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Tolled Education: An Economic Markets and Goods Analysis of Inefficiencies in American Public Education

Ethan Dilks*

INTRODUCTION

“[E]ducation is perhaps the most important function of state and local governments.”1 Despite this, state and local governments have failed to provide equitable and reasonable education in the United States. Racial segregation is more pervasive now than at any time since the 1960s,2 and states are allowing segregation to expand as wealthy and white families sever their resources from diverse schools.3 For complex historical and systemic reasons, education in the United States is locally controlled and funded, state regulated, and federally subsidized.4 As a result, segregated districts have fewer resources,5 Fewer resources result in worse life outcomes for students6—even more so when the school is “intersectionally” segregated by race and wealth.7 We can understand this divergence in outcomes through multiple distinct lenses, and this Comment seeks to do so through the use of economics and education policy. Radical change to the structure of American public education is needed to actually mitigate those inefficiencies and inequities.

The most straightforward method would be increased federal enforcement of a national baseline standard; however, the ability of the federal government to do so is highly restricted by Supreme Court precedent that holds there is no substantive right to education in the United States.8 Because of education’s importance, all fifty

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3 See U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104737, K-12 EDUCATION: STUDENT POPULATION HAS SIGNIFICANTLY DIVERSIFIED, BUT MANY SCHOOLS REMAIN DIVIDED ALONG RACIAL, ETHNIC, AND ECONOMIC LINES 24 (2022) [hereinafter GAO REPORT] (“[N]ew districts [created from 2014–21] had, on average, roughly triple the share of White students, double the share of Asian students, two-thirds the share of Hispanic students, and one-fifth the share of Black students. New districts were also generally wealthier than remaining districts.”).

4 See discussion infra Part I.A.

5 See GAO Report, supra note 3, at 1.


states have created a positive right to primary and secondary education; however, a federal substantive right to education was rejected by the Supreme Court. Since that decision, attorneys and scholars have searched for ways to ensure quality education in the courts: violations of state equal protection; violations of educational clauses within state constitutions; violations of a federal substantive right to basic literacy distinct from education; violations of the federal privileges and immunities clause; violations of federal equal protection via illicit targeting of non-suspect groups; violations of federal procedural due process via denial of education created by the state governments; or a rollback of due process analysis to revitalize the concept of a public right. Despite all of these potential arguments, the current Supreme Court is unlikely to expand federal protections in education. Even while acknowledging this, this Comment seeks to provide a logical framework to reconsider the policies, laws, and, perhaps someday, precedent so that more effective, equitable support will reach those who need it.

The goal of this Comment is to evaluate the failures of the current system of education within the United States via policy and economic market and goods analysis lenses; in doing so, it will establish that public education in the United States is a toll good, and the only way to properly fix the inefficiencies that result is to reduce excludability and convert the education into a public good. First, Part I will overview how we got here by describing relevant laws and history, the current state of federal case law, and the dire situation for many students throughout the country. Part II will describe policy rationales and explore types of markets and goods. Finally, Part III will evaluate the results of those classifications. It will build on an interdisciplinary foundation by combining economics, education policy, and law; in doing so, it will classify and identify education in a novel perspective with unique consequences. Specifically, it will address how our current education system

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11 E.g., Serrano v. Priest, 557 P.2d 929, 949 (Cal. 1976) (affirming a prior ruling in the case, holding that under the Fourteenth Amendment Equal Protection was valid because state constitutional equal protection applied).

12 E.g., Robinson v. Cahill, 303 A.2d 273, 290–91, 295 (N.J. 1973) (deciding that the state’s funding formula for school violated the state’s positive right to education, while declining to decide on equal protection).

13 E.g., Gary B. v. Whitmer, 957 F.3d 616, 662 (6th Cir. 2020), reh’g granted en banc, 958 F.3d 1216 (6th Cir. 2020) (case mooted before rehearing by settlement).


does not properly satisfy our market goals—producing workers and informed citizens—thus resulting in arbitrage-like inefficiencies. It will also propose a solution to that problem and how the nature of the good or market could be altered to minimize those inefficiencies. However, it is important to observe that this change would not be constitutionally required but rather an ideal to be modified for local needs. A federal baseline is likely needed to achieve those goals.

As we enter a potential fourth wave of education reform litigation, it is important to consider and expand justifications for the most important role of local and state governments, both for state leadership and to eventually lay groundwork for federal intervention into an area of traditional state control.

I. HOW WE GOT HERE AND WHERE WE ARE

Broadly, because of its decentralized process of creating education and federal structure, the United States’ education system is locally organized and controlled, state regulated, and federally supported. These layers of government have differing obligations to schools and to students, and those obligations define the legal landscape of education in the United States. They also create the varied markets and good types that create inefficiencies with which this Comment is concerned. They in turn exacerbate inequality, as the inherent localness of schools with prior discriminatory policies to create “intersectionally” segregated schools and access to lower quality education. Despite this mass inequality, the Supreme Court has been determined to avoid this problem, and has left it to the states. Various scholars have proposed numerous legal workarounds, which this Comment seeks to support.

A. A Brief History of Public K-12 Education

Public education as we currently understand it in the United States did not properly begin until the late-nineteenth century, but early forms of public education began early in American history. In the colonial period, local communities largely created the initial schools, pooling together local resources for the sake of local

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19 Kiracofe & Weiler, supra note 18, at 229–30.
21 See generally Fahle & Reardon, supra note 7, at 228; Sean Reardon, Why is There So Much Inequality? Berkeley-Stanford Conference on Inequality, YouTube (April 15, 2016), https://www.youtube.com/watch?v=NkK9lujhxgo; Sean F. Reardon & Kendra Bischoff, Income Inequality and Income Segregation, 116 AM. J. SOCIO. 1092 (2011).
benefit. In that model, the federal government set aside lands in the Northwest Territory for the purpose of education broadly; the local communities created in that process could use the set-aside land to support education within that community. As noted by Black, many of the founding fathers viewed public education as a necessity, at least at what we would now consider the primary level, to maintain the newly created republic. As the country became more interconnected, state governments took increasing control of education by regulating those locally created schools. They did not, however, generally interfere with the pre-existing localness in funding and decision-making for the schools. The federal government showed it was not afraid to be involved in ensuring an educated population, filling in for the lack of schools for freedmen during Reconstruction via Freedmen’s Bureau programs. As part of Reconstruction, it also required that states reentering the Union had to protect a right to education within their state constitutions. It is important to note that the federal government was not solely using this power to benefit all people, as it also created schools for Native Americans to forcibly assimilate them into Anglo-American culture.

Over the course of the succeeding decades, the states became increasingly involved in setting the standards for local public education. They increasingly focused on the expansion of schools as preparing students for the labor force in the aftermath of the Second Industrial Revolution. They also created laws that set state standards for public schools. Despite this, most funding was still coming primarily from local taxes, particularly property taxes. Efforts were made to create baseline funding from the state in many cases, but there were still

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24 Black, supra note 22, at 64–72.
26 Black, supra note 22, at 54–57. Others have consistently argued that this federal involvement and investment in education was not a federal declaration of intent to control education. See Anderson, supra note 24, at 30–31.
27 Messerli, supra note 23.
29 Black, supra note 22, at 95–99.
30 Id. at 110–11.
31 Bryan Newland, Office of the Assistant Secretary, Indian Affairs, Federal Indian Boarding School Initiative Investigative Report 20–22 (2022); Kober & Rentner, supra note 23, at 5.
33 See William Fischel, Neither “Creatures of the State” nor “Accidents of Geography”: The Creation of American Public School Districts in the Twentieth Century, 77 U. Chi. L. Rev. 177, 190–95 (2010) (noting that the efforts were controlled heavily by rural constituencies and legislation was almost always contingent on the consent of rural constituencies, but that progressive standardization was implemented by legislation).
substantial disparities as a result of differences in resources.\textsuperscript{35} It would take legal challenges to the funding structure of public education before that there were meaningful changes.\textsuperscript{36}

The federal government also became increasingly involved in public education because of the Cold War and the civil rights movement. The former prompted categorical funding provided for STEM courses during the early part of the space race to ensure American technical superiority over the Soviet Union.\textsuperscript{37} The latter, civil rights leaders pursued change through the courts and through Congress. In \textit{Brown v. Board of Education}\textsuperscript{38} and subsequent desegregation cases, the Supreme Court permitted a proactive federal role in public education.\textsuperscript{39} Notably, the Court almost declared in a companion case to \textit{Brown} decided in the same term, \textit{Bolling v. Sharpe},\textsuperscript{40} that education was a right protected by the Fourteenth Amendment; however, because Chief Justice Warren demanded unanimity in the decision and two of the nine justices balked at reading a positive right into the Constitution, the language was left out of the final decision.\textsuperscript{41} Even as the later bills of this civil rights push were being considered and passed, the Court refused to advance federal education protections.

