

Ghetto Education

Sarah Jane Forman*

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INTRODUCTION

We are not speaking of education in the narrower sense, but of that other education in virtue from youth upwards, which makes a man eagerly pursue the ideal perfection of citizenship, and teaches him how rightly to rule and how to obey. This is the only education which, upon our view, deserves the name; that other sort of training, which aims at the acquisition of wealth or bodily strength, or mere cleverness apart from intelligence and justice, is mean and illiberal, and is not worthy to be called education at all.

—Plato, *The Laws*¹

* University of Detroit Mercy School of Law.

1. Plato, *THE LAWS* (Benjamin Jowett trans.), <http://classics.mit.edu/Plato/laws.mb.txt>.

The important role of education in America is evidenced in compulsory school attendance laws enshrined in state constitutions and codes; it is made apparent in the vigorous and often heated debate over education reform at the state and national level; and it is endorsed in the powerful rhetoric of our highest court. However, something has gone terribly wrong in the American system of public education. Two systems of public education have emerged—one for the privileged and one for the poor. Under this paradigm, education equity, the promise of *Brown v. Board of Education*, remains unfulfilled. For the privileged, who are wealthy and mostly white, public education works just fine. Students graduate with the knowledge, ability, and ambition to achieve success across multiple domains. The poor, who are mostly urban and from historically oppressed groups, not only live in the ghetto of life but are also receiving a “ghetto education.”

I use the term ghetto education to describe a phenomenon that has multiple contributing factors but one disturbing outcome: it creates second-class citizens, undereducated at best and illiterate at worst. Ghetto education is characterized by punitive disciplinary policies that feed the school-to-prison pipeline, de facto racial and socioeconomic segregation, high-stakes testing, weak academics, and insufficient funding. It also includes a unique sense of demoralization and alienation that occurs in young people when they are consistently made to feel that they are not smart, competent, or successful. Students who are subjected to a ghetto education are disempowered and disengaged, seeking a sense of self identity through actively dis-identifying with the school and the values a liberal education promotes. A ghetto education perpetuates poverty and prepares an entire demographic of youth for life at the margins of our nation’s political, economic, and social framework.

The existence of a ghetto education crisis is evident in the numbers. Nationally, black students drop out of high school at twice the rate of their white counterparts; Hispanic students at three times the rate;² black and Hispanic students are more likely than any other

2. U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2011 66–67 (2011), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2011034>.

group to be pushed out of school via suspensions and expulsions.³ As a result of drop-out and push-out, the graduation rates for black and Hispanic youth hover around 50 percent.⁴ For those who do remain in school, the ghetto education phenomenon shapes the content of the curriculum: majority minority inner-city schools are far less likely than suburban schools to offer advanced math and college preparatory courses.

The social and long-term economic costs of ghetto education are high. Economically, higher educational attainment results in higher earnings for individuals. On average, high school graduates will earn \$130,000 more over their lifetimes than high school dropouts.⁵ The dropouts from the class of 2011 would have generated up to \$154 billion in additional earnings over their lives had they graduated from high school.⁶ Higher wages also reduce dependence on state or federal welfare and increase the tax base. Socially, drop-out, push-out, and under-education increase the likelihood that a youth will come into contact with the juvenile or criminal justice systems.

The pervasiveness of ghetto education is especially troubling in a “post-racial” America because it harkens back to the Jim Crow era, when black youth regularly received substandard education in segregated schools all across the country. Then, public education was targeted by the NAACP through institutional reform litigation because of the important role segregated, unequal education played in perpetuating the legal regime of racial subordination.⁷ Now, although

3. Ed.gov, *Civil Rights Data Collection*, U.S. DEP’T OF EDUC., <http://ocrdata.ed.gov/DistrictSchoolSearch#schoolSearch>.

4. Gary Orfield, Daniel Losen, Johanna Wald & Christopher B. Swanson, *Losing Our Future: How Minority Youth Are Being Left Behind by the Graduation Rate Crisis*, URBAN INSTITUTE (2004), <http://www.urban.org/publications/410936.html>.

5. Robert Balfanz, John M. Bridgeland, Mary Bruce & Joanna Hornig Fox, *Building a Grad Nation: Progress and Challenge in Ending the High School Dropout Epidemic*, Executive Summary at 1 (2012), <http://www.americaspromise.org/~media/Files/Our%20Work/Grad%20Nation/Building%20a%20Grad%20Nation/BuildingAGradNation2012ExecSummary.aspx>.

6. Alliance for Excellent Education, *The High Cost of High School Dropouts: What the Nation Pays for Inadequate High Schools* at 1 (Nov. 2011), <http://www.all4ed.org/files/HighCost.pdf> (retrieved Feb. 16, 2012).

7. See generally MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (2005); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* xii (2d ed. 2004).

there is significant data documenting an ever-widening achievement gap divided along lines of race and class, the discussion around education reform often skirts a frank assessment of the underlying causes of this gap. This Article addresses these underlying causes, which amount to ghetto education when grouped together. In Part I, I focus on the historical context of public education, which has important implications for my proposed reforms and policy initiatives. Part II examines the ghetto education phenomenon in its component parts and looks at how these components affect student socialization in detrimental ways. Part III argues for the constitutionalization of education equality. I set forth a national legislative agenda that includes the creation of a fundamental right to education and the repeal of No Child Left Behind.

I. OF FOUNDERS AND FREEMEN

“Only the educated are free.”

—Epictetus

The debate over public education in this country is not new—it was a debate that first took root among the founding fathers of the American Republic. Many notable figures, including Thomas Jefferson, Noah Webster, and Benjamin Rush, participated in the public discourse of their day extolling the merits of a national system of public education. The founding fathers fancied education as the ultimate prophylactic against monarchic tyranny.⁸ Likewise, those

8. Although Jefferson was one of the first American leaders to suggest creating a public school system, it must be noted that his ideas about who should receive that education were probably somewhat limited. Jefferson did educate some of his female slaves, but he certainly did not envision the modern system of compulsory public education for all citizens. SAMUEL EAGLE FORMAN, *THE LIFE AND WRITINGS OF THOMAS JEFFERSON* 195 (1900) (discussing Thomas Jefferson's plans for public education contained in his 1779 Bill for the More General Diffusion of Knowledge). *See also Hannah*, THOMAS JEFFERSON'S POPLAR FOREST, <http://www.poplarforest.org/jefferson/plantation-life/slave-bios/hannah> (last visited Nov. 18, 2012) (noting that “[a]rcheologists [have] discovered pieces of a writing slate at a slave quarter [at Thomas Jefferson's villa retreat, Poplar Forest], suggesting that at least one resident was literate”). Jefferson did develop a plan for the public education of slaves; this plan provided that the educated slaves would then be emancipated and relocated, at public expense, to a colony in “such place as the circumstances of the time should render most proper.” FAWN MCKAY BRODIE, *THOMAS JEFFERSON: AN INTIMATE HISTORY* 50 (W. W. Norton & Co. 1998) (1974).

who were systematically excluded from the public discourse, such as slaves, also viewed education as a necessary condition of freedom because the denial of education for blacks was a part of the chattel slavery system.⁹ Illiterate slaves dreamt of freedom, and freed slaves dreamt of education.¹⁰ This Part examines the nature of this historical discussion because it raises themes that are still relevant today, such as how we characterize the role of public education in our society.

A. Ye Olde Deluder Satan

Government-directed public education in the United States has its roots in a series of legislative measures passed into law by the Massachusetts Bay Colony General Court beginning in 1642.¹¹ The act and its subsequent amendments required local townships of fifty households or more to establish and maintain schools to “teach students to read and write in order to prevent ye old deluder Satan from keeping the people ignorant of the Scriptures.” The “old deluder Satan” law allowed for the collection of local taxes to finance the mandated educational services.¹² Although schooling itself was not compulsory, municipalities were fined if they did not create a system of education that was available to the public as set forth in the act.¹³ Interestingly, the act also provided for the education of servants.¹⁴

9. CARTER G. WOODSON, *THE EDUCATION OF THE NEGRO PRIOR TO 1861* 151–78 (Julie Kehrwald ed., 1919).

10. Anthony Farley, *No Exit*, CHANGING LIVES THROUGH LITERATURE, <http://cld.umassd.edu/Issuessentencing3.cfm>. In *Brown v. Board of Education*, the Supreme Court found that racial segregation in public schools deprived schoolchildren of equal educational opportunities in violation of the Equal Protection Clause of the Fourteenth Amendment. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See also the cases consolidated under that heading: Delaware: *Belton v. Gebhart*, 87 A.2d 862 (Del. Ch. 1952); South Carolina: *Briggs v. Elliot*, 132 F. Supp. 776 (E.D. S.C. 1955); Virginia: *Davis v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 149 F. Supp. 431 (E.D. Va. 1957); Washington, D.C.: *Bolling v. Sharpe*, 347 U.S. 497 (1954).

11. KERN ALEXANDER & RICHARD G. SALMON, *PUBLIC SCHOOL FINANCE* 7 (1995).

12. *Id.*

13. See *McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E. 2d 516, 529–30 (Mass. 1993) (outlining the history of public education in Massachusetts and describing the terms of the 1647 legislation).

14. Slavery was not practiced among the puritans of the Massachusetts Bay colony although servants were common. See DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 341–42 (1988); see generally GEORGE H. MOORE, *NOTES ON THE HISTORY OF SLAVERY IN MASSACHUSETTS* (1866).

The Massachusetts school laws were the first of their kind in the English-speaking world, and with their passage, the regulation of education in America began.¹⁵ In the end, these laws were not successful in deluding Satan entirely, but the bifurcated funding structure (divided between state and local authorities) they introduced remains largely intact today.¹⁶ Although the colonial legislature was primarily motivated by religious concerns, these concerns included the creation of moral citizens who could not only read and write but who were also knowledgeable of the law and “fitted for the university.”¹⁷ The law demonstrates that “the Massachusetts colonialists believed from the outset that an educated populace was vital to good government and social welfare.”¹⁸ On a normative level, this law transformed education from a private privilege into a civic obligation to be undertaken by the government.¹⁹ “The Puritans quite deliberately transferred the . . . functions of the family to formal instructional institutions, and in so doing not only endowed schools with a new importance but expanded their purpose”²⁰ Other colonies, including Connecticut, Pennsylvania, and New York, passed similar legislation prior to 1700.²¹ Further south, in colonies

15. Although during the same time period several European powers adopted some form of public education law. *See generally* ELLWOOD P. CUBBERLEY, *THE HISTORY OF EDUCATION* 304–43 (2004); HENRY BARNARD, *3 NATIONAL EDUCATION IN EUROPE: BEING AN ACCOUNT OF THE ORGANIZATION, ADMINISTRATION, INSTRUCTION, AND STATISTICS OF PUBLIC SCHOOLS OF DIFFERENT GRADES IN THE PRINCIPAL STATES* (2d ed. 1854).

16. “Frederick the Great, a Prussian emperor, who was considered an enlightened ruler, established a public education system in the early 1800s. After Prussia united with Germany to form a more powerful state, other European countries began establishing public education systems.” Gerry Riposa, *Urban Universities: Meeting the Needs of Students*, 585 *ANNALS* 51, 53 (2003).

17. GEORGE ALEXANDER OTIS ERNST, *BOSTON FINANCE COMMISSION, A CHRONOLOGY OF THE BOSTON PUBLIC SCHOOLS* 5 (1912).

18. Denise A. Hartman, *Constitutional Responsibility to Provide a System of Free Public Schools: How Relevant is the State’s Experience to Shaping Governmental Obligations in Emerging Democracies?*, 33 *SYRACUSE J. INT’L. & COM.* 95, 102 (2005).

19. Prior to this act, education in Europe and Colonial America was primarily a private endeavor; most individuals were homeschooled in reading, writing and mathematics. *See* GEORGE R. CRESSMAN & HAROLD W. BENDA, *PUBLIC EDUCATION IN AMERICA: A FIRST COURSE* 21–23 (1956); MILTON GAITHER, *HOMESCHOOL: AN AMERICAN HISTORY* 19 (2008) (noting “the home was the basis for nearly all colonial education”); Kara T. Burgess, Comment, *The Constitutionality of Home Education Statutes*, 55 *UMKC L. REV.* 69, 69–70 (1986).

20. BERNARD BAILYN, *EDUCATION IN THE FORMING OF AMERICAN SOCIETY* 27 (1960).

21. LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE COLONIAL EXPERIENCE 1607–1783* 124–27 (1970).

including Virginia, Georgia, and the Carolinas, education remained a private enterprise.²² Virginia Governor Sir William Berkely espoused the laissez-faire attitude toward education embraced by these colonies in 1671 when he wrote that Virginia's approach to education was "the same . . . that is taken in England out of towns; every man according to his own ability in instructing his children."²³

However, by the final decades of the eighteenth century, attitudes toward education began to change, even in the South. Over a hundred and fifty years after the old deluder Satan act was enacted, the Revolutionary War had transformed the relationship between the people and their government. Citizens replaced subjects; republicanism replaced colonialism; democracy replaced monarchy; and, at least in theory, egalitarianism replaced elitism.²⁴ Influenced by enlightenment thinkers such as Jean Jacques Rousseau, who in 1758 stated that "public education . . . is one of the fundamental rules of popular or legitimate government," many prominent American thinkers touted public education as critical to the new nation's ability to maintain a republican form of government.²⁵ In 1778, as Governor of Virginia, Thomas Jefferson proposed legislation to transform the delivery of education in his state.²⁶ *A Bill for the More General Diffusion of Knowledge* set forth Jefferson's comprehensive plan for a statewide system of education at the public's expense. The bill provided:

[T]he indigence of the greater number disabling them from so educating, at their own expense, those of their children whom

22. EDGAR WALLACE KNIGHT, PUBLIC EDUCATION IN THE SOUTH 41 (1922).

23. WAYNE J. URBAN & JENNINGS L. WAGONER, JR., AMERICAN EDUCATION: A HISTORY 22–23 (McGraw-Hill ed., 2d ed. 2000).

24. See generally CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 71–72, 149–51, 188, 325 (Macmillan Co. 1921) (1913) (arguing that the language of equality and egalitarianism contained in the Constitution is empty rhetoric utilized to create an abstraction that the document was created "by the people" when, in fact, it was created by and served the economic interest of the wealthy, white male property holders who wrote it).

