

Public Education as a Social Right:

The Static Nature of *Brown v. Board of Education*

I. Introduction

Two distinct viewpoints regarding the equality of humankind surfaced amongst ancient philosophers and continue to be debated in today's public policy, albeit using different terminology. One viewpoint "is the principle that prima facie human beings are entitled to be treated alike," and the other is that human beings fall "naturally and unalterably into certain classes, so that some were naturally fitted to be free and others to be their slaves" or, as Aristotle expressed it, "the living instruments of others."¹

However, H.L.A. Hart points out two exceptions to the prima facie principle of equality:

- 1) the class discriminated against lacks "certain essential human attributes" or
- 2) "demands of justice must be overridden in order to preserve something held to be of greater value."²

As Hannah Arendt pointed out, the founders of the American republic fell into the second category of exceptions, with regard to education. The "something of greater value" was "not however, in order to enable every citizen to rise on the social ladder, but because the welfare of the country and the functioning of its political institutions hinged upon education of all citizens,"³ Therefore, the founders

demand 'that every citizen should receive an education proportioned to the condition and pursuits of his life', whereby it was understood that for the purpose of education the citizens would 'be divided into two classes – the labouring and the learned' since it would be expedient for promoting the public happiness of those persons, whom nature hath endowed with genius and virtue, should be rendered...able to guard the sacred deposit of

¹ H.L.A. Hart, *The Concept of Law*, Oxford U Press (1961), 162.

² Ibid.

³ Hannah Arendt, *On Revolution*, Viking Press (1963), 72.

the rights and liberties of their fellow citizens...without regard to wealth, birth, or other accidental condition and circumstance.’⁴

The founders’ intent was not to create equality of opportunity or social mobility for all classes. The language suggests that the “learned” protect or “guard” the “labouring” members of society. Did this division provide a foundation for segregation based upon race? Was race just a more obvious way to separate groups “naturally and unalterably into certain classes?”

The infamous case decided in 1896, *Plessy v. Ferguson* (hereinafter “Plessy”), created the standard “separate but equal,” which extended to public education. The Plessy court held that:

the underlying fallacy of the plaintiff’s arguments to consist in the assumption that the enforced separation of the two race stamps the colored race with a badge of inferiority. If this be so, it is not be reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.⁵

However, the fallacy of this holding is did not die with *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, (hereinafter “Brown”), which overturned *Plessy* in 1954. Fifty years later, although “70 percent of black students attend schools in which racial minorities are a majority, and fully a third are in schools 90-100 percent minority,” the fervor to desegregate schools has passed into history, despite the “racial packing” that is occurring in inner city schools.⁶ Further, not only are these schools segregated, but public schools in the United States are funded through a property tax base, leaving poor students, the majority being Black and Latino students, with a poorly funded school.

⁴ Arendt, quoting from Thomas Jefferson, “A Bill for the More General Diffusion of Knowledge” and “Plan for an Educational System,” *The Complete Jefferson*.

⁵ *Plessy v. Ferguson*, 16 S.Ct.1138, 1143.

⁶ Adam Cohen, “The Supreme Struggle,” *The New York Times Education Life*, Section 4A (January 18, 2004), 22.

These facts lead one to question why segregation and public school funding is no longer being challenged and who is constructing the situation, or who is refusing to deconstruct the situation? Geographic location, with minorities concentrated in urban areas and whites in the suburbs provide an easy answer. However, it fails to explain *why* so many minorities are concentrated in urban areas and *why* these schools often fall below performance levels. Other arguments sound astoundingly similar to those of Aristotle, the Founders, and the *Plessy* court. One argument is that students should be trained to participate in society at an appropriate level. Technical high schools have become popular in areas with high crime rates and low academic performance. However, *who* determines the appropriateness of one's role in society is left unstated. Another argument is that students are guaranteed an education and if they fail to utilize the education, they in effect, *choose* to stamp themselves with a badge of inferiority. Others feel that students should have the same opportunities in public education, regardless of their previous academic performance, socio-economic class, or their standardized test results. One radical policy implementation is to subsidize public school funding. A final argument has relied on standardized testing to hold schools and students "accountable" for their performance or underperformance by measuring this performance with standardized tests. Rather than addressing the underlying issues of socioeconomic issues, the solution merely divides and separates the "product" of a discriminatory educational system.

This paper will examine public education as a political issue, the definition and categorization of rights, the role of justice and morality in creating and interpreting laws, and legitimacy issues, according to Poggi, Marshall, and Hart. These theoretical

constructs will be applied to the *Brown* decision in 1954 and to the subsequent *Rodriguez* decision in 1973. Finally, this paper will critically analyze current judicial vehicles of change and postulate other methods to improve the quality of public education by demonstrating the importance of civil society and proposing a new form of social revolution. One overarching theme will be the encompassing violence that surrounded *Brown* overshadowed the deeper goals of justice, equality, and full citizenship sought by the plaintiffs in *Brown*. The unanimous decision proved difficult, if not impossible, to implement, and subsequent challenges to the inadequate implementation via *Rodriguez* were denied. Education is more important today than ever before and functions to stratify members of society, creating a cyclical pattern of poverty amongst families, similar to a caste system. This paper asserts that the judicial process is not the most effective way to implement radical fiscal reform, rather, civil society provides an alternative means to implement the intent of *Brown*.

