

Learning to Change: New Takes on Education Reform

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A Review of:

The Choice We Face: How Segregation, Race, and Power Have Shaped America's Most Controversial Education Reform Movement, by Jon N. Hale (Beacon Press), <http://www.beacon.org/The-Choice-We-Face-P1635.aspx>

A Search for Common Ground: Conversations about the Toughest Questions in K-12 Education, by Frederick M. Hess & Pedro A. Noguera (Teachers College Press), <https://www.tcpspress.com/a-search-for-common-ground-9780807765166>

Unshackled: Freeing America's K-12 Education System, by Clint Bolick & Kate J. Hardiman (Hoover Press), <https://hooverpress.bookstore.ipgbook.com/unshackled-products-9780817924454.php>

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Note from the Editor:

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Other Views:

• Peter Bergman & Isaac McFarlin, Jr., *Education for All? A Nationwide Audit Study of School Choice* (May 2020), available at http://www.columbia.edu/~psb2101/BergmanMcFarlin_school_choice.pdf.

• Erica Frankenberg et al., *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards*, Civil Rights Project (Dec. 2010), available at <https://escholarship.org/uc/item/4r07q8kg>.

“Education is America’s great conundrum,” say Clint Bolick and Kate J. Hardiman in their new book, *Unshackled: Freeing America’s K-12 Education System*.¹ Few would disagree. The nation’s lackluster test scores, underperforming schools, and persistent racial and socio-economic achievement gaps have long been symptoms of a system in need of reform. And the sudden, often rocky, shift to virtual schooling during the COVID-19 pandemic has only heightened awareness of the inefficiencies and inequalities that plague American education. While there is wide agreement that there is a problem, however, there is little consensus on the best solutions.

Three new books are representative of the diverse viewpoints of education reformers. One, Jon Hale’s *The Choice We Face: How Segregation, Race, and Power Have Shaped America’s Most Controversial Education Reform Movement*, is a critical examination of the history of American education and its persistent inequality problem.² Another, *A Search for Common Ground: Conversations About the Toughest Questions in K-12 Education*, by Frederick M. Hess and Pedro A. Noguera, is an effort by reformers with opposing philosophies to identify areas of consensus on difficult problems in education.³ The third, and most useful, is Bolick and Hardiman’s *Unshackled*, which proposes bold solutions to redesign the education system to better serve all students.

This review addresses each book in turn, identifying causes for both optimism about the future of the education reform debate and concern that—despite opportunities for consensus and innovation—that debate will remain contentious. Hale’s *The Choice We Face* offers a useful history lesson, but it does little to advance the conversation around education reform. Making an unconvincing case that the movement for educational choice is irredeemably rooted in racism, Hale deems educational choice reformers as guilty by (often distant) association and spends little time engaging with their ideas on their own terms. In contrast, Hess and Noguera use *A Search for Common Ground* to engage one another’s opposing ideas in good faith, seeking to build the necessary consensus for needed change. Finally, in *Unshackled*, Bolick and Hardiman offer innovative proposals for what that change should look like, identifying practical steps toward a better future in education.

1 CLINT BOLICK & KATE J. HARDIMAN, *UNSHACKLED: FREEING AMERICA’S K-12 EDUCATION SYSTEM 1* (2020).

2 JON HALE, *THE CHOICE WE FACE: HOW SEGREGATION, RACE, AND POWER HAVE SHAPED AMERICA’S MOST CONTROVERSIAL EDUCATION REFORM MOVEMENT* (2021).

3 FREDERICK M. HESS & PEDRO A. NOGUERA, *A SEARCH FOR COMMON GROUND: CONVERSATIONS ABOUT THE TOUGHEST QUESTIONS IN K-12 EDUCATION* (2021).

I. A CYNICAL CRITIQUE

Among the most strident critics of the educational choice movement today are those who view it as a barrier to racial equity in education. This criticism lies at the heart of Professor Jon Hale’s forthcoming book, *The Choice We Face: How Segregation, Race, and Power Have Shaped America’s Most Controversial Education Reform Movement*.⁴ In *The Choice We Face*, Hale recounts the tumultuous history of American public education in the years following the Supreme Court’s landmark decision in *Brown v. Board of Education*. The book details public and private efforts to resist desegregation in the wake of *Brown* and highlights the undeniable fact that the promise of *Brown*—equality of educational opportunities for all American children—remains far from realized.

