

# Chapter 1

## Education, Inequity, and the Level Playing Field

*If all the rich and all of the church people should send their children to the public schools they would feel bound to concentrate their money on improving these schools until they met the highest ideals.*

Susan B. Anthony, Letter to Dr. Sarah R. Dolley, 1900

### The Need for Public Education

Political and social philosophers have long affirmed the need for education. In the *Republic*, Plato organizes his ideal state around an educational system. Aristotle's *Politics* proposes public education. Hellenistic, Roman, Medieval, Renaissance, and Baroque thinkers wrote about education. In the late seventeenth century, John Locke argued that the people have a right to overthrow a government that did not fulfill the purposes for which it was established—to protect natural rights to life, liberty, and property. In answer to the key question—“Who is to judge when the government needs to be replaced?” Locke replied, “The people shall judge.”<sup>1</sup> For this, they must be educated. Because Locke's *Second Treatise on Government* provided the basis of the Bill of Rights, it has played a large role in education law.

In *Some Thoughts Concerning Education*,<sup>2</sup> Locke set forth the implications of his empiricist epistemology for education. He advised parents of the class of gentlemen to educate their children at home. Although Locke did not include girls in his plan, he illustrates the educational value of absorbing games and actual activities from his observations of girls playing jacks and learning to speak French from their maids. Locke believed that both boys and girls could learn. Scorning instruction in classical languages,

Locke derided forcing children to write essays in Latin on topics beyond their childish understanding. He proposed the astonishing ideas that children should study English and modern languages, have recess, read illustrated storybooks written at their level of understanding, play with educational games and toys, and even learn to dance.

A hundred years after Locke, Mary Wollstonecraft wrote an impassioned appeal that women be accorded an education in *A Vindication of the Rights of Women*.<sup>3</sup> She thought that cultivating reason was the avenue to virtue. She disagreed with Locke on home schooling, which isolated upper-class children, although she, too, disliked the boarding schools. Ahead of her time by more than a century, Wollstonecraft recommended establishing tax-supported, coeducational neighborhood day schools, attended by children of all social classes. She envisioned children of all levels in society learning and playing together without detrimental, false distinctions based on class, wealth, and gender. She wanted teachers to use the Socratic method; she thought children should be allowed to play; and, like Locke, she was aware of developmentally appropriate practice and age-appropriate educational materials. For this, Horace Walpole called her “a hyena in petticoats.”<sup>4</sup> Her foresight was remarkable.

The question of who should provide schools and for what purposes was still unresolved in mid-nineteenth-century Britain. In *On Liberty*, John Stuart Mill advised that the government provide schooling, but only when parents were delinquent in doing so.<sup>5</sup> He feared too much uniformity if state schools became the norm. Although this is a step beyond Locke, it is a long way from establishing a right to an equal, public education. Wollstonecraft’s proposal for public, tax-supported, comprehensive day schools fifty years before was more progressive than Mill’s. In Mill’s view, public schools represented a threat to individuality, a notion perhaps worth reconsidering in this time of standards and standardized testing.

In the colonies destined to become the United States, if parents wanted a school, they hired a teacher. Or, a teacher could set up shop, collecting fees. The Old Deluder Law of 1647 in the Massachusetts Bay Colony required towns of more than fifty households to establish a school so that children might resist the snares of that Old Deluder, Satan, by being able to read the Bible. During the colonial period schooling varied widely. After unification under the United States Constitution, the United States did not establish a national system of education. The Constitution does not contain an education clause, although it does have clauses useful in education finance litigation, which guarantee rights to life, liberty, property, and the pursuit of happiness (variously phrased) in the establishment clause, the equal protection clause, and the due process clause.<sup>6</sup> However, the tenth amendment reserves all powers not delegated to the federal government to the states, including education. This stopped the

Supreme Court from regulating funding, but not from mandating desegregation and special education, nor the Congress from passing the No Child Left Behind Act. In turn, states delegated education to local school districts, which they created for that purpose. Because of this history, it is commonly held in the United States that education is a local affair, subject to local control, although there are exceptions.<sup>7</sup>

In the 1830s, Secretary of the Massachusetts Board of Education Horace Mann conceived the Common School Movement, publicizing his ideas in *The Common School Journal*. Proclaiming education “the great equalizer,” he believed that access to quality education would benefit not only the children of poor people, but also the nation, eliminating social unrest caused by the great divide between rich and poor. Mann thought this would be achieved by “common schools,” which the state, not the town, supported and regulated. He wanted to minimize religious differences by limiting religion in public schools to the “common elements” of Christianity. This move offended Catholics, since the common elements were undeniably Protestant, prompting the development of a system of private Catholic schools that remains in place today. In becoming “common schools,” public schools reduced their emphasis on religion, but did not eliminate it altogether. This remained unchanged until *Engel v. Vitale* (1959)<sup>8</sup> in New York barred school prayer under the establishment clause of the first amendment. The Constitutional commitment to separation of church and state implicit in the first amendment influenced education, but not until the second half of the twentieth century, and not without continuing opposition from the religious right.

