

## **Understanding Education in the United States: Its Legal and Social Implications**

*Richard A. Epstein<sup>†</sup> & Jacob E. Gersen<sup>††</sup>*

Education is one of the most complex American industries, covering a wide range of activities, both public and private. As of 2010, there were approximately 55 million students in K–12 education. Close to 90 percent of those are enrolled in public schools, with the remaining enrolled across an array of private and religious schools, to which also must be added a growing home-school population that now numbers over 1.5 million students. On top of that lies a huge cohort of students in post-secondary education — about 15 million students of all ages — of whom about 10 percent are enrolled in for-profit institutions, whose numbers have increased about fourfold from 2000 to 2009. Of these students, just over 60 percent are enrolled in four-year degree programs. About one-quarter are in two-year institutions, and the remaining 15 percent are in shorter programs. Total expenditures at all levels of education in the United States are around \$900 billion per annum, of which about 20 percent is federal with the rest state and local expenditures. These schools, colleges, and universities are all subject to multiple layers of regulation at both the federal and state level, which in turn is subject to an overlay of judicial intervention that often has constitutional dimensions.

It is very difficult to come up with a single theme that unites these various educational efforts. But it is possible to note that there is an undertow of disquiet with respect to student performance levels found in each of these smaller systems. At the K–12 level, there are constant exhortations as to how the United States should resume its leadership throughout the world. Yet notwithstanding the massive resources devoted to this problem, the world ranking of the United States has slipped and seems to resist the wide range of initiatives designed to turn the system around. At the same time, systems of higher education in the United States are also subject to increased

---

<sup>†</sup> Laurence A. Tisch Professor of Law, New York University Law School; Peter and Kirsten Bedford Senior Fellow, Hoover Institution; James Parker Hall Distinguished Service Professor Emeritus of Law and Senior Lecturer, University of Chicago Law School.

<sup>††</sup> Professor of Law, Harvard Law School.

stress. There is no question that the huge budget cutbacks have had profound impact on the ability to run public institutions, from community colleges to the great research universities and everything in between. In response to the increased unresponsiveness of public institutions, for-profit institutions have sought to fill the gap. Yet these have been subject to charges of providing shoddy education solely to attract government funds, without which these institutions could not exist, at least not in a world where students who attend state community colleges remain eligible for such subsidies.

In putting together this conference on education, we did not restrict the topics on which people could speak and write. It is therefore no surprise that our authors addressed a wide range of issues. In listing these papers, it is perhaps easiest to divide them between those papers that address matters of K–12 education on the one hand and those which deal with higher education on the other.

On the K–12 education side, two of the papers deal with the role of nonpublic schools in K–12. William A. Fischel addresses the ability of Amish schools to provide education to their own students. Margaret F. Brinig and Nicole Stelle Garnett turn their attention to the impact that Catholic and charter schools have on their own neighborhoods. Michael Heise and Gregory C. Sisk focus on the determinants of judicial outcomes in religion cases in connection with both the Establishment and Free Exercise Clauses. Emily Buss in turn addresses the question of how parents, K–12 schools and other actors, both private and governmental, should deal with the developmental needs of students in their early life. Martha C. Nussbaum asks a similar question of how patriotism and critical thinking are best taught, primarily at the K–12 level.

Working at a more institutional level, Christopher Berry and Charles Wysong empirically examine the impact of interest group politics on the implementation of state-mandated financial equalization across school districts. Paul E. Peterson and Daniel Nadler discuss the influence of different visions of federalism on the organization of education at the K–12 level, both before and after the rise of public teacher unions during the early 1960s.

In dealing with higher education, Richard A. Epstein looks at the impact of accreditation procedures on the transfer of control of academic institutions from nonprofit to for-profit status. David Figuli and Anthony J. Guida in turn look at the effect of the Department of Education's Gainful Employment Rules on minority, low-income, and other high-risk students who enroll in both community colleges and for-profit institutions. Henry Hansmann examines the place that

endowment policies have in the management of traditional four-year colleges.

It should be perfectly apparent that these papers deal with topics that are difficult to categorize in some neat boxes. In effect, we think that this problem of classification is symptomatic of the extreme difficulties that face researchers who attempt to isolate one portion of this huge problem for their own analysis. Our knowledge of complex systems is limited, but our need to address these problems is imperative. Our hope is that these essays offer our readers some assistance in thinking their way through the present challenges that face educational systems at all levels.