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## Rightsizing Fed Ed

### Principles for Reform and Practical Steps to Move in the Right Direction

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#### EXECUTIVE SUMMARY

The federal government has been heavily involved in education since the mid-1960s, intervening in everything from early childhood education to graduate schooling. This paper lays out the principles that should govern federal involvement in seven specific areas and briefly examines the effects of Washington's policies. The areas are elementary and secondary education funding; curricular standards and testing mandates; state and local planning mandates; school choice; higher education; early childhood education and care; and civil rights. Each section also lays out steps that can be taken relatively quickly to move in the right direction. These include the following:

- Allow states to control distribution of federal funding under the Elementary and Secondary Education Act.
- Allow states to approve multiple, diverse curricular standards and aligned tests and permit local education authorities to select the ones that best fit the needs of their students.
- Eliminate federal mandates for centrally designed state and local policies and replace federal review panels with state assurances that they will meet federal requirements.
- Expand private education choice options to more students who live in Washington, DC, are in active-duty military families, or attend Bureau of Indian Education schools while protecting private school curricular autonomy and enhancing parent-driven accountability.
- Reduce federal student aid, starting by phasing out PLUS loans, to restore discipline to college pricing.
- Phase out the ineffective Head Start program and return early childhood education and care to states, communities, and parents.
- Move civil rights enforcement from the Department of Education to the Department of Justice and use standard notice-and-comment procedures, not "Dear Colleague" letters, to make substantive regulatory changes.

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## INTRODUCTION

The federal government has become heavily involved in education over the past six decades. In so doing, it has exceeded its constitutional bounds in numerous ways and created policies that have negatively impacted education. Rather than present a sweeping review of the evolution of the federal role—everything it does, why it does those things, budget growth, etc.—this paper furnishes quick explanations of the current federal role in seven major areas of education and offers suggestions for reforms that could be quickly undertaken to move policy in the right direction.

Feel free to read every section or to proceed directly to the area or areas that most interest you. The areas are elementary and secondary education funding; curricular standards and testing mandates; state and local planning mandates; school choice; higher education; early childhood education and care; and civil rights. The authors stand ready to assist anyone who wishes to dive more deeply into any area.

## CUT THE STRINGS ON K-12 EDUCATION FUNDING

In 1998 the “Report on the Activities of the Committee on Education and the Workforce during the 105th Congress” stated:

The federal government should play only a limited role in education. It should serve education at the State and local level as a research and statistics gathering agency, disseminating findings and enabling States to share best practices with each other.<sup>1</sup>

Despite more than half a century of ever-increasing federal involvement and spending on K–12 education, Washington remains a relatively modest financier of elementary and secondary schooling. Although this financing is modest, it still exceeds the appropriate, constitutional scope of Washington’s authority in education, which is not an enumerated

power of the federal government. K–12 spending financed by federal taxpayers accounts for just 8.5 percent of all K–12 spending; state and local taxpayers foot more than 90 percent of the bill. Although the federal government is a minority stakeholder in K–12 financing, the regulations and red tape from Washington far exceed that 8.5 percent share. Yet, as the Government Accountability Office estimates, although the federal government provides less than 10 percent of K–12 education financing, federal regulations caused more than 40 percent of the administrative burden felt by state education agencies—and that was in 1994, before the extremely heavy-handed No Child Left Behind Act became law.<sup>2</sup>

For foundational constitutional reasons, and more pedestrian reasons such as reduced regulatory burdens and good governance, Congress should allow states to opt out of the myriad federal education programs and direct existing federal dollars toward state- and locally determined education priorities. Since state and local taxpayers pay for more than 90 percent of K–12 education, it is appropriate for Congress to let states determine how to best use federal education funds. Indeed, data suggest federal spending on K–12 education since 1965 has failed to improve the relative academic achievement outcomes for the disadvantaged children it was intended to help. As researchers Paul Peterson, Eric Hanushek, and others have documented, the achievement gap between children from the top and bottom deciles of the income distribution was the equivalent of four grade levels’ worth of learning in 1965; today, that gap is the same, despite a four-fold inflation-adjusted increase in total per-pupil spending over that time period.<sup>3</sup> The federal government does not have a clear track record of educational improvement.