With the spread of the Common School Movement beyond Massachusetts, education became the responsibility of states, rather than localities. Most state constitutions delegated their responsibility, including much of the funding, to local school districts, which they designated for that purpose.<sup>9</sup> This idea of local control created the inequitable school funding that persists at the beginning of the twenty-first century. In the second half of the twentieth century, states gradually assumed more control than localities over many aspects of schooling—regulating teacher education and certification, passing compulsory attendance laws, mandating curricula and testing, and, in the final decades of the twentieth century, adopting standards and high-stakes testing. States also gradually assumed a larger state share of funding, although this proportion is far from uniform. With the No Child Left Behind Act of 2001 (NCLB), the federal government assumed a larger role in regulation, imposing more federal testing, additional qualifications for teachers, and financial consequences for so-called failing schools, although without sufficient funding to cover the costs of these mandates. Federal funding has shrunk in the past several decades from highs of 7 percent

to 9 percent to lows of 4 percent to 5 percent, a figure that varies widely by district and program.

Despite the lack of an education clause in the Constitution, in 1954 the United States Supreme Court held that segregated schools violated the Fourteenth Amendment's equal protection clause. In *Brown v. Board of Education of Topeka* (1954), all nine Supreme Court justices agreed:

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 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 undertaken to provide it, is a right which must be made available to all on equal terms.<sup>10</sup>

The justices made it clear in their conclusion that this ruling was made under the Fourteenth Amendment, guaranteeing equal protection of the laws, including state laws, to all citizens of the United States, not under the due process elements of the Fifth and Fourteenth amendments. The *Brown* court concluded:

. . . in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.<sup>11</sup>

Despite their care to avoid the due process clause in *Brown*, the court issued a much-overlooked ruling, *Bolling v. Sharpe* (1954),<sup>12</sup> on the same day, which applied the due process clause to school desegregation. *Bolling* fell under Supreme Court jurisdiction since it was brought in the District of Columbia. Chief Justice Warren argued in *Bolling* that "the 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases."

But he added, “Discrimination may be so unjustifiable as to be violative of due process.”<sup>13</sup> Consequently, the court ruled that black school children in the District of Columbia could not be racially segregated in the public schools simply because the Fourteenth Amendment only applied to states. In Warren’s words:

. . . it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.<sup>14</sup>

In *Goss v. Lopez* (1975)<sup>15</sup> the court ruled that students could not be suspended without due process (a hearing), because education is a “property” protected by the Fifth Amendment.<sup>16</sup> Nevertheless, the due process clause has not been used in school finance litigation. *Goss* is consistent with *Bolling*, but the court’s 1973 ruling in *San Antonio Independent School District et al., v. Demetrio Rodriguez, et al.*,<sup>17</sup> holding that education is not a fundamental right under the Constitution is clearly inconsistent with both.

## Early School Finance Litigation

*Brown* seemed to early school finance litigators to be good precedent for equal protection of the laws in education finance, since equal protection was guaranteed in desegregation cases. In the first wave of finance cases, *Serrano v. Priest* was based on the equal protection clauses of both the United States Constitution and the California Constitution.<sup>18</sup> The California Supreme Court ruled for the plaintiffs in 1971, overturning an earlier dismissal of the charges. The court declared:

We are called upon to determine whether the California public school financing system, with its substantial dependence on local property taxes and resultant wide disparities in school revenue, violates the equal protection clause of the Fourteenth Amendment. We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child’s education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded, therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause.<sup>19</sup>

The court remanded the case to the trial court, having decided that there was sufficient cause for action. The trial commenced in 1972 and was decided in favor of the plaintiffs in 1974. The court determined that the California school finance system did not violate the Fourteenth Amendment of the federal constitution, but did violate the state constitution. This decision was appealed, and the state supreme court upheld the ruling under the state's equal protection clause in 1977. The intervening years brought the *Rodriguez* case to the Supreme Court, which forced lawyers in *Serrano* to drop the federal violation. *Rodriguez* has had a tremendous impact on school finance litigation.

In 1973, when the Supreme Court of the United States chose to overrule the Texas courts in *Rodriguez*, not only were they inequitably funded, the Texas schools involved were also segregated. Admitting that there were "substantial disparities"<sup>20</sup> established in the case, the court was unwilling to mandate a federal remedy for fear that this would involve the court in further decisions for which they felt local policy makers should be responsible. This fateful five-to-four decision declared that education was not a "fundamental right"<sup>21</sup> under the United States constitution (despite the earlier declaration in *Brown*), nor were poor children a "suspect class"<sup>22</sup> as black children were in *Brown*. Consequently, the court applied rational basis scrutiny, rather than the strict scrutiny required when a constitutional right is invoked. Under rational basis scrutiny, the state need only claim that there is some rational basis for its action. Texas claimed local control of the schools as its rational basis. Although Marshall's dissent rejected local control as a rational basis for inequitable funding, nevertheless, the controversial five-to-four decision stands as precedent. Marshall called "local control," proffered as "an excuse" for "grossly inequitable funding," a "sham."<sup>23</sup> He pointed out that there is no necessary connection between state-supplied funding and local control. Indeed, he remarked that local control was a "cruel irony" for poor districts, which had to tax at high rates to provide the bare minimum. Such districts could not choose to provide an excellent education.<sup>24</sup> Marshall also held that the clearly disparate impact of inequitable school funding violated the Civil Rights Act of 1964.

