Financing PUBLIC SCHOOLS

Theory, Policy, and Practice

Kern Alexander
Richard G. Salmon
F. King Alexander

ROUTLEDGE

Financing Public Schools

Financing Public Schools moves beyond the basics of financing public elementary and secondary education to explore the historical, philosophical, and legal underpinnings of a viable public school system. Coverage includes the operational aspects of school finance, including issues regarding teacher salaries and pensions, budgeting for instructional programs, school transportation, and risk management. Diving deeper than other school finance books, the authors explore the political framework within which the schools must function, discuss the privatization of education and its effects on public schools, offer perspectives regarding education as an investment in human capital, and expertly explain complex financial and economic issues. This comprehensive text provides the tools to apply the many and varied fiscal concepts and practices that are essential for aspiring public school administrators who aim to provide responsible stewardship for their students.

Special Features:

- "Definitional Boxes" and "Key Terms" throughout chapters enhance understanding of difficult concepts.
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- Offers in-depth exploration of business management of financial resources, including fiscal accounting, school facilities, school transportation, financing with debt, and the nuances of school budgeting techniques.

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Brief Contents

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Preface

The central theme of this book concerns the necessity for the general diffusion of knowledge throughout society and the financing of the public school as the principal mechanism to achieve that end. Centuries of human experience in many lands has taught that only government has the capacity to address this embracing obligation that is owed to the citizenry. The aspect most essential to fulfilling the social contract is that government commit itself to the adequate and equitable financing for the public schools of the youth of a nation. When this responsibility is properly discharged the duality of happiness of the individual and viability of the democratic state is achieved.

Public schools are best defined as a system of "public entities that provide public instruction and are of the body politic, possessing state sovereignty controlled by publicly elected officials, governed by the people, free and common to all children and youth for the ages set forth in law."[1] A *public school* is "not merely a function of government; [rather] it is of government."[2] The "power to maintain a system of public schools is an attribute of government in much the same sense as is the police power or the power to administer justice or to maintain military forces or to tax."[3] Public schools were, in fact, created not merely to convey value-free knowledge geared to the pursuit of private economic interests, but rather were founded primarily for the inculcation of the values and understanding of the principles of virtuous government.

Thus, children are educated with the goal of creating citizens who will value democracy, a particular form of government that is best able to ensure that the affairs of state will be conducted in the most virtuous manner possible. Montesquieu early observed that all forms of government require education, that monarchies require education to instill deference and politeness, that despotisms require education to teach excessive obedience, and that the republican form of government requires education to instill a desire for freedom and equality, a preference for public over private interests, and an appreciation of the expansion of knowledge.[4] Montesquieu therein captures the essential nature of the republic and the key ingredients of the public common school system: liberty, equality, and community purpose buttressed by the limitless expansion of knowledge. It is now acknowledged by all advanced nations and

societies that free schooling furnished by government is not merely a "right granted to pupils as [but] a duty imposed upon them for the public good."[5] Public expenditure must be provided to effectuate the ends of that public or common good, whether that good is for public instruction, defense of the nation from invasion of foreign enemies, health care, or financial support for the poor and benighted.[6] In a pure economic sense, the public expenditure for public instruction is justified because a large measure of fiscal outlay for education is an investment that yields high social rates of return for progress and a rising standard of living. As this book indicates, the more advanced nations of the world expend much greater percentages of their gross domestic product on education than do underdeveloped nations. Development and education are part and parcel of each other. It is a settled maxim that public provision of education is the principal foundation stone of more economically advanced nations.

The issue of inequality of opportunity in American society reverberates throughout this book and is almost certainly one of the most urgent issues of our time. Later in this book we shall see how Piketty and Saez have shown that inequality between rich and poor in the United States is now the most severe since Woodrow Wilson was president. Equality is desirable not only because it is moral and just in all societies, but also because inequality is economically inefficient and generally deleterious to good government. Equality fuels economic growth and stimulates the overall standard of living of a country.[7] As if one would find it necessary to document the ill effects of inequality in a society, various studies[8] have done so primarily because some conservative economists, who oppose progressive taxation and positive redistribution, have gone to great lengths in attempting to prove the perverse position that inequality is a necessary attribute of positive economic growth.[9]

Rebecca Blank, in her book, *Changing Inequality*, enumerates the baneful economic consequences of inequality that should be known and resisted by government policymakers. *First*, rising inequality usually indicates a declining economic position of those at the bottom of the income ladder, more families and individuals falling into poverty, and an increase in the relative economic difference between the haves and have nots. *Second*, inequality reduces economic mobility, creating a stagnation of movement upward in economic class, sealing in a permanent underclass. *Third,* inequality is harmful to economic growth. The absorption effect of an economy is reduced if a high percentage of the population is frozen in poverty. Though quantitative economic analyses give mixed results, it can be reliably concluded, per Bowles and Gintis, that "under favorable circumstances egalitarian outcomes are not incompatible with the rapid growth of productivity or other valued economic outcomes."[10] *Fourth*, inequality will almost certainly have injurious effects on political processes and democracy. The great Justice of the U.S. Supreme Court, Louis D. Brandeis, summed the issue when he said, "We can have democracy in this country, or we can have great wealth concentrated in the hands of a few, but we can't have both."[11] Stiglitz in his 2012 book, *The Price of Inequality*, explains that one of the most important costs of inequality is that "our democracy is being put in peril."[12]

When the voice of the affluent individual and the *speech* of their corporations are backed with such fiscal strength that the nation's political system is dramatically skewed in the direction of their interests, and inequality, then democracy may well be endangered.[13] Such distortion is readily observed as banks and other large corporations

are financially protected by government while the middle and lower classes are denied services for health, education, and welfare. The popular and highly instructive book, *The Spirit Level: Why Greater Equality Makes Society Stronger,* by Wilkinson and Pickett, cites an imposing array of malevolent consequences of inequality, including infant mortality, low life expectancy, crime and incarceration, physical and mental health problems, and reduction in educational performance.[14]