II. Social Issues as Political and Economic Issues

In what capacity is public education a political issue rather than a social issue? More specifically, how did the Civil Rights Movement succeed in making education a politically charged issue? One might look to Gianfranco Poggi's analysis regarding the determination of a social issue as political. According to Poggi, this determination stems from three related factors: "(1) the enfranchisement of social groups that expected the state to attend to such issues, (2) the resulting emergence of the notion of 'social' rights

of citizenship, and (3) the assumption by the state of some responsibility for ameliorating the phenomena in question.”⁷

An interesting piece of the personal narrative of *Brown* sheds light on Poggi’s analytical framework. On April 23, 1951, sixteen year old Barbara Johns, niece of the legendary preacher Vernon Johns, organized a mass school assembly of 450 students, where she gave her own sermon on the injustices of the school followed by a strike in which the entire student body followed Ms. Johns out of the school.⁸ This student-led strike led to the NAACP filing *Brown* in 1951 with four similar lawsuits. In May of 1954, by unanimous decision, the Supreme Court declared segregated schools unconstitutional.

Can the supremely controversial decision in *Brown* be attributed to Poggi’s three factors and constitute a political issue? In response to Poggi’s first factor, African-Americans were enfranchised to some degree; the Church succeeded in propelling African-Americans to positions of power within their own communities and also paved the way for prospective ministers to attend college and graduate schools of theology. The NAACP was in a position to raise expectations within the African-American community by creating legal issues before the courts. However, “enfranchised” seems a bit strong considering Jim Crow was still in effect and African-Americans had little or no recourse within the law. Poggi’s second criterion, a resulting emergence of “social” rights of citizenship, is also debatable, although it appears to fit neatly within the historical framework. The early Civil Rights Movement, the Movement sought to secure civil and political rights, not social rights, and focused on desegregation and voting rights.

⁷ Gianfranco Poggi, *The Development of the Modern State*, Stanford U Press, 1978, 114.

⁸ Taylor Branch, *Parting the Waters*, Simon & Schuster Inc., 1988, 19-20.

However, the emergence of social rights of citizenship occurred in the 1970's with the *Rodriguez* set of cases, which challenged the implementation of *Brown*. Finally, the assumption of responsibility to ameliorate by the state is applicable to the *Brown* case. Although the Warren Court is notorious for its liberal decisions and has been accused of legislating social policy rather than interpreting the law, the tension that surfaced in the 1960's was brewing in the 1950's. The NAACP gained prestige and demanded attention from politicians and from the legal system. Therefore, increased opportunities for African-Americans coupled with various organizations fighting for civil and political rights led to state intervention in the form of *Brown*.

In addition to Poggi's three factors to identify social issues as political issues, Poggi also emphasizes the importance of the economic structure. He strongly asserts that the "*ascendant* force" of capitalism, which is "inherently dynamic and powerfully expansive, "does not operate within the societal sphere simply as a 'factor' among and coordinate with others; rather, it imperiously *subordinates* or otherwise reduces the independent significance of all other factors, including religion, the family, the status system, ***education***, technology, science, and the arts."⁹ [Emphasis added] This analysis moves further than Habermas' claim that theorized that "The distinctive features of modern law...reflect the specific moral and cultural preferences of the bourgeoisie."¹⁰ Poggi interprets Habermas as being Marx-inspired, and suggests that

the state's institutional principles are instrumental to bourgeois class dominance within the society; political structures are primarily responsive to the requirements of the capitalist mode of production, at the same time expressing and concealing the functional subordination of political to economic power.¹¹

⁹ Ibid., 120-21.

¹⁰ Ibid., 119.

¹¹ Ibid., 119-20, Poggi citing Karl Marx, *Fruehe Schriften*, (Stuttgart, 1962), vol. I, p. 483.

How does capitalism influence public education? Moreover, is public education an instrument of the state to suppress certain classes and elevate others?

From the Constitution's inception, education served to stratify individuals in order to further the "welfare of the country and the functioning of its political institutions."¹² The Founders never considered that an individual had the "right to a full development of all his gifts." How does this stratification function today? Is America's need for service workers enough to keep minorities, especially recent immigrants, from receiving a quality education? The debate today still rages over whether the modern day bourgeoisie has a duty or an obligation to help finance education of the masses. However the question today centers on whether the property wealth of a school district should determine the amount of money invested in the student's education in that school district. This leads to the question, in "the land of opportunity," does one have a *right* to a certain *level* of education? If so, *what* is that standard and *who* determines it?

III. Political Issues as Social Rights

The concept of standards presupposes a right to some benefit. The U.S. Constitution does not explicitly provide a right to education; however, many state constitutions explicitly provide the right to education. The concept of rights is often used loosely in a variety of contexts, but how does one define rights in general? According to Hart, rights stem from legislative disability and the ability to make claims to courts, however, rights make these actions possible, not necessary.¹³

¹² Arendt, 72.

¹³ Hart, 69 and Arato Class Lecture 10/21.

According to Marshall, empowerment for action in civil society is defined by citizenship; one is a full citizen if one is a full member and one is a full member if one has these three rights: civil, political, and social membership.¹⁴ For Marshall,

there is a kind of basic human equality associated with the concept of full membership of a community—or, as I should say, of citizenship—which is not inconsistent with the inequalities which distinguish the various economic levels in the society. In other words, the inequality of the social class system may be acceptable provided the equality of citizenship is recognized.¹⁵

What Marshall fails to recognize is the connection between full citizenship, inequality, and economic differentiation. In the United States, minorities are disproportionately poor and continue to struggle for civil, political, and social membership. For example, the currently pending lawsuit, *Hayden v. Pataki*, is a class action seeking to empower disenfranchised felons with the right to vote. This provides a classic case of huge numbers of minority men, largely poor men from urban areas, who are denied the right to vote due to a felony conviction. Thus, until all Americans have full citizenship, it seems specious to speculate that inequalities in social class system are acceptable “provided the equality of citizenship is recognized.”