When it serves as a record of the historical battle over integration of American schools, *The Choice We Face* is effective. Most compellingly, it contains the stories of individuals on the front lines of the post-*Brown* fight for integration. Hale recounts, for example, the story of Millicent Brown, one of the first eleven students to desegregate public schools in Charleston, South Carolina.⁵ Drawing on an interview he conducted with Brown, Hale relates how she moved north after graduating from high school to attend Emerson College in Boston. Brown chose Boston, she tells Hale, because she “decided that these problems were of the South” and so she would “go North where things were different.”⁶ Brown arrived in Boston, however, at the height of the city’s busing controversy.⁷ The city’s transportation plan seeking to integrate schools had sparked heated, and at times violent, opposition.⁸ Brown soon learned that the racism she had faced in her youth was not unique to her home state. “I ran away from southern racism but ran into something else,” Brown tells Hale.⁹

Stories like Millicent Brown’s are important. They remind us that the national shame of *de jure* segregation is uncomfortably recent. They also remind us that the Supreme Court’s decision in *Brown v. Board of Education* was not the final word on the problem of racism in American education. But although this history is part of *The Choice We Face*, it is not the book’s primary focus. Rather, Hale tries to show that today’s movement for increased choice in education is poisoned by its alleged ties—both historical and contemporary—to segregation and racism. In this central argument, the book falls flat.

“School choice in its contemporary form,” Hale argues, “developed in fierce opposition to desegregation.”¹⁰ Yet the two chapters in which Hale develops this argument center on a form of “choice” that bears little resemblance to the programs advanced by today’s educational choice advocates. Hale discusses “freedom

of choice” plans enacted by southern states in the 1960s. Under those plans, families could apply to any school in their districts; in practice, this meant applying to either the white school or the black school.¹¹ Although black families could theoretically choose to apply to formerly all-white schools under these plans, as Hale notes, they faced overwhelming pressure—and often intimidation—from their white neighbors to keep their children in all-black schools.¹² As a result, in 1969, only 2 percent of black students in the South attended desegregated schools.¹³

The Supreme Court struck down these “freedom of choice” programs in *Green v. County School Board* and *Alexander v. Holmes County Board of Education*, holding that they violated the *Brown* rule that public schools admission must be determined on a nonracial basis.¹⁴ Though they were called “freedom of choice” programs, these programs were nothing like school choice as we know it today. The architects of these programs did not design them to foster competition and innovation in schools—two objectives at the heart of the modern educational choice movement. Nor did they seek to offer families a range of educational options.¹⁵ Rather, the alleged choice was limited to two options: a nearly all-white public school and a nearly all-black public school. Hale rightly characterizes these programs as efforts to resist mandated desegregation. But despite his claims that this “regional massive resistance” turned into “national policy” in the form of contemporary educational choice reforms, he fails to convincingly link the two movements.¹⁶

To bridge the gap between post-*Brown* “freedom of choice” plans and the modern educational choice movement, Hale attempts to link failures to desegregate schools to Milton Friedman—widely regarded as the forefather of today’s educational choice movement. Hale first explains how racial covenants and segregationist residential policies in the City of Chicago led to a *de facto* segregation in schools which resembled the pre-*Brown* *de jure* segregation in southern states.¹⁷ In response to demands for integration following *Brown*, the city enacted a “voluntary transfer

⁴ Hale, *supra* note 2.

⁵ *Id.* at 63.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 62-63.

⁹ *Id.* at 63.

¹⁰ *Id.* at 19.

¹¹ *Id.* at 33.

¹² *Id.* at 33-34.

¹³ *Id.* at 34.

¹⁴ *Id.* at 35. See *Green v. Cty. Sch. Bd.*, 391 U.S. 430 (1968); *Alexander v. Holmes Cty. Bd. of Ed.*, 396 U.S. 19 (1969).

¹⁵ Hale does point to one briefly lived program in South Carolina that included state funding of private tuition. He uses this program as evidence that “like the concept of school choice in general, vouchers originated with racism and the politics of segregation in the aftermath of *Brown*.” Hale, *supra* note 2, at 123. But that is not true. South Carolina was not the first state to offer state funding for private tuition. In fact, when *Brown* was decided, Vermont had been operating a town tuitioning program (to serve children in rural areas without public schools) for 85 years. EdChoice, *School Choice: Vermont—Town Tuitioning Program*, available at <https://www.edchoice.org/school-choice/programs/vermont-town-tuitioning-program/>. Similarly, Maine has operated a town tuitioning program since 1873. EdChoice, *School Choice: Maine—Town Tuitioning Program*, available at <https://www.edchoice.org/school-choice/programs/maine-town-tuitioning-program/>.