To improve education, schools need genuine freedom from Washington. Although there have been various congressional proposals to achieve that goal, one such option, the Academic Partnerships Lead Us to Success (A-PLUS) Act provides a solid map

for beginning the process. In both the House and Senate versions, A-PLUS would allow states to issue a “declaration of intent” to the Department of Education, signaling a state’s desire to exit the Elementary and Secondary Education Act (ESEA)—the largest federal law governing K–12 education today. A-PLUS would send funding under the ESEA back to a state, allowing the state to then direct funding to any education purpose under state law. A-PLUS enables a state “to assume full management responsibility for the expenditure of Federal funds for certain eligible programs for the purpose of advancing, on a more comprehensive and effective basis, the educational policy of such State.”<sup>4</sup>

Such an approach would place decisions about education spending and programs in the hands of state and local leaders, help downsize federal intervention in education, reduce the bureaucratic compliance burden, and begin to restore federalism in education. Opting out of the ESEA would not only enable local policymakers to better direct funding but would also bring federal intervention into education more in line with Washington’s 8.5 percent financing share. A-PLUS, however, is just a first step. Congress should also trim federal programs and spending, work toward scaling back the federal Department of Education by removing its cabinet-level agency status, and restore state and local control of education.

### Recommendations

- Allow states to opt out of all federal programs that fall under the ESEA and put those dollars toward any lawful purpose as defined by state law, per A-PLUS.
- Cut federal programs and spending, trimming the ESEA to the spending allocated under Title I of the law, as a first step. Then slowly taper Title I spending, phasing it out over a 10-year period, providing time for states to adjust.
- In the interim, allow states to make their Title I and Individuals with Disabilities Education Act dollars portable in the

form of education savings accounts, following a child to a private school or service provider of choice.

- In the long run, remove cabinet-level agency status from the Department of Education, including shifting data collection functions such as the National Center for Education Statistics to the Bureau of Labor Statistics.

### ELIMINATE OR REDUCE CURRICULUM STANDARDS AND TESTING MANDATES

Since the 1994 amendments to the Elementary and Secondary Education Act (ESEA), federal legislative mandates have promoted central planning of curricular content and testing by government entities geographically removed from local schools. This top-down trend has empowered an ideologically driven education establishment to impose a progressivist curricular and instructional wish list on local schools, often over the objections of concerned parents.

Instead of allowing testing to retain its traditional role as one of several tools that parents and local educators use to evaluate student learning in the local curriculum, federal mandates have pushed local schools to modify their instruction to teach to standards-based tests designed by government agencies. (“Standards-based tests” refers to tests aligned to specific curricular standards.) The federal mandate for grade-by-grade accountability testing in grades 3–8, established by the No Child Left Behind Act of 2001, further encouraged a focus on the curricular and instructional assumptions of external tests that are designed to drive—or “guide”—instruction.<sup>5</sup> One result has been a testing-driven school culture that has frustrated many parents as well as educators. At the same time, the federal mandate on states and districts to achieve 95 percent student test participation has arguably impinged on the right of parents to direct their children’s educations by opting out of this regime.

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Promoted as necessary to improve the international competitiveness of our students, these centralizing policies have not only failed to achieve this lofty goal but have also had little effect on long-term trends in student achievement, which until recently generally continued at the same slow rate of improvement that we have seen in the National Assessment of Educational Progress (NAEP) since the 1970s.<sup>6</sup>