25. Jean Jacques Rousseau, *A Discourse of Political Economy*, 1758 in THE SOCIAL CONTRACT AND DISCOURSES 269 (J.M. Dent & Sons ed., G.D.H. Cole trans., 1920). John Locke also believed that education should not be limited to the upper classes. See generally JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION (1693).

26. 2 THE PAPERS OF THOMAS JEFFERSON 526–27 (Julian P. Boyd, Charles T. Cullen, John Catanzariti, Barbara B. Oberg et al. eds., Princeton Univ. Press 1950).

nature hath fitly formed and disposed to become useful instruments for the public, it is better that such should be sought for and educated at the common expense of all, than that the happiness of all should be confided to the weak or wicked.²⁷

Jefferson strongly valued the principles contained in his public education bill, writing to his legal mentor George Wythe:

I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised, for the preservation of freedom and happiness Preach, my dear Sir, a crusade against ignorance; establish & improve the law for educating the common people. Let our countrymen know that the people alone can protect us against these evils [tyranny, oppression, etc.] and that the tax which will be paid for this purpose is not more than the thousandth part of what will be paid to kings, priests and nobles who will rise up among us if we leave the people in ignorance.²⁸

Although never fully enacted by the Virginia House of Delegates, the ideas contained in Jefferson's bill both exemplified and influenced the thinking of many eighteenth century proponents of public education. For example, in 1785, Georgia legislator Abraham Baldwin, like Jefferson, developed a comprehensive education plan that resulted in the creation of a state university.²⁹ In the preamble to the university's charter, Baldwin echoed Jefferson's earlier sentiments:

When the minds of the people in general are viciously disposed and unprincipled, and their conduct disorderly, a free government will be attended with greater confusions and evils more horrid than the wild, uncultivated state of nature. It can

27. FORMAN, *supra* note 8, at 195.

28. 10 THE PAPERS OF THOMAS JEFFERSON 224 (Julian P. Boyd, Charles T. Cullen, John Catanzariti, Barbara B. Oberg et al. eds., Princeton Univ. Press 1950).

29. See CHARLES COLCOCK JONES, BIOGRAPHICAL SKETCHES OF THE DELEGATES FROM GEORGIA TO THE CONTINENTAL CONGRESS 6-7 (Repring Co. 1972); *History of UGA*, UNIV. OF GEORGIA, <http://www.uga.edu/profile/history/> (last visited Nov. 20, 2012).

only be happy when the public principles and opinions are properly directed, and their manners regulated. This is an influence beyond the reach of laws and punishment and can be claimed only by religion and education.³⁰

Baldwin would go on to represent Georgia at the Constitutional Convention of 1787.³¹ He was one of several framers of the Constitution who strongly believed in government's duty to provide education.

In 1786, the year before the Constitutional Convention, Benjamin Rush, one of the signers of the Declaration of Independence and later a delegate to the convention, wrote an essay addressed to the legislature and citizens of Pennsylvania in which he proposed a state system of public education that would be funded by county taxes.³² Rush saw public education as an investment in future prosperity and stability. He argued that the expense of providing public education was less than that associated with administering justice to those whose "vices and punishments are the fatal consequences of the want of a proper education in early life."³³ Like Jefferson and Baldwin, Rush believed that public education "is favorable to liberty. A free government can only exist in an equal diffusion of literature. Without learning, men become savages, and where learning is confined to a few people, we always find monarchy, aristocracy, and slavery . . . [public education] promotes just ideas of laws and government."³⁴

Other prominent founders also placed great value in the concept of public education. James Madison, Jefferson's close friend and architect of the Constitution, shared Jefferson's reverence, if not his passion, for public education. "The best service that can be rendered to a Country, next to that of giving it liberty," wrote Madison, "is in diffusing the mental improvement equally essential to the

30. See JONES, *supra* note 29, at 6–7.

31. *Id.* at 8.

32. See generally Benjamin Rush, *A Plan for the Establishment of Public Schools and the Diffusion of Knowledge in Pennsylvania; to Which are Added, Thoughts upon the Mode of Education, Proper in a Republic*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* (Frederick Rudolph ed., Harvard Univ. Press 1965).

33. *Id.* at 7.

34. *Id.* at 3–4.

preservation, and the enjoyment of the blessing.”³⁵ Likewise, John Adams wrote that “whenever a general knowledge and sensibility have prevailed among the people, arbitrary government and every kind of oppression have lessened and disappeared in proportion.”³⁶ In his 1796 farewell address, George Washington declared that “[Americans must] promote among them, as an object of primary importance, institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force of public opinion, it is essential that public opinion be enlightened.”³⁷

But even though influential, these leaders extolled the virtues of “the general diffusion of knowledge” during the early years of the republic; other pressing issues loomed much larger in their conscience as they began the work of nation-building.³⁸ Perhaps due to the impassioned advocacy of proponents of public education such as Baldwin and Rush, “in the [Constitutional] Convention proceedings, Virginia’s James Madison and South Carolina’s Charles Pinckney proposed to vest congress with power to establish a university . . .”³⁹ It is no surprise then that the document that emerged from this process does not mention education or the diffusion of

35. James Madison, *Letter to Littleton Dennis Teackle*, March 29, 1826; in *ADVICE TO MY COUNTRY* 42 (David B. Mattern ed., Univ. Press of Va. 1997).

36. JOHANN N. NEEM, *CREATING A NATION OF JOINERS: DEMOCRACY AND CIVIL SOCIETY IN EARLY NATIONAL MASSACHUSETTS* 26 (2008).

37. WASHINGTON’S FAREWELL ADDRESS, New York Public Library Collection, available at http://avalon.law.yale.edu/18th_century/washing.asp.

38. The Constitutional Convention of 1787 was tasked with amending the Articles of Confederation (interestingly, not drafting a new constitution, although that is what ended up happening). The federal government was very weak under the Articles of Confederation; it did not even have the power to tax. Much of the debate at the Philadelphia convention revolved around how to create a representative government and the extent of the power that the federal government should have. James Madison, *Notes on Hamilton’s Speech to the Constitutional Convention on June 13, 1787*, in 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 282–83 (Max Farrand ed., Yale Univ. Press 1967); James Madison, *Journal of the Constitutional Convention of 1787*, in 3 *THE WRITINGS (1787)*, available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1935&chapter=118621&layout=html&Itemid=27.

39. JOHN R. VILE, *THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA’S FOUNDING* 516 (2005). Many of the same concerns are still very much alive and a part of the current debate around education reform. During the 2012 Republican primary, for example, several candidates raised the idea of abolishing the Department of Education. Alicia DeSantis, Ford Fessenden, Kevin Quealy, Archie Tse, Lisa Waananen & Derek Willis, *Republican Presidential Candidates on the Issues*, N.Y. TIMES, available at <http://elections.nytimes.com/2012/primaries/issues#issue/education>.

knowledge, even though some contemporaneous state constitutions did.⁴⁰

As compared to the Articles of Confederation, the Constitution of the United States greatly expanded federal powers, which was controversial at the time.⁴¹ Anti-Federalist opponents, such as Patrick Henry, feared that the Constitution created a centralized government with too much power.⁴² Therefore, political expediency dictated that only the functions most indispensable to creating a cohesive federal governance structure (taxing, spending, interstate regulation, common defense, etc.) were specifically enumerated.⁴³ Education did

40. *See, e.g.*, MASS. CONST.

41. The Constitution gives the federal government limited powers, including the power to tax, the power to spend, and the power to regulate interstate commerce. U.S. CONST., art. I, § 8. The Tenth Amendment makes it clear that any power not expressly delegated to the federal government by the Constitution remains with the states. U.S. CONST. amend. X. Anti-Federalists believed that the delegates to the Constitutional Convention did not have the authority to create a new governing document because their charge was limited to amending the Articles of Confederation. James Madison and the Federalists believed otherwise, and were successful in building support for the Constitution, which was essentially based on Madison's "Virginia Plan." VILE, *supra* note 39, at 21, 814–19.

42. In a speech given at the Virginia ratifying convention on June 4, 1788, Patrick Henry expressed his concerns with the Constitution:

If you make the citizens of this country agree to become the subjects of one great consolidated empire of America, your government will not have sufficient energy to keep them together. Such a government is incompatible with the genius of republicanism. There will be no checks, no real balances, in this government. What can avail your specious, imaginary balances, your rope-dancing, chain-rattling, ridiculous ideal checks and contrivances? . . . This Constitution is said to have beautiful features; but when I come to examine these features, sir, they appear to me horribly frightful. Among other deformities, it has an awful squinting; it squints towards monarchy; and does not this raise indignation in the breast of every true American? . . . Your President may easily become king. Your Senate is so imperfectly constructed that your dearest rights may be sacrificed by what may be a small minority; and a very small minority may continue forever unchangeably this government, although horribly defective.

THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 208–17 (Ralph Ketcham ed., Signet Classics 2003).

43. Given the general distrust many Revolutionary War veterans and their contemporaries had for centralized authority, the framers would have had difficulty building a consensus around a document that included education as a government function. Therefore, the powers of the federal government are "few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which . . . the power of taxation will for the most part be connected." THE FEDERALIST NO. 45 (James Madison). The states' powers "extend to all the objects, which, in the ordinary course of affairs, concern the lives,

not make the cut. Because education is not specifically provided for, most legal scholars and the Supreme Court view it as a power within the province of the states under the Tenth Amendment.⁴⁴ However, like many issues that were a source of tension and debate during the founding period, discussion about the role of the federal government in public education continued long after the Constitution was ratified in 1789.⁴⁵

In 1790, Noah Webster proposed a national system of public education because he believed “[t]he education of youth is, in all governments, an object of first consequence.”⁴⁶ Webster implored Americans to “frame a liberal plan of policy and build it on a broad system of education.”⁴⁷ The system of education he envisioned “gives every citizen an opportunity of acquiring knowledge and fitting himself for places of trust. These are fundamental articles; the *sine*

liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.” *Id.*

44. The Tenth Amendment to the Constitution provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. *See also* Willson v. Black Bird Creek Marsh Co., 27 U.S. 245 (1829) (holding that states retain the power to regulate commerce as long as the state law does not conflict with federal law); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (limiting Congress’s power to regulate industry under the Sherman Act by drawing a distinction between manufacturing and interstate commerce); United States v. Butler, 297 U.S. 1 (1936) (striking down the Agricultural Adjustment Act as an unconstitutional exercise of the taxing power in violation of the Tenth Amendment); New York v. United States, 505 U.S. 144 (1992) (invalidating a federal environmental law on federalism grounds); United States v. Lopez, 514 U.S. 549 (1995) (finding that the federal Gun-Free School Zones Act of 1990 went beyond constitutional limitations on federal power to regulate interstate commerce); Printz v. United States, 521 U.S. 898 (1997) (holding that the Tenth Amendment prevents Congress from forcing states to enact or administer federal programs). *But see* Susan H. Bitensky, *Legal Theory: Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U.L. REV. 550, 630 (1992). “Original intent, as gleaned from the evidence described above, supports the interpretation that there is an implied power over education delegated by the Constitution to the federal government.” *Id.* Furthermore, this author believes there is also an argument to be made that there is a federal duty to support education based on Article IV of the Constitution, which “guarantee[s] to every State in this Union a Republican form of Government,” and the Necessary and Proper clause in Article I, Section 8, Clause 18. This will be discussed in more detail *infra* Part III.

45. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 14 (Ralph Ketcham ed., Signet Classics 2003).

46. Noah Webster, *On the Education of Youth in America*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* 43 (Frederick Rudolph ed., Harvard Univ. Press 1965).

47. *Id.* at 77.

qua non of the existence of the American republics.”⁴⁸ Like Benjamin Rush, Webster saw public investment in a “good system of education” as an effective way to “preserve morals,” thereby reducing dependence on the criminal justice system to correct the corrosive effects of a “bad system.”⁴⁹ Revolutionary War veteran and intellectual Robert Coram, a less famous contemporary of Webster and Rush, published an essay in 1791 that also advanced the case for a national system of free compulsory education.⁵⁰ Under Coram’s plan, schools would be supported by a general tax. Coram believed that a national system of public education was “a duty which every man owes to his posterity, to his country, and to his God . . . this is the rock on which [America] must build [its] political salvation.”⁵¹

In 1795, the American Philosophical Society sponsored an essay contest seeking proposals for a national system of public education.⁵² The prize for best essay was shared by Samuel Harrison Smith and Reverend Samuel Knox. Both men linked a national design of public education to the American republic’s long-term prosperity and ability to attain public happiness.⁵³ Like their previously discussed

48. *Id.* at 66.

49. *Id.* at 23.

50. Robert Coram, *Political Inquiries: to Which Is Added, a Plan for the General Establishment of Schools throughout the United States*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* 79 (Frederick Rudolph ed., Harvard Univ. Press 1965) (1791).

51. *See* Coram, *supra* note 50, at 125. Like his contemporaries, Coram thought public education was essential to support and maintain a republican form of government. But Coram’s arguments are more egalitarian than those of Rush or Webster; he was very concerned with the poor and dispossessed. He devotes an entire chapter refuting Blackstone’s theory of property rights. In refuting Blackstone, he recognized that “the unequal distribution of property was the parent of almost all disorders of government.” Coram contended that exposing this “important truth” was beneficial because it created “a foundation whereon to erect a system . . . of equal education.” *See id.* at 111.

52. Benjamin Justice, “*The Great Contest*”: *The American Philosophical Society Education Prize of 1795 and the Problem of American Education*, 114 *AM. J. OF EDUC.*, 191 n.2 (2008). The American Philosophical Society was founded by Benjamin Franklin in 1743 and had many of the founding fathers as members, including George Washington, John Adams, Thomas Jefferson, Alexander Hamilton, Thomas Paine, Benjamin Rush, James Madison, and John Marshall. *See About the APS*, AMERICAN PHILOSOPHICAL SOCIETY, <http://www.amphilsoc.org/about> (last visited Nov. 20, 2012).

