



Equality in Education Law and Policy, 1954–2010

Benjamin Michael Superfine

CAMBRIDGE

Equality in Education Law and Policy, 1954-2010

Benjamin Michael Superfine

University of Illinois Chicago



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA
www.cambridge.org
Information on this title: www.cambridge.org/9781107016927

© Benjamin Michael Superfine 2013

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2013

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data
Superfine, Benjamin Michael.

Equality in education law and policy, 1954-2010 / Benjamin Michael Superfine,
University of Illinois Chicago.

pages cm

Includes bibliographical references and index.

ISBN 978-1-107-01692-7 (hbk.)

1. Educational equalization – Law and legislation – United States – History.

2. Educational equalization – United States – History. 3. Discrimination
in education – Law and legislation – United States – History. I. Title.

KF4155.S87 2013

344.73'0709045-dc23 2012042702

ISBN 978-1-107-01692-7 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of
URLs for external or third-party Internet Web sites referred to in this publication and
does not guarantee that any content on such Web sites is, or will remain, accurate or
appropriate.

To Alison, Chloe, Estelle, and George

Acknowledgments

This book could not have been written without the help of many people.

Several people provided excellent feedback on particular chapters or drafts of this book: Alison Castro-Superfine, Suzanne Eckes, David Mayrowetz, Mark Smylie, Kevin Welner, and two anonymous reviewers provided especially extensive feedback. Their comments and advice were invaluable, and this book is significantly better for their gracious efforts. Of course, all mistakes and omissions are my own.

I am also grateful to the faculty and administration at the College of Education at the University of Illinois at Chicago for their continuing support. I am particularly grateful to Mark Smylie for his intellectual mentorship. He provided a sounding board for many of my ideas and more broadly helped me navigate the strange environment that is academia. I am also grateful to John Benjamin for his research support.

Most of the ideas in this book were developed and sharpened in several courses that I taught at the University of Illinois at Chicago. I am indebted to the undergraduate, master's, and doctoral students who have taken my classes more than they will ever know for the opportunity to discuss these ideas over and over again. My students' enthusiasm and passion for education reform are driving forces behind this book.

Last, I would like to thank my family. My wife, Alison Castro-Superfine, has been my go-to source for helping me hash through issues of teaching and learning, which are far too often ignored in works focusing on law and policy. More importantly, she has been a never-ending source of encouragement as she strategically pushed the right buttons at just the right times. Chloe, Estelle, and George kept me firmly grounded every day. I can never fully express how much all their love and support mean to me.

Frequently Used Abbreviations

ARRA	American Recovery and Reinvestment Act
AYP	Adequate Yearly Progress
CSTP	Cleveland Scholarship and Tutoring Program
ED	U.S. Department of Education
ELL	English Language Learner
ESEA	Elementary and Secondary Education Act
ESRA	Education Sciences Reform Act
Goals 2000	Goals 2000: Educate America Act
HEW	U.S. Department of Health, Education, and Welfare
HQT	Highly Qualified Teacher
IASA	Improving America's Schools Act
IDEA	Individuals with Disabilities Education Act
IEP	Individualized Education Program
IES	Institute of Education Sciences
KERA	Kentucky Education Reform Act
MCT	Minimum Competency Test
MPCP	Milwaukee Parental Choice Program
NAEP	National Assessment of Educational Progress
NDEA	National Defense Education Act
NEA	National Education Association
OSP	Opportunity Scholarship Program
OTL	Opportunity to Learn Standards
RtI	Response to Intervention
RTT	Race to the Top Fund
SFSF	State Fiscal Stabilization Fund

Contents

<i>Acknowledgments</i>	page ix
<i>Frequently Used Abbreviations</i>	xi
1. Introduction	i
2. Government, Equality, and School Reform	19
3. <i>Brown</i> and the Foundations of Educational Equality	37
4. The Maturation of Educational Equality	68
5. The Turn to Adequacy, Outcomes, and Systemic Change	100
6. Developments in Local Control	139
7. The Continuing Expansion of the Federal Role	165
8. Conclusion	196
<i>Notes</i>	217
<i>Index</i>	259

Introduction

Educational equality has long been a vital concept in U.S. law and policy. While its roots stretch back to the founding of the United States, educational equality took center stage in law and policy with the Supreme Court's decision in *Brown v. Board of Education* in 1954 and subsequent civil rights decisions and legislation.¹ Since the civil rights era, the concept of educational equality has remained markedly durable and has animated major school reform efforts, including desegregation, school finance reform, the education of students with disabilities and limited English proficiency, the various iterations of the Elementary and Secondary Education Act (ESEA) since 1965, and school choice (including charter schools and voucher policies).² This concept continues to find expression in major education policies currently being implemented that have commanded significant attention from the White House and the American public more generally, such as the No Child Left Behind Act (NCLB) and the American Recovery and Reinvestment Act (ARRA) (which is popularly referred to as the federal "Stimulus").³ As such, the concept of educational equality has dramatically transformed since *Brown* as legal and policy movements appear, evolve, disappear, and recombine.