Tom Bottomore expanded the three rights of full citizenship posited by Bottomore. Civil rights are “the rights necessary for individual freedom—liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice,” and political rights include “the right to

¹⁴ T.H. Marshall and Tom Bottomore, “Citizenship and Social Class,” Pluto Press, 6-8 and Class Lecture 10/21.

¹⁵ Bottomore, 6.

participate in the exercise of political power.”¹⁶ The third element of citizenship, social rights, consists of

security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society. The institutions most closely connected with it are the *educational system* and the social services.¹⁷ [Emphasis added]

Hannah Arendt points out that one cannot participate without being a member, but if one is a member one may not be able to participate because one has to *exercise the right*.¹⁸ Further, a state’s duty to enforce those rights is not automatic; action must be initiated for rights to be restored.¹⁹ In the case of *Brown*, African-Americans were not fully empowered because they were denied civil, political, and social membership. However, the NAACP exercised its right to make a claim before the courts and filed on behalf of disenfranchised African-American school children and their families. Further, the right to a non-segregated education had to be *created*, not restored, because equality had not been interpreted as “separate but equal” prior to *Brown*.

Marshall and Bottomore add the importance of citizenship to the economic component of social rights. The Plaintiffs in *Brown* had to fight the notion from *Plessy* that “If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”²⁰ However, the *Plessy* court failed to acknowledge the importance of education in placing groups on the ‘same plane.’ The Civil Rights Movement achieved certain “civil” and “political” rights, as defined by

¹⁶ Bottomore, 8.

¹⁷ Ibid.

¹⁸ Class Lecture, 10/21.

¹⁹ Ibid.

²⁰ *Plessy*, 1143.

Marshall. Civil rights came to be associated with the removal of “Whites Only” signs and other blatant segregation such as in busses and in schools. Political rights were also achieved with respect to voting rights. However, this paper will show that Marshall’s third element of citizenship, the social element, specifically in regard to education via *Brown*, was not attained, nor has it been attained via *Rodriguez*.

Historically, social rights, especially in the realm of education have been paramount for securing property and a comfortable lifestyle. Marshall “recognized only definite right, the right of children to be educated, and in this case alone did he approve the use of compulsory powers by the state to achieve his object.”²¹ In describing the public sphere, Jurgen Habermas states,

This public remained rooted in the world of letters even as it assumed political functions; education was the one criterion for admission—property ownership the other. De facto both criteria demarcated largely the same circle of persons; for formal education at that time was more a consequence than a precondition of a social status, which in turn was primarily determined by one’s property. The educated strata were also the property owning ones.²²

The early relationship between education and property takes on a different meaning in this analysis because property value determines the funding for public education in the public sphere today. However, the result is the same; “the same circle of persons” benefits and maintains their social status by receiving a superior education, which allows them to perpetuate their privileged, property-owning status.

The connection between education and citizenship has obvious implications, such as the ability to read the ballot (political) or the ability to exercise free speech (civil), but is also has wide-ranging effects on the social aspects of citizenship. Bottomore stated:

²¹ Bottomore, 7.

²² Jurgen Habermas, *The Structural Transformation of the Public Sphere*, MIT Press, 1989, 85.

The education of children has a direct bearing on citizenship...the right to education is a genuine social right of citizenship, because the aim of education during childhood is to shape the future adult. *Education is a necessary prerequisite of civil freedom.*²³ [Emphasis added].

The question then becomes, what effect does education have on citizenship in 2003 when the question is no longer a matter of general literacy? Further, how does the quality of education affect civil freedom, if at all? Finally, what role does wealth play one's ability to obtain a high quality education? Bottomore is concerned with the selective processes within the educational system, where "The right of the citizen in this process of selection and mobility is the right to equality of opportunity. Its aim is to eliminate hereditary privilege."²⁴ Bottomore fails to consider socio-economic privilege, which is becoming increasingly tied with hereditary privilege in the United States. As the income gap widens and the middle class disappears, the opportunities for social mobility become entrenched in one's hereditary privilege. This paper contends that the selective process begins with the schools themselves. Children are not separated once they enter school, but they are separated by the very schools that they enter. Today the issue is not hereditary privilege, but socioeconomic privilege based upon where a student lives, which affects the amount of property taxes available to the school district. Thus, the issue is not which group a student is herded into once a child enters primary school, as Bottomore contends, but which primary school the student attends.

Another important facet of this analysis is the expectations of the affected citizenry. Bottomore states that service benefits "cannot be precisely defined" and

A modicum of legally enforceable rights may be granted, but what matters to the citizen is the superstructure of legitimate expectations. It may be fairly easy to enable every child below a certain age to spend the required

²³ Bottomore, 16.

²⁴ Bottomore, 38.

number of hours in school. It is much harder to satisfy the legitimate expectation that the education should be given by trained teachers in classes of moderate size.²⁵

Bottomore makes a poignant point because this is precisely where *Brown* failed.

Although the Court succeeded in desegregating schools on paper, the underlying “legitimate expectation” of equal opportunity to a quality education was never achieved.

Schools are still segregated and urban dwelling African-American children still receive, on the whole, an inferior education in comparison to their white suburban counterparts.

This point illustrates the correlation between race and wealth, which is ignored, or relegated to an aside, in the court cases that have challenged the legality of the current educational system. The problem lies in the fact that race is a “suspect class,” not wealth, leaving the expansive “strict scrutiny” standard of review available solely for cases involving a specific instance of racial discrimination. Thus, where race and wealth are ‘inextricably bound,’ the standard of proof is “beyond a reasonable doubt.”