Since widespread implementation of the national Common Core curricular standards, the logical culmination of this centralizing trend, we have seen historic, sustained declines in student achievement in math and reading on the NAEP that are unprecedented as far back as we have trend data. For example, in the decade before most classrooms implemented Common Core—roughly 2014—average annual gains on NAEP at grade 8 were nearly three-quarters of a scale point in math and half a point in reading, but since then we have seen average annual declines at the same grade of half a point in math and over three-quarters of a point in reading. A similar pattern of gains before Common Core implementation and declines after also occurred on NAEP at grade 4. Unfortunately, the declines have been most significant among the students who can least afford them: those in the bottom half of the achievement distribution. While students at the 90th percentile have either continued the pre-Common Core trend of slow gains or just plateaued on NAEP, students at the 50th, 25th, and 10th percentiles have seen statistically significant declines—with the steepest declines for the lowest-performing students.<sup>7</sup>

Some had hoped that the 2015 passage of the Every Student Succeeds Act amendments to the ESEA would substantially reduce federal mandates on curricular standards and testing and allow states to try a less top-down approach.<sup>8</sup> However, continued federal rejection of Arizona’s ESEA plan to allow local education authorities to select from a list of tests that best fit local curricula and student needs has indicated no significant improvement in state and local flexibility. Additional changes are required.

## Recommendations

While it would be preferable to end all federal mandates regarding curricular standards and tests, if mandates in this area are to continue, the following modifications would greatly reduce the federal imposition:

- Modify ESEA Title I, Part A to replace the current requirement that each state establish a single set of detailed, statewide curricular standards and aligned tests in mathematics and reading/language arts for all public schools in their jurisdiction with a more flexible requirement that states approve one or more curricular standards and aligned tests. Local education authorities may, for example, select from a state-approved list of diverse curricular standards and aligned tests, choosing one or more standards that best meet their needs. States that wish to continue to impose a single set of curricular standards and tests on all public schools would be able to do so, but states that wish to allow greater local control on curricular standards and testing while maintaining state oversight would also have that option.
- Modify ESEA Title I, Part A to replace the current requirement that standards-based tests in math and reading/language arts be administered to all students at each grade in grades 3–8 and once in high school with a requirement that standards-based tests in math and reading/language arts be administered to all students at least once in grades K–5, once in grades 6–8, and once in grades 9–12. Again, those states that wish to test more often would retain that option.
- Modify ESEA Title I, Part A to replace the current requirement that standards-based tests be administered to at least 95 percent of all students, as well as 95 percent of students in each student subgroup, with a requirement that each state establish the test participation standards it deems appropriate for all

students and for each student subgroup while protecting the fundamental right of parents to direct their children's educations (e.g., by opting out of state or national testing).

## **REMOVE ELEMENTARY AND SECONDARY EDUCATION ACT STATE AND LOCAL PLANNING MANDATES**

“The 2015 passage of the Every Student Succeeds Act (ESSA) ushered in a new era for state education accountability systems,” the Washington-based Bellwether Education Partners wrote in 2017. “The law requires states to submit their plans to the U.S. Department of Education.”<sup>9</sup> While the 2015 law's proponents heralded it as a dramatic shift toward greater K–12 federalism, if states need to continue to submit 150- to 300-page reform plans (as they had been required to do under previous versions of the Elementary and Secondary Education Act [ESEA]), they lose substantial autonomy to design authentic state, local, and parent-driven K–12 reforms.<sup>10</sup>

The federal mandate for state and district central planning establishes a default mindset for education reform that encourages top-down approaches rather than bottom-up approaches, such as charter schools, tax credits for private and religious school choice, and homeschooling.

In addition, like their predecessors under the No Child Left Behind Act of 2001 or the Race to the Top Fund (RTTT), current plan requirements remain a key leverage point for federal and state officials to continue to control education reform from the top. Since the Obama administration signed ESSA into law, few governors or state chiefs have provided the type of bolder state-driven K–12 leadership seen in the 1990s and pre-RTTT. There is also little evidence that state plans, including after RTTT and ESSA, have much, if any, positive impact on the nation's overall student achievement. In fact, approximately two-thirds of states experienced declines on NAEP

in reading and math, including the highest-performing states, such as Massachusetts, New Hampshire, and Minnesota, between 2011 and 2019.<sup>11</sup>

Similarly, the ESEA mandate for local, stakeholder-driven education reform plans encourages a top-down mindset at the district level. While not expressly prohibiting bottom-up approaches that rely on initiative from entrepreneurial school leaders, the bureaucratic ESEA district reform planning process also establishes top-down reform as the default local approach.