There is no conflict between equality and efficiency. The most efficient economic systems are those that are supported by wide-ranging equality of opportunity. Equality of education is economically efficient because it systematically develops intellectual capacities throughout society and the wastage attributable to underdeveloped human capabilities is kept to a minimum. The most thoughtful philosophers of political economy acknowledge the importance of educational opportunity as a public enterprise to undergird economic growth.[15] John Stuart Mill, the great utilitarian and archetypal champion of privatization, singled out education as one of the few exceptions that should be publicly governed to assure that imperfections in private demand and lack of aspiration would not be permitted to stifle individual intellectual development and thereby reduce the economic capability of the nation as a whole. According to Mill, equality of educational opportunity is essential to a utilitarian government because without it members of the community would "suffer seriously from the consequences of ignorance and want of education in their fellow citizens."[16] It is, thus, a false thesis that postulates that equality is detrimental to social utility. In fact, current thinking regarding economic development strongly supports the theory that greater income equality is compatible with economic growth and that heavy emphasis on universal education results in higher growth rates and lower inequality.[17] If equality is both economically productive and utilitarian, it can hardly be rationally maintained that equality is subversive to quality or that schools in the United States cannot be both equal and excellent. Decisions with regard to school financing that deprive some children of equal opportunity in the name of quality education for a few are sustained on assumptions that are erroneous and socially and economically injurious. The discussions throughout this book implicitly assume that equality, efficiency, and quality of education are complementary and mutually supportive.

The organization of this book is envisaged as an inverted pyramid, general to the specific, broad to the narrow, federal to the state, and state to the local school district. In keeping with that rough design, we begin by defining the public schools as a legacy of *The Enlightenment*, move to the international view of the fundamentality of education, and consider from that broad perch the theoretical questions of equality and liberty. Finally, we span a series of more pointed issues ranging from politics, taxation, teacher compensation, vouchers and charter schools, equity measures down to the specific fiscal considerations of state school financing, distribution procedures, and, at last, to the more mundane but vital aspects of local school district financial management, including financial accounting, budgeting, school infrastructure, debt, risk management, the financing of pupil transportation, and school food services. The line-up of the overall content of the eighteen chapters is briefly as follows.

The initial chapters of the book are devoted to the essential nature of the public school in achieving a virtuous society. The first chapter reminds the student of the watershed era of *The Enlightenment*, that arose principally in the United States and

France, in removing the cloud of myth and superstition that had previously been so detrimental to the progress of mankind.

Chapter 2 examines the entitlement of the human being to knowledge and the right to know, whether education is a fundamental right of each individual, and how that right is perceived as a natural liberty. This chapter considers both the moral sentiments of such fundamental liberty and its sanctification and inviolability by statutes and constitutions in the United States, the United Nations, and the European Convention on Human Rights.

Chapter 3 explains the problem of poverty within states and other nations. Of most importance in this chapter is the concept that poverty is the result of a "system" of private human social and economic interaction that drives some into an underclass of social and economic immobility and the failure of government to play a transcending role in extricating persons from that underclass.

Chapter 4 is concerned with the morality of equality, the philosophical justifications, and the divergent views regarding poverty and inequality. This chapter explains the dichotomy of views from the "selfish gene" of self-interests, as theorized in Social Darwinism, and Adam Smith's "invisible hand," to the charitable spirit of Reinhold Niebuhr's "moral man and immoral society" and John Rawl's "difference principle."

Chapter 5 explores in some depth the idea that education is a highly productive investment in human capital that benefits both the individual and the state. Considerable attention is given to John Stuart Mills' views on gender equality and the economic benefits to the state derived in providing women with equal educational opportunity as well as equality in the workplace. Also important to this chapter is the methodology of how rates of return are calculated and, in particular, McMahon's unraveling of the complexities of the measurement of the external nonmarket benefits to investment in education.

Chapter 6 provides an overview of various political issues that bear on the provision of education in the United States. The chapter attempts to relate the various aspects of political reality to the funding of education. Of particular interest in this chapter is the political power of business corporations in influencing governmental decision making and the overall effect on public schools as a common good. At its base, this chapter attempts to identify the various aspects of political reality as evidenced by the politics of race and religion in America.

Chapter 7 explains the realities of the financial circumstances of states and nations as measured by their fiscal capacity and fiscal effort to support government and education. The various most common barometers of wealth and income are defined and comparability of government units by such measures are set forth. Considerable discussion is devoted to property wealth as a common source of public school funding within states of the United States. Another feature of this chapter is the concept of "fractionalization" of society by race, religion, and ethnicity, and the effects that it may have on tax effort for public services in general, and public schools in particular.

In Chapter 8, the book proceeds into the realm of taxation. Herein we are reminded of the words of Justice Oliver Wendell Holmes regarding taxes: "I like to pay taxes. With them I buy civilization." With taxes for public schools one can easily see what Justice Holmes had in mind. The taxation chapter begins by reviewing the "tax maxims" advanced by Adam Smith in 1776 and Joseph Stiglitz in 2002. From that

point the chapter proceeds to define the various types of taxes used by states and the Federal government. A portion of the chapter is utilized to identify new types of taxes that are popular in European countries but are not common to the United States. In addition, this chapter cites a host of tax exemptions that tend, in the most part, to drain resources away from worthy public functions and favor individual or corporate enterprises that may or may not be for the public good.

The federal role in the financing of education is examined in Chapter 9. The chapter begins with the constitutional justification for federal spending on education and the major programs that have historically been a staple of educational activities in states. This chapter enters into the controversial waters of the federal debt, and the current lively debate over the merits or demerits of federal fiscal austerity versus stimulus. Figures and tables are provided that show the effects of federal austerity on the funding of major federal education programs such as ESEA and IDEA and unfunded mandates.

We devote Chapter 10 to the most important educational budgetary consideration, the compensation of the public school teaching force. Teachers' salaries in the United States are compared with other developed countries, teacher pensions and, generally, the relative financial condition of the teaching force.

Chapter 11 is wholly devoted to the recent rise of charter schools, as corporate entities, in the delivery of educational services as a parallel system with the traditional public school. This chapter also discusses the public funding of church schools by means of the voucher in the United States, a phenomenon that was put into play by the present United States Supreme Court in 2003 when it largely nullified the Establishment Clause of the United States Constitution.