¹⁶ See Hale, *supra* note 2, at 37.

¹⁷ *Id.* at 50-57.

plan” that allowed black families to elect to transfer and enroll in historically white public schools.¹⁸ This supposedly voluntary plan posed the same problems, and had similarly negligible success at integration, as the “freedom of choice” programs of the South.

About the Chicago transfer plan, Hale puzzlingly declares, “Friedman’s ‘free market’ was not free to all.”¹⁹ It is true that Milton Friedman, a professor at the University of Chicago, lived in Chicago when the city enacted its voluntary transfer plan. Friedman’s physical presence in the city of Chicago, however, is the only link that Hale provides between Friedman and that plan. In fact, as any serious observer of the educational choice movement will immediately recognize, the school choice envisioned by Friedman bears no resemblance to Chicago’s transfer plan—which was, indeed, not a market at all.

Friedman’s vision of school choice was a systematic rethinking of government-funded education. Under his approach, the state would distribute education funding to individual families rather than government entities. In Friedman’s vision, families would vote with their educational dollars, fostering competition among schools and encouraging innovation in education. Such a plan is a far cry from Chicago’s plan, which—like the “freedom of choice” plans in the South—offered only a choice between two segregated public schools, both directly funded and operated by the same government actor.

But the dissimilarity between Chicago’s approach and Friedman’s proposed policies is not the only problem with Hale’s attribution of the Chicago plan to Friedman. Friedman himself explicitly disavowed segregated public schools. In a footnote²⁰ to his seminal essay, *The Role of Government in Education*, Friedman lays out his position on segregation in public schools. He notes his libertarian opposition to any state coercion in a family’s school selection, but he writes, “so long as the schools are publicly operated, the only choice is between forced nonsegregation and forced segregation; and if I must choose between these evils, I would choose the former as the lesser.”²¹ Yet Hale blames Friedman in part for Chicago’s failure to desegregate, writing that Friedman “fiddled as Chicago burned.”²² Worse, Hale asserts, without evidence, that supporters of Friedman’s theory were interested less in improved educational outcomes than they were in segregationist goals. “Friedman’s theory,” he writes, “gave northerners an alibi for their racism” and paved the way for “dismantling of public education . . . on a national scale.”²³

Besides being unsupported by his proffered historical evidence, Hale’s depiction of an irredeemably racist underpinning to today’s educational choice movement is complicated by the fact that educational choice is extremely popular among racial minorities. According to surveys cited in the book, 73 percent of Latinos and 67 percent of African Americans support school choice.²⁴ To his credit, Hale acknowledges this popularity, as well as the work of prominent civil rights leaders who have taken up the cause of school choice.²⁵ He even concedes in the abstract that “[i]t is particularly important to listen to and prioritize the recommendations of people of color who advocate for school choice from a civil rights perspective.”²⁶ Yet Hale—who describes himself in the introduction as “problematically white”²⁷—seems to be conflicted about how best to engage with black proponents of educational choice.

Hale’s discussion of the intersection of educational choice and the civil rights movement focuses in part on Dr. Howard Fuller. When it comes to civil rights activism, few can match Fuller’s wide-ranging experience. He participated in Freedom Rides to desegregate southern bus terminals in the 1960s, worked with a program to combat poverty in black communities in North Carolina, and established Malcolm X Liberation University, a university “committed to the principles of Black Power.”²⁸ And in a role that Hale describes as “rais[ing] eyebrows” and “perplexing white progressives,” Fuller is also a leader in the school choice movement.²⁹ Today, Fuller operates a successful charter school in Milwaukee.

Hale portrays Fuller as an exception to a perceived rule of racism in educational choice advocacy. Yet he simultaneously views Fuller as problematically tainted by his connections to unsavory allies such as former Wisconsin governor Tommy Thompson, former president George W. Bush, and former Secretary of Education Betsy DeVos (DeVos is a recurring bogeyman throughout the book). About these relationships, Hale writes, “It was easy to wonder how Fuller—a radical Black activist—ended up in the company of conservative whites. It was even easier to criticize him for it.”³⁰ Later, Hale asserts that Fuller is “forced to constantly fend off allegations of working with the worst of the worst.”³¹ In the same breath, Hale quotes Fuller as responding in an interview with exasperation—“[If you are] saying that I’m trying to help Donald Trump, you’re insane”—presumably in response to Hale’s allegation that he works with “the worst of the worst.”³²

18 *Id.* at 58.

19 *Id.* at 60.

