A PROVEN REFORM STRATEGY 1–3 (2008), [http://www.nea.org/assets/docs/PB08\\_ClassSize08.pdf](http://www.nea.org/assets/docs/PB08_ClassSize08.pdf) [<https://perma.cc/5DMY-YS25>].

13. See *id.*

14. See generally Claudio Sanchez, *Jaime Escalante's Legacy: Teaching Hope*, NPR (Mar. 31, 2010, 3:05 P.M.), <http://www.npr.org/templates/story/story.php?storyId=125398451> [<https://perma.cc/6JAR-RZYZ>].

15. See ENCYCLOPEDIA OF EDUCATIONAL REFORM AND DISSENT 279 (Thomas C. Hunt et al. eds., 2010).

16. See *id.*

17. New York City, the largest school district in the United States, was home to 989,012 students as of 2013. See INST. OF EDUC. SCIS., NATIONAL CENTER FOR

not possibly capture economies of scale.<sup>18</sup> They siphon off massive amounts of money without delivering a commensurate educational productivity,<sup>19</sup> they are prone to capture by special interest groups,<sup>20</sup> and they perpetuate funding inequity through property taxes.<sup>21</sup>

We need to think about bold systemic reforms like changing the school district system. One reform in particular has large potential to transform American education: education savings accounts.<sup>22</sup> It is an idea I am proud to say was born in my former organization, the Goldwater Institute,<sup>23</sup> and it was born of necessity.<sup>24</sup> Goldwater pushed school vouchers and helped get a program passed for disabled kids<sup>25</sup> and foster kids in Arizona.<sup>26</sup> The school voucher program was struck down by the Arizona Supreme Court under the so-called Blaine

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EDUCATION STATISTICS: TABLE 215.10 (2013), [https://nces.ed.gov/programs/digest/d15/tables/dt15\\_215.10.asp](https://nces.ed.gov/programs/digest/d15/tables/dt15_215.10.asp) [<https://perma.cc/3KVW-GKPR>].

18. See Marvin E. Dodson, III & Thomas A. Garrett, *Inefficient Education Spending in Public School Districts: A Case for Consolidation* 13–14 (Fed. Reserve Bank of St. Louis, Working Paper No. 2002-010C) (demonstrating that consolidation of small school districts results in efficiency gains).

19. See, e.g., Terrance F. Ross, *Where School Dollars Go to Waste*, ATLANTIC (Jan. 30, 2015), <http://www.theatlantic.com/education/archive/2015/01/where-school-dollars-go-to-waste/384949/> [<https://perma.cc/9BC9-UDMC>].

20. See Neal McCluskey, *Corruption in the Public Schools: The Market is the Answer*, CATO INST. POL'Y ANALYSIS NO. 542, at 2–3 (Apr. 20, 2005) (providing examples of special interest corruption in the Miami-Dade public school system).

21. See Laurie Reynolds, *Full State Funding of Education as a State Constitutional Imperative*, 60 HASTINGS L.J. 749, 751–52 (2009).

22. See Clint Bolick, *Nevada Places a Bet on School Choice*, WALL ST. J., (June 14, 2015, 6:06 P.M.), <http://www.wsj.com/articles/nevada-places-a-bet-on-school-choice-1434319588> [<https://perma.cc/HUG4-HAW6>]; Fernanda Santos & Motoko Rich, *With Vouchers, States Shift Aid for Schools to Families*, N.Y. TIMES (Mar. 27, 2013), <http://nyti.ms/16iODpa>, [<https://perma.cc/K6JF-RE9C>].

23. See DAN LIPS, GOLDWATER INST., EDUCATION SAVINGS ACCOUNTS: A VEHICLE FOR SCHOOL CHOICE 2, 4 (2005), [https://www.heartland.org/sites/all/modules/custom/heartland\\_migration/files/pdfs/19148.pdf](https://www.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/19148.pdf) [<https://perma.cc/L7P8-CB34>]; JONATHAN BUTCHER & LINDSEY M. BURKE, THE HERITAGE FOUND., EXPANDING EDUCATION CHOICES: FROM VOUCHERS AND TAX CREDITS TO SAVINGS ACCOUNTS 1, 4 (2013), <http://report.heritage.org/sr136> [<https://perma.cc/5U3M-TPKE>].