53. “[W]isdom itself, in its greatest extension, would, if universally diffused, produce the greatest portion of general happiness.” Samuel Smith, *Remarks on Education*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* 176 (Frederick Rudolph ed., Harvard Univ. Press 1965). “In a course or system of national education, there ought to be two and I think, but two great leading objects to which it should be adapted, the improvement of the mind and the attainment

contemporaries, Smith and Knox characterized public education as essential to a republican form of government because of its “intimate connection” to civil liberty and freedom.⁵⁴ “The citizen, enlightened,” wrote Smith, “will be a free man in its truest sense. He will know his rights, and he will understand the rights of others; discerning the connection of his interests with the preservation of these rights, he will as firmly support those of his fellow men as his own.”⁵⁵ A national system of education, then, is not just about learning to read and write—public education is also citizen education. These thinkers recognized public education as a conduit for normative socialization.⁵⁶ In addition, they believed the public had an interest in subsidizing this process on a national level because that is the only

of those arts on which welfare, prosperity, and happiness of society depend.” Rev. Samuel Knox, *Liberal Education*, in *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* 79 (Frederick Rudolph ed., Harvard Univ. Press 1965).

54. Knox, *supra* note 53, at 311; Smith, *supra* note 53, at 219. “Is it a question with any man whether our liberties are secure? Let him know that this knowledge depends upon the knowledge of the people and that this knowledge depends upon a comprehensive and energetic system of education.” Smith, *supra* note 53, at 219.

55. Smith, *supra* note 53, at 220.

56. “[D]oes not the conduct of children in a public institution in a considerable degree resemble the actions of men in the world?” Smith, *supra* note 53, at 209. “Nothing, then, surely might be supposed to have a better effect towards harmonizing the whole in [morals and literature] than an *uniform system of education*.” Knox, *supra* note 53, at 311. “Our schools of learning, by producing one general and uniform system of education, will render the mass of the people more homogenous and thereby fit them more easily for uniform and peaceable government.” Rush, *supra* note 32, at 10. “[T]he only way to make good citizens is to nourish them from infancy . . .” Coram, *supra* note 50, at 126.

The objects of this primary education [university education] determine its character and limits. These objects would be To give to every citizen the information he needs for the transaction of his own business; To enable him to calculate for himself, and to express and preserve his ideas, his contracts and accounts, in writing; To improve by reading, his morals and faculties; To understand his duties to his neighbors and country, and to discharge with competence the functions confided to him by either; To know his rights; to exercise with order and justice those he retains; to choose with discretion the fiduciary of those he delegates; and to notice their conduct with diligence, with candor and judgment; And, in general, to observe with intelligence and faithfulness all the social relations under which he shall be placed. To instruct the mass of our citizens in these, their rights, interests and duties, as men and citizens, being then the objects of education in the primary schools, whether private or public, in them should be taught reading, writing and numerical arithmetic, the elements of mensuration . . . and the outlines of geography and history.

Report of the Commissioners for the University of Virginia, August 4, 1818, in THOMAS JEFFERSON WRITINGS 459 (Peterson, Merrill Peterson ed., Library of Am. 1984).

way to assure equality among economic classes, something they deemed necessary to the sustenance of liberty.⁵⁷ As Jefferson observed: “the farmer . . . will see his children educated, and the face of his country made a paradise by the contributions of the rich alone.”⁵⁸

As president, Jefferson actively supported the federalization of education by proposing a constitutional amendment that would explicitly give the federal government power over education.⁵⁹ In his second annual address to Congress in 1805, he proposed that surplus federal revenue be used for “the improvement of roads, canals, rivers, education and other great foundations of prosperity and union under the powers which congress may already possess, or such amendments of the Constitution as may be approved by the states.”⁶⁰ Although some scholars interpret this as proof that framers such as Jefferson recognized the limitations placed on direct federal involvement in education by the Tenth Amendment, many of Jefferson’s actions as president indicate otherwise. He signed multiple bills setting aside vast amounts of federal land for public universities, colleges, and common schools, including the bill that founded the West Point Military Academy.⁶¹ These actions “[inaugurated] a policy by which the national government has aided states to establish and maintain school systems.”⁶² These actions (many of which were continued by James Madison, Jefferson’s successor) support the proposition that “there is an implied power over education delegated by the Constitution to the federal government.”⁶³ I will return to the issue of constitutional authority in Part III. For now it is sufficient to highlight

57. See, e.g., Coram, *supra* note 50, at 125 (“In monarchies education should be partial and adapted to each class of citizen. But in a republican government . . . the whole power of education is required. Here every class of people should know and love the laws.”) (quoting Noah Webster, *supra* note 46, at 65).

58. Thomas Jefferson, *Letter to Monsieur Dupont de Nemours April 15, 1811*, in THOMAS JEFFERSON’S VIEWS ON PUBLIC EDUCATION 352 (John Cleaves Henderson ed., 1890).

59. See *id.*; FRANK BOURGIN, THE GREAT CHALLENGE: THE MYTH OF LAISSEZ-FAIRE IN THE EARLY REPUBLIC 45, 140–45 (1989).

60. Jefferson, *supra* note 58, at 351–52.

61. *Id.* at 353–54.

62. *Id.* at 354.

63. Bitensky, *supra* note 44, at 630 (finding support for implied federal authority over education in the Due Process clause, the Free Speech clause, the implied right to vote, and the Privileges and Immunities clause of the Constitution).

the profound significance the founders placed on public education, the zeal with which they sought to make it a national priority, and their explicit recognition of a nexus between education and republican citizenship.

B. Dreams of Our Fathers

It is also important to recognize that the egalitarian ideals advanced by early supporters of public education became inconsistent hyperboles when applied to groups without the social and economic standing of Jefferson, Washington, and Madison. These were, after all, wealthy, white, slaveholding men who built a republic on a document that divested their African brethren of the basic liberties which they themselves so greatly prized. As Thurgood Marshall observed in 1987:

When the Founding Fathers used [the phrase “We the People”] in 1787, they did not have in mind the majority of America’s citizens. “We the People” included, in the words of the Framers, “the whole Number of free Persons.” On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes at three fifths each.⁶⁴

Needless to say, the aforementioned plans for a national system of public education did not address the education of slaves.⁶⁵ The notion would have been preposterous because slaves were considered property, denied the franchise, and generally unable to avail themselves of the rule of law.⁶⁶ Pro-education arguments regarding citizen education and political socialization were inherently moot.

64. Thurgood Marshall, *Remarks at The Annual Seminar of the San Francisco Patent and Trademark Law Association* (May 6, 1987), http://www.thurgoodmarshall.com/speeches/constitutional_speech.htm. In this speech, Marshall describes the Constitution as “defective from the start.”

65. Webster and Rush both discuss the importance of female education, as did Jefferson. There is some indication that Jefferson supported the idea of public education for slaves and their descendants. See David Reed, *Jefferson Advocated Slave Education*, *FREE LANCE-STAR*, Mar. 7, 1998, at B2.

66. ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 22 (2004).

However, if, as Webster confidently stated, “[i]nformation is fatal to despotism,” then it is fatal to bondage as well.⁶⁷ Uneducated slaves toiled under the petty despotism of their masters: never knowing liberty, unable to freely pursue happiness—oppressed, to a large degree, by ignorance.⁶⁸ “All slaveholders agreed that the thinking slave was a potentially rebellious slave.”⁶⁹ Therefore, the intellect of black Americans was denigrated by both custom and law.⁷⁰ Most slaveholding states outlawed slave education.⁷¹ A North Carolina law, passed in 1830, provided:

Whereas the teaching of slaves to read and write has a tendency to excite dissatisfaction in their mind, and to produce insurrection and rebellion . . . any free person who shall hereafter teach or attempt to teach, any slave within this state to read or write, or shall sell to such slave or slaves any books or pamphlets, shall be liable to indictment in any court of record in this state.⁷²

67. Webster, *supra* note 46, at 65.

68. “Learning would *spoil* the best nigger in the world. . . . [I]f you teach that nigger (speaking of myself) how to read, there would be no keeping him. It would forever unfit him to be a slave.” FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 35 (H.G. Collins 1881) (quoting his master Mr. Auld when he discovered that Mrs. Auld was teaching young Douglass to read). Later, Douglass describes the impact education had on his awareness regarding the condition of slavery: “the more I read, the more I was led to abhor and detest my enslavers.” *Id.* at 41. “The educational process during slavery was not designed to empower but rather was designed purposefully to make and maintain slaves as a subservient class to Anglo Americans.” Donald Aquinas Lancaster, Jr., Comment, *The Alchemy and Legacy of the United States of America’s Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African American Reparations*, 43 HOW. L.J. 171, 185 (2000).

69. Denise C. Morgan, *What is Left to Argue in Desegregation Law? The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 102 (1991) (quoting RICHARD KLUGER, *SIMPLE JUSTICE* 28 (1975)).

70. HEATHER ANDREA WILLIAMS, *SELF TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM* 1 (2005).

71. See EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 561 (1976) (discussing repressive laws against teaching slaves to read and write in South Carolina, Georgia, Alabama, and Missouri); C. WOODSON, *THE EDUCATION OF THE NEGRO PRIOR TO 1861*, 151–78 (1919) (describing opposition to education of blacks); TESIS, *supra* note 66, at 11–12, 19, 22, 106 (describing the anti-education slave codes in the South and poor whites’ support for such laws).

72. WILLIAMS, *supra* note 70, at 8–9.

Some laws even went so far as to criminalize the sale of writing materials to slaves.⁷³ Slaveholders also threatened, intimidated, and brutally punished slaves whose literacy was exposed.⁷⁴

Repressive laws and private intimidation were employed because education, and the literacy that resulted, threatened the institution of slavery itself.⁷⁵ The undeniable connection between literacy and freedom caused fear among slaveholders and hope among the enslaved.⁷⁶ Many slave narratives describe the great value placed on education by early black Americans.⁷⁷ “Education is a calling into

73. GENOVESE, *supra* note 71, at 803.

74. WILLIAMS, *supra* note 70, at 2–7, 11–12 (describing a variety of incidents involving severe physical punishment including lynching, whipping, cutting off fingers, or selling off family members); LEWIS CLARKE, INTERESTING MEMOIRS AND DOCUMENTS RELATING TO AMERICAN SLAVERY AND THE GLORIOUS STRUGGLE NOW MAKING FOR COMPLETE EMANCIPATION 80 (1969). According to Clarke:

I did not dare to learn. I attempted to spell some words when a child. One of the children of Mrs. Banton [his owner] went in, and told her that she heard Lewis spelling. Mrs. B. jumped up as though she had been shot. “Let me ever know you to spell another word, I’ll take your heart right out of you.” I had a strong desire to learn. But it would not do to have slaves learn to read and write. They could read the guideboards. They could write passes for each other. They cannot leave the plantation on the Sabbath without a written pass.

Id.

75. WILLIAMS, *supra* note 70, at 13 (“southern lawmakers linked black literacy to [slavery’s] demise”).

76. *Id.*; David Walker, *Walker’s Appeal, in Four Articles; Together with a Preamble, to the Coloured Citizens of the World, but in Particular, and Very Expressly, to Those of the United States of America, Written in Boston, State of Massachusetts (Sept. 28, 1829)*, available at <http://docsouth.unc.edu/nc/walker/walker.html> (“The bare name of educating the coloured people, scares our cruel oppressors almost to death.”).

77. See generally FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE (H.G. Collins 1881) (describing how he used food to bribe the poor white boys in his neighborhood to give him reading lessons until he learned enough to read the newspaper himself); HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL (Dover Publications 2001) (recounting how her grandmother, a freed slave, taught reading and writing to her grandchildren before they were old enough to work on the plantation); MARY PRINCE, THE HISTORY OF MARY PRINCE: A WEST INDIAN SLAVE NARRATIVE (Penguin Books 2000) (explaining how literacy gave her the courage and ability to seek freedom).

Mrs. Auld, she very kindly commenced to teach me the A,B,C . . . Mr. Auld found out what was going on, and at once forbade Mrs. Auld to instruct me further. . . I now understood what had been to me a most perplexing difficulty—to wit, the white man’s power to enslave the black man.

FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 35–36 (H.G. Collins 1881).

freedom, a calling out of objecthood. The slave is not called. The slave is not free. The slave is an object.”⁷⁸ Yet, even from the depths of objecthood, the basic human longing for knowledge and freedom could not be suppressed. “As slave owners and legislators suspected, African Americans, free and slave, designed all manner of strategies to elude the laws against learning.”⁷⁹ Therefore, in spite of constant repression, W.E.B. DuBois estimated that in 1860, on the eve of the Civil War, nearly 5 percent of American slaves were literate.⁸⁰ Some commentators suggest this figure may have been greater.⁸¹ Regardless of the exact figure, what emerges is the fact that a significant number of people overcame nearly insurmountable obstacles to educate themselves. It is a testament to the ingenuity, dedication and desperation of the slave seeking a way out of objecthood.

Education happened in hidden places, late-night vigils, stolen moments peeking through the schoolhouse window, or chance encounters with willing whites, either too young to know better or too low-spirited to care.⁸² The black American fixation with education took root during the dark days of slavery, through an “intricate web of secrecy” that was maintained, for the most part, by the sheer will of those involved.⁸³ Just as the founders recognized that education was a sufficient condition for freedom, so did these enslaved men and women. Like Thomas Jefferson, they looked “to the diffusion of light

78. Anthony Paul Farley, *Perfecting Slavery*, 36 LOY. U. CHI. L.J. 225, 253 (2005).

79. WILLIAMS, *supra* note 70, at 12.

80. CAROL CAMP YEAKY & RONALD D. HENDERSON, 1 SURMOUNTING ALL ODDS: EDUCATION, OPPORTUNITY, AND SOCIETY IN THE NEW MILLENNIUM 5 (2003).

81. GENOVESE, *supra* note 71, at 556.

82. *Id.* at 806–07 (providing examples of the clandestine ways in which slaves learned). “Elijah P. Marr recalled an old plantation slave who had taught others after ten o’clock at night . . . More commonly, slave children who had to carry the books of white children to school would sit outside, listen, and try to keep up with the lessons.” *Id.*

Some slaves hid spelling books under their hats to be ready whenever they could entreat or bribe a literate person to teach them. Some turned to white children, too young to understand that they violated the slave code, or to poor white men who did not care. . . . In exchange for writing lessons, G.W. Offley fed a white boy whose father had gambled away the family’s money. . . . James Fisher gave an old man money in exchange for his writing lessons.