In my view, then, it is inequality—not some notion of gross inadequacy—of educational opportunity that raises a question of denial of equal protection of the laws. I find any other approach to the issue unintelligible, and without directing principle. Here, appellees have made a substantial showing of wide variations in educational funding and the resulting educational opportunity afforded to the school children of Texas. This discrimination is, in large measure, attributable to significant disparities in the taxable wealth of local Texas school districts. This is a sufficient showing to raise a substantial question of discriminatory state action in violation of the Equal Protection Clause.<sup>25</sup>

Despite Marshall's opposition, the majority ruled against any federal action in school funding. The decision in *Rodriguez* drove school funding cases into state courts. Although state courts are free to apply intermediate or strict scrutiny, they often choose rational basis scrutiny following *Rodriguez*, despite the fact that many state constitutions have education clauses that allow education to be construed as a fundamental right.

In 1984, parents and districts in Texas brought another case against school funding, under the Texas constitution, *Edgewood v. Kirby*.<sup>26</sup> The trial court ruled the Texas funding formula unconstitutional, but this ruling was overturned on appeal in 1988 in a two-to-one decision based on the Supreme Court ruling that education was not a fundamental right in *Rodriguez*. However, the Texas Supreme Court ruled unanimously that the funding formula was unconstitutional under the Texas constitution, returning to the trial court's ruling.<sup>27</sup> Then the battle between the courts and the legislature began. The situation was complicated by a provision in the Texas constitution forbidding the establishment of a statewide property tax. The plan the legislature first proposed was challenged by the plaintiff school districts and ruled unconstitutional. The second plan was challenged by wealthy districts, which would lose money, and was also ruled unconstitutional. By 1993, the legislature passed a plan providing five options for recalcitrant districts to share their wealth, which the court accepted in 1995, after more challenges, although the judge added that it needed more work and periodic updating.<sup>28</sup> This took place twenty-three years after the United States Supreme Court decision in *Rodriguez* in 1973, and twenty-six years after the original filing of *Rodriguez* in 1969.

Two weeks after the *Rodriguez* decision, the New Jersey Supreme Court issued the first ruling that declared inequitable school funding unconstitutional under the New Jersey Constitution, in *Robinson v. Cahill* (1973).<sup>29</sup> The court declared a violation of the state education clause, which mandated that a "thorough and efficient" education be provided the children of New Jersey. *Robinson v. Cahill* was followed by a long series of failed policies, more rulings, more failed policies, and more rulings before the Supreme Court judged that the solution was constitutional. The same thing happened in New York, California, and other states. Solutions often took more than thirty years to implement, cases followed cases in succession, and, in many states, there is still egregious inequality. Since *Rodriguez* had ruled out appeal to the federal constitution, subsequent cases cited state education clauses, marking a change in strategy and making a nationwide, uniform solution to the problem of inequitable school funding impossible.

Although *Brown I* laid the groundwork for federal enforcement of equal educational opportunity in integrated schools in 1954, the decision was not construed in later cases to include equitable funding. In fact,

some states in the years before *Brown I* attempted to equalize funding for segregated schools, in an effort to avoid desegregation by complying with *Plessy v. Ferguson*'s<sup>30</sup> "separate but equal" formulation. Neither did *Brown I* make clear that *de facto* segregated schools (located in the north) were unconstitutional, nor that inequitably funded schools were unconstitutional. Ordered to integrate "with all deliberate speed" in *Brown II* (1955),<sup>31</sup> states stalled on enforcing the decision. Some southern states even closed their public schools, shifting education to the private sector to avoid integration. Efforts to enforce *Brown* have been hampered by court rulings in the last half of the twentieth century that effectively overruled *Brown*. Desegregation would have required hard work over the long term to remedy a complex series of factors. Where desegregation had at least begun, mostly in the South, it has recently been undone. Schools are resegregating. In the *de facto* segregated schools in the North, schools were never desegregated.<sup>32</sup> In the 1970s, regressive rulings interfered with what progress had been made. The *Milliken v. Bradley* (1974)<sup>33</sup> decision in Detroit removed one of the most readily available remedies: busing children between districts. In *Milliken II*,<sup>34</sup> the following year, the court ordered remedial programs for the segregated Detroit Metro district. *Milliken II* disregarded the unanimous *Brown* judgment, "Separate educational facilities are inherently unequal."<sup>35</sup> Nor were the remedial programs effective. Redistricting might have offered a solution, but the suburban districts opposed it effectively on the grounds that they were not involved in the harm, so they should not be involved in the remedy. By the late 1970s, it appeared that *de facto* segregation was almost impossible to eliminate, because the court ruled out mandatory busing. In an all-black district like Detroit Metro, there were few other strategies.