24. See LIPS, *supra* note 23, at 4.

25. See Ariz. Rev. Stat. Ann. §§ 15-891 to -.06 (Supp. 2008) (amended 2014).

26. See *id.* §§ 15-817 to -.07 (repealed 2011).

Amendment.<sup>27</sup> A number of states have these types of amendments.<sup>28</sup> The court concluded that because the money and vouchers could only go to private schools, it violated this super-protection of the separation of church and state.<sup>29</sup>

The school voucher program got us thinking at the Goldwater Institute: What if we had a program of school choice that did not just allow you to choose private schools?<sup>30</sup> And the idea of education savings accounts was born.<sup>31</sup> This is how they work: If you are an eligible student, the state will take 90 percent of what it would have spent on your education and instead put it into an education savings account that you own and control.<sup>32</sup> You can then use it for any educational expense, from private school tuition to distance learning to technology to tutoring to purchasing discrete services or classes in your local public school to community college classes to transportation.<sup>33</sup> And if you do not use all of the money, you can save it for college.<sup>34</sup>

This idea started in Arizona.<sup>35</sup> It was adopted for the same two groups of students that had the vouchers—the foster kids and disabled kids.<sup>36</sup> It was upheld under the Blaine Amendment by the same courts that had struck down the

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27. *Cain v. Horne*, 202 P.3d 1178, 1185 (Ariz. 2009) (en banc); *see also* *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (describing the Blaine Amendment as a constitutional amendment “which would have . . . bar[red] any aid to sectarian institutions”).

28. *See, e.g.*, ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. II, § 12; CAL. CONST. art. IX, § 8; COLO. CONST. art. IX, § 7; DEL. CONST. art. X, § 3; FLA. CONST. art. I, § 3; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 5; ILL. CONST. art. X, § 3; KY. CONST. § 189; MINN. CONST. art. XIII, § 2; MO. CONST. art. IX, § 8; MONT. CONST. art. X, § 6(1); N.Y. CONST. art. XI, § 3; PA. CONST. art. III, § 29; S.C. CONST. art. XI, § 4; S.D. CONST. art. VI, § 3; TEX. CONST. art. I, § 7; WASH. CONST. art. I, § 11; WYO. CONST. art. I, § 19.

29. *See Horne*, 202 P.3d at 1184.

30. *See LIPS, supra* note 23, at 4–5.

31. *See id.* at 4–6.

32. *Id.* at 6.

33. *See id.*

34. *Id.*

35. *See generally* Ariz. Rev. Stat. Ann. §§ 15-2401 to -2404 (2015), amended by S.B. 1457, 52d Leg., 2d Reg. Sess. (Ariz. 2016).

36. *See id.* §§ 15-2401(6)(a)(i)–(iii), (viii), (ix), amended by S.B. 1457, 52d Leg., 2d Reg. Sess. (Ariz. 2016).

school vouchers<sup>37</sup> and it was soon on the move, first to Florida, which also had struck down vouchers<sup>38</sup> but not education savings accounts,<sup>39</sup> and then to Tennessee<sup>40</sup> and Mississippi.<sup>41</sup> Nevada recently became the first state to adopt nearly universal education savings accounts.<sup>42</sup> Practically every student in Nevada is eligible for an education savings account if they choose to have it.<sup>43</sup>

The benefits of this program are potentially enormous.<sup>44</sup> First of all, educational savings accounts cut out the middle man in education.<sup>45</sup> They cut out the educational bureaucracy.<sup>46</sup> It is just like so many other things in our society, where you can directly purchase the types of educational services that you want for your child.<sup>47</sup> You can customize them because not every child needs the exact same things. They are especially good for kids with special needs, like kids with disabilities that often require special education.<sup>48</sup> They facilitate the purchase and delivery of technology, they eliminate the power of self-

37. See *Niehaus v. Huppenthal*, 310 P.3d 983, 987 (Ariz. Ct. App. 2013), *appeal denied*, 2014 Ariz. LEXIS 59 (Ariz. Mar. 21, 2014).

38. See *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006).

39. See Fla. Stat. § 1002.385 (2016), *amended by* S.B. 672, 24th Leg., 2d Reg. Sess. (Fla. 2016); *Faasse v. Scott*, No. 2014-CA-1859 (Fla. Cir. Ct. Dec. 30, 2014) (dismissing the plaintiff's challenge of Florida's Education Savings Account with prejudice).

40. See S.B. 27, 2015 Gen. Assemb. (Tenn. 2015).

41. See S.B. 2695, 2015 Reg. Sess. (Miss. 2015).

42. See S.B. 302, 2015 Sess. (Nev. 2015); Jason Bedrick, *Nevada Enacts First Nearly Universal Education Savings Account*, CATO INST. (June 3, 2015, 7:42 A.M.), <http://www.cato.org/blog/nevada-enacts-first-nearly-universal-education-savings-account>, [https://perma.cc/G4J5-K4ML].