While the transformation of such a durable and pervasive concept in law and policy is inevitable over time, an examination of it sheds light on a handful of fundamental problems that have persistently plagued large-scale school reform efforts. Although equalizing educational opportunities for students has been a central aim of education law and policy since *Brown*, such opportunities have not been realized as our understandings of the primary goals underlying schooling and, in turn, the very definition of an equal education have continually shifted. Similarly, although fundamental changes in the nature of educational governance have tracked transformations in the concept of educational equality and the underlying goals of

education, these governance changes have generally failed to achieve many of their desired effects as well. Grounded in muddled educational goals and responding only obliquely to significant problems they have faced in the past, reforms of educational governance have yielded mixed results at best and have often created a slew of unintended problems. As a result, we have devoted huge amounts of resources to law and policy efforts aimed at educational equality without achieving the significant and lasting results at scale that many of the reformers driving such changes have sought. Given such problems, we now risk taking an overly narrow, if not myopic, view of why we educate children in the United States without enough to show for our efforts.

This book accordingly examines the transformation of equality in education law and policy from *Brown* through the ARRA, the major factors influencing this transformation, and the significant problems raised by this transformation that modern school reform efforts continue to face. This examination particularly focuses on the relationship between the transformation of the concept of educational equality in legal and policy decisions, key shifts in understandings of the purposes of education underlying these decisions, and the evolution of educational governance structures. In examining such interrelated developments, this book asks several fundamental questions about the current state of education law and policy and how it got here since *Brown*: How have education law and policy reform efforts focused on equality reflected shifts in understandings of major political and social goals of education, such as supporting U.S. international competitiveness, a robustly functioning democracy, and broad-based social mobility? To what extent can these reforms serve as vehicles for supporting several different goals concurrently? How have the changing structures of educational governance, and federalism in particular, influenced (and been influenced by) the accomplishment of educational equality and these underlying goals? How has the notion of equality itself been translated in the context of such shifts? How have students' educational opportunities, which have long been dramatically unequal, ultimately been influenced by these changes? In short, this book investigates the development of equality in education law and policy in relation to major educational goals and governance structures and highlights a handful of major problems raised by these changes. This examination is particularly aimed at shedding light on how historical purposes and problems underlie more immediately visible ones that characterize current school reform efforts.

Although law and policy reform efforts have long centered on the concept of equality in a range of major domestic policy areas, such as

employment, health, housing, and voting, the concept of equality has arguably assumed its most prominent role in education. Despite its centrality and the continual waves of reform efforts associated with it, the concept of an equal education has transformed dramatically over time. When this concept took center stage in *Brown*, it was largely structured around protecting the rights of underrepresented groups.⁴ But as courts and legislatures continued to craft decisions about educational equality throughout the second half of the twentieth century and beginning of the twenty-first, the concept generally evolved into one that is situated in broad social structures and institutions. The legal and policy strategies used to address educational equality accordingly began to deal with increasingly complicated issues, grounded deeply within the workings of school systems, schools, and classroom practices, that stretch the traditional boundaries of governmental power and capability⁵ – instead of dealing largely with concerns about equal access to schools, these strategies now focus on broader issues of school and student performance, and instituting accountability mechanisms tied to such performance.⁶ As a result, many modern reforms in education law and policy have become concerned with increasing and equalizing students' demonstrated academic performance on measures such as standardized tests through the systemic restructuring of school systems.