20 Lest it seem unfair to expect Hale to have read every Friedman footnote, Hale cites this very footnote (which he describes as “often overlooked in the history of school choice”) as representative of a perceived lackluster opposition to racism on Friedman’s part.

21 Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 131 n.2 (Robert Solo & Eugene Ewald eds., 1955).

22 Hale, *supra* note 2, at 60.

23 *Id.* at 61.

24 *Id.* at 141.

25 *Id.*

26 *Id.* at 208.

27 *Id.* at 3.

28 *Id.* at 139-140.

29 *Id.* at 140, 162.

30 *Id.* at 141.

31 *Id.* at 162.

32 *Id.*

Though he implies guilt by association, Hale does also distinguish Fuller's work from the "agendas of Donald Trump and billionaire education reformers."³³ Fuller, Hale writes, views choice as "an opportunity for poor families to escape, if not control and repair, a broken system."³⁴ In a telling aside, Hale also describes Fuller's commitment to the school choice movement as "obviously for very different reasons than southern whites."³⁵ Hale's determination to find nefarious racialized motivations in the educational choice movement creates a troubling blind spot. He cannot see that the goals he concedes are worthy when pursued by black choice advocates—goals like "community control, autonomy, and the best means given the reality of public education in the twenty-first century"—are shared by the movement more broadly.³⁶ Fuller's vision is inspiring to people of any race or class who agree that "[g]iving low-income and working-class parents the power (and the money) to make choices about the schools their children attend will not only revolutionize education but provide the compass to a better life."³⁷

Throughout the book, Hale lays out various other objections to educational choice programs. Some are thoughtful and actionable. He notes, for example, a fact laid bare by the COVID-19 pandemic: in the context of virtual learning, low-income communities need more support to ensure that children have the technology they need to succeed.³⁸ Others are oft-repeated myths about educational choice presented without support—like the old canard that educational choice inevitably leads to "divestment" and underfunded public schools.³⁹ But his focus is on impugning the educational choice movement for its supposed ignoble lineage, and educational choice advocates for their supposed racism.

Besides finding little support in the cited evidence, such an attack on educational choice reformers is counterproductive. As Hale admits, educational choice is one of the rare areas of contemporary politics in which alliances cut across the too-often intractable lines of party, race, and class. People like Hale who have thought hard about the problems facing American education should capitalize on this atmosphere of collaboration to propose solutions and search for areas of common ground. That does not mean that Hale should keep his criticisms to himself. He should advocate vigorously for the reforms he sees as best suited to improve our system and poke holes in those he views as wrongheaded. But painting the entire educational choice movement, and his adversaries themselves, as committed to goals of racial exclusion is not just incorrect; it shuts down the debate before it can get started.

33 *Id.* at 163.

34 *Id.* at 140.

35 *Id.*

36 *Id.* at 163.

37 *Id.* at 140.

38 *Id.* at 137.

39 *See, e.g., id.* at 175.

II. A CONSCIENTIOUS CONVERSATION

In stark contrast to Hale's heavy-handed critique is a new book by Frederick M. Hess and Pedro A. Noguera, *A Search for Common Ground: Conversations About the Toughest Questions in K-12 Education*. In a series of letters, Hess (an educational choice advocate) and Noguera (an opponent of most choice programs) discuss important topics in education and—as the title suggests—seek to find common ground. Both men bring to the table an impressive history of academic and practical experience in education. Amid our increasingly polarized climate, they refreshingly engage one another's ideas with respect and goodwill, even on the most contentious topics. The letters also reveal a genuine friendship between the men, who relay birthday wishes, commiserate over their children's sudden transition to virtual learning at the start of the pandemic, and even—in another relatable early-pandemic missive—bemoan the unavailability of toilet paper at the grocery store. The back-and-forth style can, at times, make for choppy reading, but the format serves a greater purpose. It is a reminder that, when education reformers can learn to agreeably disagree, they may find that they don't disagree quite so much as they thought.

Noguera and Hess address a wide range of topics related to education. Their exchanges on three of these topics are particularly illustrative of their ability to identify shared goals and values. The two men manage to build consensus around important points related to per-pupil funding, social and emotional learning, and teacher pay.

In an exchange about school choice, Noguera expresses a concern that traditional public schools may suffer a loss of funding when students leave for charter or private schools (a notion, as mentioned, also advanced by Hale). Hess counters that, when a student leaves through a voucher program or to a charter school, federal and local funding structures largely insulate districts from financial loss, enabling them to retain much of the funding that had been allocated to that child. As a result, the district may have *more* money per child when students depart.⁴⁰ And as Hess observes later, many public schools seem unable to provide strong educational outcomes even with per-pupil expenditures that are comparatively very high.