43. See S.B. 302, 2015 Sess. (Nev. 2015).

44. See Thomas W. Stewart & Jenn Odell, *2015 Legislative Recap: Important Bills From Nevada's 78th Legislative Session*, 16 NEV. L. J. 419, 430–31 (2015); FOUND. FOR EXCELLENCE IN EDUC., *ESA'S: THE NEXT GENERATION OF SCHOOL CHOICE 2–4*, 17 (2015), <http://www.excelined.org/wp-content/uploads/ESAs-the-NextGen-of-School-Choice-FINAL.pdf> [https://perma.cc/P8UL-RUZA]; Josh Cunningham, *The Next Generation of School Vouchers: Education Savings Account*, NCSL (2016), <http://www.ncsl.org/research/education/the-next-generation-of-school-vouchers-education-savings-accounts.aspx> [https://perma.cc/D2UK-NKLB].

45. See Stewart & Odell, *supra* note 44, at 430–31; Cunningham, *supra* note 44.

46. See Stewart & Odell, *supra* note 44, at 430–31; FOUND. FOR EXCELLENCE IN EDUC., *supra* note 44, at 17.

47. See Stewart & Odell, *supra* note 44, at 430–31; Cunningham, *supra* note 44.

48. Stewart & Odell, *supra* note 44, at 430–31; Cunningham, *supra* note 44.

interested special interests in the educational arena, and they are a way of saving for college.<sup>49</sup> They also are ultimately equitable because every child gets the same amount of money unless they have special needs, in which they get more.<sup>50</sup>

The program is under legal challenge in Nevada.<sup>51</sup> It will be very interesting to see what happens there. I am predicting that if the program is upheld, it will continue to move to other states. And I think that this will be the first truly twenty-first-century system of K-12 education that really exists from a public policy standpoint.

A final comment, and a very important one. The realm of the possible in terms of education reform is bound ultimately by the United States Supreme Court. When my colleagues and I argued the *Zelman v. Simmons-Harris*<sup>52</sup> case in 2002, which upheld school vouchers by a 5-4 majority, the dissent warned that if the voucher program was upheld, we would see religious strife—the likes of which we had not seen since Bosnia and Northern Ireland.<sup>53</sup> Well, we have come to see that has not happened, and I hope that if the issues of school choice go to the U.S. Supreme Court, a more contemporary perspective will apply.<sup>54</sup> But this is an area where you, as lawyers, can make an enormous difference, whether you serve on a school board or as a lawyer for schools or education reform groups. Our nation's future depends upon the engagement of each and every one of us.

I want to finish with a very quick tribute to Justice Antonin Scalia in the *Zelman* case. A very good lawyer named Bob

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49. See Stewart & Odell, *supra* note 44, at 430–31; FOUND. FOR EXCELLENCE IN EDUC., *supra* note 44, at 17.

50. Stewart & Odell, *supra* note 44, at 430–31; Cunningham, *supra* note 44.

51. See Note, David Wilhelmsen, *Orphans, Baby Blaines and the Brave New World of State-Funded Education: Why Nevada's New Voucher Program Should Be Upheld Under Both State and Federal Law*, 42 J. LEGIS. 257, 257–58 (2016); Michelle Rindels, *Judge Puts Sweeping Nevada School Choice Program on Hold*, LAS VEGAS SUN (Jan. 11, 2016), <http://lasvegassun.com/news/2016/jan/11/judge-puts-sweeping-nevada-school-choice-program-o/> [<https://perma.cc/T8XY-UFXD>].

52. 536 U.S. 639 (2002).

53. *Id.* at 685–86 (Stevens, J., dissenting).

54. See John Schoenig, *Parental Choice, Catholic Schools, and Educational Pluralism at the Dawn of a New Era in K-12 Education Reform*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 513, 529 (2013) (discussing the benefits of educational choice programs and their spread following *Zelman*).

Chanin from the National Education Association was arguing against the voucher program in its constitutionality. He said that if only the school districts had more money, this problem would die; we would not even need to talk about vouchers.<sup>55</sup> Justice Scalia, in the way that only he could get to the absolute heart of the problem, leaned back and said, "It isn't a money problem . . . . It's a monopoly problem."<sup>56</sup> I think that truer words have not been spoken. We will miss him enormously. But it falls to the rest of us to carry the standard to improve our nation's schools and educational opportunities.

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55. See Transcript of Oral Argument 59, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/00-1751.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/00-1751.pdf) [<https://perma.cc/N5A5-MT2Z>].

56. *Id.*