Chapter 12 discusses the production function research question of "whether money matters" and the difficulty of relating the quantum of money directly to school performance and productivity. The measurement of the equity and adequacy of school funding is the thrust of Chapter 13. Here we provide specific explanations of the statistical methods that are most commonly used by finance experts in determining the fiscal effects of state school funding formulas.

A key chapter of the book is found in Chapter 14 wherein the principal methods of state school funding are set forth. This chapter has the practical value of relating in simplified form the fiscal procedures utilized by states in distribution funds to local school districts. Basic to the various methodologies are the extent and degree of fiscal equalization employed by state funding in mitigating the disequalizing effects of the local property tax.

The final part of the book, Chapters 15 through 18, is devoted to the business management of local school district financial resources. These chapters explain in considerable detail fiscal accounting, school facilities, financing with debt, and nuances of school budgeting techniques. The book concludes with a thorough explanation of fiscal management considerations in safeguarding the school district against liability and the methodologies for school district provision of pupil transportation and school food services.

In sum, this book pays attention to foundational fiscal issues regarding public schools and at times expresses evaluative opinions in keeping with the principles and processes enunciated herein. Regardless of the technical discussions undertaken in

this book, the underlying values of public common school ideals emerge as evaluative criteria. Whether taxpayers are treated equitably, whether tax burdens are properly apportioned, whether equal distributions are achieved, whether the finance system supports the common good and deters ill-gotten privilege, and whether the educational needs of all children are addressed equitably are all relevant to the determinations of how public funds for education should be distributed.

As with any project involving three professors, uniformity of agreement is not necessarily a foregone state of affairs. This is especially true when the topics under discussion involve a multiplicity of issues that bear on theory and policy, and political philosophy. Several chapters in this book have to do with matters of perception on which we have general agreement, but may, when further explicated, discover nuanced issues that can lead to divergence of thought, or even dissent. Writing assignments in this book were divided equitably, but not evenly, amongst we three professors, and in some instances the majority opinion may represent the dominant view, but not unanimity or concordance. The book is dissimilar from a judicial panel in that we do not publish our concurrences and dissents. The author of the chapter quite naturally has the weight of persuasion on his side.

There is a most compelling issue on which the three authors are in complete accord and sing in unison the praise and appreciation for Mrs. Shari Hall. We express our great indebtedness and profound thanks to Mrs. Hall for her research, coordination, editing, and transcribing of this entire project. Without her dedication to the task the authors could not have possibly brought it to fruition.

We also wish to extend our appreciation to Ms. Karla Walsh for her timely assistance in completing the preparation of the manuscript and for her assumption of the onerous task for obtaining permissions from sources utilized in the text.

Finally, we must give our sincere thanks to Ms. Heather Jarrow, our Routledge editor, who was most gracious and understanding as we extended, and extended again, the timetable for the submission of the manuscript.

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NOTES

1. Newton Edwards, *The Courts and The Public Schools* (Chicago: The University of Chicago Press, 1955), p. 29.
2. Ibid.; *City of Louisville v. Commonwealth,* 134 Ky 488, 121 S.W. 411.
3. Ibid.
4. Montesquieu, *The Spirit of Laws, 1748*, ed. David Wallace Carrithers (Berkeley: University of California Press, 1977), pp. 126–130.
5. Edwards, *op. cit*., p. 26. *Fogg v. Board of Education*, 76 N.H. 296, 82 A. 173 (1912).
6. David Miles, Gareth Myles, and Ian Preston, *The Economics of Public Spending* (Oxford: Oxford University Press, 2003), p. 1.
7. Janet C. Gornick and Markus Jäntti*, Income Inequality: Economic Disparities and the Middle Class in Affluent Countries* (Stanford: Stanford University Press, 2013), p. 3.

8. Rebecca M. Blank, *Changing Inequality* (Berkeley: University of California Press, 2011).
9. The following researchers have reviewed and discussed these studies: Philippe Aghion, Eve Caroli, Cecelia Garcia-Penalosa, "Inequality and Growth: The Perspective of the New Growth Theories," *Journal of Economic Literature*, 37:4, pp. 1615–1660; Sarah Voitchovsky, "Does the Profile of Income Inequality Matter for Economic Growth," *Journal of Economic Growth,* 10:3, pp. 273–296.
10. Samuel Bowles and Herbert Gintis, "Recasting Egalitarianism: New Rules for Communities, States and Markets," edited by Erik Olin Wright (London: Verso Books, 1999).
11. http://izquotes.com/author/louis-d.-brandeis/3.
12. Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers our Future* (New York: Norton, 2012), p. 117.
13. Gornick and Jäntti, *op. cit*., p. 4.
14. Richard Wilkinson and Kate Pickett, *The Spirit Level – Why Greater Equality Makes Societies Stronger* (New York: Bloomsbury Press, 2009).
15. John Stuart Mill, *Political Economy, Vol. II* (London: Colonial Press, 1900), pp. 454–456.
16. Ibid., p. 455.
17. Sylvia Nasar, "Economics of Equality: A New View," *New York Times*, January 8, 1994.

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CHAPTER 1

The Nature and Theory of the Public School

TOPICAL OUTLINE OF CHAPTER

- The Theory of Public Schools
- Virtues of Public Schools
- The Public School Philosophy
- *The Enlightenment* and Public Schools
- The French Connection
- Adam Smith and Public Instruction
- Economic Development and Public Instruction
- Common Schools for Public Instruction
- A System of Schools
- Public School Precepts

INTRODUCTION

An understanding of public school finance requires some basic knowledge of the nature of public schools and how they developed in both their philosophical and historical contexts. To know only the mechanisms of how public tax dollars are distributed by governments for the purpose of education without knowing the purpose for which they are distributed is to know the means but not be aware of the rationale for the ends to be achieved. This book will go into substantial detail about the technicalities of the allocation of funds for public schools, but first it is appropriate that a few words in this chapter be devoted to the philosophy and purpose undergirding the idea of public schools.