Noguera concedes that evaluating public funding is complex, but in a related later discussion, he makes the important point that more money spent per child is not necessarily indicative of failure in traditional public schools as compared to charter or private counterparts. This is because the kids left in traditional public schools in urban districts are disproportionately "high-need," that is, "students with disabilities, kids in foster care, kids experiencing homelessness, English learners, and so forth."⁴¹ These kids require more services and are thus more expensive to educate.⁴² For this reason, it's essential that comparisons of schools not only examine per-pupil funding, but also analyze how dollars are being spent.

40 *Id.* at 27.

41 *Id.* at 46.

42 *Id.*

Both men raise counterintuitive, yet important, considerations in comparing educational options based on per-child spending. And both ultimately agree that “simply putting more money into failed school systems does not produce better results.”⁴³ Rather, according to both men, any discussion about spending must include a commitment to fiscal transparency.⁴⁴

In another set of letters, Noguera and Hess discuss social and emotional learning, or SEL. Both men highlight SEL as a corrective measure balancing the overzealous focus on test preparation that followed the passage of No Child Left Behind two decades ago. As Hess describes it, “support for SEL is really just a reminder that schools should unapologetically embrace both academic achievement and the social and emotional skills that equip students for citizenship, life, and work.”⁴⁵ Noguera agrees that SEL is a “common sense” idea that emphasizes that children’s academic needs cannot be separated from their “social, emotional, and psychological needs.”⁴⁶ As an example of successful implementation of SEL, Noguera describes a school he visited which fully integrated the arts into the entire curriculum. He recounts, “[k]ids are singing, drawing, playing music, and acting while they write, problem-solve, and learn history and science.” We should expect such a whole-child focus to succeed, Noguera argues, because “kids learn better when they’re happy and when we teach them in ways their brains are hardwired to understand.”⁴⁷ While both men agree on the value of SEL, they both also acknowledge difficulties in implementation. Success or failure of SEL efforts can be hard to measure,⁴⁸ schools and teachers may be ill-equipped to handle the array of challenges that come from tackling mental health and psychological issues,⁴⁹ and there is little research on how best to support teachers seeking to transform culture within schools.⁵⁰ In their discussion of SEL, Noguera and Hess reveal a promising glimpse that perhaps not every issue in education need be controversial. Though they do not advocate a singular best practice for SEL implementation (such an idea would likely be impossible, at least in Hess’s preferred decentralized model of effective education), they broadly agree at least that teachers and schools should embrace the philosophy.

Another area on which Noguera and Hess find that they largely agree is, perhaps surprisingly, teacher pay. Both agree that “[t]eachers should be paid more, and terrific teachers should be paid much more.”⁵¹ They also broadly agree that teacher pay should include incentives for taking on greater responsibility, as well as incentives for taking hard-to-fill jobs in

urban and very rural schools.⁵² That’s not to say they arrive at a full consensus. Noguera sees value in a robust support staff, for example, while Hess regards the over-proliferation of support personnel as a challenge to ensuring the availability of sufficient teacher pay.⁵³ Both men agree, however, that there is room for substantial improvement in teacher education and professional development.⁵⁴

Noguera and Hess’s colloquy on teacher pay is interesting because it defies the usual stereotypes of advocacy on teacher pay. It was uncontroversial to Noguera, for example, that we should tie teacher pay in some way to teacher performance (for example, higher pay for taking on greater responsibility). And Hess did not respond to Noguera’s expressed appreciation for the value of tenure, which many educational choice advocates view as a too-strong measure of job security that makes it hard to get rid of bad teachers. To a certain extent, these priorities around teacher pay defy tidy political categorization. Even in the controversial area of teacher pay, it appears, there is room for consensus-building.