This situation creates the current environment in public K-12 schools. They are still, at their core, local institutions with local boundaries. To summarize, the states have codified those boundaries but have attempted to standardize expectations, curriculum, and, to highly varying degrees, funding. In most states, funding and decisions on how to meet those expectations are fundamentally local decisions. The federal government provides oversight and ensures the schools that do exist abide by civil rights law while providing some funding to support schools.

\textsuperscript{35} Jackson, et al., \textit{supra} note 6, at 161–62; see, \textit{e.g.}, Cahill, 303 A.2d 273, at 290–92. \textit{See generally} Kiracofe & Weiler, \textit{supra} note 18 (notes the transition in the different waves of cases).

\textsuperscript{36} Jackson, et al., \textit{supra} note 6, at 161–62; see, \textit{e.g.}, id. at 297. \textit{See generally} Kiracofe & Weiler, \textit{supra} note 18 (second wave cases). \textit{See infra} section I.B.ii.


\textsuperscript{38} 347 U.S. 483 (1954).

\textsuperscript{39} \textit{See} BLACK, \textit{supra} note 22, at 174; Kristen Clarke, \textit{The Civil Rights Division Marks the 69th Anniversary of Brown v. Board of Education}, DEP’T JUST. (May 17, 2023) https://www.justice.gov/opa/blog/civil-rights-division-marks-69th-anniversary-brown-v-board-education (noting the continued Justice department role in enforcing \textit{Brown} in schools to this day).

\textsuperscript{40} 347 U.S. 497 (1954).

\textsuperscript{41} BLACK, \textit{supra} note 22, at 176. Congress and the courts would act almost as if this right did exist in the following two decades, as the federal role in education expanded dramatically to provide additional funding. ANDERSON, \textit{supra} note 22, at 64–66, 98–99. \textit{See} Title VI of the Civil Rights Act of 1964, 42 U.S.C § 2000(d)–2000(d)(7); Individuals with Disabilities Education Act of 1975, 20 U.S.C. §§ 1400–1491(o); Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681–1689. That funding was not truly content focused, and instead focused on providing general aid to schools (although described as categorical and antipoverty) and as a civil rights measure. \textit{See} ANDERSON, \textit{supra} note 22, at 65–69.
B. The Current Legal Landscape

In short, this Comment assumes that no meaningful expansions to rights to education are forthcoming in the near future, at least at the federal level. This is due to the Burger Court’s decision in San Antonio Independent Schools v. Rodriguez, which resulted in a shift in the discussion to the state courts for decades. This results in a piecemeal approach to education across the country, where citizens have wildly different rights and thereby different access to quality education. This interstate disparity exacerbates intrastate disparities, which together form the current system.

i. Federal Rights and Positive Rights: Rodriguez

The majority in the Warren Court considered K-12 education to be a substantive right protected by the Fourteenth Amendment but did not include such language in the final opinion out of political considerations. The Court was still able to include language in Brown that strongly suggested that education was a right: “[Education] is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship . . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” When the issue again came before the Supreme Court, the conservative-leaning Burger Court had taken power and was leery of this expansive view.

The issue in San Antonio Independent School District v. Rodriguez was massive inequities within the Texas public school system that resulted from the overwhelmingly local funding for those schools. Using the logic from Brown about the importance of education as necessary for the country, the plaintiff’s most important argument was that education was a substantive due process right, and disparities in funding created vastly different levels of education; therefore, the funding system was a violation of the Equal Protection Clause.

Such an argument would create a positive right, which would be rare under the federal Constitution and was rejected fundamentally on those terms. Justice

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43 Kiracofe & Weiler, supra note 18, at 200.
44 See BLACK, supra note 22, at 176.
46 411 U.S. at 44–46; BLACK, supra note 22, at 189.
48 Barry Friedman & Sara Solow, The Federal Right to an Adequate Education, 81 GEO. WASH. L. REV. 92, 117–18 (2013). In short, a positive right is a right that requires government action; a negative right is a right, which prohibits government action. Jenna MacNaughton, Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune, 3 U. PA. J. CONST. L. 750, 754–57 (2001). An example of the difference can be seen with freedom of speech: the government cannot, with exceptions, prevent expression; however, the government is not required to ensure every person have the opportunity to express themselves. Cf. id. at
Powell, writing for the Court, used the idea of positive versus negative rights to explain: “The Court has long afforded zealous protection against unjustifiable governmental interference with the individual’s rights to speak . . . . Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech . . . .”49 The Court acknowledged the importance of education for speech and for the franchise but held that importance does not create a substantive right.50 The Court did allow a narrow possibility in dicta: there could be a violation if there was a complete denial of education.51 The Court did, however, indicate that the simple inequities in this case were not enough to rise to that hypothetical level.52

The Supreme Court has since ruled on education issues, most notably the denial of access to education on grounds of immigration status being a violation of equal protection in Plyler v. Doe.53 Thus, it has not found that a federal right exists—only that clear discriminatory access to that state right violated the federal Equal Protection Clause.54 This left it up to the States to fill in the gaps.

ii. A State Right to Education and the Three Waves of Education Rights Litigation

State court decisions followed Rodriguez, with varied results; three were directly intertwined. The first was Serrano v. Priest.55 In that case, the California Supreme Court revisited its prior decision that California’s system of school funding was unconstitutional on federal equal protection grounds.56 Following Rodriguez, which explicitly cited Serrano I,57 the decision was revisited.58 In its decision, the California Supreme Court pointed to a footnote in Serrano I stating that state equal

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49 Rodriguez, 411 U.S. at 36.
50 Id.
51 Id. at 36–37.
52 Id. at 37. The Court similarly dispensed with the other arguments, including that there was discrimination based on race or wealth involved with the state funding scheme. Id. at 29. Once dispensed, the Court turned to a rational basis review. Id. at 44. On that lenient standard, the plaintiffs failed, and the Texas funding system was upheld. Id.
54 It specifically held that this failed rational basis review, as there could not be any rational reason to deny children access to literacy based solely on immigration status. Id. at 223–30.
55 Serrano v. Priest, 557 P.2d 929 (Cal. 1976) [hereinafter Serrano II].
56 Serrano v. Priest, 487 P.2d 1241, 1263 (Cal. 1971) [hereinafter Serrano I].
58 Serrano II, 557 P.2d 929.
protection applied separately and distinctly.\textsuperscript{59} It thus affirmed the prior decision but this time solely on state equal protection grounds.\textsuperscript{60}

A similar situation occurred in Michigan in \textit{Milliken v. Green}.\textsuperscript{61} Once the \textit{Rodriguez} Court overturned the federal reasoning, the Michigan Supreme Court was also asked to review.\textsuperscript{62} It declined to read the state equal protection clause as being more expansive than the federal.\textsuperscript{63} Thus, in these two early cases, a bifurcation of protection was created between the states on how education was to be treated by the courts.

In \textit{Robinson v. Cahill},\textsuperscript{64} New Jersey faced the same problem and the case was argued at the same time as \textit{Rodriguez}.\textsuperscript{65} Similar to the Michigan Supreme Court, the New Jersey Supreme Court declined to find an equal protection violation within the state constitution as distinct from the federal one.\textsuperscript{66} Instead, it found that the New Jersey Constitution did create a distinct positive right to education, which, while not required to be equal, did necessarily require the state to have an obligation to properly support school districts beyond their local resources.\textsuperscript{67} This was later expanded by the \textit{Abbott v. Burke} decisions, which mandated that certain services and funding levels be met for the worst-off districts.\textsuperscript{68}

\textit{Serrano I, Milliken I,} and \textit{Rodriguez} are what Kiracofe and Weiler refer to as “first wave” cases, dealing with federal equal protection arguments related to inequality in education through the lens of unequal finance.\textsuperscript{69} \textit{Serrano II, Milliken II,} and \textit{Robinson} began the second wave of cases, which rely on the same core arguments but instead focus on state constitutional protections to achieve their results.\textsuperscript{70} The later \textit{Abbott} decisions are third wave cases, focusing on the disparities in outcome, rather than finance, to achieve equitable (not just equal)