THE THEORY OF PUBLIC SCHOOLS

Public schools are an organized means to educate the citizens of a republic, schools of a republic. Public schools were not created merely to teach persons to read and write but, importantly, to provide universal education for the purpose of maintaining a republican form of government. It is a tenet of public school philosophy that a knowledgeable people will reject tyranny, and if the people understand their options, they will recognize and revere liberty and equality. Yet, learned people do not choose a republican form of government in the abstract; rather, they adopt such a government to acquire and maintain a government of virtue. A virtuous government holds freedom, liberty, and equality in the highest regard and dispenses social justice to achieve that end. A government without virtue is not worth preserving. It is believed that an educated populace is a condition precedent to achieve virtue in government. Sustaining a virtuous government requires a people of sensitivity and compassion willing to act for the commonweal. Knowledge elevates persons above the state of nature. In an uneducated world without governments to regulate and without "Knowledge of the face of the Earth," Hobbes' language in *Leviathan*, citizens cannot discern between the individual liberties that must be subordinated to the mutual benefit of society and those that should not.

A virtuous government must be buttressed by an educational system that instills ideals reflecting the social justice that should be fostered in society. The system of public common schools as envisaged by the American founders and their contemporaries in France represents society's best effort to broadly diffuse knowledge to effectuate the end of a desirable government. The United States is still involved in the public common school experiment, started less than two centuries ago, that seeks to achieve these ideals.

VIRTUES OF PUBLIC SCHOOLS

In a 2008 book of remarkable scholarship, Goldin and Katz,[1] two Harvard economists, capture the unique historical essence of the American public school. They assert that the twentieth century could be appropriately called either the "American Century" or the "Human Capital Century" in which great strides were taken toward worldwide mass education, and at its base in all of the developed nations was the American concept of public schools. Other countries that had become economically developed with high standards of living had emulated or adopted the American model of public schools. Goldin and Katz tell us that from about 1830 to 1900 the United States set out on a path of public universal education of which European philosophers had dreamed, but America implemented. This "American Century was an era of long-term economic growth and declining inequality."[2] At the heart of this undiminished progress, "the secret of American success," was the system of public schools.[3] Following the American lead, the now advanced nations of the world adopted, with slight variations, the concept of public schools. That which was unique about American education were attributes that Goldin and Katz identify and group into seven categories of *virtues.*[4]

These *virtues,* Goldin and Katz say, are "a set of characteristics that originate in basic democratic egalitarian principles" unique to a new nation unshackled by old world culture and mores. The virtues they discern as inimitable and peerless elsewhere among nations produced a rapid pervasive unparalleled diffusion of knowledge.[5] The virtues of American public schools are these:

1. Public funding
2. Public instruction
3. Secular control
4. Open access
5. Lay-controlled independent districts
6. Gender neutrality
7. Forgiveness

Goldin and Katz summarize these virtues to be basically a common system of equality of opportunity.[6] Briefly, these may be elaborated as follows: *Public funding* means "free," no fees for the children, all costs are paid by the public collectively. *Public instruction* is "public provision,"[7] meaning that children are instructed by publicly employed teachers certified by the state who teach a publically, democratically approved curriculum. *Secular control* refers to separation of church and state as standard; sectarian ideologies and religious dogma are not a part of the curriculum and are left to home and church. *Open access* is an implicit virtue, but at times it is easily overlooked or desensitized as with issues of nationality, race, culture, ethnicity, disability, etc. The virtue of *lay control* is an unexcelled earmark of the American public school. Systems in Europe were by and large controlled by a state central authority, certainly France, England, countries of northern Europe, and arguably Germany, after Bismarck. In America, local control pervaded; control was vested in 50 states composed of thousands of school districts, run by a hundred thousand or more democratically elected lay persons. Goldin and Katz recognize that the downside of the American system was a high degree of fiscal inequality, yet it had a compensating and contrasting attribute of being of the local community, non-elite, and close to the people.[8] Of singular importance is the virtue of *gender neutrality*. American public schools, from the origins, rejected the idea of separate schools for boys and girls, as had been practiced in the private systems of Europe, primarily religious schools that had prevailed for centuries. In America, the "[h]igh school entering classes in 1900 . . . contained an almost equal number of boys and girls. Considerably more girls than boys were in attendance in the upper secondary school grades, and a larger proportion of females than males eventually graduated."[9] Finally, the last virtue expounded by Goldin and Katz is that of *forgiveness*. Unlike most education in European countries, the American public school system has the quality of tolerance, indulgence, and pardon. It offers at various levels a second chance for children or youth who at some point in their education did not attain a requisite level of performance. The system has extended allowance to those who for some personal or societal reason have not mastered or cleared a particular educational hurdle.

In various ways most of these virtues have been emulated, in some measure, by advanced countries of the world; yet, in no instance have such virtues been as

pervasive as they have been in the American public school system. Today, however, there is a tendency in the United States to question the efficacy of certain of these virtues with centralizing legislation, reducing lay local democratic control, decreasing public funding, practicing unequal fiscal distribution, and reducing government funding of public instruction in favor of private instruction.

THE PUBLIC SCHOOL PHILOSOPHY

The public schools were formed from philosophical reasoning that aspired to betterment in government through commonality, mutuality, and harmony of interests. The common school followed the idea of community as opposed to that of "individual self-interest" and elevation of self over the interests of the state. The public school's philosophical foundation is found early in Aristotle's *Politics*[10] wherein he says that each citizen is pledged in allegiance to the state to place the interests and common good of all above those of self and separate interests. Aristotle maintained that the impulse of man, a "political animal," is to increase individual pleasure and reduce personal pain by the elevation of the condition of the entire community. The state, according to Aristotle, "has a natural priority over the household and over the individual among us. For the whole must be prior to the part."[11] This pursuit of the common good through political association enables liberty and justice for the individual to prevail.

BOX 1.1

Aristotle on Education

. . . it is manifest that education should be one and the same for all, and that it should be public, and not private . . . Neither must we suppose that anyone of the citizens belongs to himself, for they all belong to the state, and are each of them a part of the state, and the care of each part is inseparable from the care of the whole.

Source: Aristotle, *The Politics, Book VIII*, in *Aristotle, The Politics and The Constitution of Athens*, edited by Stephen Everson, translated by Benjamin Jowett (Cambridge: Cambridge University Press, 1996), p. 195.