Such transformations in equality have in turn been anchored in significant changes in educational governance. While federal courts were the primary governmental institution involved with reform efforts centered on educational equality during *Brown* and the heyday of the desegregation movement, these courts have faded into the background in this area over time.⁷ However, state courts have taken on increasingly important roles by becoming involved in school finance reform litigation in almost every state, and state legislatures and agencies have become involved in setting educational standards and holding students and schools accountable for their performance.⁸ At the same time, educational federalism underwent dramatic shifts as the role of the federal government in matters of educational equality began to grow and change with the passage of laws like the ESEA in the 1960s and its reauthorization as NCLB in 2002.⁹ Still, educational decision making has become decentralized in other respects since the 1990s. The proliferation of school choice reforms, such as charter school and voucher policies, has positioned schools and school districts as primary sites of reform and accountability, and they have empowered more parents to make decisions about which schools their children attend.¹⁰ Given such shifts in the loci of decision-making authority, “policy instruments” that

structure the relationships among educational actors have evolved as well. For example, while the federal government heavily relied on basic grant mechanisms in the 1960s to improve states' educational systems for poor students, complex accountability systems focused on school, teacher, and student performance now structure major relationships between federal and state governments as well.

Educational equality in law and policy and the underlying governance structures have similarly transformed in the context of a shifting web of broad political and social goals.¹¹ Educational and political theorists have long underscored the importance of an equal education for the operation of a robust democracy.¹² Especially during the civil rights era, reformers also framed educational equality as a key element for increasing social mobility.¹³ As highlighted by the education legislation enacted in the wake of *Sputnik*'s launch, reformers have positioned education as a needed support for international competitiveness as well.¹⁴ With the attention of policy makers and the public currently focused on globalization, conceptual links between education and international economic competitiveness have recently cast an even longer shadow over education reform efforts in debates over modern policies such as NCLB.¹⁵ Indeed, schools have consistently served as a battleground for struggles over wide-spanning social and political issues, and the legislative and judicial spheres have played key roles in these battles. This book analyzes how educational equality has transformed in light of such major changes in educational governance and goals, and the major problems still associated with these changes.

Although educational governance and goals are useful touchstones for an analysis of the transformation of equality, there are countless angles that one could potentially take in such an examination. Instead of focusing on educational goals and governance, one could highlight the significant political, economic, technological, and demographic shifts that swept through the United States since *Brown*. Alternatively, one could focus on how powerful interest groups and advocates have influenced education law and policy. Because an examination of the transformation of educational equality in law and policy since *Brown* would not be complete without discussing such changes, this book references these changes throughout. However, focusing on equality in relation to the touchstones of educational goals and governance is useful precisely because they mediate the influence of such broader shifts; as politics, economics, technology, and demographics change, so too do our notions of why schools operate and how they should be run. Examining the transformation of equality in relation to a couple of

fundamental touchstones allows for an analysis that is broad and holistic yet not overly unwieldy or unintelligible.

The focus on educational goals, governance, and their relationship with educational equality is further based on a fundamental insight about the nature of education law and policy that appeared in *Brown*. In this case, the Supreme Court famously stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required even in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has taken to provide it, is a right which must be made available to all on equal terms.¹⁶

With this statement, the Supreme Court framed educational equality, a primary target of school reform efforts for at least the following half-century, directly in relation to the public institutions responsible for governing education and its underlying purposes. As the constitutional scholar Bruce Ackerman argued, *Brown* represents a synthesis of two major strands of constitutional thought – one focused on the concept of equality that emerged in response to Reconstruction and the Fourteenth Amendment in particular, and the other on the modern functions of governmental institutions that emerged in response to the New Deal.¹⁷ Furthermore, as the educational scholars David Tyack and Larry Cuban argued, “Americans have translated their cultural anxieties and hopes into dramatic demands for educational reform.”¹⁸ While legal analyses of educational equality often ignore the range of purposes and politics underlying school reform, educational analyses often ignore the institutional complexities associated with it. This book aims at reinvigorating the fundamental insight of *Brown* that equality in education law and policy is effectively understood in relation to both governmental institutions and broad social and political purposes.

In addition to focusing on educational goals and governance as a way to make sense out of the transformation of equality, the examination in this book also emphasizes certain large-scale education reform strategies over others. This examination particularly focuses on desegregation, school finance reform, standards-based reform and accountability policies, and

school choice, which researchers have historically identified as the primary types of equal opportunity reforms in education law and policy.¹⁹ The examination also includes reform efforts in both judicial and legislative spheres involving the education of students with disabilities and English language learners (ELLs) because these types of reforms have at times dramatically altered the education law and policy landscape. However, analyses of these reforms are often folded into broader discussions about the other major types of reforms noted previously. This book also discusses several other types of education law and policy reform strategies throughout, such as the recent focus in federal education policy on conducting “scientifically based research” in education and funding reforms based on this kind of research. In this way, several laws and policies that are not directly aimed at leveraging educational equality or involve goals beyond educational equality are also included. Without an analysis of such areas and the major aspects of these reforms that do not immediately involve educational equality, this book could not present a complete picture of how educational equality has transformed. Still, the focus remains on the laws and policies involving equality that have played major roles in education since *Brown*.