### **Recommendations**

- Replace ESEA's mandate requiring state reform plans approved by federally selected review panels with state assurances and commitments to meet necessary statutory requirements, subject to federal review only on a limited, as-needed basis.
- Replace ESEA's federal mandate requiring district reform plans with district assurances and commitments to meet necessary statutory requirements, subject to state or federal review on a limited, as-needed basis.

## **ADVANCE SCHOOL CHOICE WITHIN CONSTITUTIONAL BOUNDS**

The Tenth Amendment of the U.S. Constitution clearly states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>12</sup>

Our Constitution does not grant the federal government nationwide authority in the area of K–12 education. In fact, the age-segregated, residential district-based school assignment system in operation today is relatively new; one-room schoolhouses operated in some areas into the 1970s, and public high schools were not common until 1920. While historians disagree on the degree to which

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various entities drove these changes, in many places local residents supported the creation of one-room schools, the eventual widespread consolidation of school districts, and the creation of high schools.

True, Washington played a role in local schooling 200 years ago, but federal activities were modest and designed to assist local initiatives. For example, as Americans moved west in the 1780s, Washington allowed sections of land in local townships to be used as endowments to help pay for local schools. Importantly, this occurred under the Articles of Confederation, not the Constitution. Its constitutional support is provided under Article IV, Section 3, which gives Washington the authority to “make all needful rules and regulations respecting the territory or other property belonging to the United States.”<sup>13</sup> This power, however, refers to the ownership of federal territories, not education within state boundaries.

How times have changed. Washington spent approximately \$85 billion on K–12 education in 2018,<sup>14</sup> and the Department of Education spent \$16.3 billion in fiscal year 2020 specifically on local education agency grants for children from low-income families.<sup>15</sup> Over the past 20 years, federal lawmakers have issued a dizzying array of new requirements, including one that says states must administer assessments and others that make school-level prescriptions for disciplining students.<sup>16</sup> The Obama administration offered to exempt states and districts from the mandates that previous administrations issued but only if they agreed to follow other requirements.

Stark ideological divides have caused federal education policies to swing wildly from one side to the other as the executive and legislative branches change hands. Currently, the Trump administration and many Republicans in Congress support private school choice. State lawmakers in more than half of all U.S. states have created opportunities for private school choices for families in the form of vouchers, scholarships made available through tax-incentivized charitable contributions to

scholarship organizations, and education savings accounts. The Supreme Court has confirmed that such state laws allowing parents to use public funds, or private funds in the form of unrealized tax revenue, at religious private schools do not violate the U.S. Constitution.<sup>17</sup>

Most important is that these options are created via state laws, which state legislators craft. While the Supreme Court has ruled that Washington may not block such opportunities, our founding document does not give the federal government the ability to spend federal dollars outside of federal purview.

This “purview” exception is crucial. Constitutionally, Washington, DC, is under direct federal control, making federal expenditures on private school choice for Washington students valid congressional actions. Similarly, the federal government has certain responsibilities on tribal lands (briefly referenced in Section VIII of Article I) and for members of the armed services.<sup>18</sup> Thus, Washington could spend federal dollars to offer private learning options to these students. The federal government provides schools through the Bureau of Indian Education and on military bases at home and abroad. These learning options could be revised so that families could use the resources otherwise set aside for their children and choose private learning opportunities, similar to the state proposals that use state funds for vouchers and education savings accounts and other private options.