The problem is circular; minorities, on average, earn substantially less in the United States and in turn live in areas where the schools are underfunded. Therefore, desegregation does little when neighborhoods and entire sections of cities are still segregated, not by law, but by economic circumstances. If schools were equally funded or funded according to need, schools could be one vehicle for social mobility, resulting in a slow desegregation of society as a whole. Therefore, Bottomore errs when he writes,

For a divided educational system, by promoting both intra-class similarity and inter-class difference, gave emphasis and precision to a criterion of social distance....Today, the segregation still takes place, but subsequent education, available to all, makes it possible for a re-sorting to take place.²⁶

²⁵ Bottomore, 34.

²⁶ Ibid.

Availability of education is not enough; “re-sorting” cannot take place until all schools are equally funded, regardless of their location and the property value of those within each school district.

Bottomore’s conclusion is as follows: “through education in its relations with occupational structure, citizenship operates as an instrument of social stratification.”²⁷ Despite holes in other areas of Bottomore’s analysis, the importance of citizenship and its role “as an instrument of social stratification” is a pivotal concept. Based upon Bottomore and Marshall’s framework, African-Americans still lack social rights; therefore, they are not full members of society. The premise of this paper is that education is the most important vehicle to advance social rights. The selection process should not begin before a child enters school and legitimate expectations regarding the quality of public schools are crucial and need to be met. This paper is premised upon the basic assumption that the wealth of a school, evidenced by \$/student, *does* affect the overall quality of the education. In short, it affects the quality of teachers, the size of classrooms, and the presence or lack of technology and modern text books. Further, the income level of a *neighborhood* also indicates whether children arrive at school properly fed, whether they receive proper medical care, and the relative safety of their neighborhood. Therefore, *where* one lives plays a monumental role in determining the quality of education they will receive, the job they will attain, and their role as citizen. This point is ignored by the groups who argue that since all children are given the opportunity to attend school, it is up to the individual student to distinguish himself or herself once they enter school. The argument sounds frighteningly similar to the

²⁷ Bottomore, 39.

argument put forth in *Plessy*; modernized to say that if a child fails in school, it is because that child *chooses* to put that construction upon himself or herself.

V. Morality and Justice

Questions of rights often bring justice and morality into the forefront of the debate. Law and morality have both an antagonistic relationship and a cooperative relationship. Shifts in morality can invoke changes in the law; however, definitions and interpretations of morality are always subjective. Nearly 50 years ago, after hearing a sermon in Rhode Island on the need for new civil rights laws, President Eisenhower made the infamous comment, “You can’t legislate morality.”²⁸ Upon hearing this remark, Martin Luther King responded to Ike’s comment by saying that the purpose of law was to establish justice in the lesser realm of ordinary life and that all laws govern external behavior rather than subjective attitudes, culminating with the comment, “A law may not make a man love me, but it can stop him from lynching me.”²⁹

Chief Justice Earl Warren handed down the Supreme Court’s decision in *Brown* without advanced notice; “The earth shook, and then again it did not.”³⁰ Although *Brown* was immediately translated into 34 languages, domestic media outlets such as Universal Newsreel “never mentioned the most important Supreme Court decision of the century. It was too controversial.”³¹ One columnist, James Reston of *The New York Times*, “attacked the *Brown* decision as a venture into sociology, saying that ‘the Court insisted

²⁸ Branch, 213.

²⁹ Branch, 213.

³⁰ Branch, 112-113.

³¹ Branch, 113.

on equality of the mind and heart rather than on equal school facilities.’’³² Optimists, such as Thurgood Marshall, told reporters school segregation would be eliminated in five years and the intention was to move on directly to housing segregation and employment discrimination.³³

Given the political nature of the issue of segregated education and the passion of a southern adolescent to get the case before the Supreme Court, can the *Brown* decision be explained by judicial interpretation of the constitution involving a “choice between moral values” as H.L.A. Hart describes in his chapter “Laws and Morals?”³⁴ Do all laws infuse morality to some extent? Did the decision attempt to regulate morality, as Ike suggested? Or was there a general moral transformation, which led to the *creation* of new law by the Supreme Court? Hart states,

The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process.³⁵

An original member of the *Brown* legal team, now a professor at Columbia Law School, says, “The other side’s briefs talked about federalism, separation of powers, textualism. Ours talked about right and wrong.”³⁶ Did the justices simply wanted to be on the right side of the critical moral question of the day? Was there a conscious decision on the part of the NAACP to turn *Brown* into a moral issue rather than a legal issue?

Questions of morality quickly came to the forefront of national debate when Governor Orval Faubus directly challenged the enforcement of *Brown* in 1957. Faubus

³² Ibid.

³³ Cohen, 22.

³⁴ Hart, 204.

³⁵ Hart, 203-4.

³⁶ Cohen, 23.

called in the Arkansas National Guard to prevent nine African-American students from entering a previously all-white school, which parallels the first of Hart's three persistent questions—that is, “How then do law and legal obligation differ from, and how are they related to, orders backed by threats?”³⁷ The Supreme Court interpreted the law, or “wrote” the law as critics would argue, with the *Brown* decision; Faubus refused to obey that law. In response to Faubus, Eisenhower ordered the 101st Airborne Division to be deployed at the Little Rock's Central High School. However, Eisenhower did not send troops until *20 days* after the chaos ensued.³⁸

Hart points out, “in the criticism of law, there may be disagreement both as to the appropriate moral standards and as to the required points of conformity.”³⁹ In this case, Faubus contested *Brown* from both ends and infamously refused to conform. Finally, Hart addressed the source of the moral standard by theorizing:

Does the morality, with which the law must conform if it is to be good, mean the accepted morality of the group whose law it is, even though this may rest on superstition or may withhold its benefits and protection from slaves or subject classes? Or does morality mean standards which are enlightened in the sense that they rest on rational beliefs as to matters of fact, and accept all human beings as entitled to equal consideration and respect?⁴⁰

Certainly, the *Brown* decision did not reflect the morality of most Southerners. Arguably, a conservative attitude constituted the prevailing attitude of the country in the mid-1950's. Thus, the Warren Court did seem to base its unanimous decision on rationality and equality of all persons before the law, or on an “enlightened” standard. However, it could be argued that *Brown* merely served as a poignant example of positive law, which

³⁷ Hart, 7, Branch 222.