Before 1989, school finance battles had gone through two stages in strategy: *Serrano* sought equality of inputs; the New Jersey cases sought equity of inputs. The Kentucky case, *Rose v. Council for Better Education* (1989), marked the beginning of a third strategy, one that focused on the adequacy of the education supplied.<sup>36</sup> The Kentucky Supreme Court, upholding the trial court, mandated that the entire state's educational system be revamped. The justices did not hesitate to set a template, although they explicitly declared the implementation of the reform to be "the sole responsibility of the General Assembly." The template proved, in time, to be the most far-reaching of those proposed by state courts and became a model for other, although often less ambitious, templates. It included seven points as follows:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;



- (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
- (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- (v) sufficient grounding in the arts; to enable each student to appreciate his or her cultural and historical heritage;
- (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently;
- (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.<sup>37</sup>

The Kentucky Supreme Court stated that these seven characteristics were “*minimum* goals” (emphasis in original) and defined “efficient” schools as “free” schools “available to all” and “substantially uniform throughout the state,” which provided “equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.”<sup>38</sup> The formulation made it clear that a mere “minimally adequate” education, such as the earlier New York cases stated, is not sufficient. Interestingly, the Kentucky case involved largely rural white children, although children of color in urban areas also benefited. Many later adequacy cases, notably the *Paynter* and *Campaign for Fiscal Equity* cases in Rochester and New York City, involved mostly urban children of color and did not fare as well as the Kentucky case.

*Paynter v. State* and *Campaign for Fiscal Equity* in New York contained an element of equity of outcomes, although it was not quite the same as the Kentucky concept of adequacy. Earlier New York decisions had specified the level of adequacy to be “minimally adequate,” enough to provide only the “sound basic education” stated in the state’s education clause. In each case, the children concerned were largely children of color. Recently, the desegregation elements of school funding cases have been abandoned, as in *United States v. Yonkers*,<sup>39</sup> in which children in segregated schools were accorded funding for remedial programs. This strategy is more reminiscent of *Plessy v. Ferguson*’s “separate but equal” than *Brown*’s “separate is inherently unequal.” The idea implies equity because children who are “difficult to educate” need more resources. Although it might be preferable not to classify children as “difficult to educate,” (which allows people to ignore root causes of the difficulty, like

poverty and racism, by blaming the victim), it is true that children who have fewer resources in their homes and communities need more in their schools. Many of these children live in poverty, are urban, recent immigrants, or members of various minority groups. In enormous districts like New York City, it is difficult to see how desegregation of the schools can be accomplished without addressing the root causes of segregation in the society. How this strategy will play out remains to be seen, although it was successful in New York's final decision in *Campaign for Fiscal Equity v. State*. Success still requires legislation that works to remedy the situation, and after that, research on effective ways to use the additional funding. In *Payner v. State*,<sup>40</sup> which failed at the Court of Appeals, a solution to either segregation or an inadequate education is not even in the offing.

### Resegregation, Doubtful Remedies, and Other Problems

During much of the twentieth century, schools in many urban areas were inadequate. Often segregated by race and class, they rarely enjoyed equal funding, let alone equitable funding affording poor children an equal educational opportunity.<sup>41</sup> This situation persists in many places. In *Board of Education of Oklahoma City Public Schools v. Dowell* (1991), the Supreme Court ruled that a school district need be declared "unitary," that is, desegregated, only once, after which it was released from court supervision.<sup>42</sup> In practical terms, this meant that districts were free to re-segregate, which happened in Oklahoma City by 1996, three years later.<sup>43</sup> In *Missouri v. Jenkins* (1995)<sup>44</sup> the United States Supreme Court ruled out using statewide taxes to create "desegregative attractiveness" to lure white students from the suburbs to magnet schools in inner cities. In consequence of these rulings, resegregation emerged in the 1990s, mostly in urban schools, more in the North than the South.<sup>45</sup> In *Sheff v. O'Neill* (1996),<sup>46</sup> the state of Connecticut ruled that the hypersegregation and economic isolation of school children in Hartford violated the state's equal protection and desegregation clauses. Alas, without busing or redistricting, remedies are hard to find.<sup>47</sup> Dennis Parker reported in 1999 that the panel appointed by the governor to make recommendations on how to implement this ruling issued a report that addressed the main problem (racial and economic isolation) in only one of its four recommendations. According to Parker, the panel suggested remedies that had already proved "ineffectual" and "lacked enforceable goals and timetables."<sup>48</sup> The Harvard Civil Rights Project reported in 2003 that Connecticut is still one of the states in which the percentage of black exposure to whites is lowest.<sup>49</sup>

*De facto* segregation is maintained, in part, because Title VIII of the 1964 Civil Rights Act, containing the fair housing law, has not been enforced. Redrawing district lines to desegregate neighborhood schools is rare.<sup>50</sup> Nor have all hypersegregation cases been decided in favor of the plaintiffs. In New York, several cases on behalf of children attending segregated urban schools have failed or been dismissed. Plaintiffs in New York's *Paynter* cases complained that the racial and economic isolation caused by the concentration of low-income housing in the city of Rochester resulted in the "wholesale academic failure" of city school children. These charges were dismissed in two stages, the trial court dismissing some, the Appellate Division the remainder. On June 26, 2003, on final appeal, the Court of Appeals upheld the dismissal of charges in *Paynter*, despite Judge George Bundy Smith's stinging dissent. Smith reviewed the history of New York's commitment to educating all children, including those born into poverty, reviewed cases in which other states declared education a fundamental right under education clauses similar to New York's, and placed blame on the state for intentionally creating the racial and economic isolation of schools in the Rochester City School District.<sup>51</sup> *Paynter* showed the Rochester City Schools violate *Brown*, but remedies for desegregation are difficult to obtain in the current political climate. The judges dismissed the charges because the funding is not inequitable, just inadequate. It doesn't compensate for segregation, which is illegal.