As important as where federal involvement in school choice should occur is the design of that involvement. In many other countries that provide public support for students in private schools, that assistance has typically been followed by substantial government regulation, including the obligation that private schools teach the same academic curriculum as the public schools.<sup>19</sup> Unfortunately, we are increasingly seeing that pattern play out in private school choice programs in the United States through requirements for the administration of particular standards-based tests. Unlike traditional standardized tests, standards-based tests are designed to drive

instruction, and schools believe that they must align their instruction with the implicit curriculum for the most students to succeed on these tests. Yet, according to a recent analysis, 63 percent of publicly funded (voucher) choice programs in the United States and even 5 percent of tax credit choice programs include a mandate that participating private schools administer a particular standards-based test and that their performance be evaluated using students' scores.<sup>20</sup>

Sometimes, school choice advocates accept such mandates before subsequently realizing—and regretting—their impact on school curricula and teaching. Other times, these mandates are part of legislative horse-trading and compromising to get a policy approved or continued. But the first responsibility of those who support expanding access to private educational options is to “do no harm” to private education. Requiring particular curricular standards, or a particular standards-based test, undermines the fundamental autonomy of private schools. If any testing mandates must accompany school choice legislation, the most tolerable compromise would be to establish a list of diverse, quality tests and permit each participating private school to select and administer the assessment that best aligns with its curriculum.

Fundamentally, “accountability” should not be a pretext for government control through regulating the core function of private education: to provide students, teachers, and families greater freedom in choosing what, and how, students are taught. There is a natural expectation that the government oversight implicit in taxpayer-funded public programs will prevent fraud and ensure that the fundamental purposes of these programs are being served. However, such oversight can be performed without imposing particular curricular standards or requiring standards-based assessments. Legitimate oversight focuses on the elimination of “bad actors” who engage in malfeasance and does so using mechanisms such as requiring accounting for the expenditure of public funds or monitoring overall programmatic performance over time by evaluating data from diverse indicators.

In private education choice programs, day-to-day accountability for success in the education of students is the parents' responsibility. Instead of centralized bureaucratic accountability that attempts to impose rigidity from afar, school choice relies on parent-driven accountability based on the needs and performance of each individual student.

### Recommendations

- For students under Washington's purview—children of parents residing in Washington, DC, students attending Bureau of Indian Education schools, and children of active-duty military parents—offer additional and more equitable private learning options and ensure that federal laws and regulations do not interfere with state efforts to create these opportunities.
- Ensure that legitimate government oversight of publicly subsidized private learning options focus on the elimination of “bad actors” who engage in malfeasance. This could be done using mechanisms such as requiring accounting for the expenditure of public funds or monitoring overall programmatic performance over time by evaluating data from diverse indicators.
- Ensure new private learning options are not conditioned on mandates regarding curricular standards or standards-based testing, especially not a mandate to administer a particular standards-based assessment. Such approaches are counterproductive because they undermine the freedom of those providing these options in core areas of what and how students are taught.

### RESTORE FEDERALISM IN HIGHER EDUCATION

The Higher Education Act of 1965 (HEA), a part of Lyndon Johnson's “Great Society,” marked the federal government's broad entry into higher education. Notably, Title IV

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of the HEA established the federal student lending program, which for much of its existence guaranteed profits for ostensibly private lenders and today provides direct federal funding for student loans.<sup>21</sup> This well-intentioned policy to increase college access has had a number of damaging, unintended ramifications. Americans now owe more than \$1.5 trillion in outstanding student loan debt, due largely to the ubiquity of federal subsidies and the lack of private underwriting.<sup>22</sup> There is no assessment of risk, especially of inadequate academic preparation, associated with federal student loans. Consequently, universities have little if any incentive to keep their costs and prices low, as they are confident that students will come up with the funds to pay them through federal aid.

The HEA additionally tied institutional eligibility for federal funds to accreditation. This turned existing accrediting agencies, which had been collegial school evaluators, into gatekeepers to federal funds and arms of the Department of Education. Ultimately, this measure of accreditation has fallen short of providing a baseline of quality assurance to students or accountability for taxpayer dollars, because accreditors are reticent to deliver a death sentence to a college by removing, or even threatening to remove, its accreditation.