WILLIAMS, *supra* note 70, at 11–14.

83. WILLIAMS, *supra* note 70, at 12.

and education as the resource most to be relied on for ameliorating the conditions, promoting the virtue and advancing the happiness of man.”⁸⁴ As Frederick Douglass put it, “[when a slave becomes literate] there would be no keeping him. It would forever unfit him to be a slave.”⁸⁵ Jefferson and the founders sought freedom from the tyranny of an unelected monarch; slaves sought freedom from the tyranny of objecthood and bondage.

The final end of chattel slavery in America came in the spring of 1865 with the surrender of the Confederate Army.⁸⁶ The former slaves, now all free people, could openly seek what had been hidden. “The desire for education everywhere exploded, for freedmen, as for the slaves before them, it represented the keys to the kingdom.”⁸⁷ In addition, the newly freed were eager to accept the rights and responsibilities of citizenship, even welcoming taxes as the “first assurance” that the government would protect their rights.⁸⁸

If the national Government had the power to put down Slave Insurrections, hunt fugitive slaves over state lines, [and] protect slavery in the states while slavery existed, it has the right to assist in the education and improvement of the newly emancipated and enfranchised citizens, now that Liberty has become the base line of the Republic and the fundamental law of the land.⁸⁹

Following the war, many states held freedmen’s conventions, which provided free black people with a forum to express their ideas about a future beyond slavery.⁹⁰ Education and citizenship were recurring themes that dominated the discussion at these conventions; indeed some conventions specifically identified the promotion of

84. THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON (Andrew A. Lipscomb & Albert E. Bergh eds., Thomas Jefferson Memorial Ass’n 1903).

85. DOUGLASS, *supra* note 68, at 35.

86. *See generally* JAY WINK, APRIL 1865: THE MONTH THAT SAVED AMERICA 310–31 (2001).

87. GENOVESE, *supra* note 71, at 565.

88. *Education of the Freedmen*, in 101 THE NORTH AMERICAN REVIEW 528, 540 (1865).

89. MARY FRANCES BERRY & JOHN W. BLASSINGAME, LONG MEMORY: THE BLACK EXPERIENCE IN AMERICA 261–67 (1982).

90. *See generally* PHILIP S. FONER & GEORGE E. WALKER, PROCEEDINGS OF THE BLACK NATIONAL AND STATE CONVENTIONS, 1865–1900 (1986).

education as a goal.⁹¹ For example, at the 1865 Freedman's Convention in North Carolina, speaker after speaker addressed the audience about education and equality before the law.⁹² Attendees at the 1866 Georgia Convention formed the Georgia Equal Rights and Educational Association, which became important to grassroots political organizing in that state.⁹³ Delegates from the 1865 South Carolina Convention engaged in a public protest against their limited access to education, disenfranchisement, the exclusion of their testimony from courts of law, and other rights associated with full citizenship.⁹⁴

This was a time of founding for black America. The principles announced at the freedmen's conventions became part of Reconstruction's framework. However, unlike the founding of the republic nearly a century before, everyone at the freedmen's conventions wanted to promote general education, although the implementation of such a plan proved difficult. In 1865, the Freedmen's Bureau was established with the purported goal of providing aid, protection, and education, and quickly went about creating freedmen's schools.⁹⁵ Essentially, the Bureau assumed oversight of schools that had already been established by freedmen's aid societies in the confederate states.⁹⁶ The efforts of the Bureau to educate ex-slaves became a cornerstone of black Americans' transition from objecthood to personhood during Reconstruction and set the stage for many of the substantial gains in sociopolitical equality during this time.⁹⁷ Armed with literacy and knowledge,

91. *Id.*

92. See generally *Minutes of the Freedman's Convention, Held in the City of Raleigh, on the 2nd, 3rd, 4th and 5th of October, 1866*, DOCUMENTING THE AMERICAN SOUTH, <http://docsouth.unc.edu/nc/freedmen/freedmen.html> (last modified Dec. 03, 2001).

93. EDMUND L. DRAGO, BLACK POLITICIANS AND RECONSTRUCTION IN GEORGIA: A SPLENDID FAILURE 28–29 (1992).

94. LESLIE A. SCHWALM, A HARD FIGHT FOR WE: WOMEN'S TRANSITION FROM SLAVERY TO FREEDOM IN SOUTH CAROLINA 182 n.143 (1997).

95. PAUL SKEELS PEIRCE, THE FREEDMEN'S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION, 3 THE STATE UNIV. OF IOWA STUD. IN SOC. ECON. POL. & HIST., no.1, 59–69 (1904). The full name of the agency was The Bureau of Refugees, Freedmen, and Abandoned Lands and was established within the War Department. *Id.*

96. ENCYCLOPEDIA OF AFRICAN-AMERICAN EDUCATION 175–76 (Faustine C. Jones-Wilson et al. eds., 1996).

97. ERIC FONER, FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION

blacks could seek office, vote, gain employment, accumulate income, property, and participate in the economic and civic life of the nation.

“The schoolhouse served overt political functions” as well as teaching basic academics.⁹⁸ Teachers engaged in citizen education and instilled a sense of self-worth in students.⁹⁹ Schools provided a forum for black leaders to give political speeches and were often the site of voter registration by Bureau agents.¹⁰⁰ To some extent, this was true as

[d]ata from original documents show the bureau was extremely successful in establishing schools throughout the former slave states. . . . [N]early two-thirds of southern blacks lived in a county with at least one bureau school. . . . the Freedmen’s Bureau schools can explain up to 38% of the increase in black literacy from emancipation until 1870.¹⁰¹

Because of education’s connection to the realization of black equality, citizenship, and economic and political power, “many southerners believed the black school was as potent a force for social change as black suffrage.”¹⁰²

Many of the social and political gains made by black Americans during Reconstruction were short-lived.¹⁰³ The Freedmen’s Bureau was shut down in 1872, and supervision of the 4,329 schools under its control was transferred to the National Bureau of Education.¹⁰⁴ However, education remains an enduring legacy of the Bureau and of

129 (2006). “By the early 1870s, biracial democratic government, something unknown in American history, was functioning effectively in many parts of the South, and men only recently released from bondage were exercising genuine political power.” *Id.*; see also *id.* at 143–44 (highlighting the progressive nature of constitutions produced by the Reconstruction convention, which explicitly recognized equality in all areas of public life including public education, prisons and public assistance for the poor).

98. JACQUELINE JONES, *SOLDIERS OF LIGHT AND LOVE: NORTHERN TEACHERS AND GEORGIA BLACKS 1865–1873* 77 (Univ. of Ga. Press 2004).

99. *Id.*

100. *Id.* at 80.

101. William Frank Troost, *Accomplishment and Abandonment: A History of the Freedmen’s Bureau Schools* (Ph.D. dissertation, University of California, Irvine, 2007).

102. JONES, *supra* note 98, at 78.

103. See generally ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877* (1st Perennial Classics ed. 1988).

104. PEIRCE, *supra* note 95, at 82.

the Reconstruction process itself.¹⁰⁵ The freedmen's schools were the foundation of the state public school systems created in the South during this period.¹⁰⁶ In addition, the Bureau built and supported institutions of higher education that would later become the historically black colleges and universities we know today.¹⁰⁷ Although these efforts resulted in a comprehensive institutional framework for black education, the promise of public education as an equalizing force failed to materialize as the quality of black education deteriorated under Jim Crow. The seeds of ghetto education had been sown; it would be well into the next century before the promise would be seriously revisited on a national level.

II. *BROWN*, INTERRUPTED

“The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of values on which our society rests, long has been recognized by our decisions. . .”

—Justice Powell, *Ambach v. Norwick*¹⁰⁸

The Civil War may have brought freedom, but formal equality was Reconstruction's unfinished business. In the aftermath of Reconstruction, a majority of states guaranteed a right to education in their constitutions.¹⁰⁹ Black education became subsumed within the

105. The Reconstruction Amendments are the most commonly celebrated legacies of Reconstruction. “The federal Congress drafted the Reconstruction Amendments and they were ratified by the several states in 1865 (Thirteenth Amendment), 1868 (Fourteenth Amendment), and 1870 (Fifteenth Amendment), respectively.” Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1067 (2011).

106. DONNA L. DICKERSON, *THE RECONSTRUCTION ERA: PRIMARY DOCUMENTS ON EVENTS FROM 1865 TO 1877* 31 (Greenwood Press 2003).

107. ENCYCLOPEDIA OF AFRICAN-AMERICAN EDUCATION, *supra* note 96, at 176.

108. 441 U.S. 68, 76 (1979).

109. *See, e.g.*, MISS. CONST. of 1868, art. VIII, § 1 (“As the stability of a republican form of government depends mainly upon the intelligence and virtue of the people, it shall be the duty of the Legislature to encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement, by establishing a uniform system of free public schools, by taxation or otherwise, for all children between the ages of five and twenty-one years, and shall, as soon as practicable, establish schools of higher grade”); LA. CONST. of 1868, tit. VII, art. 135 (“All children of this state between the years of six and twenty-one shall be admitted to the public schools or other institutions of learning sustained or established by the

state public education systems, rendering it vulnerable to Jim Crow's regime of de jure racial subordination in the South and de facto segregation in the North.¹¹⁰ Although the doctrine of separate but equal was endorsed as constitutionally adequate by the Supreme Court in *Plessy v. Ferguson*,¹¹¹ those subjected to its mandate knew the truth—that separate was fundamentally unequal.

Nowhere was this more apparent than in public education where black schools lacked even basic supplies.¹¹²

The public education that was provided for Blacks in the Jim Crow South was very specifically tailored not to produce “separate but equal” citizens with essentially equal abilities to produce knowledge and obtain wealth. Schools were designed to produce laborers who knew the skills necessary for

state in common, without distinction of race, color, or previous condition.”); S.C. CONST. of 1868, art. X, § 10 (“All the public schools, colleges and universities of this state, supported in whole or in part by the public funds, shall be free and open to all the children and youths of the State, without regard to race or color.”); TEX. CONST. of 1868, Art. VII, § 3; FONER, *supra* note 103.

110. See FONER, *supra* note 103, at 422, 589; see also Paul D. Carrington, *Lawyers Amid the Redemption of the South*, 5 ROGER WILLIAMS U. L. REV. 41, 59 (1999) (citing John Hope Franklin, *Jim Crow Goes to School: The Genesis of Legal Segregation in Southern Schools*, 58 S. ATLANTIC Q. 225 (1959)); Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 UCLA L. REV. 677, 685–86 (1997); Carlton Waterhouse, *Avoiding Another Step In a Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law From 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207, 236 (2006).

111. 163 U.S. 537 (1896).

112. See Marian Wright Edelman, *Young People Standing Up for Themselves and for Our Nation*, HUFFINGTON POST (Dec. 2, 2011), http://www.huffingtonpost.com/marian-wright-edelman/young-people-standing-up_b_1125631.html. Edelman describes the experiences of Barbara and Joan Johns, who attended a segregated school in Prince Edward County, Virginia. According to Joan:

Most of the school supplies that we got were torn and tattered, and we didn't have enough supplies to write with. The school we went to was overcrowded. Consequently, the county decided to build three tarpaper shacks for us to hold classes in. A tarpaper shack looks like a dilapidated black building, which is similar to a chicken coop on a farm. . . It was a very difficult setting for trying to learn. And I remember we were always talking about how bad the conditions were but we didn't know what to do about it.

Id.

rudimentary work within a subordinated labor force but who had no knowledge essential to obtain higher incomes.¹¹³

Instead of citizen education, students in these schools received something so impoverished, so devoid of substance that it created second-class citizens—undereducated at best, and functionally illiterate at worst.

The socializing power of education was brought to bear, but not in the way the founders or the freedmen had imagined. Rather than “rendering the mass of people . . . more homogenous and thereby fit . . . for uniform and peaceable government,”¹¹⁴ segregated education inculcated inferiority. Rather than “unlocking a golden door of freedom,”¹¹⁵ it locked black youth into a repressive political, social, and economic order.¹¹⁶ Rather than orienting young minds towards citizenship and civic engagement, Jim Crow education oriented youth toward the apathetic resignation of second-class citizenship and civic disenfranchisement. Today, ghetto education does the same. Below, I discuss three of the dominant ingredients in the fowl stew of ghetto education.¹¹⁷ These include resegregation, harsh disciplinary practices

113. James W. Fox, Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 HOW. L.J. 113, 150–51 (2007).

114. Rush, *supra* note 32, at 10.

115. GEORGE WASHINGTON CARVER: IN HIS OWN WORDS 62 (Gary R. Kremer ed., 1991).

116. BERRY & BLASSINGAME, *supra* note 89, at 261–67.

117. The other major structural factor that contributes to ghetto education, which I will not address here, is inequality in public school funding and the host of issues that flow from the resulting lack of resources in low-income areas, including high student to teacher ratios, poor nutrition, and inadequate books, technology and other educational materials. I do not address this issue for three reasons: first, I believe that resegregation and high-stakes testing have a stronger direct socializing impact on youth; second, the issue of school funding disparities is very complex, state-specific and would require more attention than I can adequately provide here; and third, because this issue has been examined very adeptly by many other scholars and commentators. For in-depth and insightful discussions around inequality in public school funding, see John C. Reitz, *Public School Financing in the United States: More on the Dark Side of Intermediate Structures*, 1993 B.Y.U.L. REV. 623 (1993); Lex Urban, Connecticut Coalition for Justice in Education Funding v. Rell: *What is an Equitable Solution to Public School Funding?*, CATH. U. L. REV. 203 (2007); Laurie Reynolds, *Skybox Schools: Public Education as Private Luxury*, 82 WASH. U. L.Q. 755 (2004); Albert H. Kauffman, *The Texas School Finance Litigation Saga: Great Progress, Then Near Death by a Thousand Cuts*, 40 ST. MARY'S L.J. 511 (2008). See also National Education Law Center, *Is School Funding Fair? A National Report Card* (June 2012), EDUCATION LAW CENTER, <http://www.schoolfundingfairness.org/> (last visited Nov. 20, 2012).

and high-stakes testing. As part of this discussion, I will discuss the socializing influence of these factors and highlight how they contribute to the overall lack of citizen education.