The Aristotelian argument simply maintained that all are better served by the "wisdom of collective judgments" than by determinations of individuals.[12] In Aristotle's view, popular judgment was also more efficient simply because in the long run decisions made in consideration of self-interest will only consider a part and not the whole. The vagaries of decision by many parts without considering the common good will inevitably result in an inefficient government. Public schools are no different. Decisions to advance the conditions of all people are more likely to be effective

and efficient if made by the many rather than the few. It is said that Canning, the prime minister of England, in 1827, once pithily commented, "The House of Commons, as a body, had better taste than the man of best taste in it . . ." This view was very much prevalent in the mid-nineteenth century when the public schools were formed in the United States. The *common will* is a more reliable standard for social conduct than individual caprice and is an underlying assumption of democratic governments.

This was the view of the French philosopher Condorcet who, in his 1792 Report on the General Organization of Public Instruction to the National Assembly of France, argued that "only through universal education could citizens be taught effectively to enjoy their rights and fulfill their responsibilities."[13] The need for an educated citizenry to act in common to advance the republican form of government was best expressed by James Madison when he explained, "A people who mean to be their own Governors must arm themselves with the power which knowledge gives and must act in concert for the common good."[14]

THE ENLIGHTENMENT AND PUBLIC SCHOOLS

The idea of schooling the masses owes its origins to *The Enlightenment, The Age of Reason* of the eighteenth century. *The Enlightenment* was the period in human progress when the most significant steps were taken to remove the shackles of myth and superstition that had bound the human mind to darkness in all prior times. From the early seventeenth century, a steady progression in thought ensued that led to the concept of universal education. There is no date certain as to when *The Enlightenment* or *The Age of Reason* began, but thereafter until today, it has marked a rising realization of people that knowledge is the most basic condition required to ensure liberty and happiness.

The first sprouts of *The Enlightenment* emerged with Francis Bacon's *Novum Organum Scientiarum* in 1620 and René Descartes' *Discourse on Method* in 1637, both prescribing thought processes of a scientific method of reasoning. That human beings could study natural phenomena and discover their causes was a new idea in an age dominated by ignorance, myth, spiritualism, and religious dogma. This benighted time of a thousand years after the decline of the Roman Empire saw kings and ecclesiastics suppress learning in order to maintain control over the mind of man, restraining progress and denying liberty and equality to most human beings except for a privileged few. We know that a light of learning was emerging by the time of Isaac Newton's *Principia Mathematica* in 1687 and John Locke's *The Second Treatise of Government* in 1689. Newton's great genius was a foremost example in the world's history of man's ability to reason. Newton's works were probably a watershed and the most important indicator of a new *Age of Reason*. Locke was the first to clearly elucidate that the rightful condition of all human beings is one of freedom and equality, limited only by their own ability to reason. Citing a couple of major players such as Newton and Locke, however, does not capture the growth of learning for which that age formed the foundation in contributing to individual autonomy, liberty, and equality that was to emerge so dramatically in *The Age of Reason*.

As Ulrich Im Hof, the German historian, wrote, learning in that era had begun "removing all of 'veils and screens' from men's minds and had rid the world of 'slavery

and superstition' and dispel[ed] the 'shadows' . . ."[15] The progress of light and liberty owes much to the states of northern Europe where there was freedom from government and church censorship; where authors with new ideas could be relatively safe from criminal prosecution or retribution by the King and Church. Indeed, Descartes,[16] the great mathematician and philosopher mentioned above, was forced to flee north to live in Sweden until his death, and Locke escaped the wrath of Charles II of England to live and write in Holland. France, however, ultimately withstanding church and state censorship and pervasive obduracy toward progress, became the European leader of the greatest remonstrance against ignorance and repression the world had known to that time as its people rose up in violent revolution.

As Anthony Pagden puts it in his acclaimed treatise, *The Enlightenment and Why It Still Matters,*[17] in the world before *The Enlightenment* man had not acquired "sufficient knowledge"[18] to inspire him to quest for more knowledge. Until *The Enlightenment* there was no developed concept of *public instruction* to elevate man from ignorance, intolerance, and myth of all the ages before. The intellect of man was frozen, or as Pagden writes, "marooned in time,"[19] and there was no real conception of "equality before the law,"[20] the public good, or the public interest.[21] All of these things were the consequences of knowledge and *public instruction*.[22]

THE FRENCH CONNECTION

The intellectual ferment generated by *The Enlightenment* took hold in Europe on both sides of the Atlantic, primarily in France, and to the greatest degree in the new American Republic. In these two places the idea of universal education was founded. Jefferson proposed the first system of free public elementary schools for all children in 1779. In Jefferson's system, all youth would attend free public schools and the costs were to be borne by all citizens of the state.[23]

Schools of the republic, in comparable degree to Jefferson's, took place, also, in France. Furet, the eminent French historian, stated the view of the Revolution best: "If the citizens were enlightened, and therefore reasonable, they could not desire other than the public good, which was also their own."[24] According to Furet, public schools "became the essential means of regenerating citizens, which was indispensable to the foundation of the Republic."[25] When French and American revolutions were fought, the emergent leaders were imbibed in the philosophy of republican government, the prerequisite for which was an educated people who could read well enough to escape poverty and ignorance. Woloch explains that in France, during the Revolution, 1791–1793, "Education quickly assumed an unparalleled ideological . . . importance. The revolutionaries came to regard universal primary schooling as the hallmark of a progressive nation and as a key to the future prospects of the French people."[26]

Condorcet, the strongest voice for public schooling during the French Revolution, maintained that the poor and oppressed lower classes could not become functioning citizens in a republic unless they had the freedom to obtain education.[27] Roche, an eminent French historian today, explains that *The Enlightenment* brought a spotlight upon "The people [who were] ignorant, inarticulate, and systematically deceived ('coddled with myths') – lived in prejudice and were lulled by preaching that

kept superstition alive. Oppressed by work, they had no opportunity to learn."[28] The great revolutionary leader, Danton, averred that, "In the Republic no one is free to be ignorant,"[29] and more directly he made clear that the child ultimately "belongs to the Republic."[30]