School choice has received attention as a remedy for schools that are "failing" according to standards set by NCLB. Charters, vouchers, and magnet schools could provide ways for parents to improve their children's education now, rather than waiting twenty or thirty years for courts and legislatures to solve the problem. Unfortunately, there are serious drawbacks to all three plans. Vouchers redirect public school money to private schools, many of them religious. If not means-tested, vouchers provide a subsidy to parents wealthy enough to send their children to private schools. They often are insufficient to cover the entire cost of a private education, which includes additional costs like uniforms, books, and transportation.<sup>52</sup> Charter schools appeal to parents who are knowledgeable about education, can provide transportation, and have time to devote to volunteering. But charter schools have yet to prove that they increase achievement or produce a "ripple effect" of improvement in public schools.<sup>53</sup> All three modes of "choice" are selective (unless run by lotteries) or may be exclusive on some grounds. They may have racial quotas; they may exclude children with disabilities; they may require parents to volunteer. They may exclude children whose grades are not good, or children requiring special education, or children who need transportation. Resources for children left behind in the unimproved neighborhood schools are diminished by "choice" plans. Furthermore, there

are not enough “choice” schools to go around. NCLB, intended to provide an exit option for parents whose children are in “failing” schools, in 2003 spawned lawsuits contesting lax enforcement in New York.<sup>54</sup> Low participation in remedies results from lack of information, lack of places to transfer children, or unwillingness on the part of parents or children to transfer far from home.<sup>55</sup> Tutoring services, for which school districts have to pay, are inadequate or unavailable. All “choice” options leave the so-called “neighborhood” schools unimproved, and with less funding to remediate their problems. Furthermore, punitive removal of funding as a “punishment” for failing schools makes no sense. Research suggests that “choice” programs will result in more social stratification, not less.<sup>56</sup>

Education, once considered the leveling device for poor people, varies in quality. Wealthy and middle-class white people have long insisted that their children receive a well-funded, quality education. Poor, minority, immigrant, urban, rural, and working-class children have faced inequitable, discriminatory schooling for centuries. In the twentieth century, a host of deliberate public policies such as redlining areas in order to deny mortgages or loans, refusing to sell housing in the suburbs to blacks, location of freeways that divide poor neighborhoods while providing easy access to the suburbs for middle-class whites, lack of enforcement of building safety codes, urban pollution, an unsafe environment, racial and economic isolation, and welfare “reform” have contributed to what has become a crisis.<sup>57</sup> Social services such as paid maternity leave, health care, day care, nutrition programs, and state-supported early childhood education programs, which could improve the lives of the increasing number of children living in poverty, are lacking. Many other industrialized countries offer such services. Fair housing laws, once prominent in political debate, have receded into the background. Even wealthy suburban neighborhoods are rarely mixed. According to Henry Louis Gates Jr., in the 2004 PBS documentary, *America Beyond The Color Line*, upper class black neighborhoods exist, but they are “self-segregated.”<sup>58</sup> More commonly, as blacks from the city move to the suburbs, neighborhoods “tip” because of white flight. What began as desegregation becomes resegregation, but in the suburbs. Inner cities have become hypersegregated, the gap between rich and poor has grown wider, child poverty has increased while the poverty level set by the federal government is absurdly low, at \$14,494 for a family of a parent and two children.<sup>59</sup> The federal minimum wage of \$5.15 per hour has not been raised since September 1, 1997; the formula dates from 1955. This is not a livable wage. Even New York’s slated increase in the minimum wage to \$7.15 an hour in 2007 is scarcely livable, although it is better. Many working Americans are now referred to as “the working poor,” at 185 percent to 200 percent of the poverty level. Workers’ productivity in the United

States has been increasing, but not their pay. As productivity goes up, so does unemployment. As unemployment goes up, those remaining employed must often accept wage cuts, longer hours, and more work to keep their jobs. In 2004, legislation threatened overtime pay; meanwhile, part-time employees at Wal-mart are forced to work off the clock but receive no benefits. The working poor get poorer and work longer hours to keep their precarious jobs, and so it goes.

In the meantime, so-called welfare reform has affected many poor families, taking mothers away from their small children without supplying adequate, affordable day care or training for jobs other than menial minimum-wage jobs.<sup>60</sup> In some cases, the “reforms” have deprived mothers of a chance to finish their college degrees or seek training for better jobs.<sup>61</sup> On the other side, people on workfare can’t make a living, nor can they lose their jobs without losing their benefits. However, the pool of low-skilled, service jobs is shrinking.<sup>62</sup> A third-world population is emerging within an affluent first-world country, which does not bode well for democracy. The impact of poverty on children is tremendous, as I shall document in chapter 5. Racism, which also abounds, is equally detrimental, as I shall document in chapter 6. Children do not choose the socioeconomic conditions of their existence, but they are treated as if they were somehow culpable. Schooling, which could address some of these disparities, fails to do so. The school-to-prison pipeline is the result.