\textsuperscript{59} \textit{Id.} at 949 (citing \textit{Serrano I,} 487 P.2d at 1249 n. 11).
\textsuperscript{60} \textit{Id.} at 957–58.
\textsuperscript{61} 203 N.W.2d 457 (Mich. 1972) [hereinafter \textit{Milliken I}].
\textsuperscript{62} \textit{Milliken v. Green,} 212 N.W.2d 711, 711–14 (Mich. 1973) [hereinafter \textit{Milliken II}].
\textsuperscript{63} \textit{Id.} at 714–15; see also Kimberly Jenkins Robinson, \textit{Designing the Legal Architecture to Protect Education as a Civil Right,} 96 IND. L.J. 51, 86–87 (2020) (noting that a compositional change on the Michigan Supreme Court likely impacted the result).
\textsuperscript{64} 303 A.2d 273 (N.J. 1973).
\textsuperscript{65} The New Jersey Attorney General even filed an amicus brief in \textit{Rodriguez} referencing the ability of the state courts to handle this on their own. \textit{See Amicus Curiae Brief for the Attorney General of New Jersey, San Antonio Indep. Sch. Dist. v. Rodriguez,} 411 U.S. 1, 4–5 (1973) (No. 71-1332), 1972 WL 136436. The notes from the New Jersey Supreme Court indicate that the \textit{Robinson} draft decision was altered as a result of \textit{Rodriguez}. \textit{Black, supra} note 22, at 205.
\textsuperscript{66} \textit{See Robinson,} 303 A.2d at 286–87.
\textsuperscript{67} \textit{See id.} at 294.
\textsuperscript{68} Since 1985, the New Jersey Supreme Court has issued twenty-three decisions in the \textit{Abbott} case, which is routinely recognized as massively reforming the state educational system. \textit{The History of Abbot v. Burke,} EDUC. L. CTR., https://edlawcenter.org/litigation/abbott-v-burke/abbott-history.html (last visited Dec. 12, 2023); \textit{Abbott Decisions,} EDUC. L. CTR., https://edlawcenter.org/litigation/abbott-v-burke/abbott-decisions.html (last visited Dec. 12, 2023).
\textsuperscript{69} \textit{See Kiracofe & Weiler, supra} note 18, at 222.
\textsuperscript{70} \textit{See id.}
funding and programs.\textsuperscript{71} Gary B. and similar cases potentially represent a fourth wave, which shift to race-conscious and federal rights arguments once again.\textsuperscript{72}

iii. A Substantive Federal Right to Literacy and the Seeming Death of a Fourth Wave (Gary B.)

Plaintiffs in Gary B. v. Whitmer,\textsuperscript{73} one of the key fourth-wave cases, sought to achieve equitable outcomes in Michigan schools.\textsuperscript{74} To do so, they argued that Michigan and Detroit were violating a right to literacy,\textsuperscript{75} aiming for the narrow dicta exception laid out in Rodriguez.\textsuperscript{76} As noted in the briefings before the court, the funding situation was so bad that students were responsible for teaching classes for other students.\textsuperscript{77} As a result, students were woefully unprepared and behind in their studies, with high rates of illiteracy even at higher grades.\textsuperscript{78} The district court dismissed the claim, but a panel of the Sixth Circuit Court of Appeals reversed, relying on the narrow gap left open by the Rodriguez Court.\textsuperscript{79}

This holding was almost immediately undone. The decision was appealed to the whole of the Sixth Circuit for rehearing \textit{en banc}, which was granted.\textsuperscript{80} That procedurally voided the decision in anticipation of the rehearing. Before that could

\textsuperscript{71} See id. (citing Rose v. Council for Better Educ. 790 S.W.2d at 186 (Ky. 1989)). \textit{Compare} Rose, 790 S.W.2d at 211–12 (expert argument laying out the needs of lower-income districts), \textit{with} Abbott v. Burke, 710 A.2d 450, 527–28 (N.J. 1998) (mandating state funding to create kindergarten, pre-k, college readiness, and facility maintenance and improvement costs in the Abbott districts).

\textsuperscript{72} See Kiracofe & Weiler, \textit{supra} note 18, at 224.

\textsuperscript{73} 957 F.3d 616 (6th Cir.), \textit{reh’g granted en banc} 958 F.3d 1216 (6th Cir. 2020).

\textsuperscript{74} See McCarthy, \textit{supra} note 16, at 3–8.

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37–38 (1973) (“Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.); \textit{see} Gary B., 957 F.3d at 646–48 (noting that Justices have considered this to be an open question).

\textsuperscript{77} Martha Minow as Amicus Curiae Supporting Plaintiffs-Appellants at 6, \textit{Gary B.}, 957 F.3d 616 (Nos. 18-1855, 18-1871), 2018 WL 6330616.

\textsuperscript{78} \textit{Gary B.}, 957 F.3d at 625.

\textsuperscript{79} \textit{See id.} at 644, 662. The panel majority relied on a two-pronged approach to reach its conclusion. First, it looked to history, as we have, and found that federal support for basic literacy has strong historical ties within the United States and is supported by the Supreme Court’s dicta in \textit{Brown} and \textit{Plyler}. \textit{See id.} at 649–52, 671. Second, it looked to the implications on other rights if it was denied and found that education is necessary for the other rights, including speech and voting, to properly exist. \textit{Id.} at 652–55. The court, in anticipation of the negative versus positive right distinction pointed to two positive rights recognized by the federal government: the obligation to provide counsel for defendants at trial, \textit{id.} at 656, and the obligation to recognize, perform, and endorse marriages, including interracial and gay marriages, \textit{see id.} at 656–57. The court acknowledged that there was a difference in burden on the government but suggested that positive rights exist within the Constitution and that the language in \textit{Rodriguez}, \textit{Brown}, and \textit{Plyler} pointed to a constitutional right to basic literacy. \textit{Id.} at 648–57.

\textsuperscript{80} \textit{Gary B. v. Whitmer}, 958 F.3d 1216, 1216 (6th Cir. 2020).
occur, the parties settled, rendering the case moot. This amounted to a win for the plaintiffs, as the Michigan funding system was redesigned to be more equitable; however, the question of a right to education went unanswered. Other courts, such as the First Circuit, have declined to expressly revisit the issue. In A.C. by Waithe v. McKee, the First Circuit noted that the deprivation of education was not as severe as in Gary B., and only denied civics education; they therefore declined to consider whether a fundamental right may exist.

While this question is unanswered, it is increasingly likely to fail before the current Supreme Court. With the Dobbs decision, the Supreme Court appears to be officially disfavoring substantive due process rights. In short, it strongly appears that any or all substantive due process rights, especially those in the Griswold v. Connecticut line of cases related to a right to privacy, are now on the chopping block. It is important to note that the majority of the Court did not officially take that position in Dobbs and that the explicit call only occurred in a concurrence by Justice Thomas. This author, and the dissent in Dobbs, fears that the Dobbs decision is just the beginning. In such an environment, where substantive due process rights are being curtailed, their expansion is impossible. Cases seeking to expand educational rights now face a conservative supermajority who appear prepared to overturn the legal principles underlying substantive due process generally. Such a Court is simply not going to find another substantive due process right. This undermines many currently existing legal positions of arguments for a right to education. The hope of this Comment is that states, Congress, and a future Supreme Court can rely on this Comment to support some of those existing arguments in finding a positive right to education.

iv. Existing Arguments

There are numerous arguments available for how to overturn this status

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82 See id.
83 AC by Waithe, 23 F.4th 37, 44–45 (1st Cir. 2022), aff’g AC v. Raimondo, 494 F. Supp. 3d 170 (D.R.I. 2020).
86 Dobbs, 597 U.S. at 332–33 (Thomas, J., concurring); Walsh, supra note 84.
87 Dobbs, 597 U.S. at 363 (Breyer, J., dissenting).
88 Id. at 332–33 (Thomas, J. concurring); Devin Dwyer, After Roe Ruling, Is ‘Stare Decisis’ Dead? How the Supreme Court’s View of Precedent is Evolving, ABC NEWS (June 24, 2022, 12:20 PM) https://abcnews.go.com/Politics/roe-ruling-stare-decisis-dead-supreme-court-view/story?id=84997047; see Kiracofe & Weiler, supra note 18, at 228.
This Comment takes no particular preference for any of them, but instead seeks to provide evidence and support for all of them as practitioners and policymakers continue to pursue educational rights. In seeking to support those arguments, they should be briefly laid out and analyzed.