What limited education there was in France before the Revolution was only for boys.[31] Neither parents nor the church usually found it desirable to educate girls. This general disregard for the value of education had produced a largely illiterate population on the eve of the Revolution.[32] In the late 1780s only 27 percent of the brides and 47 percent of the grooms could sign their names on parish marriage registers,[33] which meant that most of them were illiterate; they were counted as literate simply because they could place their mark on the marriage registers. In wide swaths of France a vast majority of the men and women were completely illiterate. The same was true of the United States. The problem was so severe in both countries that it was realized that intergenerational remediation could only be addressed by a system of public instruction with a huge public commitment of labor and capital as its foundation. The supply of qualified teachers was nonexistent, requiring the state to first create training schools to certify teachers and in doing so develop a force of trained teachers for primary schools, the costs to be provided at state expense.[34]

BOX 1.2

Science, Progress, and Myth

If the society's world view encourages the belief that humans have the capacity to know and understand the world around them, that the universe operates according to a largely decipherable pattern of laws, and that the scientific method can unlock many secrets of the unknown, it is clearly imparting a set of attitudes tightly linked to the ideas of progress and change. If the world view explains worldly phenomena by supernatural forces, often in the form of numerous capricious gods and goddesses who demand obeisance from humans, there is little room for reason, education, planning, or progress.

Source: Lawrence E. Harrison, "Underdevelopment Is a State of Mind" in *Development and Underdevelopment: The Political Economy of Global Inequality*, 4th Edition, edited by Mitchell A. Seligson and John T. Passe-Smith (Boulder: Lynne Reinner Publishers, 2008), pp. 231–232.

Certain principles emerged from the revolutions in America and France that formed the nature of public schools: (1) society must do everything possible to favor the progress of public reason, (2) instruction must be secular and should not be under the control of priests, (3) primary education must be universal and free to all children, (4) the costs must be borne by the state, (5) instruction in the public schools must be conveyed by trained, state-certified teachers, and (6) the decision to educate children must not be optional for parents.[35]

ADAM SMITH AND PUBLIC INSTRUCTION

A principal aspect of *The Enlightenment* philosophy was that education should be universal and that education should be formed and effectuated by public instruction.[36] Public instruction, formal instruction, is not simply parental instruction, and not merely ecclesiastical instruction, but, rather, instruction that is free to all, taught by public school teachers with a curriculum designed by the people in the state to foster freedom and independence of mind. Adam Smith, the father of economics, a pillar of *The Enlightenment*, the author of *The Wealth of Nations* (1776),[37] wrote that school instruction should be without religious superstition,[38] and, importantly, children should be taught to be "incredulous," with inquiring minds that separate the child from the limits of parental mind control, religious inculcation, or government propaganda. Smith said,

> There seems to be in young children an instinctive disposition to believe whatever they are told . . . Their credulity accordingly, is excessive, and it requires long and much experience of the falsehood of mankind to reduce them to a reasonable degree of diffidence and distrust.[39]

Accordingly, Smith argued that neither the parent nor the church was capable of teaching "incredulity" in children. The parents innocently instill in their children their own beliefs, right or wrong, and generally demand that their children adhere to those beliefs without question. Homeschooling was rejected by Smith as was the English residential "public" school. The English "public" school remains today a private elite school for children of the wealthy. It is an interesting paradox that Adam Smith's philosophy of economic competition has been relied upon to justify the public funding of private schools in America. Smith had much to say in his rejection of private schools, especially clerical schools that had dominated and limited education to his time by the Church of England and the state church of Scotland.

Condorcet, cited above, writing immediately before the French Revolution, referenced Adam Smith in his first proposal for "true public instruction"; he concluded that free universal public instruction is the "only effective remedy"[40] to adequately redress the condition of illiteracy of the people of France.[41] Emma Rothschild, in her recent important work, *Economic Sentiments: Adam Smith, Condorcet and The Enlightenment,* cites the connection between Smith and Condorcet, who both called for public instruction to alleviate poverty and to form the foundation for a republic. Condorcet cites Smith, saying: "Instruction is the only remedy for this ill . . . The laws proclaim an equality of rights, and only institutions for public instruction can make this equality real."[42] Condorcet encapsulated the importance of public instruction when he said that the ultimate objective should be for individuals to understand their rights in the acquisition of ultimate happiness.[43]

Rothschild writes that the "efficiency" of society and the economy, to Smith and Condorcet, were dependent on equality of public instruction "which would lead in turn to greater equality of industry and wealth,"[44] and that, according to Smith, a system of public instruction would "ensure that no one was obliged to depend blindly on others in the ordinary business of life or in the exercise of individual rights."[45] We know, as Rothschild observes, that Thomas Jefferson's own views regarding public

schools may well have been influenced by Smith and Condorcet. When Jefferson compiled his "course on reading" in 1799, he included Locke's *Essay Concerning Human Understanding*, Smith's *Wealth of Nations*, and Condorcet's *Esquisse D'un Tableau Historique Des Progress De L'espirit Humain.*[46]

BOX 1.3

Public Instruction Drives Total Education

The history of mass primary and secondary schooling is dominated by the rise of public, not private, supply. No high-income OECD country has relied solely on private demand and supply in education, least of all in primary schooling.

Source: Peter H. Lindert, *Growing Public: Social Spending and Economic Growth Since the Eighteenth Century, Vol. I* (Cambridge, UK: Cambridge University Press, 2004), p. 88.

ECONOMIC DEVELOPMENT AND PUBLIC INSTRUCTION

Peter H. Lindert, in one of his remarkable books, *Growing Public: Social Spending and Economic Growth since the Eighteenth Century,*[47] chronicles the progression of public schools from about 1820 into the twentieth century. He documents that initially, from 1833 to 1850, "no country collected even as much as one-half of one percent of national income in taxes for education."[48] He shows that even though funding in the mid-nineteenth century was minimal, it was much better than before *The Enlightenment* took hold in the late eighteenth century.[49] Lindert theorizes that the dearth of investment at this early stage was not due to the lack of intellectual leadership but, rather, is to be attributed to the opposition of mostly powerful persons who for self-indulgent and pietistic reasons blocked public school creation and public financing.[50]

Lindert further writes that "[I]n fact, both Adam Smith in Britain and Thomas Jefferson in colonial America supported the government's collection and allocation of taxpayers' dollars to pay for the education of 'other people's children.'"[51] The expressed views of Smith and Jefferson are worth noting, even though their opinions were strongly opposed by controlling persons who generally objected to taxes for schools, as well as other social spending. Social spending for welfare at that time was referred to as "poor relief," and in reference to education, at least in England and some states in the United States, public school funding was justified as aid for only "paupers' children."