Noguera and Hess, though able to find an impressive amount of common ground, still maintain strong opposing views on crucial areas of education reform. Perhaps most notably, Noguera opposes vouchers and for-profit charter schools; Hess, on the other hand, like most choice-oriented reformers, sees both as useful parts of a wide-ranging menu of educational choice options. Noguera acknowledges that some choice can be useful in education; he sees value in some nonprofit charter schools and chose bilingual schools for two of his kids, for example. His primary concern about educational choice, however, is about “kids who are never chosen: the homeless kids, the kids in foster care, the undocumented kids, and the kids who don’t have caring parents.”⁵⁵ He worries that in a system of full choice, these kids will be left in schools that are “underfunded and overwhelmed by their needs.”⁵⁶

Hess shares Noguera’s concern about underserved kids, but he reminds Noguera to ask a question that is essential—and too often overlooked—in the debate about educational choice: “Compared to what?”⁵⁷ As Noguera observes, educational choice is not a “panacea.”⁵⁸ It cannot and will not solve the problem of poverty and the social ills that accompany it. There will always be kids who suffer, and Noguera is right that we do well to continue to search for ways to ease that suffering. But restricting the choices of non-affluent families—because, as Hess and other choice advocates rightly observe, wealthy families already have educational choice—will not achieve that noble goal. Expanding choice empowers families to find schools that best meet their children’s unique needs and educational goals. And it encourages

43 *Id.* at 45.

44 *Id.* at 48.

45 *Id.* at 62.

46 *Id.* at 63.

47 *Id.*

48 *Id.* at 65.

49 *Id.* at 64-65.

50 *Id.* at 71.

51 *Id.* at 124.

52 *Id.* at 128.

53 *Id.* at 130-131.

54 *Id.* at 134.

55 *Id.* at 32.

56 *Id.*

57 *Id.* at 26.

58 *Id.* at 34.

schools and teachers to innovate solutions that can benefit all kids. This is a welcome alternative to a system in which a child's educational opportunities—and, too often, outcomes—are determined by her zip code.

III. A CALL TO ACTION

Another valuable addition to the national conversation about educational reform is *Unshackled: Freeing America's K-12 Education System*, a new book by Clint Bolick and Kate J. Hardiman.⁵⁹ While Noguera and Hess usefully identify areas of agreement on tough problems in education, Bolick and Hardiman propose bold solutions. Bolick, an Associate Justice of the Arizona Supreme Court,⁶⁰ and Hardiman, a Georgetown law student and legal fellow at Cooper & Kirk, are both former teachers who have spent time considering thorny issues in American education. They identify four crucial elements to systemic educational reform: choice, competition, deregulation, and decentralization.⁶¹ They show how choice and competition can lead to the development of new, innovative educational options, and how deregulation and decentralization can dramatically improve the options that already exist.

The argument for increased choice in education is familiar. Empowering families to choose their schools puts the responsibility of school assignment into the hands of those most invested in a child's well-being—and with the most knowledge of his unique needs. As an added benefit, as more families can choose among schools, competition among schools for their tuition dollars challenges all schools to improve and leads to the emergence of innovative methods to better educate children. The attraction of choice is intuitive, but its implementation atop the preexisting educational landscape can take many forms, including vouchers, tax-credit scholarships, and education savings accounts. Among these policy options, Bolick and Hardiman consider education savings accounts, or ESAs, to be the gold standard in education reform.⁶²

ESAs are savings accounts funded by the state or a third party with funds earmarked for education. If a family decides to withdraw a child from her public or charter school, it receives a deposit of funds in an ESA. It may then use those funds for any approved educational expense.⁶³ This, of course, includes private school tuition, but it also includes things like “distance learning, software, educational therapies, community college courses, [and] extracurricular activities.”⁶⁴ Transferring to parents the full power over how and where to spend education dollars allows them to choose among schools, but it also allows them to

create personalized, non-traditional educational plans for their children.⁶⁵

By giving money directly to families, Bolick and Hardiman argue, we can be more confident that public money “spent on *schooling* is actually going toward *educating* [] children”⁶⁶ (rather than, for example, the administrative bloat that plagues the public school system⁶⁷). The amount of public money we spend on education can be staggering. New York, for example, spends \$22,366 per pupil each year.⁶⁸ And where policies like vouchers may be less useful for families in rural areas where the emergence of many competing schools is unlikely,⁶⁹ ESAs open the door to creative alternatives. The authors detail, for example, the promise of new technologies and programs in homeschooling (of which, the authors convincingly argue, pandemic-induced virtual school is not representative).⁷⁰ Bolick and Hardiman acknowledge that because ESAs are new and not yet widely adopted, there is little empirical evidence on their impact.⁷¹ But early studies and reports from families who use them are promising.⁷² As families push for reforms in education, particularly in the wake of the educational challenges brought on by COVID-19, ESAs should be at the top of their list of goals. By offering choice and encouraging competition, ESAs could revolutionize American education.