A. *The New Separate and Unequal*

*Brown v. Board of Education*¹¹⁸ is the next important stop on the historical continuum because it seemed to finally deliver on the promise of equality. *Brown* is a much discussed and often celebrated turning point in American public education.¹¹⁹ “Probably no case ever

Additional factors that exacerbate, if not create, ghetto education include housing instability, inadequate physical and mental health care, community violence, and other trappings of poverty. For a more detailed analysis of the impact of poverty on children’s ability to learn, see Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1472–79 (2007).

The impact of poverty on children’s readiness for learning is profound. Children from low-income households are more likely to have severe vision impairments, hearing problems, untreated cavities, exposure to lead dust and poisoning, and/or asthma, all of which affect their ability to learn. For example, “children with vision problems have difficulty reading and seeing what teachers write on the board,” and “asthma keeps children up at night, and, if they do make it to school the next day, they are likely to be drowsy and less attentive.” Influences during pregnancy also affect children from poverty backgrounds. Their mothers are more likely to partake in harmful prenatal behaviors such as binge drinking and smoking, which cause babies to be born prematurely or with low birth weights. “Low-birth-weight babies, on average, have lower I.Q. scores and are more likely to have mild learning disabilities and attention disorders.” Lack of food, lack of adequate housing, and residential mobility also affect children’s performance in school. In 2002, not less than “2% of children from low-income families seem to have experienced real hunger at some time in the year.” Inadequate housing often deprives children of quiet study space and contributes to frequent moves and, therefore, a high mobility rate for lower-class children.

Rebell, *supra* (quoting RICHARD ROTHSTEIN, *CLASS AND SCHOOLS* 37–42 (2004); Jeanne Brooks-Gunn & Greg J. Duncan, *The Effects of Poverty on Children*, THE FUTURE OF CHILDREN, Summer/Fall 1997, at 55; Whitney C. Allgood, *The Need for Adequate Resources for At-Risk Children* (Econ. Policy Inst., Working Paper No. 277, 2006), available at <http://www.epinet.org/workingpapers/wp277.pdf>; Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, CIVIL RIGHTS PROJECT HARVARD UNIV. 28 (2003), available at <http://www.civilrightsproject.harvard.edu/research/res03/AreWeLosingtheDream.pdf>).

118. 347 U.S. 483 (1954).

119. See, e.g., Mark A. Graber, *The Price of Fame: Brown as Celebrity*, 69 OHIO ST. L.J. 939 (2008); Michael W. Combs & Gwendolyn M. Combs, *Revisiting Brown v. Board of Education: A Cultural, Historical-Legal, and Political Perspective*, 47 HOW. L.J. 627 (2004); Kevin D. Brown, *Brown v. Board of Education: Reexamination of the Desegregation of Public Education from the Perspective of the Post-Desegregation Era*, 35 U. TOL. L. REV. 773 (2004);

to come before the nation's highest tribunal affected more directly the minds, hearts, and daily lives of so many Americans."¹²⁰ While *Brown* created a legacy of equality that still lives on, its promise seems to have been broken or perhaps never even fulfilled.¹²¹ In the years since *Brown*, many of the gains in educational equality ushered in by that decision have been lost.¹²² Essentially, there has been a de facto resegregation of many school districts across the country in the nearly sixty years since the decision.¹²³ Today, most inner-city school districts service primarily low-income communities of color where students attend intensely segregated schools.¹²⁴

Karl A. Cole-Frieman, *A Retrospective of Brown v. Board of Education: The Ghosts of Segregation Still Haunt Topeka, Kansas: A Case Study on the Role of the Federal Courts in School Desegregation*, 6 KAN. J.L. & PUB. POL'Y 23; Mark V. Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173 (1994); Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1910 (1991).

120. Charles V. Willie, *The Social and Historical Context: A Case Study of Philanthropic Assistance*, in *THE EDUCATION OF AFRICAN-AMERICANS* 7, 23–24 (Charles V. Willie, Antoine M. Garibaldi & Wornie L. Reed eds., 1991) (quoting Richard Kluger).

121. Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994) (arguing that "*Brown* was directly responsible for only the most token forms of Southern public school desegregation.").

122. See Bryan L. Adamson, *A Thousand Humiliations: What Brown Could Not Do*, 9 SCHOLAR 187, 188 (2007) ("Even measuring the *Brown v. Board of Education* decisions by the most modest standard is to acknowledge a dream not realized. While *Brown* represented, most unequivocally, a blow to segregation in public schools, some fifty years later, many public schools have become racially identifiable again.").

123. Danielle R. Holley, *Is Brown Dying? Exploring the Resegregation Trend in Our Public Schools*, 49 N.Y.L. SCH. L. REV. 1085, 1086 (2005).

A 2004 study by the Harvard Civil Rights Project ("CRP") entitled *Brown at 50: King's Dream or Plessy's Nightmare?* identifies the trend towards resegregation in American public schools. CRP notes that schools are more segregated today than they were twenty years ago, and that the trend towards resegregation continues. CRP also notes that the percentage of African American students attending majority white schools peaked in 1988 at 43.5%. By 2001, the number of African American children attending majority-white institutions had declined to 30.2%, the lowest level since 1968. CRP reports that by the 2000–01 school year, the average white student was attending a school that was 79% white. The average African American student was attending schools that were approximately 54% African American and 30% white.

Id. at 1086–87.

124. See *Civil Rights Data Collection*, U.S. DEP'T OF EDUC., <http://ocrdata.ed.gov/DistrictSchoolSearch#schoolSearch>. A review of the data from large urban school districts such as Boston, Dallas, Los Angeles, New York, Detroit, Atlanta, Chicago, Baltimore, and the District of Columbia reveals that most of these districts are majority-minority, meaning that blacks and Latinos are well over half the population. Some, such as Detroit, Los Angeles, New York, and

The myriad of factors that contribute to resegregation are beyond the scope of this Article,¹²⁵ but what must be noted is that segregation patterns are worsening over time.¹²⁶ The significance of intense resegregation is captured in the words of Chief Justice Earl Warren, *Brown*'s author: "separate educational facilities are inherently unequal."¹²⁷ Although the Court has drawn a distinction between the de jure segregation of *Brown* and the de facto segregation of ghetto education,¹²⁸ the "troubling truth" of segregation exists in both situations.¹²⁹ That is, regardless of how it is effectuated, segregation "perpetuates racial hierarchy through its unequal distribution of resources."¹³⁰ However, it must be noted that the resegregation of ghetto education is not just racial—it is also socioeconomic.¹³¹

For example, under the current system of segregation, "most black and Latino students never receive similar opportunities, similar peer groups, or any real chance to connect with and learn how to operate comfortably in middle class white institutions and networks."¹³² These students are woefully unprepared for college because of a lack of qualified teachers in critical areas and a dearth of classmates interested in or able to take advanced pre-college courses.¹³³ Racial and economic isolation in public education deprives youth of exposure to a world beyond the ghetto. Without this exposure or access to opportunity, transitioning out of poverty is extremely difficult. These youth are expected to pull themselves up by their bootstraps; the problem is, they don't even have boots. "For those

Chicago, have a large number of hyper-majority-minority schools, meaning that minorities make up 90–100 percent of the student population.

125. Many scholars link segregation in education to segregation patterns in residential housing. See, e.g., Richard H. Sanders, *Housing Segregation and Housing Integration: The Diverging Paths of Urban America*, 52 U. MIAMI L. REV. 977 (1998).

126. Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge*, THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES AT UCLA (2009), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf>.

127. 347 U.S. at 495.

128. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

129. Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 30 (2008).

130. *Id.*

131. Orfield, *supra* note 126, at 14–15.

132. *Id.* at 4.

133. *Id.*

students, there is no way to get the right preparation in their school regardless of their personal talent and motivation.”¹³⁴

Likewise, their white counterparts are also denied the beneficial experience of racial diversity.¹³⁵ Segregation perpetuates otherness, allowing groups to indulge in reckless stereotyping and wallow in cultural ignorance. “If children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society.”¹³⁶ This is counterproductive for whites as well as minority groups because as America becomes increasingly non-white and diverse, the need for cross-racial and cross-cultural understanding intensifies.¹³⁷ Segregation makes all racial groups less prepared to successfully navigate the opportunities and challenges of a diverse workforce and society. “[T]he elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to all students, both black and white.”¹³⁸

In short, the de facto separation of educational opportunity that operates in public education today carries with it the same ills as the legal segregation of the past. Racial and socioeconomic separation breeds inequality in “every aspect of schooling,” from funding to curriculum.¹³⁹ In segregated, non-white schools, teachers are less experienced and more transient, academic achievement is low, and disengagement in the form of drop-out and push-out is high.¹⁴⁰

Students in these schools are being socialized into marginalization. “[S]chools are an important socializing institution, imparting those shared values through which social order and stability are maintained.”¹⁴¹ Schools bear central responsibility for “inculcating [the] fundamental values necessary to the maintenance

134. *Id.*

135. *Id.*

136. *Jenkins v. Twp. of Morris Sch. Dist.*, 58 N.J. 483, 498 (1971).

137. Orfield, *supra* note 126, at 4.

138. *Lee v. Nyquist*, 318 F. Supp. 710, 714 (W.D.N.Y. 1970), *aff'd without opinion*, 402 U.S. 935 (1971).

139. Orfield, *supra* note 126, at 6.

140. *Id.*

141. *Plyler v. Doe*, 457 U.S. 202, 222 n.20 (1982).

of a democratic political system.”¹⁴² In the ghetto education environment, youth are “doomed to pass the most susceptible period of their life” confined to the ghetto—alienated from the mainstream culture of aspiration.¹⁴³

The troubling effect of racial and economic isolation in public schools on youth socialization has been understood for decades. The Court in *Brown* recognized that racial segregation instilled “a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹⁴⁴ In a 1967 report, the United States Commission on Civil Rights found that racial and economic segregation went hand in hand and that students in segregated schools struggled with a “sense of incompetence” that had “other significant attitudinal manifestations,” including “the belief that one cannot do anything about destiny, one cannot control the environment.”¹⁴⁵ More recently, Professor Liu observed:

The socialization goals of school integration go beyond cultivating harmony in interpersonal relations. A critical part of what it means to be educated for citizenship in a multiracial society is to understand racial dynamics as a social not merely interpersonal phenomenon, shaped not only by individual attitudes and prejudices but also by the demographic structure of the surrounding community.¹⁴⁶

However, the Supreme Court is not concerned with the de facto resegregation of American public education.¹⁴⁷ The Court in *Parents Involved in Community Schools v. Seattle School District No. 1* made it clear that the avoidance of racial isolation and promotion of socialization benefits that accrue from racially diverse educational settings are tantamount to racial balancing.¹⁴⁸ Therefore, it is unlikely that de facto segregation will be remedied by judicial decision under the current legal framework. In Part III, I propose reforms to the legal

142. *Ambach v. Norwick*, 441 U.S. 68, 77 (1979).

143. Webster, *supra* note 46, at 62.

144. 347 U.S. at 494.

145. RACIAL ISOLATION IN THE PUBLIC SCHOOLS 129, 260 (Vol. 2, 1967).

146. Goodwin Liu, *Seattle and Louisville*, 95 CALIF. L. REV. 277, 289 (2007).

147. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

148. *Id.* at 726–32.

framework that provide new approaches to de facto segregation and education equity.

B. The Pedagogy of Punishment

Punitive disciplinary policies and practices are other core components of ghetto education. Like patterns of resegregation, school suspensions have risen steadily over the past few decades, and racial disparities in exclusionary discipline have widened as well.¹⁴⁹ The current reality in urban public schools is that students are subjected to a pedagogy of punishment that treats students as threats to society rather than young citizens in the making. Heightened security is everywhere: from metal detectors¹⁵⁰ and video surveillance,¹⁵¹ to threat evaluation software¹⁵² and random sweeps

149. DANIEL J. LOSEN, DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE 4 (Kevin Welner et al. eds., 2011).

150. *Indicators of School Crime and Safety: 2008, Indicator 20: Safety and Security Measures Taken by Public Schools*, INST. OF EDUC. SCI., U.S. DEP'T OF EDUC., http://nces.ed.gov/programs/crimeindicators/crimeindicators2008/ind_20.asp [hereinafter *Indicators of School Crime*].

151. Between the 1999–2000 and 2005–06 school years, the percentage of schools using one or more security cameras to monitor the school increased from 19 percent to 43 percent. *Id.* See generally ELORA MUKHERJEE, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY PUBLIC SCHOOLS (Phyllis Eckaus et al. eds., 2007), available at http://www.nyclu.org/pdfs/criminalizing_the_classroom_report.pdf. See also Jen Weiss, “Eyes on Me Regardless”: Youth Responses to High School Surveillance, 21 EDUC. FOUND. 47, 47–48 (2007), available at <http://www.eric.ed.gov/PDFS/EJ821604.pdf>; Dominique Braggs, CHALK TALK: Webcams in Classrooms: How Far is Too Far?, 33 J.L. & EDUC. 275, 276 (2004) (noting that by the 1999–2000 school year, 15 percent of public schools nationwide reported using some form of video surveillance); ACLU Protests Cameras in Colorado Schools, ACLU (Jan. 25, 2001), <http://www.aclu.org/Privacy/Privacy.cfm?ID=6962&c=130> (noting that purposed spending would cost up to \$840,000 for new security cameras in schools); Graeme Zielinski & Christine B. Whelan, Fauquier to Use Cameras to Keep Eye on Students, WASH. POST, Aug. 6, 2000, at B1, available at <http://www.highbeam.com/doc/1P2-544867.html> (reporting the installation of \$60,000 worth of cameras in Fauquier County, Virginia schools “even though there has been no serious violence at [district schools] in recent years”); Press Release, ACLU, ACLU Asks Arizona School District to Reject Face-Recognition Checkpoints (Dec. 17, 2003), available at <http://www.aclu.org/news/newsprint.cfm?ID=14598&c=253> (providing that a face-recognition system is allegedly being installed to identify sex offenders and missing children who visit the school).