The approach needed to conduct an examination that centers on educational equality, and particularly on educational governance and goals, over such a broad range of reforms is not easy. It involves an analysis of what various laws and policies say and the principles underlying their text; an understanding of courts, legislatures, agencies, and other governmental and nongovernmental entities as institutions with different characteristics that sometimes compete and sometimes cooperate; an examination of how educational laws and policies are implemented, move through various administrative levels, and ultimately influence what happens in schools and classrooms; knowledge of the political and historical contexts surrounding legal and policy reform efforts in education; and a sensitivity to how these contexts can influence understandings of educational goals that underlie these reform efforts.

This book accordingly synthesizes insights from various disciplines, including law, history, political science, and education policy. Legal opinions, statutes, and other legal texts (such as regulations and agency decisions) constitute the primary sources of evidence for this examination. As such, this book employs traditional methods of legal analysis to understand the rules and principles underlying these different texts, and to analyze how the concept of educational equality is treated in these texts in specific relation to educational goals and governance.²⁰ When examining

law and policy events that are particularly central to the major issues in this book, other sources that provide more direct insight into the reasons underlying legal and policy change are also examined. For example, the *Congressional Record* is examined to illuminate the reasons and arguments underlying legislative change, and legal briefs and court transcripts are analyzed to understand how such issues are reflected in litigation.

A range of theoretically and empirically oriented secondary sources provide additional insight into the transformation of equality. This book draws on theoretical perspectives from the study of law and political science focusing on legal and policy change, how governmental institutions influence and are influenced by such change, and the implementation of public policy across administrative levels. This literature can help explain how and why legal and policy changes in the area of educational equality occurred over time and across governmental institutions. Historical and political science research are also used to situate legal and policy changes in their particular historical and political contexts. This literature is used to create a robust picture of the environment in which these changes occurred and the major actors involved with such changes and to illustrate why changes in educational goals and governance structures have been such powerful factors influencing changes in equality.

Finally, this book draws on education policy literature to understand the concrete effects of legal and policy decisions on schools and school systems. This literature helps illustrate what these reforms have looked like in practice and how they have changed (or failed to change) conditions outside courts and legislatures. Moreover, this literature provides an evidence-based view of the concrete problems education reform efforts have faced and the problems to which changes in educational governance could have potentially responded. Together, these disciplinary perspectives facilitate a broad analysis of how the concept of equality has transformed over time in education law and policy, the major factors that have influenced its transformation across institutional environments, and the major problems that law and policy reform efforts focused on educational equality continue to face.

Such an examination of the transformation of equality in education law and policy is particularly important and timely. We are currently at a historical moment that requires a strong and holistic understanding of how the concept of educational equality has fared since *Brown*. Although education was largely a local concern for much of U.S. history, law and policy became among the most significant tools for reforming schools in the wake of *Brown*.²¹ Beginning with the desegregation movement, the

federal and state roles in education have expanded dramatically, especially in issues related to equality. And with the Supreme Court's emphasis of the importance of education in *Brown*, governmental recognition of education's importance began to grow.²² Building on this foundation, a range of legislative and judicial decisions at federal and state levels have aimed at increasing and equalizing students' educational opportunities and performance. With the acceleration of changes in educational federalism and the policy instruments used to structure the relationships among federal, state, and local governments, as exemplified by NCLB and the recent passage of the ARRA, it appears that such involvement will only intensify in the foreseeable future. Yet, despite the significant resources accompanying intensive judicial and legislative efforts to equalize educational opportunities, these efforts have often failed to achieve their goals.²³ In order to structure such ongoing efforts more effectively, it is imperative to understand how and why education law and policy have arrived at the state they are in today.

Moreover, the changing political and social contexts of school reform make such an examination more pressing than ever. The concept of an equal education has long played a central role in democratic theory and is key for facilitating social mobility in a country characterized by vast gaps in wealth and class.²⁴ While the notion of an equal education has also played a role in ideas about how to strengthen the U.S. economy, the ideas of educational efficiency and excellence have, at times, provided powerful competition to the idea of educational equality. As governmental and public attention to the place of the United States in a globalizing world only intensifies over the coming years, we risk taking an overly narrow view of the purposes and potential of school reform efforts. A nuanced understanding of how equality has transformed in education law and policy can provide an important guidepost for navigating difficult legal and policy decisions aimed at school reform in this quickly changing time.