There are proposed legislative solutions to these problems. The first is to encourage and support state legislatures in creating systems that encourage student development and growth. This is obviously limited in that it does not minimize the interstate problems and allows a fundamental aspect of American life to be determined by legislative priorities rather than true constitutional rights. The second is to encourage more federal involvement by establishing a statutory federal baseline to education (such as setting minimum standards for what schools must provide, creating due process protections, and tying federal funding to their implementation); this would utilize existing federal power in ways akin to when it expanded educational rights for other groups, such as for special education students.

There are also case law arguments, which simply continue the second or third wave education rights cases, dealing with violations of state equal protection or violations of the educational clauses within the state constitutions. These arguments are well-established and have been actively litigated throughout the country. They are currently the most successful arguments, as federal first and fourth wave cases have consistently failed. They are inherently limited, however, as they do not actively minimize the differences between education in the various states.

Other options require a small narrowing of the precedent. One option is to look to violations of federal equal protection regarding a state right. This option concedes, at least temporarily, the battle over a federal right or privilege in

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89 This section builds off and updates Derek W. Black, Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right, 51 WM. & MARY L. REV. 1343 (2010).
90 Id. at 1382–83 (citing Kimberly Jenkins Robinson, The Case for a Collaborative Enforcement Model for a Federal Right to Education, 40 U.C. DAVIS L. REV. 1653, 1671 (2007)).
91 Id. at 1403.
92 See Kimberly Jenkins Robinson, Disrupting Education Federalism, 92 WASH. U. L. REV. 959, 963, 983 (2015) (noting that federal statutes have expanded access to education over time for disadvantaged groups, such as special needs children); see also About IDEA, U.S. DEP’T OF EDUC., https://sites.ed.gov/idea/about-idea/ (last visited Dec. 17, 2023) (noting the purpose and history of IDEA, including its origins as EAHCA cited by Robinson, supra note 92).
93 E.g., Serrano II, 557 P.2d 929, 957–58 (Cal. 1976) (affirming a prior ruling in the case that both the Fourteenth Amendment’s Equal Protection Clause and the state constitutional’s equal protection clause applied).
94 E.g., Abbott v. Burke, 575 A.2d 359, 362–63, 384–85 (N.J. 1990) (deciding that the state funding formula for the school violated the state positive right to education, while declining to decide on equal protection).
95 See generally Kiracofe & Weiler, supra note 18.
96 See id. at 221–24.
97* See Id.
education. It instead argues that state enforcement of the right is inequitable either by state policies illicitly targeting non-suspect groups\(^{98}\) or by simply declining to enforce their own state constitutional provisions.\(^{99}\) Another option is to argue that denial of educational benefits is a violation of federal procedural due process via denial of property or liberty interests created by the state governments.\(^{100}\) The idea of liberty interests has already been explicitly rejected by a court,\(^{101}\) but the concept of property interests may still have merit.\(^{102}\) It has been observed that such an argument would be incredibly narrow and subject only to *Mathews v. Eldridge* factors even if accepted.\(^{103}\)

There are additional federal arguments designed to circumvent or overturn *Rodriguez*. It should be acknowledged that the obvious option is to simply overturn *Rodriguez*; however, overturning precedent is generally difficult to do and requires major ideological or legal changes that subvert the Court’s faith in the original precedent.\(^{104}\) The ideological and legal changes have seemingly strengthened the Court’s faith in *Rodriguez*. One workaround is to pursue the federal substantive right to basic literacy distinct from education, as seen in *Gary B.*; however, and as seen in *A.C. by Waithe*, this is likely very narrow, even if good law.\(^{105}\) Another possible argument, which may have a stronger chance before the current Supreme Court, is to shift the analysis from substantive due process to the federal privileges and immunities clause.\(^{106}\) A similar argument may be made through the privileges or immunities clause, expansive readings of which have been dead since the *Slaughter-House Cases*;\(^{107}\) however, Justice Thomas has at least indicated that he is open to moving some substantive rights protections to that clause.\(^{108}\) Another dramatic option would be to read the property interest created by state courts expansively as what Professor Shaw refers to as a “public right.” Then, state-created positive right property interests would be protected as part of federal

\(^{98}\) See Black, *supra* note 15 at 1392–93.

\(^{99}\) See Black, *supra* note 89 at 1393–94.


\(^{101}\) *Martinez*, 350 F. Supp. 3d at 93–94.


\(^{103}\) Shaw, *supra* note 17, at 1209. The balanced factors are the private interest of the individual, the government interest, and the burden on the government to provide greater process. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).


\(^{105}\) See *Gary B. v. Whitmer*, 957 F.3d 616, 662 (6th Cir.), *reh'g granted en banc* 958 F.3d 1216 (6th Cir. 2020) (case mooted before rehearing by settlement); *AC by Waithe v. McKee*, 23 F.4th 37, 44–45 (1st Cir. 2022).


substantive due process.\textsuperscript{109}

C. Failures of the Current System

As seen by the complete failure of the Detroit school system to truly support Michigan children in the \textit{Gary B.} case, the current system is failing to provide for students.\textsuperscript{110} This is a result of the racism and classism baked into American geography combining with the inherent localness of American education to create a massively inequitable system. It is well documented that Black Americans began to leave the South and Jim Crow states following the federal government’s abandonment of Reconstruction.\textsuperscript{111} The Great Migration saw Black Americans primarily travel to where expanding job opportunities existed: namely, cities, particularly in the North, Midwest, and West.\textsuperscript{112} Redlining, white flight, and de jure segregation resulted in the concentration of Black Americans and other Americans of color in particular neighborhoods and cities, while white Americans concentrated in others, particularly in newly built suburbs and exurbs.\textsuperscript{113} The consequences of this on the racial demography of schools were intentional: for instance, notes to redlining maps point out that the government’s rationale for downgrading particular areas included the percentage of black students within the local school system.\textsuperscript{114} The economic consequence of the leaving of capital and loss in demand was that property values in many urban areas collapsed.\textsuperscript{115}

When one combines this history of de facto and de jure segregation and its fiscal consequences with an education system designed and funded around geography, there is a massive problem. Schools with low property values, particularly in rapidly depopulating rural areas and urban cores abandoned or

\textsuperscript{109} Shaw, \textit{supra} note 17, at 1226.

\textsuperscript{110} \textit{Gary B.}, 957 F.3d at 624–28.

\textsuperscript{111} See \textit{The Great Migration (1910-1970)}, NAT’L ARCHIVES, https://www.archives.gov/research/african-americans/migrations/great-migration#:~:text=The%20Great%20Migration%20was%20one,1910s%20until%20the%201970s;

\textsuperscript{112} The Great Migration, supra note 111.


\textsuperscript{114} E.g., \textit{Mapping Inequality, Philadelphia, Pennsylvania}, UNIV. RICHMOND, https://dsl.richmond.edu/panorama/redlining/map/PA/Philadelphia/area_descriptions/B5#loc=11/40.0149/-75.1285 (clicking on “Scan,” the Area B5 neighborhood note says “Grade schools in Chew Avenue section have about 15% negro children” under the section “Detrimental Influences”).

targeted for mistreatment by government planners, needed to dramatically increase their property tax rates in order to maintain funding levels. Many of these schools were overwhelmingly serving students of color. This divide creates a school system that is fundamentally “intersectionally” segregated based on class and race.

These problems and their consequences are widely recognized within the legal and social science scholarship on education. As noted by Reardon, it is not de facto segregation on its own that creates the problem; put another way, schools are not doing worse because they have students of a particular race in them, although it is likely that other systemically racist policies create hurdles that do lower outcomes for students of color no matter where they are located. Instead, it is the intersectional segregation that compounds racist systems with a lack of resources, which creates wide disparities in outcomes between students within the same state. When those intrastate disparities are combined with divergent state policies and factors, there are dramatic and statistically significant variances in outcomes for students based on the town and state they live in versus another American citizen living elsewhere. Scholars have carefully laid out the damage this does to our democracy and society. Simply put, the localness of schools has resulted in systemically unequal schooling because of divergent access to resources in those schools.

Those disparities in outcome are wide-ranging beyond school academics. The level of school funding is positively tied to graduation rates within the school, which results in much more economically fruitful adulthoods; to the qualification levels of the teachers and their longevity in the school, which is strongly correlated with teacher effectiveness; and to college-preparedness and college admissions rates. As shown by C. Kirabo Jackson and his co-authors, there is a direct relationship between changes to student outcomes, as measured on these terms, to

116 See generally Joshua McCarty, The Financial Implications of Redlining (July 27, 2021), https://storymaps.arcgis.com/stories/c9e63aa84577747aaba09aae2bec6f6b0 (showing how much more revenue would be available to school districts had low value properties survived redlining).