152. Bill Dedman, *Does Every School Need a Metal Detector? Experts Say Schools Rely Too Much on Physical Security*, MSNBC (Oct. 3, 2006, 7:43 PM), http://www.msnbc.msn.com/id/15111439/ns/us_news-crime_and_courts/t/does-every-school-need-metal-detector/#.UAg9d7QV2Ms.

for contraband by police using drug-sniffing dogs.¹⁵³ In addition, proliferation of zero-tolerance policies¹⁵⁴ and increased reliance on police to enforce school rules¹⁵⁵ has “[transformed] schools from sites of democratic education to sites of social control and punishment.”¹⁵⁶ Zero tolerance leads to an increased number of suspensions and expulsions, and youth of color are overrepresented in these figures.¹⁵⁷

153. Twenty-eight percent of public high schools conduct random sweeps for drugs and weapons. U.S. DEP’T OF EDUC., National Center for Education Statistics, (2008). Sixty-one percent of high schools performed random dog sniffs to check for drugs. *Indicators of School Crime*, *supra* note 150. *See, e.g.*, Candice Williams & Santiago Esparza, *Grosse Pointe School Searched for Drugs*, DETROIT NEWS, Apr. 29, 2010; Allison Manning, *Rockland High Searched for Drugs and Guns; One Student Fined for Having Marijuana*, PATRIOTLEDGER.COM (Mar. 18, 2010), http://www.patriotledger.com/news/cops_and_courts/x1514354744/Rockland-High-searched-for-drugs-and-guns-one-student-fined-for-having-marijuana; Nate Schwerber, *Drug Sniffing Dogs Patrol More Schools*, N.Y. TIMES, Mar. 20, 2009, available at <http://www.nytimes.com/2009/03/22/nyregion/long-island/22Rsniff.html>; Christian Nolan, *Parents Raise Stink Over Drug-Sniffing Dogs*, CONN. LAW TRIB., Oct. 9, 2009, at 6, available at <http://www.ctlawtribune.com/getarticle.aspx?ID=35256>; Loren Moreno, *Mckinley, Roosevelt High to Use Drug-Sniffing Dogs on Campus*, HONOLULU ADVERTISER, Apr. 23, 2009, available at <http://the.honoluluadvertiser.com/article/2009/Apr/23/In/hawaii904230361.html>; Ruth Teichroeb, *Stanford Examining High School Drug Bust*, SEATTLE POST-INTELLIGENCER, Jan. 22, 1998, available at <http://www.highbeam.com/doc/1G1-64578872.html>; Daniel de Vise, *Dogs Sniff Out Scent of Trouble at High Schools*, SAN DIEGO UNION-TRIB., Sept. 28, 1996; Jay A. Miller, Letter, *Dogs in Schools Provide Poor Lesson*, CHI. TRIB., May 10, 1990, available at http://articles.chicagotribune.com/1990-05-10/news/9002070587_1_sniff-dogs-4th-amendment; Colin Gustafson, *Police With Drug-Sniffing Dogs to Patrol GHS*, STAMFORD ADVOC., Jan. 22, 2010, available at <http://www.stamfordadvocate.com/news/article/Policewith-drug-sniffing-dogs-to-patrol-GHS-332820.php>.

154. HENRY GIROUX, *MIS/EDUCATION AND ZERO TOLERANCE: DISPOSABLE YOUTH AND THE POLITICS OF DOMESTIC MILITARIZATION* 87 (2001) (“Zero tolerance laws make it easier to expel students than for school administrators to work with parents, community justice programs, religious organizations, and social service agencies. Moreover, automatic expulsion policies so little to produce a safer school. . .”).

155. *See* Johanna Wals & Lisa Thureau, *First, Do No Harm, How Educators and Police Can Work Together More Effectively to Preserve School Safety and Protect Vulnerable Students*, CHARLES HAMILTON HOUSTON INST. FOR RACE & JUST., Mar. 2010, at 1, available at <http://charleshamiltonhouston.org/assets/documents/news/FINAL%20Do%20No%20Harm.pdf>; *Indicators of School Crime*, *supra* note 150.

156. WILLIAM LYONS & JULIE DREW, *PUNISHING SCHOOLS: FEAR AND CITIZENSHIP IN AMERICAN PUBLIC EDUCATION* 90 (2006).

157. *See* RUSSELL J. SKIBA, *ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICES* 3 (2000), available at <http://www.indiana.edu/~safeschl/ztze.pdf>.

[R]acial disparities in the application of school disciplinary policies have long been documented. The disparities are quite troubling. Most recent data from the Department of Education indicates that while African-American children only represent 17% of public school enrollment nationally, they constitute 32% of out-of-school suspensions. . . . In fact, the U.S. Department of Education’s report, *The Condition of Education*

Increased use of law enforcement in schools has resulted in the formal criminalization of behaviors (via the juvenile and criminal justice systems) that, in the past, might have warranted less formal sanctions within the school (such as detention).¹⁵⁸ Again, youth of color are overrepresented in school-based arrests, which funnel them into the justice system.¹⁵⁹

A review of the most recent data from the U.S. Department of Education Office for Civil Rights survey (covering the 2009–10 school years) reveals that punitive disciplinary practices intersect with resegregation. In intensely segregated urban schools, such as Detroit, Chicago, and Dallas, suspensions and expulsions are a much more common practice than in segregated suburban schools, where most of the student population is white.¹⁶⁰ In the segregated white schools, students of color are subjected to discipline at a higher rate than their white peers.¹⁶¹

1997, reveals that almost 25% of all African-American male students were suspended at least once over a four-year period.

OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE 6 (2000),

158. See Stephen Cox & Mario Gaboury, Abstract, *Creating More Labels: Examining Juvenile Arrests in Urban and Suburban Police Departments* (Am. Soc’y of Criminology, 2009) (analyzing juvenile arrest data from a large Connecticut city and two neighboring towns, and finding that the majority of police arrests in the city were at public schools and were typically made by school-based police officers); ACLU, *HARD LESSONS: SCHOOL RESOURCE OFFICER PROGRAMS AND SCHOOL BASED ARRESTS IN THREE CONNECTICUT TOWNS* 9 (2008), available at http://www.aclu.org/files/pdfs/racialjustice/hardlessons_november2008.pdf (finding a high rate of school-based arrests by school resource officers in two of the three school districts studied, the third district had higher suspension and expulsion rates which perhaps obviated the need for school-based arrests).

159. See *HARD LESSONS*, *supra* note 158, at 35–37 (finding that although African-American and Hispanic students accounted for only 24 percent of the student body, they made up 63 percent of all school-based arrests. The report also found that for several minor offenses, students of color were more likely to be arrested at school than white students who committed the very same offenses); see also JUDITH A. BROWNE, *ADVANCEMENT PROJECT, DERAILED! THE SCHOOLHOUSE TO JAILHOUSE TRACK* 18–19 (2003), available at http://www.advancementproject.org/sites/default/files/publications/Derailerepor_0.pdf (documenting racial disparities in school-based arrests in select jurisdictions in Florida).

160. See *Civil Rights Data Collection*, U.S. DEP’T OF EDUC., <http://ocrdata.ed.gov/DistrictSchoolSearch#schoolSearch>.

161. *Id.* For example, in Allen, Texas, black students account for 11 percent of the student body but 33 percent of the students facing out-of-school suspensions. Likewise, in Rochester Hills, Michigan, blacks make up 5.3 percent of the student body but 33.3 percent of those suspended.

While the causes of racial disparities in school discipline are complex and beyond the scope of this discussion, one thing is clear—there is no nexus between greater suspension rates and more frequent or more serious offending behavior.¹⁶²

Research on student behavior, race, and discipline has found no evidence that African American over-representation in school suspension is due to higher rates of misbehavior This suggests two possibilities: perhaps Black students focus their misbehavior on those types of activities that call for a subjective judgment of such misbehavior, or perhaps Black students are being unfairly singled out when it comes to prosecuting such misbehavior.¹⁶³

Regardless of the cause, the socialization that occurs in schools engaging in heightened and racially disproportionate disciplinary practices perpetuates a sense of disempowerment and lack of autonomy by normalizing restrictive means of social control. Young people, in the process of shaping an identity for themselves, internalize the “deviant” label applied to them by teachers, school officials, and police. “[A] teacher’s perception of a student as a troublemaker can create a negative self-image that leads to escalating misbehavior through a self-fulfilling prophecy.”¹⁶⁴ The stigmatizing effect of such labeling further marginalizes vulnerable youth; and the walls of the ghetto seem higher than ever.

Moreover, several studies suggest that increased use of suspension and other exclusionary measures to push “troublemakers” out of school negatively impacts drop-out levels.¹⁶⁵ Once students realize that the benefits of education (college, job, upward socioeconomic mobility) are unavailable to them, the risk of disengagement is high.¹⁶⁶ Add to this the repeated experiences with teachers and school officials who view them through a lens of criminality, and the process

162. LOSEN, *supra* note 149, at 6–7.

163. *Id.* at 6.

164. Miriam Rokeach & John Denvir, *Front-Loading Due Process: A Dignity-Based Approach to School Discipline*, 67 OHIO ST. L.J. 277, 294 (2006).

165. RUSSELL W. RUMBERGER, WHY STUDENTS DROP OUT OF SCHOOL 143–44 (2004).

166. Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY INTO PRAC. 341, 343 (2003).

of disengagement becomes a coping mechanism.¹⁶⁷ “Those perspectives that school systems present receive the imprimatur of society.”¹⁶⁸ Thus, humiliation, rejection, and alienation within the school system eventually lead students to reject it altogether and seek acceptance and recognition in other, less “mainstream” venues.¹⁶⁹ Therefore, while some measure of school discipline is compatible with citizen education,¹⁷⁰ the current pedagogy of punishment actually reduces student engagement in the education process.

C. The Kids Don’t Stand a Chance

The next piece of ghetto education I will discuss is high-stakes testing. While many states utilize standardized tests to measure student achievement, I intend to focus solely on the national standardized testing as part of No Child Left Behind for two reasons.¹⁷¹ First, it demonstrates the extent to which the federal government is already involved in public education in the states, and second, it highlights the shortcomings of the current legal framework for federal participation in public education. Moreover, because No

167. ANN ARNETT FERGUSON, *BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY* 99 (2001) (“To agree to learn from a stranger who does not respect your integrity causes a major loss of self. The only alternative is to no-learn and reject the stranger’s world [these students are] engaged in a struggle of wills with authority, and what seemed to be at stake for them was nothing less than their pride and integrity.”) (internal citations omitted).

168. Stanley Ingber, *Socialization, Indoctrination, or the “Pall of Orthodoxy”: Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 24–25 (1987).

169. ELIJAH ANDERSON, *LIFE OF THE INNER CITY* 96–97 (1999).

When students become convinced that they cannot receive their props from teachers and staff, they turn elsewhere, typically to the street, encouraging others to follow their lead . . . [I]nvest[ing] themselves in the so-called oppositional culture . . . Such a resolution allows these alienated students to campaign for respect on their own terms, in a world they control. Impacted by profound social isolation, the children face the basic problem of alienation. Many students become smug in their lack of appreciation of what the business of the school is and how it is connected to the world outside.

Id.

170. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 524 (1969) (Black, J., dissenting) (“School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens.”).

171. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–7941 (2011).

Child Left Behind is tied to federal funding, its impact on ghetto education is perhaps greater than similar state mandates.¹⁷²

The No Child Left Behind Act (NCLB or “the Act”) became law in 2002 with the purported purpose of “[ensuring] that all children have a fair, equal, and significant opportunity to obtain a high-quality education” and to close the “achievement gaps between minority and non-minority students, and between disadvantaged children and their more advantaged peers.”¹⁷³ NCLB creates a regime of high-stakes testing to measure student performance levels and then imposes tough sanctions on schools whose students fail to perform up to the federally mandated standards within a set period of time.¹⁷⁴ Although these are worthy goals, the Act has failed to achieve them.¹⁷⁵ “The best available scientific comparisons show that NCLB, in spite of putting intense pressure and sanctions on schools serving minority students, has made no significant change in the previous trends in test scores or in the racial achievement gaps.”¹⁷⁶ Moreover, nearly half of

172. In resource-poor school districts, the funds and penalties tied to NCLB have a serious impact on school budgets. See Coulter Bump, *Reviving The Coercion Test: A Proposal to Prevent Federal Conditional Spending That Leaves Children Behind*, 76 U. COLO. L. REV. 521, 548 (2005).

Under NCLB, schools cannot afford to reject federal funds and, as a result, must opt into the program. . . . When Congress enacted Title I, it established a relationship with states founded on financial support for the educational improvement of low-income children. Over the years, states have come to rely on that federal money to enrich the academic programs for those disadvantaged students. This reliance has increased as the recent economy has hurt local schools.

Id. (footnote omitted).

173. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301, (3) (2002).

174. *Id.* § 6311(b)(3)(c)(vii) (2011).

175. See, e.g., Lisa Guisbond with Monty Neill & Bob Schaeffer, *No Child Left Behind 10th Anniversary Report, NCLB’s Lost Decade for Educational Progress: What Can We Learn from this Policy Failure?*, NAT’L CTR. FOR FAIR & OPEN TESTING, available at <http://www.fairtest.org/NCLB-lost-decade-report-home>; Thomas Rentschler, *No Child Left Behind: Admirable Goals, Disastrous Outcomes*, 12 WIDENER L. REV. 637 (2006); Craig Livermore & Michael Lewchuk, *Centralized Standards and Decentralized Competition: Suggested Revisions for No Child Left Behind to Create Greater Educational Responsiveness Toward Disempowered Minority Groups*, 33 SETON HALL LEGIS. J. 433, 435 (2009); Regina Ramsey James, *How to Mend a Broken Act: Recapturing Those Left Behind by No Child Left Behind*, 45 GONZ. L. REV. 683, 683–84 (2010).