³⁸ Branch, 224.

³⁹ Hart, 205.

⁴⁰ Ibid.

is the third of Hart's three persistent questions. For Hart, the legal system consists of rules, but rules are positive laws.⁴¹ As Poggi states, "the state could not ultimately be bound by its own law precisely because it was its *own* law, positive law, and as such intrinsically changeable, with only procedural, formal constraints on its changeability."⁴²

If *Brown* illustrates a shift in morality and/or positive law, not rationality and equality, whose morality governed prior to the Warren Court? Whose interests did it serve to keep schools and other public facilities segregated? Hart suggests,

Coercive power...may be used to subdue and maintain, in a position of permanent inferiority, a subject group whose size, relatively to the master group, may be large or small, depending on the means of coercion, solidarity, and discipline available to the latter, and the helplessness or inability to organize of the former."⁴³

Restricting education is a means for the state to *impose* helplessness without being lawless. Prior to the Civil Rights Movement, civil and political rights were restricted for African-Americans, however, social rights provide more discreet leverage to implement coercive power and maintain the status quo. This paper does not utilize race theory, however, political and economic impacts of suppression with regard to education cast light on some of the incentives to maintain the current segregated and unequal education system.

Poggi suggests that the pressure of collective interests may be influenced by capitalism, which

is a system of power...It entails the self-perpetuating dominance of the capital-owning class over those social groups whose livelihood and social standing depend on the sale of labor power; and to this extent it generates contrasting sets of typical interests in the two key classes.⁴⁴

⁴¹ Hart, 8-9.

⁴² Poggi, 135-6.

⁴³ Hart, 201.

⁴⁴ Poggi, 122.

Does capitalism require “self-perpetuating dominance”? For capitalism to survive there must be a class of service workers or “the sale of labor power.” How are these “typical interests” manifested? Historically, restricting suffrage based upon education and property furthered the interests of the ruling elite. For Poggi, the “safest way to uphold...is to exclude from constitutional political process the claims and demands of groups in whose interest it may lie to abolish capitalist ownership, to modify its distribution, or to interfere with its chances for profit or its control over accumulation.”⁴⁵

What replaced the restriction of suffrage? Could education be the social right that substitutes the political and civil rights gained during the Civil Rights Movement?

One current piece of education legislation helps illuminate some of the current problems with education reform. The *No Child Left Behind Act of 2001*, enacted under the Bush administration, is “built upon four common-sense pillars: accountability for results; an emphasis on doing what works based on scientific research; expanded parental options; and expanded local control and flexibility.”⁴⁶ However, the Act also makes federal aid for schools conditional on those schools meeting academic standards and abiding by policies set by the federal government. Does this piece of legislation represent a political maneuver to disguise underlying inequalities by focusing on test results and withholding funding from districts deemed to be ‘underperforming’? Or does it increase performance by holding schools and students accountable for ‘failing’ scores? This paper posits that if students are tested, but conditions are not improved, test results merely show the inequalities present in a given school. Further, if once the “failure” of a

⁴⁵ Poggi, 122.

⁴⁶ ED.gov, 1.

school is shown, and federal funding is subsequently cut, as in *No Child Left Behind*, how is that school to improve?

The Reading School District in Pennsylvania educates 16,000 students with a weak tax base and operates at a deficit. The district is suing over the Act's requirements because the 11% of students with limited English proficiency are not offered Spanish versions of the required tests, assuring poor results.⁴⁷ Is this the state's way of imposing helplessness? The Bush administration and the Department of Education are familiar with many of the problems facing underperforming public schools; one of the primary problems involves language barriers. Although the decision not to offer a test in Spanish may not constitute coercive power or a purely economic decision to ensure labor power, money is gained by cutting funding to schools with large numbers of students who speak Spanish. However, a more poignant question arises, where is the justice in this legislation?

Hart defines justice as: "one segment of morality primarily concerned not with individual conduct but with the ways in which *classes* of individuals are treated...It is the most public and the most legal of the virtues."⁴⁸ For Hart, the "central precept of justice is 'Treat like cases like and different cases differently.'"⁴⁹ In the case of public schools today, how are these classes of poor minority students treated? Doesn't justice require that they receive the same quality education as other students? The law itself may be criticized as either unjust. Others may argue that "fundamental differences, in general moral and political outlook, may lead to irreconcilable differences and disagreement as to what characteristics of human beings are to be taken as relevant for the criticism of law as

⁴⁷ iEDx.org, 1.

⁴⁸ Hart, 167.

⁴⁹ Ibid., 164.

unjust.”⁵⁰ Still another side argues that motivation and perseverance can conquer any deficits in a particular child’s education, or the notion of ‘pulling oneself up by one’s own bootstraps.’ This argument is strikingly similar in logic to the majority opinion in *Plessy*, which claimed that if “the enforced separation of the two race stamps the colored race with a badge of inferiority,” it is not because of the “separate but equal standard” but “solely because the colored race chooses to put that construction upon it.”⁵¹

If *No Child Left Behind* is analyzed as a follow-up to *Brown* to address the inequalities that remain in schools, is this a *just* way to treat these groups of children? More specifically, does failing to give Spanish-speaking students a test in Spanish fail under Hart’s central precept of justice, ‘Treat like cases alike and different cases differently?’ Should all schoolchildren in an English-speaking country take standardized tests in English? Or should these students be considered a ‘different case’ and be given the test in their primary language? Further, how far should this extend? Should these tests be available in *every* language?