117 See Nodjimbdam, supra note 112.


119 See id. at 32–36; see generally GAO REPORT, supra note 3 (finding that while student population has diversified, many schools are still racially and economically segregated).

120 See Robinson, supra note 20.

121 See generally BLACK, supra note 22.

122 Jackson, et al., supra note 6, at 193.

123 Id. at 209–11.

implementations of school finance reforms in multiple different states.\textsuperscript{126} Admittedly, one area where there is not a strong relationship is between school funding increases and student performance on standardized tests.\textsuperscript{127} However, in the aggregate, one can observe that young people have stronger life outcomes from better-funded schools.

The consequences of America’s history for educational outcomes is clear. American education is defined by its adherence to local control and federalism. The federal government and the Supreme Court have left education almost exclusively to the states and local governments to handle, resulting in a lack of baseline control that could reduce harm. Government policies at all levels have segregated or do segregate based on race and class, making education benefit the wealthy and the racially privileged. These policies go against many of the democratic and egalitarian ideals public education was created for. The policies also create political and economic costs, which harm the United States and its people. This structure is likely to continue to breed these harms, which exist as a form of inefficiency resulting from the economic goods and markets involved.

II. THEORETICAL FRAMEWORKS

To further discuss the inefficiencies created, it is important to lay out theoretical frameworks for economic goods and markets. The first is the overall rationale for K-12 public education and how this relates to the concept of economic goods. The second is a discussion of what economic goods are and how to classify them under Ostrom’s framework. Finally, we need to define and describe the characteristics of economic markets. This discussion will then allow us to consider the nature of public education as an economic good and how that nature and the markets currently breed inefficiencies that cause harm.

A. Rationale for K-12 Public Education

Public education is, on a historical timescale, a new phenomenon.\textsuperscript{128} The process of its creation has led to deep debates over its purpose and has created an ambiguous structure that likely fails to achieve economically efficient outcomes. At its core, there is a three-way debate about the true purpose of education: the creation of good citizens, the creation of good workers, or the allowance for individual social mobility.\textsuperscript{129}

Democratic equality, the creation of citizens to support democracy, was the

\textsuperscript{126} Id. at 212.
\textsuperscript{127} Id. at 157–58.
\textsuperscript{128} See discussion supra Part I.A.
\textsuperscript{129} See generally Labaree, supra note 32.
earliest policy rationale for public education. Many early proponents of public education advocated for it primarily as a public good needed to create good citizens. This policy rationale is not an wholly positive: as time progressed and the number of immigrants and indigenous peoples under governmental control increased, advocates looked to education to assimilate non-Anglo-Americans to the values of that privileged group, which Anglo-Americans considered to be paradoxically both superior and threatened. Many modern advocates for the democratic equality rationale reject these racist and xenophobic positions, but still support the important role education plays in allowing participation in the American political system. In sum, while this rationale is idealized and used to promote cultural acceptance, it is also a position to justify nationalist rewritings of history and cultural genocide. From this rationale, the purpose of education and teachers then is to shape the next generation of voters and leaders, including those to confront this nation’s complicated history.

Social efficiency, a focus on education’s role in economic development of the country by creating workers, was a later-developing rationale for education. Part of the reason for the acceleration of access to public education in the late nineteenth century was advocacy by corporations and industry. This was likely primarily out of self-interest: a better-educated populace would be better workers and reduce costs to the business. By pushing training costs for the elementary math, reading, and writing needed for middle management off themselves and onto society writ large, those businesses saved money. The same logic applies for secondary math and reading for the purposes of specialists like accountants and executives. Additionally, by widening the possible labor pool, the cost of labor for many of those positions goes down. Beyond businesses, the social-efficiency rationale also allows people to work effectively at their jobs, driving down the costs of goods and services; overall economic efficiency is therefore increased. The purpose of education then is to give students the chance to choose a profession and ensure a ready supply of workers to needed jobs.

Increasingly and largely simultaneous to increasing support for neoliberal economic policies, laypeople view education primarily as an avenue for social

130 See id. at 43–46.
131 Id.; see BLACK, supra note 22, at 54–57.
133 Labaree, supra note 32, at 43–46.
134 See id.
135 See id.
136 Id. at 46.
137 Id. at 46–50.
139 See Hamilton, supra note 137.
140 See Labaree, supra note 32, at 46–50.
mobility. This is the meritocratic and market view of education. The individual successes and failures in school compound as ways to advance or fall behind. The better one does, the better the next layer of school is, until one eventually reaches a high-paying upper-middle-class or upper-class job of choice. The worse one does, the more hurdles are thrown in the way and the likelier it is that one will either stay in the same or fall in socioeconomic class. This view is simultaneously the nepotistic view of education, as it encourages helicopter parenting to fight for every grade and thus reducing schools to a rubber-stamp for high marks. The purpose of education and teachers then is more antagonistic, as they are the gatekeepers to a better life.

These distinct policy goals in education relate to the kind of good education is and informs our solution to the inefficiencies of public education’s nature as an economic good.

B. Economic Goods and Markets

In order to complete the analysis of the implications of K-12 education’s status, we must define economic goods and market structures. Economic goods are conceptually any resource or service, tangible or intangible, that has a value. These types of goods are more expansive than property that exists within the legal space. As laid out by Ostrom, there are four kinds of economic goods. Those goods are defined by how rivalrous the usage of the good is and by how excludable the good is. Rivalrousness is how the quality of the good is decreased by increased competing usage of the good. A perfectly nonrivalrous good does not degrade, while a perfectly rivalrous good can only be used once or by one person at a time. Excludability is how difficult it is to prevent others from accessing the good, where “excludable” means it is easy to keep people out. In legal terms, it is how feasible it is to enforce a right to exclude with regard to that property. These are relative

141 See id. at 50–58.
142 See id. at 53.
143 See id. at 54–56.
144 See id.
145 See id. at 54.
149 Ostrom & Ostrom, supra note 147, at 11.
150 Id.
151 Id. at 10.
positions, and exist on a continuum, as almost nothing is completely within one categorization; however, the classification is useful in defining how we interact with those goods and how they should be supported or regulated.\footnote{152}{Id. at 11.}

First, a private good is rivalrous and excludable.\footnote{153}{Id. at 12.} It most closely matches the idea of a property interest in common law, including realty or personalty. A serving of food is a perfect example of a private good, as it is destroyed when used (thus making it rivalrous) and is small and well-contained, making it easy to exclude others.\footnote{154}{Public Goods, supra note 148.}

Second, a common-pool resource is one which is rivalrous but is difficult to exclude.\footnote{155}{Public Goods, supra note 148.} These are resource pools, such as rivers or fisheries, which are rapidly depletable at standard commercial usage, and which are incredibly difficult to prevent access to.\footnote{156}{Id.} These are the “commons,” which give rise to the tragedy of the commons; as Hardin observes, in many cases there is an incentive to selfishly deplete a common in order to gain individual advantage.\footnote{157}{Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1234, 1244 (1968).} This gives rise to his solution, which is to privatize the commons, as with Western water rights or government regulations dictating the size of catch.\footnote{158}{Id. at 1245.} As pointed out by Ostrom, the tragedy is not the inevitable outcome if the community reliant on the commons is sufficiently small and can internally regulate.\footnote{159}{See Elinor Ostrom & Roy Gardner, Coping with Asymmetries in the Commons: Self-Governing Irrigation Systems Can Work, 7 J. ECON. PERSP. 93, 95–96, 109–10 (1993); Roy Gardner, Elinor Ostrom & James M. Walker, The Nature of Common-Pool Resource Problems, 2 RATIONALITY & SOCY 335, 354–55 (1990).}

Third, a public good is nonrivalrous and difficult to exclude others from, thus increasing the odds of free-rider problems.\footnote{160}{E.g., Paul Kim, The Free Rider Problem: When Consumers Don’t Pay for Shared Public Resources, BUS. INSIDER (Apr. 18, 2022, 1:18 PM), https://www.businessinsider.com/personal-finance/free-rider-problem.} In simple terms, if people cannot be excluded but the quality does not go down for the number accessing it, there only needs to be a single buyer for all people who benefit from it.\footnote{161}{Id.; Ostrom & Ostrom, supra note 146, at 12 fig. 1.} Thus, things in this category (national defense, clean air, and so forth) are often government provided; acting for us, the government ensures we benefit but that we pay our share by collecting taxes.\footnote{162}{Ostrom & Ostrom, supra note 146, at 12–13.}