Higher education accreditation should no longer be a de facto federal enterprise and should return to a system of peer review and quality assurance. As critically, student aid would be more efficiently and appropriately handled through the restoration of a robust private lending market.

The “Bennett Hypothesis” provides further justification for a return to federalism in higher education. The idea that federal funding for higher education has encouraged colleges and universities to raise their prices year after year, contributing to decades of tuition inflation, was prominently presented by William Bennett, then the secretary of education, in a 1987 *New York Times* op-ed.<sup>23</sup> Today this is no longer a hypothesis but a clearly observable reality.<sup>24</sup> Additionally, federally subsidized higher education removes direct accountability for quality

on the part of universities, allowing many to graduate students without the necessary skills to compete in the job market.

Accreditation reform is badly needed to combat poor quality assurance among American universities, provide true accountability for taxpayer dollars, and open doors to innovative postsecondary education providers. The Higher Education Reform and Opportunity (HERO) Act would give states the option to exit the current accrediting structure and determine which entities could act as an accreditor in their state, simply by notifying the secretary of education.<sup>25</sup> Decoupling federal financing from accreditation would be a significant step in breaking up the higher education cartel. Additionally, allowing funds to flow to career and technical schools, as well as individual courses, would let students customize their own postsecondary experiences based on their specific needs and career goals.

### Recommendations

- Gradually reduce or phase out the federal government’s role in providing student loans for higher education.<sup>26</sup> A good starting point would be eliminating parent and graduate student PLUS loans, which are available without regard to income and are capped only at the price of attendance.
- Decouple federal financing from accreditation and allow states to set up their own systems for accrediting colleges and universities. The HERO Act provides a legislative path for this and places significant caps on the federal lending programs.<sup>27</sup>

### DEVOLVE FEDERAL EARLY CHILDHOOD EDUCATION AND CARE PROGRAMS

Despite having no constitutional authority to manage and fund nationwide early education and childcare programs, the federal government operates and pays for some 69 preschool and early childhood education subsidies across 10 federal agencies.<sup>28</sup> By



conservative estimates, these programs cost federal taxpayers approximately \$25 billion annually, and policymakers are now increasing their calls to expand early childhood education and care programs at the federal level. Major federal preschool and care programs include the Child Care and Development Block Grant, which provides federal funding to states to subsidize childcare costs for low-income families; the Social Services Block Grant, which provides daycare subsidies through the Department of Health and Human Services (HHS); and Part C of the Individuals with Disabilities Education Act, which provides federal funding to states to support preschool programs for children with special needs.<sup>29</sup>

Far and away the largest and most expensive of these programs is Head Start, which will cost taxpayers more than \$10 billion in fiscal year 2020. Federal taxpayers have spent more than \$240 billion on Head Start since it began in 1965 as the preschool component of Lyndon Johnson’s “War on Poverty.”<sup>30</sup> In 2012, HHS, which administers Head Start, released the scientifically rigorous Head Start Impact Study, which tracked 5,000 3- and 4-year-old children through the end of third grade. HHS found that Head Start had little to no sustained impact on the parenting practices or the cognitive, social-emotional, and health outcomes of participants through third grade.<sup>31</sup> Notably, on a few measures, access to Head Start had harmful effects on participating children, including worse peer relations and lower teacher-assessed math ability.<sup>32</sup> Adding to this poor track record, researchers have recently exposed systemic fraud and abuse in the Head Start program.<sup>33</sup>

The track record for government preschool programs at the state level is equally uninspiring. Researchers at Vanderbilt University recently evaluated the impact of Tennessee’s Voluntary Pre-K program, lauded by proponents as a model state-based preschool program. Vanderbilt’s randomized control trial evaluation found no significant differences between the control group and the preschool group on any achievement measures by the end of kindergarten, and a follow-up evaluation

found that there were no sustained benefits for the same children through the end of third grade.<sup>34</sup> Some studies have suggested pre-K programs may have positive longer-term, non-academic effects, but these are often either older studies, studies of specialized, highly intensive pre-K programs, or both.<sup>35</sup>