Progress toward tax funding of public schools was led by the United States, France, and countries of northern Europe. Leadership in the expansion of state schooling was also developed in Prussia and Scandinavian countries that had moved forward at a slower, but with an increasingly competitive, pace. German education progressed dramatically under Bismarck, 1870 to 1890, but lost ground with the calamity of World War I.

Thus, some countries were more directly influenced by *The Age of Reason* than others as they, in different measure, absorbed new learning. Those countries that progressed more rapidly, according to David S. Landes, in his bestseller, *The Wealth and Poverty of Nations*,[52] had two special characteristics. "First, their stress on instruction and literacy for girls as well as boys"[53] resulted in "greater literacy and a larger pool of candidates for advanced schooling. The education of girls ensured a continuity of literacy from generation to generation."[54] According to Landes, "Literate mothers matter."[55] Landes' second rationale for educational and economic progress was what he calls "unobtrusive evidence of the importance of time."[56] Learning had led to a reliance on clocks which were manufactured and used to govern the efficient use of the individual's days. Landes also explains that countries with an educated labor force were more advanced in scientific measurement and commerce. He argues persuasively that countries controlled by the clergy that remonstrated against *The Enlightenment,* constrained new knowledge, censored literature, and repressed scientific works were the same countries that resisted public schooling. As a result, the same countries were relegated to a future of lower standards of living.[57] Landes cites for corroboration Hugh Trevor-Roper, the famous British historian, who maintained that because of religion and anti-learning the countries of southern Europe and Central and South America sealed their fate of lingering for centuries as underdeveloped countries.[58]

America adapted to mass public education with greater alacrity than most countries of Europe because the people in America were unburdened from centuries of control by princes and priests. Prussia, under Bismarck,[59] had stimulated peripheral awakening in Austria. Bismarck's grand design for the modernization and unification of Germany had been, to a large degree, dependent on economic development and, particularly, mass education in the face of rigid opposition by both Protestant and Catholic churches.[60]

The Enlightenment did not reach Africa, India, or the Far East, primarily because of geography, but it did not reach Latin America for other reasons. The western hemisphere was first accessed by Spain and Portugal, but both had rejected the ideals of public instruction for its secular overtones and had thereby been denied the benefits of the progress that had ensued. The result was a stagnation that negatively affected both Iberia and its influences throughout Central and South America of which it controlled and exploited.

Angus Maddison conjectures that Latin America lagged behind Western Europe and North America because it was dominated by Iberian institutions that "were less propitious to capitalist development than those of North America."[61] Also, he speculates that Spain and Portugal did little to elevate the indigenous people of Central and South America; they allowed a large economic and social underclass to persist and, moreover, public schools were founded in the face and opposition of the interests of Iberian institutions which were hampered by economic control of religious traditions and culture. Thus, "over the long run the rise in per capita income was much smaller than in North America."[62] Daron Acemoglu and James A. Robinson set forth the theory that the "institutions" there were "absolutist," politically controlled by King and Church, and were economically "extractive,"[63] not "inclusive" economic systems that were "narrowly monopolized," unequal with an immobilized underclass, and made

no provision for a secular broad-based education system. Absolutist regimes, whether state or church, are obstacles to entrepreneurial activity and equality.[64]

COMMON SCHOOLS FOR PUBLIC INSTRUCTION

The use of the word *common* invokes special meaning in economic, historical, and constitutional contexts. Common schools in the United States were created as institutions where all children, regardless of economic or social condition, could obtain public instruction free of charge. The costs were to be shouldered by the public through taxation. The instruction was to benefit all in common, and the costs were to be shared by all in common. Use of the term *common* as an adjective implies that the schools are free and open to all. The great educational debate of the late eighteenth and nineteenth centuries was whether schools should be free to all children and the costs borne by the citizenry from revenues gained from taxation.

The framers of the various state constitutions in the United States in using the term *common* evidenced an unmistakable state role for the general diffusion of knowledge. Importantly, the intent was to create state-operated schools that were free to all. Early, as it became clear that private schools had failed to meet the general educational needs of the people, some states experimented with public academies, but it soon became apparent that they were ineffectual in educating the masses. Though academies and pauper schools proliferated, they failed to enroll a significant segment of the youth and soon disappeared; thus, public schools became dominant.

As the private and quasi-private forms of schooling were unable to meet the needs of an expanding nation, an awakening educational consciousness called for a government-maintained system of schools for all children. This philosophy generally followed the ideas of eminent thinkers of *The Enlightenment* who sought to build republican forms of government on the foundation of a more literate and homogeneous mass of people. Specifically, the common schools were designed to remedy three major shortcomings: (1) The private schools did not constitute a system but were created and funded by different means by various initiatives for private objectives. (2) The private schools were not normally free. Poor families struggled financially in order to enroll their children. (3) The private schools had special motivations of religious, social, ethnic, economic, and sometimes racial separation.

When the common school system was finally established in the United States, the recurrent theme enunciated by the earlier proponents encompassed certain elements that distinguished public common schools from their forerunners. These common schools were based on certain *a priori* considerations:

1. Each child was equally important to the republic.
2. Education benefitted all, not just the person being educated.
3. All should pay in common.
4. All should receive the educational benefits in common.

The word *common* as it relates to schools has special and significant meaning. The common school system as envisioned by the policymakers during its formative years

is a stark contrast with its educational antecedents. The common school was unique because it was:

1. A free school where the levy of tuition or fees could not impose a burden on poor children.
2. A school open to all, not just the poor but a cross-section of the population where all classes could mingle and learn together.
3. A school supported by taxation of all the people of the state.
4. A school that provided public instruction and was governed as a public secular entity, free from sectarian or special interest control.
5. A school that was part of a system where a high degree of uniformity existed throughout the state.

A SYSTEM OF SCHOOLS

In the late eighteenth and early nineteenth centuries the word *system* in state constitutions in the United States held a special connotation emanating from the earlier discussed revolutionary enlightenment republicanism. The idea that public instruction of the masses was the key to the formation of the new political order and general happiness of the people was a pervasive theme as it became clear that tutorials, home instruction, private schools, and other limited devices such as the pauper schools were inadequate to support a new and thriving nation. Only a state system could meet the needs of a growing nation.