Finally, there are toll goods (which other scholars refer to as club goods), which are nonrivalrous but where exclusion is possible.\footnote{163}{Id. at 11.} As the names suggest,
the key examples include pay-for-access services such as clubs or toll roads.\textsuperscript{164} These are readily excludable as one simply needs to put up a gate and charge a fee for these goods, and the rate discourages rivalrous usage.\textsuperscript{165} As anyone who has driven a toll road can attest, there is a reduction in quality based on the number of people accessing the road; however, the problem would likely be significantly worse if it—the toll—was not in place.\textsuperscript{166}

Markets are defined principally by the kinds of good being sold and the number of buyers and sellers within the market. It is important to note that “selling” is not necessarily in monetary terms but is an exchange of items of value.\textsuperscript{167} This is not a precise definition, and other factors (access to information, geography, and so on) play a vital role;\textsuperscript{168} however, this shorthand is useful for our purposes. Perfectly competitive markets are those with many buyers and sellers, purchasing undifferentiated goods.\textsuperscript{169} Monopolistically competitive markets are the same, except that the goods are differentiated; in doing so, a premium may be charged for the branded good that allows an economic profit\textsuperscript{170} in the short run.\textsuperscript{171} This is the reason why apples, a previously undifferentiated product that was fundamentally interchangeable, now have specific branded and copyrighted names that charge at a higher price.\textsuperscript{172}

The following markets are defined, not by the nature of the product, but by the number of buyers or sellers. In a monopolistic or monopsonistic market, there is one dominant seller or buyer, respectively, of a good.\textsuperscript{173} In that position, they can dictate pricing, limit supply, and thereby gain an economic profit.\textsuperscript{174} If there are a small number of buyers or sellers but no singularly dominant party, it is an oligopolistic or oligopsonistic market.\textsuperscript{175} In such markets, economic profits are often

\begin{footnotes}
\footnotetext[164]{See id. at 12 fig. 1.}
\footnotetext[165]{See id. at 11, 13.}
\footnotetext[166]{Id. at 11. It is worth noting that if the good does become congested enough it switches naturally from a toll good to a private good. See Richard Cornes & Todd Sandler, The Theory of Externalities, Public Goods, and Club Goods 374 (2d ed. 1996). In our toll good analogy, we can picture the good changing from being toll good usage of a toll road and the use of your own individual space on that roadway, which is slowly changing overtime.}

\footnotetext[168]{Id. at 299.}
\footnotetext[169]{Id.}
\footnotetext[170]{An economic profit is a profit earned above both the resource inputs and the opportunity costs related to those resources. Id. at 183.}
\footnotetext[171]{Id. at 368.}

\footnotetext[173]{Univ. Minn. Librs. Publ'g Servs., supra note 167, at 337, 473.}
\footnotetext[174]{Id.}
\footnotetext[175]{Id. at 376; see V. Bhaskar, Alan Manning & Ted To, Oligopsony and Monopsonistic Competition in Labor Markets, 16 J. Econ. Persps. 155, 155–56 (2002).}
\end{footnotes}
still possible and price setting occurs but in a way that is reactive to the actions of the other oligopolists.\(^{176}\)

The combination of goods and markets creates a complicated system of differing valuations and different sides seeking advantages. For education, there is a distinction between the kinds of markets and goods involved, which creates inefficiencies.

III. Toll Goods and Inefficiencies

Having now defined economic goods and markets, we can identify that K-12 education in the United States is a monopolistic toll good, resulting in inefficiencies and inequities when students attempt to convert that education into labor within the job market or partisanship within the political market. This structural weakness needs to be addressed to properly alleviate the problems in American education. As noted above, the federalist approach has failed to properly address this problem,\(^{177}\) and thus a federal policy is needed to correct the problem. This Comment will suggest one possible ideal that states could implement. It is key to emphasize that an increased federal role needs to be flexible, and that the suggested method is not the only solution; instead, a federal baseline role in education would minimize the inter- and intrastate disparities and encourage true national standards for educational support.

A. Toll Goods and Markets

Education in the United States is best understood as a toll good in a monopolistic market, and the economic consequences of this are impactful and inefficient. School district boundaries, paid for primarily through local taxes, function as exclusion in economic terms.\(^{178}\) As discussed above, the early phases of education were through local communities pooling resources.\(^{179}\) There was a de facto limit on who would attend based on the physical limitations on entry, but that boundary was practical rather than truly regulatory.\(^{180}\) The states made these de facto boundaries de jure when they created school districts and formalized, to varying degrees, local control over schools as school boards.\(^{181}\) When combined with redlining and disenfranchisement, the codification of boundaries and the future adjustments to those boundaries amount to intentional separation, designed to

\(^{176}\) Univ. Minn. Librs. Pub’g Servs., supra note 167, at 376.


\(^{178}\) See Ostrom & Ostrom, supra note 146, at 10, 13, 16.

\(^{179}\) Kober & Rentner, supra note 23, at 1–2.

\(^{180}\) See id.

\(^{181}\) See Fischel, supra note 33, at 188–90.
separate different populations,\textsuperscript{182} to create haves and have-nots.\textsuperscript{183} These boundaries are enforced, enrollments are checked, and students are removed as needed;\textsuperscript{184} this is excludability in action, creating a toll booth for public education. Despite this, some have classified education as a public good. Sometimes this is on the basis of its public funding and public nature.\textsuperscript{185} This is an older definition of economic goods, however, that considered goods as a binary.\textsuperscript{186}

It is important to note that education is still not a private good, despite the excludability. This is because, at an ideal level of usage, education is functionally not rivalrous.\textsuperscript{187} It should be noted that in education literature class size is hotly contested, but some useful conclusions can be drawn.\textsuperscript{188} It is understandable that, in a perfect world, one-to-one teaching would prove the most effective; however, as that is not possible, we have a different range for public education. In an ideal range which research seems to indicate varies based on grade level and content,\textsuperscript{189} educational outcomes are altered by marginal changes in student achievement, but not by a dramatic amount.\textsuperscript{190} However, it is quite possible that in many schools, that ideal number is not currently reached, especially for schools serving students

\textsuperscript{182} Nodjimbadem, supra note 113; GAO REPORT, supra note 3, at 24. It is worth noting that CORNES & SANDLER, supra note 166, calls these local public goods; however, because of the intentional class-and-race segregation involved in the boundaries, there are indications that this is more than simple localness, but rather true exclusion.

\textsuperscript{183} Black, supra note 15, at 1390–91.


\textsuperscript{186} This is similar to Labaree, supra note 32, 46–48, which considers the switch in perspective on education to be one from a public good to a private good over time; however, that dichotomy is not the current perspective on goods used by economists.


\textsuperscript{188} Barnum, supra note 187.

\textsuperscript{189} See generally Whitehurst & Chingos, supra note 187.

\textsuperscript{190} Id. at 10 (“It appears that very large class-size reductions, on the order of magnitude of 7-10 fewer students per class, can have meaningful long-term effects on student achievement and perhaps on non-cognitive outcomes. The academic effects seem to be largest when introduced in the earliest grades, and for students from less advantaged family backgrounds. They may also be largest in classrooms of teachers who are less well prepared and effective in the classroom.”) This is admittedly an oversimplification of a complex issue. The amount of difference it makes is highly dependent on how far behind students are to begin with, with those who are struggling needing more attention. HENRY LEVIN, CLIVE BELFIELD, PETER MUENNIG & CECILIA ROUSE, THE COSTS AND BENEFITS OF AN EXCELLENT EDUCATION FOR ALL OF AMERICA’S CHILDREN 2 (2007), https://academiccommons.columbia.edu/doi/10.7916/D8CF9G9. In context of the other research, this author is cautiously optimistic that students not falling behind to begin with in a more equitable school system would minimize this result.
who are already disadvantaged by the systemic issues we have discussed.\textsuperscript{191} The conclusion is thus that education, and similar to the turnpike, is nonrivalrous within an ideal level of usage, which is still a class of students and not one-on-one for the majority of students, which means that it is nonrivalrous but subject to congestion.\textsuperscript{192}

Because districts are exclusive, each district functions as an educational monopoly. While each district is competing with other districts for people to move to their locality, as the perceived quality of education is a major factor when people are choosing where to move,\textsuperscript{193} the districts have a dominating presence in the schooling once within those boundaries.\textsuperscript{194} The rate of movement, and the existence of alternatives such as vouchers, private schools, and charter schools, means it is not a perfect monopoly;\textsuperscript{195} however, the controlling position of the local public school creates a baseline in quality that other schools need to significantly differentiate themselves from to compete for a share.\textsuperscript{196} Together, public education consists of thousands\textsuperscript{197} of localized monopolies,\textsuperscript{198} each providing education as a toll good.\textsuperscript{199} This creates inefficiencies and an arbitrage problem when students leave school and can only be rectified through systemic change.