To restore federalism in education policy, Congress should phase out spending on most federal preschool and childcare programs, making space for private options and in-home care. Families have a variety of preferences and needs when it comes to early childhood education and care that the free market is better situated to meet, including the option to stay at home in their children’s earliest years—which, according to a recent Pew Research Center study, is the preference of 20 percent of mothers. Another 47 percent of mothers prefer to work part time and stay home part time when their children are young.<sup>36</sup> Government officials should avoid policies that prefer center-based care over family and in-home care. When subsidies for center-based care are provided, those funds should support individual families, enabling them to enroll their children in private preschool or childcare providers of choice, hedging against government crowding out of the private sector, and supporting a variety of options for families.

### Recommendations

- Sunset the federal Head Start program, phasing out funding over a 10-year period. Congress should similarly sunset the dozens of other federally funded early childhood education and childcare programs.
- In the interim, as long as the federal government funds early childhood education and childcare programs such as Head Start, allow states to make preschool dollars portable, following eligible children to a private preschool provider of choice.
- Lower taxes to allow families to keep more of their money and finance preschool options of choice, and enact pro-growth regulatory policies that

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enable employers to afford paid family leave for workers.

## CIVIL RIGHTS

The 14th Amendment of the Constitution states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>37</sup>

This amendment empowered the federal government to enforce civil rights—the rights to liberty and equal treatment under the law—throughout the country. Eventually these incorporated all the specific rights enumerated in the Bill of Rights, such as freedom of speech and religion, but originally protected only against acts of Congress. Unfortunately, enfranchisement of these rights was slow to come, and the federal government, especially the Supreme Court, failed to abide by the clear wording of the 14th Amendment. In the process, the federal government allowed states and local governments to treat African Americans especially unequally under the law. Only slowly did federal actions, especially through the courts, begin to whittle away at inequality in education, culminating in the Supreme Court’s decision in *Brown v. Board of Education*, which declared segregated schooling unconstitutional.<sup>38</sup> But even after that, more than a decade passed before many states and districts complied with the requirement to end de jure segregation.

The federal government has clear constitutional authority to enforce civil rights protections against state and local governments, including school districts. To best uphold federalism—allowing states to run their own systems—adjudication of alleged rights violations should primarily fall to the federal courts,

with the executive branch enforcing court orders if necessary. Courts are the first recourse for those who believe that school districts or states are violating their civil rights. It is the role of the judicial branch to weigh accusations and determine guilt or innocence. If civil rights violations are found to have occurred, then the executive branch can ensure that such violations cease. It should first, though, offer offenders an opportunity to correct any violations and act only when it is clear that a district will not reform itself and that the state will not intervene.

A major value of a restrained executive role is that it decreases the threat of overreaching, capricious, and confusing regulation interpretation. Regulations are often very difficult to understand and enforce, and they inflict substantial compliance costs on states, districts, and schools. They also risk subjugating the rule of law to the rule of bureaucracy, such as through “Dear Colleague” letters from regulators that reject constrained rulemaking processes in favor of de facto law changes through mere regulatory interpretation.<sup>39</sup>

## Recommendations

- Move civil rights enforcement responsibilities currently housed in the Department of Education, whose expertise is supposed to be in education, to the Department of Justice. Enforcing the law, including civil rights, is the core function of the Department of Justice, including the U.S. Marshall’s Service, which helped enforce the integration of the University of Mississippi and other desegregation orders.<sup>40</sup>
- Ensure regulation follows the notice-and-comment procedure. The federal government should refrain from issuing “Dear Colleague” letters, such as those regarding enforcement of sexual assault rules, and bathroom and locker room access, which have had the effect of making new regulations—and essentially law—simply by reinterpreting terms.

## NOTES

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## CITATION

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