No Child Left Behind places monetary compensation after test score achievement, rather than before testing, which would help schools ensure proper attention and programming. Therefore, this legislation practically ensures that justice will not be served and that certain classes will continue to be treated unfairly. Schools are being punished for educating non-English proficient students and the underlying societal problems of language barriers, poor preparation of students are ignored rather than addressed proactively.

⁵⁰ Hart, 161.

⁵¹ *Plessy*, 1143.

IV. Legitimacy

If morality and justice fail to explain the inadequate implementation of *Brown*, legitimacy questions quickly come to the forefront of the discussion. For Poggi,

the state found a new and different response to the legitimacy problem: increasingly it treated industrial growth per se as possessing intrinsic and commanding political significance, as constituting a necessary and sufficient standard of each state's performance, and thus as justifying further displacement of the state/society line.⁵²

However, if legitimacy is measured according to industrial growth alone, as measured by the GNP for example, factors such as the deficit, income gap, and an unsustainable minimum wage are not addressed. Similarly, one could point out the increased numbers of highly educated people in the United States and technological and scientific advances made by its citizens and claim that the educational system is successful. However, like the GNP, this is illusory because it fails to account for those who are not being educated, are not full citizens, and are socially immobile.

For Poggi, there are three responses to a legitimation crisis. First, the "State can try to do without a legitimizing formula and rely on intimidating and repressing the disaffected sections of the citizenry and on favoring the rest in order to maintain control over society."⁵³ Poggi's first response to a legitimation crisis is relevant to the time period before *Brown* overturned *Plessy*. Intimidation and repression is illustrated most clearly through Jim Crow in the South. The law often provided no recourse for lynchings, segregation, and harassment directed at African-Americans. MLK's response to Ike illustrates the urgency for legal protection when he said, "A law may not make a

⁵² Poggi, 133.

⁵³ Ibid., 147.

man love me, but it can stop him from lynching me.”⁵⁴ The legitimation crisis turned into national news with Governor Faubus’ infamous response to school integration in Little Rock; Faubus called in the Arkansas National Guard to repress and intimidate the nine African-American students who were trying to attend school, resulting in a terse standoff. The federal government’s response, though delayed, clearly attempted to intimidate and repress the Faubus threat in order to maintain control.

The second response to a legitimation crisis is that the State “can fall back on the earlier legitimizing formula of power politics, seeking to generate a wider consensus by pointing to the real or imaginary military threat posed to one state or coalition of states by other states or coalitions.”⁵⁵ One could argue that Faubus’ gesture resurrected images from the Civil War of a secession threat and that Arkansas poised a military threat with the Arkansas National Guard. Thus, the violence imagery of Faubus chaining himself to the high school to prevent formal desegregation remains the focal point of the *Brown* decision.

Poggi’s final response to a legitimation crisis is that the State “can try to ‘sell’ the society on a new formula—preferable one superficially attractive enough to evoke wide acclaim (with the help of the media), and general enough not to commit the state to anything in particular.”⁵⁶ As stated earlier, American media did little to broadcast the monumental decision to Americans, rather the international media sources remained the central concern. *Brown II* sought to create an implementation strategy for school desegregation, however the language remained vague and the obstacles were great. The brunt of the responsibility fell directly on school officials with the vague command of a

⁵⁴ Branch, 213.

⁵⁵ Poggi, 133.

⁵⁶ Ibid.

“prompt and reasonable start toward full compliance.”⁵⁷ The only other criterion was for school officials to “admit to public schools on a racially nondiscriminatory basis with all deliberate speed.”⁵⁸ At the time, *Brown* and *Brown II* were “superficially attractive enough” to calm the various parties in the Civil Rights Movement, while vague enough to appease white Southerners. However, a subsequent challenge to the implementation of the *Brown* decisions, via another Supreme Court case, resurrected and challenged this vague language.

VI. *Brown* and *Rodriguez*

In 1973, *San Antonio Ind. Sch. Dist. v. Rodriguez*, a civil action lawsuit, challenged the use of property tax as a basis for public school funding, and proceeded on a Fourteenth Amendment Equal Protection Claim.⁵⁹ The District Court found wealth to be a ‘suspect’ classification and education to be a ‘fundamental’ right, and accordingly, such a system could only be held upon a showing of compelling state interest.⁶⁰ The fundamental issue on appeal was “whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.”⁶¹

This essay will examine the rationale of the majority opinion, written by Justice Powell, in order to synthesize the key issues regarding challenges to the implementation of *Brown*. The first threshold issue Powell identified was “whether it makes a difference

⁵⁷ *Brown v. Board of Educ. of Topeka, Kansas*, 75 S.Ct. 753, 756.

⁵⁸ *Ibid.*, 757.

