



Call to 2023 National Education Finance Academy Conference

Colleagues,

The United States is defined not by race, blood, soil, religion, language, or culture, but by “the belief in the principles of equality and freedom this country stands for.”¹ As President Biden observed, “America is unique. Unlike every other nation on Earth, we were founded based on an idea. We hold these truths to be self-evident: that all people are created equal, endowed by their creator with certain unalienable rights — among them life, liberty, and the pursuit of happiness.”² This is the “promissory note to which every American was to fall heir.”³ Ours is “a nation conceived in liberty and dedicated to the proposition that all . . . are created equal.”⁴

These truths are self-evident, but not self-executing. Because We The People are not angels, but imperfect humans,⁵ government is necessary to secure our

¹ Antonin Scalia, *What Makes an American* in SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 15, 17 (Christopher J. Scalia & Edward Whelan, eds. 2017).

² Joseph Biden, REMARKS BY PRESIDENT BIDEN CELEBRATING INDEPENDENCE DAY AND INDEPENDENCE FROM COVID 19 (2021).

³ Martin Luther King, I HAVE A DREAM (1963).

⁴ Abraham Lincoln, GETTYSBURG ADDRESS (1863).

⁵ THE FEDERALIST NO. 51 (James Madison).

liberties and equality.⁶ As our leaders are not saints, but sinners, it is necessary to control the government.⁷ Therefore, a written Constitution “must first enable the government to control the governed; and in the next place control itself.”⁸

Reflecting an “obsessive distrust of government—*all* government—and [the] elevation of law into the ruling power of the state,”⁹ the National and State Constitutions limit government in two distinct ways. First, by withdrawing “certain subjects from the vicissitudes of political controversy” and placing “them beyond the reach of majorities and officials,”¹⁰ the Constitutions *confirm rights*. Second, by imposing a duty to act in a particular way,¹¹ the Constitutions, particularly the State Constitutions,¹² *create responsibilities*.¹³

These rights and responsibilities are timeless, but sometimes it is necessary to reimagine how these principles can be applied to better our society. A century ago, the National Association for the Advancement of Colored People reimagined how

⁶ DECLARATION OF INDEPENDENCE ¶ 2.

⁷ THE FEDERALIST NO. 51 (James Madison).

⁸ *Id.*

⁹ David Starkey, *MAGNA CARTA: THE MEDIEVAL ROOTS OF MODERN POLITICS 1308* (2015) (Kindle Edition) (emphasis original).

¹⁰ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

¹¹ Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 747-48 (2012).

¹² Emily Zackin, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 36-47 (2013).

¹³ William E. Thro, *Who, What, Why & How: Reimagining State Constitutional Analysis in School Finance Litigation*, 2020 B.Y.U. EDUC. & L.J. 29, 41 (2020).

equal protection rights applied to segregation,¹⁴ a process that eventually resulted in *Brown v. Board of Education*.¹⁵ A half-century ago, scholars reimagined equal educational funding as a constitutional requirement,¹⁶ a premise rejected by the Supreme Court of the United States,¹⁷ but accepted by some state high courts.¹⁸ A generation ago, advocates reimagined the State Constitutions' Education Clauses as requiring adequate education,¹⁹ a theory that launched the Third Wave of school Finance litigation.²⁰

In the third year of the third decade of the third millennium, it is again time to reimagine our rights and responsibilities. Our traditional understandings of equal protection, parental rights, free speech, religious liberty, disability rights, equitable financing, adequate education, local control, student financial aid, and debt financing are no longer sufficient to resolve the challenges of equity and excellence facing our

¹⁴ Mark V. Tushnet, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION: 1925-50* (2012).

¹⁵ *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

¹⁶ John Coons, William Clune, & Stephen Sugarman, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970); John Coons, William Clune, & Stephen Sugarman, *Education Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 313-16 (1969).

¹⁷ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

¹⁸ Following *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), high courts in Arkansas, California, Connecticut, New Jersey, Washington, West Virginia, and Wyoming reached comparable results.

¹⁹ *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989).

²⁰ William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990).

educational system. Without abandoning the rights and responsibilities contained in our Constitutions and statutes, we must find a way to reimagine those principles.

From Wednesday, April 6 to Saturday, April 8, 2023, the National Education Finance Academy will meet in Indianapolis to begin the process of reimaging our rights and responsibilities. We invite you to join us and to contribute papers and presentations addressing school finance and related issues from academic, administrative, or legal perspectives. It is our hope that our collective reimaging will result in a deeper understanding of the role of school finance issues within the rights and responsibilities framework.

William E. Thro
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