### Lacking: The Political Will to Reform School Finance Reform

The political will to remedy social injustice seems to be lacking, although people express outrage at the status quo. Part of this is the lack of will to fix inequitable school funding. The courts have failed to enforce equal educational opportunity under the equal protection clause, following *Brown*, or under the due process clause, following *Bolling v. Sharpe*. Many factors contribute to the lack of political will. The main argument of the defendants in the *Rodriguez* case stemmed from a common belief that local control, needed to maintain local interest and support of schools, depends on local financing, although there is no necessary connection. Local financing has, in turn, traditionally depended on local property taxes, but the tax districts, whether school districts, counties, or towns, have widely varying resources. Tax burden varies inversely in proportion to the wealth of the district; poorer districts must set higher rates to provide even minimal services. State aid supposedly evens out the inequities, but this rarely works, since the aid formulae must be decided in legislatures where powerful, suburban constituencies rule. Where the state’s share of the budget is high, the funding is more equitable. The average

state share is around 50 percent. Even if states manage to fund schools equitably (and some do), inequities among the states would remain. A child's educational opportunities should no more depend on place of residence than on gender, racial or ethnic identity, socioeconomic status, immigrant status, language, handicapping conditions, or other accidental factors.

In addition to the issues of local control and property taxes, inertia, precedent, and tradition contribute to the difficulty of obtaining school finance reform. Most people are conservative by nature and like to do things as they have done them in the past. Many thinkers in the classical liberal tradition propose that people are naturally inclined to be self-interested, although others propose that perhaps they could be educated to seek the common good, or at least to be ethical in seeking their own self-interest. According to the classical liberal tradition, in addition to being self-interested, people form political factions to pursue special interests. The tax revolt in California following *Serrano* resulted in capping increases in property taxes. Proposition 13 revealed taxpayers thinking primarily of their own pocketbooks, not the common good. Now, more than twenty-five years later, California's once highly ranked schools are among the lowest. In *The Federalist Papers*, Number 10, Madison argued in the early 1790s that the new constitution will "break and control the violence of faction,"<sup>63</sup> but will not be able to change the factional nature of human beings themselves:

As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other and the former will be objects to which the latter will attach themselves. (*Federalist Papers*, 78)

According to Madison, diversity of faculties produces a differential in the ability to acquire property, which inevitably leads to diversity of interests because some people will be rich (presumably the intelligent people) and others poor (presumably the unintelligent people). From this arises the misconception that poor people are poor because they are not intelligent enough to be rich. In this conception, their poverty, since it arises from their own nature, is irremediable. Madison concluded that factions cannot be avoided, only mitigated: "The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degree of activity, according to the different circumstances of civil society" (79). The "greater variety of parties" under the new constitution, he believed, would provide security for minority rights against "local prejudices" and "schemes of injustice" (84) because permanent

factions contrary to the public good will be less likely to form in such a large group (77–78).

Unfortunately, history has proved Madison wrong. It is now apparent that “intelligence,” including that tested by pencil and paper tests, can be taught. As evidence, test scores of United States citizens in general have been rising while gaps between minority groups formerly thought to be inferior by nature and privileged white students supposed to be superior are shrinking.<sup>64</sup> Nor are the fluid, shifting groups that Madison envisioned characteristic of politics in the United States today. Contrary to Madison’s view, the two-party system is entrenched in custom; many people even believe that it is enshrined in the Constitution. Unfortunately, the right of minorities to an equitable education has become more difficult to protect, despite *Brown*, since the *Rodriguez* court refused to accord education constitutional protection as a fundamental right. Jurists, scholars, and legal writers have suggested that an implicit right to an education could be construed as supporting explicit rights granted in the constitution, such as the right to participate in the political process, the right to due process, or the right to equal protection of the laws. The right to vote in state elections is not explicitly granted, but has been supported in federal decisions concerning voting rights and reapportionment cases in state elections.<sup>65</sup> Other implicit rights include the right to procreate (or not), the right to travel, the right to desegregated schools and housing, and more. The courts could have chosen to protect the right to an education similarly, and could still define and protect the right to a “minimally adequate” education without overturning *Rodriguez*’s “absolute deprivation.”<sup>66</sup>

Education is often thought to be a conservative venture, in the traditional sense defined by Edmund Burke in his *Reflections on the French Revolution*. Burke maintains that political institutions evolve gradually through experience. Gradual change makes much more sense to him than Thomas Paine’s call for a revolution every generation if necessary. In Burke’s view, “A spirit of innovation is generally the result of a selfish temper, and confined views.”<sup>67</sup> People who attempt it are “confounded by the complication of distempered passions, their reason is disturbed; their views become vast and perplexed; to others inexplicable; to themselves uncertain” (194). Simply put, Burke warns against rocking the boat. Many educators have long seen their function as reproduction of cultural knowledge and values, rather than transformation. Perhaps because of this idea, education has changed little during the second half of the twentieth century. Many administrators are concerned with budgets and bond issues, hiring, school-community relations, buildings, and capital outlay, not innovative pedagogy or critical literacy, certainly not challenging the political and social status quo by promoting social

justice. Instead, their goal is static—to produce a few “meritocratic” leaders and a large, docile workforce. Their epistemology focuses on reproductive knowledge.