Bolick and Hardiman rightly acknowledge that, as promising as educational choice reforms are, any comprehensive plan to improve the nation's education system must include plans to improve the nation's *public* schools, which will continue to educate the “vast majority of children.”⁷³ The argument that there is room for improvement in our public schools should be uncontroversial. The authors point out, for example, the academic gap dividing black and Hispanic students from their white and Asian American peers, and national test scores that persistently lag those of our international counterparts.⁷⁴ The most promising public school reforms, Bolick and Hardiman argue, aim to deregulate and decentralize.

The authors offer an alternative vision to a public school system they view as bogged down by bureaucratic inefficiencies and too rigidly tied to arbitrary geographic lines dividing

⁵⁹ Bolick & Hardiman, *supra* note 1.

⁶⁰ Before joining the bench, Bolick spent much of his career litigating educational choice cases at my firm, the Institute for Justice, of which he was a co-founder.

⁶¹ Bolick & Hardiman, *supra* note 1, at 10.

⁶² *Id.* at 73.

⁶³ *Id.* at 76.

⁶⁴ *Id.* at 73.

⁶⁵ *Id.* at 76.

⁶⁶ *Id.* at 77.

⁶⁷ *Id.* at 29.

⁶⁸ *Id.* at 77.

⁶⁹ *Id.* at 74.

⁷⁰ *Id.* at 91-104.

⁷¹ *Id.* at 82.

⁷² *Id.* (citing Jonathan Butcher & Jason Bedrick, *Schooling Satisfaction: Arizona Parents' Opinions on Using Education Savings Accounts*, The Friedman Foundation for Educational Choice (Oct. 2013), available at <https://www.cato.org/sites/cato.org/files/articles/bedrick-friedman-foundation.pdf>; Andrew D. Catt et al., *Nevada K-12 & School Choice Survey*, edChoice (Mar. 2019), available at <https://www.edchoice.org/wp-content/uploads/2019/03/2019-2-NV-Poll.pdf>).

⁷³ *Id.* at 51.

⁷⁴ *Id.* at 17-19.

districts. Rather than school districts with duplicative layers of governance (the school board and the administrative staff),⁷⁵ Bolick and Hardiman suggest a system of “community schools” which, subject to baseline educational standards set by the state, would be “largely free to adopt strategies and allocate resources to fulfill those responsibilities as they deem best.”⁷⁶ The authors envision community schools as governed by a public board and accountable to the state. This would give them the degree of autonomy currently exercised by charter schools, but they would be operated by the state instead of a private entity. They point to innovative, successful charter schools as evidence of the promise of such a system.⁷⁷

The case for community schools is compelling. Even those already skeptical of the efficiency of public school funding may be shocked to learn the scale of the bureaucratic behemoth of public education. The United States spends more on school administration than any other OECD country. As of a decade ago, the United States spent 25 cents of every public education dollar on administrators and support personnel—twice as much as other OECD countries.⁷⁸ This means money that could be spent on, for example, hiring and retaining the best and brightest teachers is caught up in administrative bloat. The numbers bear this out. According to the same 2011 analysis, the United States spent 54.8 cents of every school operating dollar on teachers, compared to 63.8 cents spent by our international peers.⁷⁹ And the public education bureaucracy continues to grow. Between 1950 and 2015, Bolick and Hardiman tell us, the number of administrative and support personnel in public education has grown seven times faster than the number of students.⁸⁰ The community school model offers a more cost-effective approach by concentrating funding at the school level and cutting out an entire level of administration at the district level. And because, under this model, that funding would come from the state rather than localities, it would not hinge on property tax revenue in the school’s area. Further, the community school plan would give principals and teachers more control over decisions on how best to run their classrooms and educate students.

Closely tied to their suggestion to abolish school districts is the authors’ proposal to eliminate the attendance zones that accompany them.⁸¹ Rather than determine each child’s school by zip code, Bolick and Hardiman advocate for open enrollment public schools—a policy already adopted in part in some states. In Maricopa County, Arizona, for example, nearly half of students attend a school other than the one for which they are zoned, and 37 percent attend a school outside their district.⁸² Open

enrollment achieves the twin goals of promoting competition—and all its attendant benefits—in the public school context and eliminating the geographic barriers that too often keep low-income kids out of the best public schools.