176. Gary Orfield, *Reviving the Goal of an Integrated Society: A 21st Century Challenge*, SCRIBD, 4 (2009), <http://www.scribd.com/doc/11021700/Reviving-the-Goal-of-an-Integrated-Society> (footnote omitted).

the nation's public schools are out of compliance with the law, and the Obama administration has agreed to grant states waivers from some NCLB test score requirements.¹⁷⁷ Although its mandates remain in effect, the Act is overdue for reauthorization.¹⁷⁸

The reauthorization process has been fraught with controversy because the Act itself has become controversial.¹⁷⁹ NCLB represents an unprecedented expansion of the federal government in public education.¹⁸⁰ NCLB usurps local educational schemes and imposes what is essentially a national education plan. "The resulting program makes states accountable for school performance, but denies them the discretionary power to decide how to achieve that task."¹⁸¹

Not surprisingly, the schools hardest hit by NCLB are in poor, urban areas, which is what ties NCLB to ghetto education. The Act "assault[s] . . . impoverished schools" by "disproportionately increasing education costs to traditionally disadvantaged urban schools through its supplemental instruction and school choice provisions."¹⁸² Furthermore, the singular focus on testing devalues critical thinking skills and forces teachers to "teach to the test" at the expense of subjects such as civics, art, and other humanities.¹⁸³

177. Richard Perez-Pena, *Waivers for 8 More States From 'No Child Left Behind'*, N.Y. TIMES, May 30, 2012, at A13.

178. Motoko Rich, *'No Child' Law Whittled Down By White House*, N.Y. TIMES, July 6, 2012, at A1.

179. See Sam Dillon, *Court Revives Lawsuit Against No Child Left Behind Law*, N.Y. TIMES, Jan. 8, 2008, available at <http://www.nytimes.com/2008/01/08/education/08child.html> (describing "partisan strife over the law's renewal"); Joy Resmovits, *Harkin-Enzi No Child Left Behind Bill Faces Uncertain Future*, HUFFINGTON POST (Oct. 27, 2011), http://www.huffingtonpost.com/2011/10/27/harkin-enzi-no-child-left_n_1035790.html; Sam Dillon, *Senate Panel Approves Bill That Rewrites Education Law*, N.Y. TIMES, Oct. 22, 2011, at A9.

180. Benton Martin, *An Increased Role for the Department of Education in Addressing Federalism Concerns*, 2012 BYU EDUC. & L.J. 79, 80 (2012).

181. Bump, *supra* note 172, at 525.

182. Ryan S. Vincent, *No Child Left Behind, Only the Arts and Humanities: Emerging Inequalities in Education Fifty Years After Brown*, 44 WASHBURN L.J. 127, 138 (2004).

183. Lisa Guisbond with Monty Neill & Bob Schaeffer, *supra* note 175, at 2, 6 ("preliminary results of a teacher survey in December 2011 . . . found that 66% of teachers said NCLB's focus on math and reading has meant reduced time for art, science, and social studies"); *NCLB Year 5: Choices, Changes, and Challenges: Curriculum and Instruction in the NCLB Era*, CTR. ON EDUC. POLICY, 8 (rev. Dec. 2007), http://www.cep-dc.org/cfcontent_file.cfm?Attachment=McMurrer%5FFullReport%5FCurricAndInstruction%5F072407%2Epdf (finding that 44 percent of all school districts had reduced instruction in social studies, art, science, music and physical education after the passage of NCLB).

Minority students suffering under the effects of resegregation and criminalization are further stigmatized and distanced from citizen education when they are required to focus most of their time and energy on standardized testing.¹⁸⁴ This stigmatizing effect is only heightened when their schools are subsequently (and often, inevitably) characterized as “failing” under the Act’s standards.¹⁸⁵ Finally, the narrow focus of standardized testing and the high stakes that are attached to it create “perverse incentives for pushing low-performing students out of school” through zero tolerance and school-based arrests.¹⁸⁶ In fact, not only are NCLB funds used to hire school police, but the Act encourages schools to refer students to law enforcement for misbehavior at school.¹⁸⁷

After a decade of NCLB, the achievement gap continues to grow, the school-to-prison pipeline continues to flow, and youth of color are less prepared than ever to claim their stake in the American Dream.¹⁸⁸ Graduation rates have steadily declined in the ten years since the Act’s enactment.¹⁸⁹ It is quite possible that NCLB’s high-stakes testing scheme is (at least in part) the cause of this decline.¹⁹⁰

Under NCLB’s high-stakes regime, rote learning is prioritized over the acquisition of meaningful knowledge necessary for engaged citizenship. Rather than being converted into “republican machines,” students are reduced to test-taking machines.¹⁹¹ NCLB, in conjunction with resegregation and exclusionary discipline, “inculcate[s] students with an ideology that replicates the current

184. Charles R. Lawrence III, *Who is the Child Left Behind?: The Racial Meaning of the New School Reform*, 39 SUFFOLK U. L. REV. 699, 705 (2006).

185. *School Testing Law Violates Ethical Principle of “Do no Harm”*, 39 NEW ENG. READING ASS’N J. 29 (2003) (“Characterizing schools as ‘failing’ or ‘bad’ publicly embarrasses and stigmatizes children and entire communities.”).

186. *Federal Policy, ESEA Reauthorization, and the School-to-Prison Pipeline*, ADVANCEMENT PROJECT, 3 (rev. Mar. 2011), <http://advancementproject.org/sites/default/files/Federal%20Policy%20ESEA%20Reauthorization%20and%20the%20School-to-Prison%20Pipeline%20-%202003%2009%2011.pdf> (footnote omitted) [hereinafter *Federal Policy*].

187. *Id.*

188. *Id.*

189. *Id.*

190. See Sean F. Reardon, *Eighth Grade Minimum Competency Testing and Early High School Dropout Patterns* 31 (Apr. 8–12, 1996) (paper presented at the Annual Meeting of the American Educational Research Association).

191. BENJAMIN RUSH, *ESSAYS ON EDUCATION IN THE EARLY REPUBLIC* 17 (Frederick Rudolph ed., 1965).

distribution of power.”¹⁹² Black students, huddled in over-crowded classrooms, under close surveillance by authorities, and learning how to fill out test forms, are destined for overrepresentation in minimum-wage and menial jobs in the service sector. Or, worse, they are prepared for the drudgery of incarceration where crowding, surveillance, and rote tasks are part of the daily grind. Like the Jim Crow schools of the South, where racial subordination was inherent in substandard lesson plans, the impoverished curriculum of ghetto education provides poor minority youth “with the knowledge and skills they needed to occupy their respective places in a labor force, stratified by class, race, and gender.”¹⁹³ As Horace Mann observed in 1848, “[i]f one class possesses all the wealth and the education, while the residue of society is ignorant and poor, it matters not by what name the relation between them may be called; the latter, in fact and in truth, will be the servile dependents and subjects of the former.”¹⁹⁴

Youth, particularly adolescents, are in the process of developing their identity and understanding their place in society.¹⁹⁵ Students’ experience of the educational process is as important as the content of the lesson plan. “[C]ontext of instruction or the hidden curriculum may be a major force in the development of political attitudes and willingness to participate in the political process. . . . The context includes not only the method of interaction and discourse in the classroom but also the overall ‘school climate.’”¹⁹⁶ Democratic “habits of the heart,” which provide young people with a sense of connectedness and community engagement, can be fostered in spite of the individual baggage each student brings to the classroom, allowing young people to overcome “the sense of relative isolation and powerlessness” that pervades urban ghettos.¹⁹⁷

192. Henry A. Giroux, *Theories of Reproduction and Resistance in the New Sociology of Education: A Critical Analysis*, 53 HARV. EDUC. REV. 257, 262 (1983).

193. *Id.* at 258.

194. CRITICAL ISSUES IN EDUCATION: AN ANTHOLOGY OF READINGS 65 (Eugene F. Provenzo, Jr. ed., 2006).

195. Alex R. Piquero et al., *Developmental Trajectories of Legal Socialization Among Serious Adolescent Offenders*, 96 J. CRIM. L. & CRIMINOLOGY 267, 272 (2005).

196. RICHARD G. NIEMI & JANE JUNN, CIVIC EDUCATION: WHAT MAKES STUDENTS LEARN 15 (2005).

197. ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER, & STEVEN M. TIPTON, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN

The normative climate of ghetto education reinforces the insecurity, disillusionment, and, ultimately, the disengagement of the dispossessed. Instead of educating for citizenship, many urban public schools are contributing to the perpetuation of the dispossessed American underclass by educating youth for marginalization, low-wage jobs with little occupational mobility, and incarceration.

Is it any wonder then, that when faced with the machinations of ghetto education, youth turn away from mainstream aspirations and embrace the “street” identity that is embodied in the culture of many low-income communities?¹⁹⁸ Relegated to a life in the ghetto, youth take control of their destiny the only way they know how—by seeking acceptance and a sense of competence that is sorely lacking in their educational experience.

If America is to deliver on the promise of equality for these young people, reform is not enough. A radical reimagining of education is required—a reimagining that creates an adequate foundation upon which a new order of educational opportunity can be built. American public education is in crisis, but it is a crisis that, as discussed above, has been a long time in the making. Likewise, any enduring solution will also be a long time in the making. In the following Part, I join those who call for a constitutional amendment creating a positive right to education. Such a plan is ambitious, sweeping, and perhaps the only measure that can resurrect the educational vision of the founding generation in a manner consistent with the vision of equality cherished by generation after generation of freedom fighters.

III. EDUCATION EQUALITY

“C’mon let’s face it/ a ghetto education’s basic/ and most of the youth dem waste it/ and when dem waste it that’s when dem get the guns to replace it/ and dem don’t stand a chance at all.”

—Damian Marley, “Welcome to Jamrock”

LIFE vii, 38 (2007).

198. ELIJAH ANDERSON, CODE OF THE STREET, DECENCY, VIOLENCE AND THE MORAL LIFE OF THE INNER CITY 96–97 (1999).

The main failure of the American system of public education is inequality. The struggle for equality in education has been long and sometimes difficult.¹⁹⁹ In spite of the difficulties, it is important to recognize the passion, dedication, and fervor with which oppressed minorities have fought for education equality throughout history.²⁰⁰ It is also important to acknowledge that gains have been made as a result of this vigilance.²⁰¹ By providing some historical context to the current meltdown within urban public education, I hope to highlight the ongoing nature of the problem. The roots of ghetto education reach back across time to the very founding of this nation when equality was sacrificed in the name of political compromise.²⁰² Therefore, in order to structure a solution with lasting influence, the foundational fissures that have led to this yawning gap between promise and delivery must be rectified.

I propose two legislative reforms. First, I urge the United States Congress to pass the Equal Education Amendment, which is currently pending in Committee.²⁰³ Second, I advocate the repeal of No Child Left Behind.

199. See, e.g., PETER H. IRON, *JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION* (2004); KIMBERLEY S. JOHNSON, *REFORMING JIM CROW: SOUTHERN POLITICS AND STATE IN THE AGE BEFORE BROWN* (2010); Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 *UCLA L. REV.* 677 (1997).

200. Derrick A. Bell, Jr., *The Legacy of W.E.B. DuBois: A Rational Model for Achieving Public School Equity for America*, 11 *CREIGHTON L. REV.* 409 (1977) (describing the over two hundred year long struggle for education equality and the historical cycle of segregation, desegregation, and resegregation).

201. David L. Kirp, *Making Schools Work*, *N.Y. TIMES*, May 19, 2012, at SR1.

202. CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787* 202–04 (1966).

203. Others have proposed amending the U.S. Constitution to include a right to education. See, e.g., Paula Rhodes, *An Afro-American Perspective: We the People and the Struggle for a New World: The Constitution of the United States of America and International Human Rights*, 1987 *HOW. L.J.* 705, 721 (1987).

The U.S. Constitution is the embodiment of We, the people's collective and supreme goals and values. It is also the enumeration of the role of government, particularly the national government, in promoting and protecting those values. That role, with respect to the civil and political rights guaranteed in the Constitution, is to enforce these rights primarily by refraining from and protecting citizens against encroachments upon the rights. The provisions of the Economic Covenant, and of other nations' constitutions, indicate that the government's primary role with respect to economic, social and cultural rights would be to enforce these rights through positive—as opposed to

A. A Fundamental Right to Education

The Equal Education Amendment, House Joint Resolution 29, was first introduced by Representative Jesse Jackson, Jr. in 2005.²⁰⁴ He has reintroduced it three times since.²⁰⁵ The resolution proposes an amendment to the Constitution that reads: “Section 1. Equality of Educational opportunity under the law shall not be denied or abridged by the United States or any state on account of race, sex, income or place of residence. Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”²⁰⁶ The Equal Education Amendment would make equal education a constitutional right for all Americans.

Since the days of Thomas Jefferson, who also sought a constitutional amendment, visionary politicians have been attempting to create a federal right to education. In 1870, President Ulysses S. Grant proposed an amendment that would guarantee all citizens a free public education.²⁰⁷ He argued to Congress that the amendment “completes the greatest civil change and constitutes the most important event that has occurred since the nation came into life. . . . I would therefore call upon Congress to take all the means within their constitutional powers to promote and encourage public education throughout the country.”²⁰⁸ In his 1944 State of the Union Address, President Franklin Delano Roosevelt presented his “Economic Bill of Rights,” which included the right to “good education.”²⁰⁹ Although

passive—actions which promote and protect these rights and ensure their availability to every person.

Id. See also THERESA PERRY, ROBERT P. MOSES & JOAN T. WYNNE, *QUALITY EDUCATION AS A CONSTITUTIONAL RIGHT: CREATING A GRASSROOTS MOVEMENT TO TRANSFORM PUBLIC SCHOOLS* (Ernesto Cortes, Jr. & Lisa Delpit eds., 2010).

204. H.R.J. Res. 29, 109th Cong. (2005), available at <http://www.govtrack.us/congress/bills/109/hjres29> (proposing an amendment to the Constitution regarding the right of all U.S. citizens to a public education of equal high quality).

205. *Id.*

206. *Id.*

207. ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 320–21 (1999).

208. Ulysses S. Grant, Special Message to the Senate and House of Representatives (Mar. 30, 1870), 7 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897* 55–56 (James D. Richardson ed., U.S. Congress 1900).

209. FRANK FREIDEL, *FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY* 500

he did not directly pursue constitutional reform, Roosevelt asked “Congress to explore the means for implementing this economic bill of rights—for it is definitely the responsibility of the Congress so to do.”²¹⁰ Although a number of measures outlined in this speech were enacted in some form, the right to education remained, once again, an unfinished business.²¹¹

Grant’s and Roosevelt’s attempts to urge Congress into action failed, but the words they spoke still ring true today. Education is more important than ever, yet inequality abounds. Inequality will be much easier to address if the right to education becomes enshrined as a federally protected right. Reformation of the current system has generally not produced greater equality, which is why something transformative is required.²¹² For better or for worse, the Court has demonstrated an unwillingness to recognize a fundamental right to education.²¹³ Therefore, as ambitious as it may seem, the best, and

(1991).