\textsuperscript{191} See generally WHITEHURST & CHINGOS, supra note 187.

\textsuperscript{192} See Ostrom & Ostrom, supra note 146, at 13; see CORNES & SANDLE, supra note 166. They define an impure public good as anything not a pure private or a pure public good, id. at 9, and analyze its allocation in terms of their club model, id. at 364–66. Other scholars have disagreed and have classified education as a private good. E.g., DEANGELIS, supra note 185, at 2–3. In essence, they view class size as making the good rivalrous. Id. If the amount of congestion in the classroom reached the point of being rivalrous, the increased tax base for the school would likely allow the hiring of additional teachers or the changing of schedules; this would fix the issue. Goods, based on how congested they are, can transfer between categories based on supply. Within an ideal range that is still larger than one-on-one, the congested and rival nature of public education is minimal. See Ostrom & Ostrom, supra note 147, at 11; CORNES & SANDLE, supra note 166, at 348. This is not a perfect proposition, and there is merit to the point that public education can be somewhat rivalrous. See Mosteller, supra note 187, at 125. However, the extent of that rivalry within an achievable class size beyond private instruction is not so significant as to make education a true private good, see Barnum, supra note 187. See Mosteller, supra note 187, at 123–26. Ostrom uses public education as an example of a toll good. Ostrom & Ostrom, supra note 147, at 16, 25–26.


\textsuperscript{194} See Fast Facts, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/fastfacts/display.asp?id=372 (showing approximately ten times as many students attending public versus private schools).


\textsuperscript{197} E.g., Fischel, supra note 33, at 177.

\textsuperscript{198} E.g., Gross, at 4.

\textsuperscript{199} See supra notes 186–91 and accompanying text.
B. Good Conversion and Passive Arbitrage Inefficiencies

The inefficiency this Comment is concerned with, which justifies the need to dramatically redefine a right to education, is created by the mismatch of education as a monopolistic toll good and the conversion of that good into labor or entrepreneurship in the labor market and political partisanship in the political market. This inefficiency, comparable to a passive form of arbitrage, needs to be rectified and only a proper federal baseline to education can ensure that this may occur.

Labor and entrepreneurship are goods that companies use to actually create, design, and innovate. In a free-market system, they are private goods: excluding someone from your labor is as simple as quitting, and humans are only truly capable of working on one job simultaneously, thus making labor rivalrous. Companies compete to gain workers, and some of those workers opt to create their own companies and provide entrepreneurship to the economy instead. In either event, those companies are leveraging their name, their compensation packages, and their location to lure in workers just as they do with customers. It is thus a monopolistically competitive market.

Partisanship, the method by which people interact with the political system via voting and advocacy, is also a distinct good. It is a public good: excludability is low, although many policies have attempted to raise the threshold, and it is fundamentally nonrivalrous, since the number of people advocating or voting may result in varying degrees of representation, but this does not impact the quality of the partisanship itself. The market is a duopsony, a form of oligopsony, where there are only two dominant buyers of a good. In the United States, the Republican and Democratic parties dominate the market and essentially act in concert to control how people act in this space.

The result is a necessary conversion and inefficiency. The story of the item being misvalued, resulting in a sequence of complex trades from a paperclip to a house, illustrates the idea of inefficiency in converting from one good to another.
The value gained from this inefficiency is known as arbitrage and is a form of market failure, often resulting in deadweight loss. When one converts one good, such as education, to another, such as labor or partisanship, there is a deadweight loss involved because of the disparities in time, perceived value, marketability, and overall quality involved. The need to convert a good to another, especially when the good suddenly must compete with others outside of its sphere, creates problems and inefficiencies. This then creates a feedback loop, wherein it is more difficult to convert when there is difficulty in converting previously. To put it another way, education does not fail until students need to use it, and the ability of students to use it is impaired by the amount of transition needed after school ends.

While such a conversion from education on one side to partisanship and labor or entrepreneurship on the other is difficult to quantify, there is almost undoubtedly some level of inefficiency in the process. Using one measure of the cost of inadequate education on lost tax revenue and needed welfare expenditure, the measure is approximately $127,000 per student. This is obviously not a perfect metric, as this indicates the value not seen through inadequate funding, rather than from the conversion itself; however, since the conversion inefficiency is because of the inability of students to see those gains and because damage to informed partisanship and citizenship does not have a dollar amount, it is a number to consider. That said, meaningful and statistically significant impacts on civic participation and informed partisanship have been shown to result from a lack of quality education.

Conceptually, the reason for the disparity is because the nature of the markets is radically different. The value of the education obtained within a school has value inside of that school; however, what is gained from that school varies dramatically when attempting to advance in schools (as seen by difficulty in getting

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209 UNIV. MINN. LIBRS. PUB’G SERVS, supra note 167, at 193 (defining deadweight loss as “The loss in net benefits resulting from a failure to carry out an activity at the efficient level”); Tim Sobierski, What is Arbitrage? 3 Strategies to Know, HARV. BUS. SCH. ONLINE (July 20, 2021), https://online.hbs.edu/blog/post/what-is-arbitrage (defining arbitrage in its normal sense); see, e.g., Koichiro Ito & Mar Reguant, Sequential Markets, Market Power, and Arbitrage, 106 AM. ECON. REV. 1921, 1922, 1952–53 (2016) (demonstrating that arbitrage and its various iterations can result in deadweight loss, especially in asymmetric markets).

210 Cf. Ito & Reguant, supra note 209, at 1952–53 (the degree and form of arbitrage is indicated by market power); Schwartz, supra note 172 (noting that the branding of apples also for the charging of a price premium, which is similar to arbitrage in pricing variance).

211 See Jack Schneider, Why Americans Think So Poorly of the Country’s Schools, THE ATLANTIC (July 17, 2017), https://www.theatlantic.com/education/archive/2017/07/the-education-perception-gap/533898/ (noting that there is a media feedback loop and a gap in experienced quality of schools and their perceived quality); see also Osamudia James, Risky Education, 89 GEO. WASH. L. REV. 667, 667 (2021) (describing the results of that feedback loop, as parents navigate school districts and school choice programs for the best advantage); cf. Catherine Greene, Differential Information, Arbitrage, and Subjective Value, 40 TOPOI 745, 751 (2021) (describing arbitrage as being the result of irrational, subjective values, which can be compared to the perceived quality in schools).

212 LEVIN ET AL., supra note 190.

into college for graduates), in the labor force, and likely in the civic literacy required for informed partisanship. There would not be inefficiency in education if the excludability, the inherent localness of the market and goods, remained in place as broadly existed in the early period of education; the fact that labor and partisanship have grown to global scales while education has remained locally tied is the problem. A student in a one-room schoolhouse of the 1800s would fundamentally be competing in a local partisanship and local labor markets, thus matching the education. As those markets expanded, the variances in value of the education received created this passive arbitrage inefficiency as students converted their education into wildly different markets. The value those markets place on a given education varies, and the amount of education available within those tolled, monopolistic markets vary dramatically. In short, it is the need to transition from a toll good in a monopolistic market, with varied qualities contained therein, to both a regional private good, monopolistically competitive market and a national public good, duopsonistic market that creates a passive arbitrage inefficiency.

C. Solutions

The solution to the problem of inefficiency bred by conversion is to change the market structure so that the conversion does not occur. Just as Hardin viewed the solution to the tragedy of the commons was to change the kind of good involved to thus change the structure and incentives, the solution to the passive arbitrage inefficiency in education is to change the kind of good and market involved. In doing so, the value of the education is likely to be equivalent and the inefficiency reduced.

i. The Siren Song of Vouchers

One solution to this problem is to abandon the public portion of public schools, other than the funding, and transition to the sole use of vouchers for schools. This would convert education into a fully private good, as the students will be using the public funds to still acquire education, but they are purchasing it directly for themselves.\(^{214}\) In theory, this would eliminate the good and market problem by matching the type of good (private) and market (monopolistically competitive) between the schools and the workforce.

Such a system would potentially bring in positives of the market and the government purse. The reason to still provide government funding in the form of a voucher is because of the massive net positive externalities in education that make it a merit good.\(^{215}\) In such a system, school districts would give money to particular students and allow parents and students to decide which school to attend at their

\(^{214}\) DeAngelis, supra note 185.