For decades the organization of schooling has remained much the same, for the most part, in spite of some advances.<sup>68</sup> Funding has undergone little real reform. Legislatures sometimes cooperate with court mandates, but often they do not. State constitutions contain some form of education clause, classified into four categories from weak to strong,<sup>69</sup> and often an equal protection clause as well, yet some states with weak clauses take strong action; others with strong clauses resist reform.<sup>70</sup> Since state legislatures rarely take up the banner of school finance reform of their own volition, plaintiffs have turned to the courts for redress. This raises arguments about separation of powers and judicial activism. Some state courts are reluctant to step into the arena of school funding policy on the grounds that this is the responsibility of the legislature.<sup>71</sup> Others are less reluctant.<sup>72</sup> The question becomes, what level of educational opportunity—minimally adequate, excellent, or something in between—should be provided to the children of a state? Should public schooling provide an equal, equitable, or differentiated opportunity? The goals of schooling determine what constitutes a quality education, an adequate education, or even a minimally adequate education. Some courts are willing to set a template for education, be it excellent, adequate, or minimal.<sup>73</sup> Others are not.<sup>74</sup> Some templates are more ambitious than others.<sup>75</sup> The questions of judicial activism and efficacy may prevent courts from setting a template either out of respect for separation of powers or fear that if they do, the legislature may refuse to act on it.

Another issue that retards reform is the cost of education and the apparent inefficiency of money spent under some circumstances. A critic of the equity movement, Eric Hanushek claims that “throwing money at the schools” has not increased test scores, so it must be ineffective.<sup>76</sup> The loaded language of this claim appeals to critics of the schools, property tax resisters, and opponents of what is regarded as excessive government intervention. But Hanushek’s view assumes that test scores provide reliable and valid evidence of effective schools. This is not always the case.<sup>77</sup> Hanushek also neglects to take into account increased expenditures on special education. He does not correct for inflation. Nor does he consider the impact of money removed from schools by magnets, vouchers, and charters. Richard Rothstein points out that spending on special education accounts for much of the increase.<sup>78</sup> In addition, Hanushek’s data does not follow a cohort of students longitudinally, but compares students in different grade levels over short periods of time. The problem with this strategy is that the effects of educational spending are cumulative. Children do not recover from lack of resources in a year.



Furthermore, even if educators agreed that tests are reliable and valid, it matters how scores are analyzed and interpreted. It also matters whether the content of tests reflects what children are learning. It is easier to test trivial “factoids” than important skills, attitudes, and processes of constructing knowledge.

In addition, there are other goals of education beyond test scores. They may be personal, such as parental and student satisfaction, personal development, happiness, or obtaining meaningful employment. They consist of acquiring kinds of knowledge, skills, and dispositions that are not on the tests—how to do science, as opposed to memorizing what is considered “normal” science at the time,<sup>79</sup> how to read and write for information and appreciation, how to think mathematically, how to interact productively and pleasantly with others, how to recognize and utilize personal strengths. These goals are not necessarily connected to test scores. Even if we adopt some rather unlovely goals that have been proposed, such as training an efficient workforce, acquiring military and technological superiority, or having a competitive economy, these are not necessarily advanced by improving test scores. The only goal that would be unequivocally confirmed by test scores is the goal of exceeding the test scores of other districts or countries. This goal also fails to address the reliability and validity of the tests, as well as the educational value of the material tested.

When the scores are disaggregated by poverty (of the children and of the district), they show clearly that money does matter in education. Many districts in the United States have not collected data that can be disaggregated to yield this information. A benefit of NCLB may be the requirement that test scores be disaggregated by race and ethnicity, but only if the data is used to provide resources where they are needed. Bruce Biddle used data sets from the Second International Mathematics Study (SIMS), Third International Mathematics and Science Study (TIMSS), and the National Assessment of Educational Progress (NAEP), in combination with figures on funding from *Education Week's* Quality Counts issues, to show that United States scores from advantaged districts are highly competitive with other nations. Indeed, advantaged United States students score below only Japan and Singapore on SIMS and TIMSS.

Unfortunately, the same is not true for disadvantaged districts, whose scores are comparable to those of Nigeria and Swaziland. Not only are there individual differences in scores between advantaged and disadvantaged children, but there are huge differences between states that spend more and states that spend less on education, as well as states where child poverty is high and those where it is low. Biddle found that school funding and child poverty together account for 55 percent of variances in state

scores.<sup>80</sup> Hanushek and others apply the business model to education—schools must be cost-effective, the bottom line is all that matters, and educated children are products to benefit the economy. But somehow these critics manage to ignore the human wastefulness of not allowing children sufficient resources to maximize their potential.

### Accomplishing Goals Requires Resources

As educational reform proceeds, it is certainly desirable to think about the goals of education. If John Dewey is right in his proposition that practice informs theory, then reforms have to be honed through practice. Reflection on what the goals of education might be, as well as how educators plan to reach them, is in order; but the value of any proposed reforms might not materialize immediately. Children's learning advances longitudinally. If we could teach them everything in one year, school would be much simpler and cheaper. In addition, many goals of schooling are not academic, but have to do with developing skills, dispositions, socialization, character, and so forth, along with knowledge. In focusing on test scores, conservatives ignore goals that are not testable in this way, many of which can and must be cultivated in schools.