210. Franklin D. Roosevelt, State of the Union Address to Congress (Jan. 11, 1944), THE AMERICAN PRESIDENCY PROJECT, available at <http://www.presidency.ucsb.edu/ws/?pid=6518>.

211. See William E. Forbath, *The Distributive Constitution and Workers’ Rights*, 72 OHIO ST. L.J. 1115, 1132 (2011) (“The main legislative embodiments of Roosevelt’s ‘Second Bill of Rights’ [include] the Wagner, Fair Labor Standards, and Social Security Acts of the 1930s.”). Other parts of the Economic Bill of Rights that became law include the G.I. Bill of Rights, which provided “a broad array of economic benefits for the millions of veterans of World War II.” Charles A. Reich, *The Individual Sector*, 100 YALE L.J. 1409, 1438 (1991).

212. THERESA PERRY, ROBERT P. MOSES, ERNESTO CORTES, JR., LISA DELPIT & JOAN T. WYNNE, QUALITY EDUCATION AS A CONSTITUTIONAL RIGHT: CREATING A GRASSROOTS MOVEMENT TO TRANSFORM PUBLIC SCHOOLS xiii (2010) (“[W]e seem content to move students around and create way for a few kids to get a better education, rather than trying to transform the system as a whole.”).

213. *Plyler v. Doe*, 457 U.S. 202 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); Joshua S. Wyner, *Toward a Common Law Theory of Minimal Adequacy in Public Education*, 1992–1993 ANN. SURV. AM. L. 389, 392–98 (1993). Despite the Court’s position that the Constitution does not provide for education, scholars and commentators have persuasively posited that there is an implied right to education contained within our founding document. See, e.g., David C. Thompson, *School Finance and the Courts: A Reanalysis of Progress*, 59 W. EDUC. L. REP. 945, 950 (1990) (arguing that the Court has already recognized an implicit right to a minimally adequate public education); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U.L. REV. 550, 579–615 (1992) (setting forth several substantive theoretical platforms for an implied right to education in the Constitution, including the Due Process Clause, the Free Speech Clause, the (implied) right to vote and the Privileges or Immunities Clause); Brooke Wilkins, *Should Public Education be a Federal Fundamental Right?*, 2005 BYU EDUC. & L.J. 261, 289 (2005) (reasoning that it would be “rather absurd for our Constitution to ignore a child’s right to education while protecting an adult’s right to private

perhaps the only, way to transform the broken public education system is legislatively. The most fitting legislative action is a constitutional amendment.

Constitutionalizing education is fitting because it provides a long-overdue constitutional imprimatur to an issue that has been crucial to Americans throughout history. It creates a single, meaningful solution to the equality crisis, reducing the need for youth and their families to seek piecemeal reforms in thousands of school districts nationwide.²¹⁴ A constitutional right to education creates a baseline against which states and local authorities will be held. As a fundamental right, courts would apply strict scrutiny in education cases, which would benefit plaintiffs seeking to enforce their right to equal education.²¹⁵ For example, “the appropriation of funds for public schools, or rather the disproportionate funding of public schools, would be considered a governmental action that would receive strict scrutiny.”²¹⁶ In addition, there is symbolic significance in elevating education to fundamental right status. America’s commitment to equality would be renewed in the eyes of the nation, and the world. Although the most immediate beneficiaries would be the poor, historically oppressed, and the dispossessed, the rising tide of equality would lift

sexual behavior”); Michael Salerno, *Reading is Fundamental: Why The No Child Left Behind Act Necessitates Recognition of A Fundamental Right to Education*, CARDOZO PUB. L. POL’Y & ETHICS J. 509, 541–42 (2007) (arguing that the “enactment of No Child Left Behind . . . [has] shifted the focus and responsibilities of education from the state to the federal government . . . this shift, when considered with the trend among state courts to recognize a fundamental right to education in their own constitutions (despite different constitutional language) and the analysis of how fundamental rights are implied into the Constitution, calls for the Supreme Court to reconsider the fundamentality of education”). Others have predicted that a positive right to education will only be given judicial recognition after intense societal pressure is brought to bear. See, e.g., Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty To Provide Public Education*, 22 U. FLA. J.L. & PUB. POL’Y 45, 89 (2011) (“In the face of a sufficiently widespread social movement, courts will have little choice but to recognize the existence of a positive right to public education.”).

214. There are approximately 16,025 school districts in the United States. See *Number of Public School Districts, by Local Code (CCD) and State: 2003–04*, NAT’L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/surveys/ruraled/TablesHTML/5localedistricts.asp>.

215. For a detailed discussion of the strict scrutiny standard see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

216. Salerno, *supra* note 213, at 517.

all boats because, as John F. Kennedy proclaimed, “our progress as a nation can be no swifter than our progress in education.”²¹⁷

The process of passage and ratification would initiate a robust national discussion around equality and public education. Constitutional sanction also provides a constant reminder for ourselves and future generations that education is more than reading and math scores; like voting, it is part of citizenship. Finally, a constitutional right to education is the radical reimagining that is needed to finally correct the failings of the framers, deliver the promise of *Brown*, and bring an end to ghetto education.

Certainly, a constitutional amendment is not the most practical solution. The process of amending the Constitution is challenging because it requires a double supermajority.²¹⁸ There will be those who ardently oppose such an amendment. In fact, in the current political climate, a supermajority on any issue seems very remote. The path to ratification, indeed the path out of committee, will not be quick, and it will not be easy.²¹⁹ As civil rights leader and education equality activist Robert Moses has recognized: “[h]ere you have an issue which will take a couple of decades to mature, but it is thinkable that if this generation takes it on . . . you actually could get a majority of people that figure out . . . [that] we’ve got to raise this public education to the level of the Constitution.”²²⁰

Some of the opposition will come from those who view it as a federal takeover, although in many ways it is less invasive than

217. John F. Kennedy, Special Message to the Congress on Education, AMERICAN PRESIDENCY PROJECT (Feb. 20, 1961), available at <http://www.presidency.ucsb.edu/ws/?pid=8433>.

218. See U.S. CONST. art. V. The Constitution requires two-thirds of both houses of Congress to propose a constitutional amendment or two-thirds of the state legislatures to call for a constitutional convention. Ratification requires three-quarters of the state legislatures or three-quarters of the states acting through conventions.

219. According to the House of Representatives bill tracker website, the Equal Education Amendment has a zero percent chance of passing. See H.R.J. Res. 29 111th Cong. (2009) (proposing an amendment to the Constitution of the United States regarding the right of all citizens of the United States to a public education of equal high quality), available at <http://www.govtrack.us/congress/bills/112/hjres29>.

220. Ronald Ahrens, *Robert Moses Encourages Students To Push for Constitutional Right To Education*, ANNARBOR.COM (Jan. 15, 2011), <http://www.annarbor.com/news/education/reformist-robert-moses-brings-push-for-constitutional-right-to-educational-to-area/#.UCNGORQV3qU>.

NCLB.²²¹ Others will resent its similarity to international documents, such as the Universal Declaration of Human Rights, which also recognizes education as a fundamental right.²²² However, the right to education is very American—it was envisioned by the founders long before there was a United Nations.²²³ Moreover, as developing nations such as India gain economic power, they also recognize the importance of education to their long-term growth and stability.²²⁴ In order to keep pace with these emerging economic competitors, it is important for Americans to prioritize education in new and vital ways.

Ratifying the Equal Education Amendment will not be a panacea. The creation of a right will not change the fundamental structure of state education systems or eliminate de facto barriers to quality education overnight. States could retain local control over schools, and they would still have discretion over curriculum, discipline, and resource allocation. What would change is *how* education is delivered. Ideally, a constitutional right to equal education would create a real “race to the top,”²²⁵ with teachers and administrators working across state lines, district lines, and color lines to create truly unitary education systems.

A constitutional right to education creates a foundation; therefore the efforts of reformers, families, and advocates will be required to assure that the structures built upon this foundation are actually delivering education equality. For example, in order to promise a

221. See Patrick McGuinn, *The National Schoolmarm: No Child Left Behind and the New Educational Federalism*, 35 PUBLIUS 41, 59 (2005) (detailing the unprecedented level of federal involvement in local school districts ushered in by NCLB).

222. See Universal Declaration on Human Rights (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/>.

223. “Jefferson . . . conceived of education first and foremost as the sine qua non of a truly viable democracy, as the inescapable prerequisite to any intelligent popular rule.” J. LEE, CRUSADE AGAINST IGNORANCE: THOMAS JEFFERSON ON EDUCATION 2 (1961).

224. Right of Children to Free and Compulsory Education Act, INDIA CODE (2009), available at <http://schoolofeducators.com/2010/06/the-right-of-children-to-free-and-compulsory-education-act-rte/>; see also *India Launches Children’s Right to Education*, BBC NEWS (Apr. 1, 2010), <http://news.bbc.co.uk/2/hi/8598167.stm>.

225. “The Race to the Top Fund provides competitive grants to encourage and reward States that are creating the conditions for education innovation and reform.” *Race to The Top Fund*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/programs/racetothetop/index.html> (last modified July 11, 2012).

more equal education experience, the way school districts and attendance zones within districts are drawn may need to change.²²⁶ These kinds of changes will only come about through a continued movement for educational equality including grassroots organizing and litigation.

B. Repeal NCLB

In order to flesh out the parameters of a right to education, supporting legislation, including federal funding, would be necessary. Under these circumstances, repealing NCLB would allow a fresh start for education in America—a public abandoning of this old, unsuccessful approach to education equality. Regardless of the ultimate success of an education amendment, NCLB still does not work. It exacerbates ghetto education rather than reduce it. NCLB has taught us important lessons about the limits of federal involvement in education as well as the limited utility of high-stakes testing.

In the absence of a constitutional right or increased federalization of education²²⁷ (through the Department of Education or a new agency set up for that purpose), carrot-and-stick approaches to education policy as embodied in NCLB cannot adequately reduce racial, ethnic, or economic disparities in public education. Therefore, even if America is not up to the task of constitutionalizing education, NCLB should still be repealed, or at least thoroughly and drastically reformed.²²⁸

Even with the most dramatic federal reforms, education will remain largely a local undertaking. Therefore, Americans, particularly people of color and those affected by ghetto education, must remain actively engaged in their communities regardless of whether education is constitutionalized. Youth and parents must hold

226. For a discussion of voluntary resegregation efforts under current law, see *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., & U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS (Dec. 1, 2011), <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf>.

227. Thomas Kleven, *Federalizing Public Education*, 55 VILL. L. REV. 369 (2010).

228. For suggestions on the kinds of sweeping reforms that would be necessary, see Lisa Guisbond with Monty Neill & Bob Schaeffer, *supra* note 175, at 14–17.

local educational authorities accountable for actively increasing opportunities for integration, reducing reliance on exclusionary discipline, moving beyond standardized testing as a measurement of educational success, and creating citizens. Education may be the great equalizer, but the struggle towards equality is far from over.

CONCLUSION

“Human history becomes more and more a race between education and catastrophe.”

—H.G. Wells

From the beginning of the Republic, notions of freedom and public education have been closely linked and have defined the American people’s connection to lofty constitutional norms. Education is embodied in the American Dream. Revolutionaries, freedom fighters, and reformers have all taken up the crusade of public education under the banner of equality. In spite of this, educational access vexed the founders and eluded generations of black Americans and other dispossessed groups. Today, the fight continues in discussions around education reform and federal government involvement in education. There is a national consensus that the public education system is broken, although little agreement exists as to how to fix it. One thing is certain: the burden of the systemic failure that I call ghetto education is felt most acutely by poor people of color in urban areas.

By placing this discussion into a historical context, I hope to surface the historical underpinnings of ghetto education as well as recoup educational ideals that have been lost over time. What becomes apparent is that educational inequality is as old as the color line, a line that runs through history to the very founding of our nation. What is also apparent is the shift in focus from earlier notions of governmental duty and citizenship education to contemporary considerations of individualized academic achievement and little else. In the race to the top, the socializing role of public education is either forgotten or ignored.

Yet, the way students are treated in school can have a profound impact on their development both academically and socially. School

is one of the dominant socializing institutions in the lives of young people. In this capacity, the schoolhouse becomes a place where youth are brought into the common civic culture: it shapes identity, builds character, and creates social and economic citizens. As Chief Justice Warren eloquently stated in *Brown v. Board of Education*, “[education] is the very foundation of good citizenship.”²²⁹ However, when academic achievement is decoupled from civic socialization, that foundation is weakened.

What happens when this foundation is weakened? Young people enter the world neither intellectually prepared to take advantage of the opportunities within the market economy (i.e., jobs that create potential economic mobility) nor politically prepared to participate competently and responsibly in the democratic process (i.e., engagement in the formulation of public policy). Without academic or political preparedness, young people are not only excluded from achieving the measures of mainstream success but are also left unable to do anything meaningful about it. They are dispossessed, disenfranchised, and disempowered. This is ghetto education.

Ghetto education will persist until there is a radical transformation of education’s role in society and government’s role in education. The values of equality and democracy that our forefathers ascribed to education must be reclaimed fully and, armed with the hindsight of history, finally realized. Creating a fundamental right to education in the Constitution targets the foundational origin of ghetto education, redeems the founders’ intention to create a robust democratic republic stewarded by an active, vigilant, and educated citizenry, and restores America’s place as a leader among nations.

The constitutionalization of public education attends to the unfinished business of our founders and fulfills the longing of slaves and the dreams of freedmen by making our democracy substantially more capable of delivering on the promise of equality. Constitutionalization bestows education with the normative force of a right, guarantees that education is treated as a national priority, and creates a clear path toward the reduction of racial and socioeconomic disparities within the delivery of education services across the nation.

229. 347 U.S. 483, 493 (1954).

Constitutionalization will not, by itself, entirely reverse the phenomenon of ghetto education. States, municipalities, communities, neighborhoods, and individuals must actively work against the inertia of hyper-individualism and middle-class contentment to usher in an era of quality, inclusive, citizen education in America's public schools.