Abolishing school districts, or even reimagining their role, is not without challenges. Bolick and Hardiman imagine turning over responsibility for things like “transportation, recruitment and hiring, payroll and benefits, [and] special services for students with disabilities”—traditionally district responsibilities—to the state, regional service providers, or private vendors contracting with schools.⁸³ Though possible, such a dramatic change would be complicated. More challenging, though, is winning support for such profound reforms. The authors acknowledge that “abolishing school districts and attendance zones would be fiercely resisted by the powerful entities benefiting from the status quo.”⁸⁴ And even this seems like an understatement. Bolick and Hardiman imagine an alliance of “teachers and principals, parents, taxpayers, and liberal reformers”⁸⁵ who could be sold on their plan, but it is just as easy to imagine an opposing alliance of teachers’ unions, administrators, and taxpayers (many of whom paid top dollar for homes in good school districts) who are already happy with their local public schools and resistant to change.

Hardiman and Bolick acknowledge the challenges for reformers in a chapter on the legal framework for education reform.⁸⁶ New measures increasing choice in education are routinely met with immediate legal challenges by opponents. Bolick and Hardiman correctly identify the “main source of legal concern for school choice advocates” as Blaine amendments—state constitutional provisions which prohibit aid or funding for “sectarian” schools.⁸⁷ Named for James Blaine, the senator who advocated a similar failed amendment to the federal Constitution, these amendments were adopted among widespread anti-Catholic sentiment in the late 1800s. That anti-Catholic bigotry motivated an effort to prohibit the use of government funds for Catholic schools—which had emerged as an alternative to public schools, which were de facto Protestant schools. Opponents of educational choice have consistently relied on Blaine amendments, found in 37 state constitutions, in legal challenges to educational choice programs. They argue that, in allowing families to use choice programs to send kids to religious schools, states violate the prohibition on using state funds for sectarian schools.

The Supreme Court roundly rejected a version of this argument last year in *Espinoza v. Montana Department of Revenue*. There, considering a tax-credit scholarship program in Montana, the Supreme Court held that if a state subsidizes private education, “it cannot disqualify some private schools solely because they are religious.”⁸⁸ And the Court is poised to resolve the final remaining question related to this issue in a case recently granted certiorari,

75 *Id.* at 26.

76 *Id.* at 39.

77 *Id.* at 39–44.

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.* at 32–33.

82 *Id.* at 33.

83 *Id.* at 34.

84 *Id.* at 35.

85 *Id.*

86 *Id.* at 127.

87 *Id.* at 132.

88 *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020).

Carson v. Makin.⁸⁹ There, the First Circuit held that Maine’s exclusion of religious schools from a town tuitioning program is permissibly based not on the religious *status* of those schools, but rather on the religious *use* of state dollars. The distinction—if any—between exclusion based on religious status and exclusion based on religious use is a question expressly left open in *Espinoza*.⁹⁰ It is also a distinction that is particularly meaningless in the context of educational choice programs, where the flow of student aid to religious schools occurs through the free choice of families rather than at the direction of the government. The outcome of *Carson* will have a huge impact on the future of legal challenges to educational choice. If the Court reverses the First Circuit and holds that Maine’s exclusion of religious schools from a choice program—like Montana’s exclusion of religious schools from a choice program—violates the First Amendment, it will put the final nail in the coffin of legal challenges to choice programs based on state Blaine amendments.

Whatever the outcome of *Carson*, reformers can expect to continue to face legal challenges to their efforts to change the educational landscape. Because every state constitution guarantees a right to a public education, for example, Bolick and Hardiman predict that “creative advocates across the philosophical spectrum surely will continue to argue that essential constitutional guarantees are unfulfilled.”⁹¹ But no change in the educational space comes easy, and—as Bolick and Hardiman show—America’s troubled education system needs bold new solutions.

IV. CONCLUSION

As advocates of educational choice know, no victory for education reform is easily won. Entrenched interests will always resist change. And the alternative to innovations in education—pouring more money into the system we have—is conventional wisdom in some corners despite past failure. But the stakes are too high to stop fighting for meaningful change. And as *A Search for Common Ground* shows, there are reformers on both sides of the educational choice debate working hard to identify policies and strategies that will help kids. After decades of evidence that our public education system is not serving the needs of America’s youth, we will ultimately need to decide when enough is enough. There is cause for optimism on this front. More and more states are beginning to embrace new ideas like those proposed in *Unshackled*. As this trend continues, policymakers and advocates will need to decide whether to tighten their grip on the status quo or abandon the strategies of the past in favor of true, systematic reform. This is, to borrow a phrase from Hale, the choice we face.

⁸⁹ 979 F.3d 21 (1st Cir. 2020), *cert. granted* (U.S. July 2, 2021) (No. 20-1088).

⁹⁰ *Espinoza*, 140 S. Ct. at 2257.

⁹¹ Bolick & Hardiman, *supra* note 1 at 129-30.