Using test scores as the primary indication of success invites inappropriate, invidious comparisons among children and among schools, following a model of competition. An ideal society does not consist of individuals competing against each other to engross the most resources for themselves, either locally or globally. As Dewey says, people should want for every child what all parents want for their own children.<sup>81</sup> His definition of society supports a cooperative model. "Society is a number of people held together because they are working along common lines, in a common spirit, and with reference to common aims." Consequently, school should be a "miniature community, an embryonic society," which aims at developing a "spirit of social cooperation and community life" (302–303). Inequitable funding is incompatible with the very aim of education, just as is competitive testing aimed at rank-ordering children, rather than diagnosing their educational needs. To achieve a just society, we must value justice over expediency in our arrangements for school finance. Surely most people want to live in a community of well-educated, civil, cultured, skillful, and happy people who have a disposition to contribute to the common good, rather than in a divided, cut-throat world of haves and have-nots. Democracy does not flourish where some people have the power to advance their own self-interest and others do not.

A full list of goals for a quality education might include:

1. civility, politeness, taking turns, sharing, interpersonal relations, citizenship; the feeling that “what I do matters”; a disposition to be politically thoughtful, open-minded, and active; an understanding of others as individuals possessing equal human dignity; a disposition to respect the rights of others and to be proactive on others’ behalf, and related social skills;
2. a disposition to be thoughtfully introspective, to develop a realistic understanding of one’s self, the potentialities one possesses, and how to develop them; dispositions of attentiveness, open-mindedness, and responsiveness; an understanding of how one’s life circumstances have contributed to or detracted from one’s accomplishments; a positive attitude toward oneself and others; a disposition to care for and about others;
3. knowledge of one’s own history and that of others; an understanding that historical accounts of events vary according to the life experiences and outlooks of different peoples; an awareness and acceptance of the cultural diversity of the world; knowledge of alternative versions of history, including social history, women’s history, histories of the enslavement and liberation, working-class history, histories of imperialism, histories of religions and cultures, and related matters;
4. knowledge of reading, skills of comprehension, and critical assessment of print, nonprint, and electronic media used for pleasure and information; reading and speaking knowledge of at least one language other than one’s own and familiarity with the culture of the people speaking that language;
5. knowledge of mathematics and the role that mathematics plays in human life; an ability to solve problems mathematically, an awareness of the relationships and patterns of numbers and their explanatory and descriptive power; knowledge of the history of mathematics;
6. knowledge of the natural sciences and the role of public policy in protecting the environment; knowledge of the hard sciences and their uses in human life; an understanding of the importance of scientific knowledge in human life and an appreciation of the history of science, including an assessment of how scientific knowledge is advanced and an understanding of the contributions of many diverse scientists;
7. knowledge of politics and economics sufficient to understand and assess the impact of public policies on human beings and to inform participation in public life; sufficient knowledge of economics to make wise and ethical decisions regarding the use of personal and public funds; a commitment to social justice

- and the common good by promoting the economic well-being of all denizens of the earth;
8. physical fitness, a disposition to participate in lifetime sports and physical activities; knowledge of nutrition, exercise, and health sufficient to promote the well-being of oneself and others;
  9. knowledge of the fine arts for appreciation and production; participation in art for pleasure and expression; knowledge of the practical arts that allow people's lives to be more comfortable, safe, convenient, and aesthetically pleasing, such as rewiring appliances, basic carpentry, roofing, guttering, interior decorating, child care, management of personal finances, cooking, sewing, gardening.<sup>82</sup>

In short, ideally, children should be cooperative, sympathetic, informed, critically literate, pleasant, artistic, ethical, employable, productive, civil, social, familial, healthy, and happy. Such an expansive list of goals will cost more to accomplish than a "minimally adequate" education aiming at eighth grade proficiency. It might also seem to be subjective, but it is all too easy to forget that human beings decide what to include and what to exclude on the tests. They make up the questions, decide how to score the answers, and set the passing level on tests. Tests are not as objective as they appear.

Until choices are made concerning goals, issues like the thoroughness, efficiency, and soundness of education, cannot be assessed. How much a society is willing to pay for education limits such choices. In the early nineteenth century, a fourth-grade education was an accomplishment; later, eighth grade. During the twentieth century, high school became common. By the end of the twentieth century, some form of higher education—vocational training or college, and some graduate or professional school—became the norm for many. A standard of basic literacy and numeracy would not be particularly hard or expensive to accomplish.<sup>83</sup> But surely citizens of a democracy want a standard higher than this in a complex world where children have, on the whole, less adult supervision, and must make, as adults, more decisions requiring critical thinking skills and knowledge of complex technological, social, political, scientific, and economic issues. This means more public expense. Other demands for public resources raise the question of priorities. Conservatives assume that test scores provide an accurate measure of success, but test scores are enhanced by items that cost money: smaller classes, qualified teachers, a longer school year, individual attention, after-school care, nutrition and health programs. Such policies may contribute to better test scores, but they are also valuable for more than test scores. A