\(^{215}\) Id. at 3.
own discretion (either completely or with some government regulation involved).216 This position is broadly supported by conservatives217 and some economists.218 This also aligns with the policy position of education as a private good, where its purpose is individual social advancement for students.219 However, there are numerous reasons to believe that this would not work as the singular model for education.

First, it is likely to harm many of the factors that have been shown previously to increase student outcomes within a school.220 There is an increased likelihood of school failure and closure in this system, as failing schools would be shuttered.221 Studies have shown that students caught in such situations tend to fall behind. In a competitive system, schools that are struggling would likely only have students who could not get into other schools or were forced into them; the result would then be struggling students being the ones most likely to fall behind.222 Additionally, such an environment would likely result in harm to the teaching profession, as pay would decrease in a free market environment and many schools created would likely have restrictions on unionization compared to traditional public schools.223 Quality teachers are one of the greatest indicators of student success,224 and forcing them out of the profession by a voucher system of education would be a negative on student outcomes.

Second, there are numerous social implications:

1. Racial segregation or class segregation may be exacerbated.
2. The traditional separation between church and state may be weakened.
3. Under a free-market arrangement, simple inflation of schooling costs may occur, and the rich will use their own funds to supplement public funds in order to acquire superior schooling for their children, thus the relative disadvantage of the poor will continue.


218 Bridge, supra note 216, at 82.

219 Labaree, supra note 32, at 50–52.

220 See generally Timothy J. Gronberg, Dennis W. Jansen & Lori L. Taylor, *The Relative Efficiency of Charter Schools: A Cost Frontier Approach*, 31 ECON. EDUC. REV. 302 (2012) (the factors that were discussed were input factors such as teachers and other personnel, which were purchased and environmental input factors that are not purchased such as student skills acquired in an earlier grade).


222 See, e.g., id. at 21.


4. The public schools stand to become the dumping grounds or schools of last resort for those children who are rejected everywhere else.

5. Parents may not be able to make intelligent decisions because they cannot discern differences between schools or programs, or because they do not care to make school[] decisions.\textsuperscript{225}

In short, these trade-offs are likely not worth it to most people considering the policy. A voucher system would likely throw the metaphorical baby out with the bathwater, as it does not appear to actually create a better education for those students who are disadvantaged by the current inefficiency, even if it removes that inefficiency.

Finally, there is no indication that this would actually improve education for many students or that the underlying assumptions are correct. Many studies have found that students in private and charter schools do better;\textsuperscript{226} however, these studies fail to take into account that those schools are self-selecting in many cases, with students only brought in by the choice and resources of the parents. Once one controls for the school’s ability to self-select, the advantage disappears.\textsuperscript{227} In a pilot test of such a full voucher system, there was no indication of growth and the only positive the researchers indicated was a reduction in bureaucracy and oversight from administrators.\textsuperscript{228}

It is worth noting that this is not an indictment of vouchers as part of a solution, especially in the short term; simply put, this is an area of active study in educational research.\textsuperscript{229} The point is that vouchers may be part of a solution, but if we assume there are non-private motivations for public education and we do not wish to accept the negatives vouchers may cause, vouchers cannot be used to essentially replace traditional public education.\textsuperscript{230} In short, another solution is needed.

ii. Quasi-Public Good

If we instead assume that education is for social benefits, be that better workers or democracy, the solution is to change the kind of good for education to make it more akin to a true public good. Simply put, more equitable funding and

\textsuperscript{225} Bridge, supra note 215, at 82 (quoting CTR. FOR THE STUDY OF PUB. POLY, EDUCATION VOUCHERS: A REPORT ON FINANCING ELEMENTARY EDUCATION BY GRANTS TO PARENTS 12–13 (1970)).

\textsuperscript{226} E.g., DEANGELIS, supra note 185, at 6–8.

\textsuperscript{227} PHILIP GLEASON, MELISSA CLARK, CHRISTINA CLARK TUTTLE, EMILY DWOYER & MARSHA SILVERBERG, NAT’L CTR. FOR EDUC. EVALUATION & REGIONAL ASSISTANCE, THE EVALUATION OF CHARTER SCHOOL IMPACTS xvii (2010); see Bridge, supra note 216, at 85 (finding no increase is math or reading test scores when vouchers were introduced to a public school system).

\textsuperscript{228} Bridge, supra note 216, at 83–86.


\textsuperscript{230} See Labaree, supra note 32.
integration in schools would drive out most of the inefficiency we are concerned about. This is because (instead of converting to match the workforce) we would be minimizing the distinction between the various districts. Without any meaningful difference, and if greater systemic reforms were made to further reduce those barriers between schools, the exclusions between the schools would no longer be meaningful, even if still technically in place. This would create a simulacrum of a public good.

There are multiple ways this could be implemented, and to varying degrees. Each state and region will have its own particularities, which is why some state or local control will always be needed in education. However, a federal baseline or federal enforcement of a federal standard could allow for a flexible policy to achieve integration and social benefits. In short, recognition of a federal right to education, as laid out by other scholars, is needed to ensure that equity and good transformation occur.

One possible solution supported by this author is commingled, intradistrict magnet programs with merged school districts and increasing equitable funding from the state and federal governments. A magnet program is a specialized program, drawing in students from a large area to allow them to participate in that specialty. Such a program would merge multiple districts of various socioeconomic backgrounds, in order to minimize the difference in resources. It would simultaneously increase funding while minimizing the localness of the funding. State and federal equitable aid would then minimize any continued differences. It would then have magnet programs for particular vocational or academic centers in all of the schools in the district, offering different programs; parents and students would then have the proactive choice of choosing their home school or a magnet program to attend based on their interests. The result would be a natural commingling of students, with more resources for all of them. It is important that only the classes or courses dedicated to magnet programs be split off, as to avoid intraschool segregation and the issues caused by tracking.

232 Id.
233 See id. at 21–22.
234 See Black, supra note 89, at 1414.
238 Lewis, supra note 237.
240 Kimberly C. West, Note, A Desegregation Tool That Backfired: Magnet Schools and Classroom Segregation, 103 YALE L.J. 2567, 2569–70 (1994); see Larry Eichel, Getting into High School in Philadelphia, PEW
This solution is not, of course, constitutionally required or the only possible solution. It can be modified and adjusted to local areas; however, it does the most to break down the excludability limitation on current public schools in all the forms it exists in, and thereby brings schools the closest to being a public good. It minimizes interdistrict differences that play a role in the passive arbitrage inefficiency and encourages homogeneity in demography and resources. It breaks up the localness of schools by expanding geographically for any resource disparities within the schools and incentivizes a willing movement of students between different areas within these enlarged districts.\(^{241}\) While this author believes such a solution is the best, it will not work in all cases and unexpected complications may impede its application. The true purpose of this proposal is instead an illustration of the kind of radical change needed to actually convert education from a toll good into the kind of public good needed to properly support students becoming adult participants in American society. Because states are moving in the opposite direction,\(^ {242}\) such radical change requires federal action, which would be best supported by the recognition of a federal right or a federal cause of action.

**CONCLUSION**

American public education has had many successes and failures. Its greatest failure is the political and legal inability to ensure that its successes can reach all students. Education is necessary for democracy, for livelihood, and for personal growth. The federal government, whether the Supreme Court or Congress, needs to ensure that this right is respected for students. As that is not likely in the immediate future, the groundwork can be laid for future leaders and lawyers to bring the best arguments before the Court and the people.

This Comment seeks to be a small part in that groundwork. It suggests, based on the policy underlying education and the economic analysis, that education must be reformed to achieve the desired outcomes. Those outcomes cannot come from privatization, but rather, by making K-12 public education closer to being a true public good by reducing the excludability built into the system. It suggests one possible structure that could do so but acknowledges that other options will exist.

Even as we close, it is worth noting that federal involvement is not a

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\(^{241}\) The incentivizing of movement is a key aspect; bussing plans to move students typically failed because they did not create incentives for privileged families to participate. See Willis D. Hawley & Matthew A. Smylie, *The Contribution of School Desegregation to Academic Achievement and Racial Integration*, in *Eliminating Racism: Profiles in Controversy* 281 (1988).

\(^{242}\) See GAO REPORT, *supra* note 3.
panacea. While increased resources in schools and treating schools as true public goods is likely to benefit students, there are other deficits in the social safety net that limit students. Additionally, federal involvement does not mean federal funding, as seen with many schools on reservation land and the unfunded mandates in special education. What this does provide is a raised national baseline and a hope for continued equitable improvements across the board. The key is that there is a need for change that only a national baseline can provide as states and local districts cannot and will not do this alone. Combined with the history and the policy involved, this need supports the recognition of education as a positive substantive right.