⁵⁹ *San Antonio Ind. Sch. Dist. v. Rodriguez*, 93 S.Ct. 1278, 1281.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, 1288.

for purposes of consideration under the Constitution that the class of ‘disadvantaged’ poor cannot be identified or defined in customary equal protection terms.”⁶² Powell then went on to define three ways to identify “poor”:

(1) against ‘poor’ persons whose incomes fall below some identifiable level of poverty or who might be characterized as functionally ‘indigent,’ or (2) against those who are relatively poorer than others, or (3) against all those who, irrespective of their personal incomes, happen to reside in relatively poorer school districts.⁶³

However, Powell found “none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”⁶⁴

The first problem occurs in Powell’s framing of the first threshold issue. Social welfare programs have used Powell’s first definition of ‘poor’ since the Depression and federal programs continue to use the national poverty line as an “identifiable indicator.” Relative poorness, Powell’s second definition of ‘poor,’ is a moot point because it is inherent in the national poverty line, which is based upon a minimum level of sustenance. Finally, the third definition of all those residing in relatively poorer schools directly contradicts his own holding; a family in a rural poorly funded school would be “saddled” with the disability of being forced to move to a more affluent area, send their child to boarding school or private school, or attempt to admit the child to a better funded school, which could be a substantial distance from their residence. Clearly, there is an element of “political powerlessness” that Powell fails to recognize.

⁶² Ibid., 1289.

⁶³ Ibid.

⁶⁴ Ibid., 1294.

The second threshold question identified by Powell was whether “the lack of personal resources has not occasioned an absolute deprivation of the desired benefit.”⁶⁵ In response, Powell stated that “at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”⁶⁶ By taking the stance of “absolute deprivation,” Powell refuses to acknowledge the decisive role of quality education and its role in allowing for social mobility. Further, in relation to the appellee’s claim that education affected one’s ability to exercise the right to free speech and suffrage rights, Powell stated, “Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.”⁶⁷ Clearly this is not what the NAACP, especially Thurgood Marshall, had in mind when *Brown* was handed down.

The final threshold issue is whether education constitutes a fundamental right. Powell asserts the “vital role” of education as discussed in *Brown*, but concluded that education was not a fundamental right that the Court should legislate and the Court should not “create substantive constitutional rights in the name of guaranteeing equal protection of laws.”⁶⁸

This essay interprets *Rodriguez* as a direct challenge to the deeper substantive notions of the *Brown* decisions. Did the violence that accompanied *Brown* take away from the important social rights the Warren Court tried to convey? Or did the 20 years between *Brown* and *Rodriguez* leave room for a new Supreme Court to merely legislate its own interpretation of morality? Another possible analytical framework asks whether

⁶⁵ *Rodriguez*, 1291.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, 1298.

⁶⁸ *Ibid.*, 1297.

the *Brown* decision constituted reform or revolution? According to Kelsen, there are two legal possibilities: reform according to legal rules of change or revolution, which is not according to legal rules of change.⁶⁹ In her examination of revolutions, Hannah Arendt looks at why revolutions fail. For Arendt, the French Revolution differed from the American Revolution because it was driven by poverty and “the rule of necessity,” and more importantly, it was the only revolution to succeed in creating a new constitution.⁷⁰ For Arendt, liberation and revolution are two essential phases, with the completion of a constitution constituting the completion of a revolution, and liberation only constituting permanent revolution, and thus failure.⁷¹

Within the Kelsen’s and Arendt’s framework, did the *Brown* decision constitute reform or revolution? According to Kelsen’s definition, *Brown* constituted reform because the United States Supreme Court handed down the final decision. In a strictly Arendtian sense, *Brown* must be examined as permanent revolution. Desegregation could be examined as liberation, but no constitutional amendments were made, thus resulting in permanent revolution. Although it is a stretch to examine a judicial decision that did not amend the Constitution as revolution or as permanent revolution, it is helpful to examine *Brown* and *Rodriguez* within this particular framework. Arendt’s theory in *On Revolution* illuminates the problems of change that does not extend into a state’s constitution. Further, Poggi makes it clear that even the constitution is subject to change. Finally, from a pragmatic approach, although constitutionalism may be possible, *Brown* and *Rodriguez* illustrate that the judicial system is not the most effective means to implement change.

⁶⁹ Lecture, 11/25.

⁷⁰ Arendt, 60.

⁷¹ Arendt.

VII. Civil Society and New Forms of Social Revolution

The Civil Rights Movement utilized the judicial system to advance civil and political rights, culminating with an attempt to acquire social rights via *Brown*. The problem of implementing the vaguely articulated vision of the Warren Court manifested itself with *Rodriguez*. The official desegregation of schools did not lead to reform in housing segregation and employment discrimination as Thurgood Marshall envisioned. Although the problem today is not as blatant as a stubborn Southern governor chaining himself to his school, attitudes that propel programs like *No Child Left Behind* are just as detrimental, if not more so. Public schools remain segregated and institutional discrimination stills runs rampant throughout the United States. Based upon the analysis of *Brown* and *Rodriguez*, this paper asserts that new modalities of change are needed, whether judicial or non-judicial, in order to institute social rights and thus full citizenship.

Some legal scholars, such as Rhonda Andrews, claim that the problem lies in the Equal Protection argument, not in the judicial system and advocate utilizing the Privileges and Immunities Clause. Although Andrews recognizes that the Court failed to recognize education as a fundamental right in *Rodriguez* and would likely refuse to recognize education as a ‘privilege’ guaranteed by the Fourteenth Amendment, Andrews writes,

Nevertheless, the claim must be brought to begin the process of transformation of the interpretation of the Privileges or Immunities Clause. Once education is accepted as among the privileges protected under the Constitution, the primary issue will be the characteristics of the education at issue, and its adequacy, fullness, or completeness as preparation for a dignified life.⁷²

⁷² Rhonda Andrews, “The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America,” *Alabama Law Review* (Winter 2003), 38.