On an even deeper level, an investigation of the transformation of equality in education law and policy has the potential to shed light on fundamental issues that lie at the heart of the modern American state. The transformation of educational equality takes place in the context of a highly fragmented legal and policy environment, laden with technical and administrative nuances, in the even larger context of a constitutional democracy composed of powerful institutions. Education itself is a legal and policy field that is highly politicized and shaped by organizations and individuals with significant economic and political stakes. Moreover, education has a limited research base and is heavily influenced by external

forces from other fields, such as health and housing. As at least a partial result, U.S. schools have long needed improvement in several respects, have commanded attention as one of the most important domestic priority areas for the future of individuals in the United States and the country as a whole, and have proven stubbornly resistant to change.²⁵ The involvement of the concept of equality heightens these stakes and pressures that already inhere in education law and policy – equality is one of the core values underlying the U.S. polity, and it has long animated fundamental issues inherent in American law and policy. When examined together, such elements of educational equality – those that are based in policy, law, governance, politics, and science – can inform us not only about how to craft education law and policy more effectively, but also about how a value core to the U.S. political order can fare as we move forward.

Although researchers have devoted significant attention to judicial and legislative involvement with particular reform efforts aimed at equalizing educational opportunities, such analyses have been limited in scope and surprisingly have not included a systematic examination of how these efforts have transformed across institutions and over time. For example, several legal, educational, and policy researchers have examined courts' and legislatures' roles in the major areas of reform aimed at educational equality, such as desegregation, school finance reform, school choice, and standards, testing, and accountability systems.²⁶ Throughout these works, researchers have identified the major goals of reform, factors influencing the formation and implementation of goals, and the outcomes of these reforms. Moreover, some recent work has focused on the importance of educational governance structures for understanding such reforms, especially in light of the recent expansion of the federal role in education.²⁷ However, these works generally do not take a bird's-eye view of education law and policy reform efforts since *Brown*. And while many of the works in this field integrate insights from legal research, they often lack significant attention to shifting educational goals and the effects of such changes on schools and classrooms. On the flip side, while educational and political theorists have devoted significant attention to developments in the purposes of education throughout U.S. history, such examinations generally have not been deeply anchored in nuanced discussions of law and policy.²⁸ Finally, few works focused on education law and policy adequately account for the influence of institutional context in their analyses.

Conducting a broad and interdisciplinary analysis is therefore necessary in order to fill gaps in existing research and shed light on major long-standing problems in this area. For example, deeply understanding recent

attempts to equalize students' educational opportunities through school finance litigation requires knowledge of how courts in these cases have begun to restructure traditional educational governance structures, which in turn requires knowledge of standards, testing, and accountability policies, which in turn requires an understanding of the shifting federal role in education, which in turn requires attention to key shifts in educational goals and their political operationalization over time. Without an analysis that traverses various reform efforts from different disciplinary perspectives, the major problems persistently associated with the transformation of equality cannot be fully appreciated. Indeed, there have been several calls for more research firmly grounded in knowledge of both education policy and the law, and this book represents an attempt to respond to this call.²⁹ In this way, this book not only is aimed at developing a nuanced and holistic map of how equality has transformed, but also responds to historical problems that persist not insignificantly because of their location at overlapping disciplinary boundaries.

OVERVIEW OF THE ARGUMENT

This book generally argues that the concept of equality in education law and policy has dramatically transformed since *Brown* was decided in 1954. This transformation has largely been driven by fundamental and interlocking shifts in educational governance and understandings of educational goals. As a result of these changes, modern education law and policy reform efforts focused on equality face a series of problems, ranging from muddled and conflicting goals to the concrete and sometimes undesirable effects of governance structures built on these goals. Despite the pervasiveness of such problems, a new approach to educational equality that is grounded in an understanding of the strengths and weaknesses of previous education law and policy reform efforts has the potential to address at least some of the major challenges.

On a more specific level, this book argues that although equality has been the focus of several different large-scale law and policy reform efforts, three major trajectories of the transformation of equality have appeared across these reforms. First, while educational equality originally was structured primarily to protect the rights of harmed groups, the concept shifted to focus on the reform of entire school systems that were built in ways that systemically produced inequalities. Second, while educational equality originally focused on educational inputs, such as access to predominantly white schools and funding, the concept shifted to focus on educational