For Andrews, it is necessary to couple humanity consciousness and race consciousness and further, “*humanity consciousness* should dictate, as perhaps first among a number of other important privileges and protections under the Constitution, a quality education for all.”⁷³ [Emphasis added] This idea of humanity consciousness is appealing because encompasses many of the other issues presented in this essay, such as differential property values and language barriers, as well as a host of other issues urban schools face. Finally, Andrews states, “Education must finally be exalted to its place of honor as among the most protected rights of citizens in a free and prosperous nation.”⁷⁴

An Arizona Supreme Court case, *Roosevelt Elementary School District Number 66 v. Bishop*, utilized Andrew’s argument, although the plaintiff used the Privileges and Immunities Clause of the Arizona State Constitution, rather than the U.S. Constitution. In Arizona, “The quality of a district’s capital facilities is directly proportional to the value of real property within the district,” including the value of commercial property.⁷⁵ This funding scheme left one elementary school’s assessed value at \$2 billion with the valuation per pupil at \$5.8 million, due to the presence of a nuclear generating station in the district, whereas a neighboring district (without a nuclear facility) had an assessed valuation per pupil of \$749.⁷⁶ While this appears strikingly unfair and discriminatory, the picture worsens as one takes into account the tax rates of each district. However, where the distribution of property is approximately equal, income creates new gaps; for example, one school district in Arizona has an assessed value per pupil of \$130,778,

⁷³ Andrews, 38.

⁷⁴ *Ibid.*, 41.

⁷⁵ *Roosevelt Elementary School District Number 66 v. Bishop*, 179 Ariz. 233, 236.

⁷⁶ *Ibid.*

while another district's is only \$18,293.⁷⁷ The Arizona Supreme Court held in *Bishop* that the Privileges and Immunities Clause of the Arizona Constitution “requires the legislature to enact appropriate laws to finance education in the public schools in a way that does not itself create substantial disparities among schools, communities or districts.”⁷⁸ Here is a poignant example of using a new argument, Privileges and Immunities over Equal Protection, and a new venue, state court rather than the U.S. Supreme Court, to facilitate change.

Another judicial alternative, advanced by Odden and Picus, is to proceed along a “need-driven equity” theory, or vertical equity, which allows for different needs among students and districts, recognizes special needs, and treats equally similarly situated students.⁷⁹ Is this merely another way of stating Hart’s central precept of justice—“Treat like cases like and different cases differently?” Need-driven equity stands in stark contrast to President Bush’s *No Child Left Behind*, where if a school is “failing,” that school is given a timeline in which to bring itself ‘up to par.’ Federal funds are given to those schools that are succeeding, and taken from those schools who continue to fail. *No Child Left Behind* does not recognize “different needs among students and districts,” but standardizes all schools and measures all districts with standardized English tests. However, need-driven equity would allow districts like Reading that have a large number of Spanish-speaking students, to properly address the language needs of its students either with ESL tutoring or Spanish tests.

⁷⁷ *Bishop*, 236.

⁷⁸ *Ibid.*, 243.

⁷⁹ Allen R. Odden & Lawrence O. Picus, *School Finance: A Policy Perspective*, (2d ed. 2000), *supra* note 23, 66-67.

Bottomore looks at solutions like a progressive tax and other equalization procedures such as making all gross incomes equal or by “reducing unequal gross incomes to equal net incomes by taxation” that “combine the principles of social equality and the price system,” however, in practice social services operate by the “guaranteed minimum.”⁸⁰ The problems with a progressive tax stem from a capitalist economy. A progressive tax runs counter to the deeply held beliefs of the “Protestant Work Ethic,” as depicted by Weber, as well as those located in America’s upper economic echelon. Even more problematic is that the politicians who could pass progressive tax legislation are largely funded by those citizens who stand to lose the most in a progressive tax system. Therefore, this option does not appear to be viable within the modern political and economic structure in the United States.

What other vehicles of change remain? Is civil society capable of mobilizing and engaging the government?⁸¹ If revolution produces dictatorships, as Arendt claims, and reform does not successfully produce a new system, what other modalities of change are available? Does the Chiapas internet movement constitute a form of change emerging from civil society, or is this another brand of reformism?⁸² The people of Chiapas are in a similar situation to the poor and/or minority communities in the United States; both groups have had basic rights denied and/or taken away. In Chiapas the issue is land, but in the United States, the issue is access to social mobility via education. Both groups have been suppressed throughout history and there is an anger building amongst the people at the injustices they face. However, what the United States lacks is a passionate citizenry; the peasants of Chiapas are willing to fight and give up their lives to get their

⁸⁰ Bottomore, 30-32.

⁸¹ Lecture, 10/7.

⁸² Lecture, 12/2.

land back. The U.S. also lacks a powerful leader. In Chiapas, Marcos became the “face,” of the Movement, even though his trademark is a black ski mask. Just as Martin Luther King became the face of the Civil Rights Movement and Malcolm X became the face of the Nation of Islam, Marcos fills the role of Weber’s charismatic authority.

American rock groups such as Rage Against the Machine and scholars such as Noam Chomsky have given Chiapas attention since the insurrection began. However, what avenues are there for the downtrodden in the United States? Further, the people of Chiapas *know* that the land is their livelihood; in America, the importance of education has been undermined to some extent. The institutional discrimination that is present is not as tangible as having one’s land taken away. In March 2003, after the U.S. invasion of Iraq, the internet became a key organization tool for protesters. Is this one possible vehicle for pushing forward social rights?

VIII. Conclusion

The fiftieth anniversary of *Brown* provides a wonderful opportunity to critically look at the current educational system. The importance of education, specifically with regard to citizenship, cannot be understated. Students in impoverished schools cannot be blamed for their failure; to blame students would be a gross return to the logic in *Plessy*. The Chiapas internet movement provides an example of civil society taking action in order to facilitate change and to fight for what is rightfully theirs. This is crucial in the United States; public outcry can change the law faster than any court case in history.