The new concept of mass public education was premised on four beliefs: (1) that education was vital to the republic; (2) that a proper education consisted of the general diffusion of knowledge; (3) that virtue and civic responsibility were essential; and (4) that public schools and colleges were the best means of providing mass education on the scale required.[65] Two important and distinguishing characteristics of this new concept of education were that it was a system and that it was of the polity. Cremin observed, "What was fresh in the republican style was the emphasis on 'system,' on a functional organization of individual schools and colleges that put them in regular relationship with one another and with the polity."[66]

The historical discussion of *system* usually employed terms such as *machine* as well as *harmony* and *uniformity*. The educational system was to be likened to a machine, which would function smoothly and efficiently in the general diffusion of knowledge. An efficient system demanded the balance and harmony of its working parts.

The term *system* was used in at least four different but related senses.

1. A vertical incremental pattern of institutions which permitted progress from one level of educational attainment to another (primary, secondary, and college).
2. A related curriculum of standard subjects which would provide a firm knowledge base for all persons.
3. A uniformity of offerings which would assure that all persons received the education necessary to carry out civic responsibilities.
4. An aspect of the polity, or extra-familial, as opposed to familial. It was necessary to fashion a system in which education was not dependent on the private sector or the family, but instead was dependent on the public.

Thus the term *system* assumes a coordinated curriculum and allows for a progression of educational achievement. Uniformity, equality, and harmony of function are implicit features of a system and are essential to the efficient diffusion of knowledge throughout the population.

PUBLIC SCHOOL PRECEPTS

The discussion of the philosophical and historical bases for public schools may be summarized in a list of precepts or principles that form the rationale for the creation and maintenance of public schools in the United States. The principles given were adapted from a statement provided by a select committee in the landmark case of *Rose v. Council for Better Education, Inc*.[67] that held in 1988 the system of public school education in Kentucky unconstitutional. The principles were accepted and were reflected in the standards adopted by the Kentucky Supreme Court.

1. *The schools are to be public, of the body politic, and are to be governed and controlled by the people*. Early experimentation showed that quasi-private and semi-public schools would not suffice to educate the masses. Control by private interest groups, regardless of their nature, always placed limitations that reduced public participation and prevented full access of the people. To assure openness to all, the system must be controlled by the polity.
2. *The schools are to be established as a system, an organic whole, arranged with interdependent parts*. The word *system* requires a measure of orderliness and uniformity regardless of the number of school districts. The state system must form a cohesive whole and cannot be merely a conglomeration of local independent initiatives.
3. *The schools are to be free and common to all with no charges to limit access.* Reluctance on the part of the people to finance schools from the public treasury was a primary hindrance to the establishment of a viable common school system. Early attempts to create an educational system failed partially because of user charges, usually in the nature of tuition and fees, which limited attendance to those who could afford to pay the requisite costs of operating the schools. The public schools are to benefit all the people and all of the people must pay for them.
4. *The schools are to be secular and free from sectarian religious control, and public funds should not be expended for religious or parochial schools.* Public schools should exemplify toleration, and the power of the state should not be used to promote or inhibit the free exercise of religion. Strict religious neutrality should be maintained in the public schools. Public tax monies should not be used to establish religion by preferring one religion over another nor by aiding a "multiple establishment" of more than one religion.
5. *The schools are to be financed by tax resources which are distributed in such a manner as to ensure that the quality of a child's education will not be dependent on the fiscal ability of the local school district.* The quality of a child's education in virtually all the states is determined by the financial ability of the community in which the child attends school. A system of schools cannot be efficient if some children are denied educational programs and services because their local communities do not happen to have wealth or income to sustain school revenues that are available to local communities that possess larger and more lucrative local tax bases.

6. *The schools are to provide equitable educational treatment to all children in the accommodation of their educational needs.* All educational programs and services cannot be precisely uniform. School districts in different areas of a state may have children with varying educational needs. For example, every school district will not have precisely the same percentage of children with disabilities or culturally deprived children. Children having such special needs may require particular educational programs which cost more than regular programs. Equity requires that additional funds be expended if the state's moral and legal obligation of an efficient system is to be met.
7. *The schools shall be financed in a manner which will prevent the quality of a child's education from being dependent on the vagaries of local tax effort.* Whether a local school district has high or low tax effort to support the schools may be determined by conditions quite unrelated to education. The social, political, and economic structure of each community is different and each community, for various reasons, may respond differently to entreaties to support the schools. This may be true even if the people, from community to community, have the same desire and aspiration for the education of their children. Because the schools of a state exist as a unified system, the caprice of local political conditions cannot be permitted to harm the educational opportunity of a child. No community has a right to impose an inferior education on its children.
8. *The schools shall be properly managed to ensure the most effective and productive use of tax funds.* The Constitution contemplates the utilitarian use of public school funds and in so doing the schools are accountable to the people. In creating a state school system, the framers of the Constitution sought to capture the advantages and utility of educating the masses in the most efficient manner possible. If aspects of the school system's management hinder efficiency of operation, they must be revised and more acceptable alternatives must be incorporated and enforced.
9. *The General Assembly of each state is to bear the responsibility for the enactment of laws to govern the common schools.* The establishment and maintenance of the common schools is not a matter of local discretion. Neither is it primarily a federal function. While the time-honored concept of local control is desirable and should be assured and safeguarded, the ultimate discretion over the schools, within the bounds of the state and federal constitutions, rests with the state legislatures. Responsibility for taxation in support of public schools falls upon the state legislature and cannot be delegated away.

SUMMARY

In summarizing and concluding this chapter, it should be noted that singular progress toward universal free education was made as a result of the ideals of *The Enlightenment*. Yet even today we have not developed satisfactory systems of tax support for the public schools in many countries and in states in the United States, and the struggle for satisfactory levels of financial support continues. As will be shown later, the public schools in the United States are still involved in what Huxley called a "struggle for existence,"[68] and the battle for tax-supported public schools is a continuing battle for survival and growth. In a rapidly changing world, there must be improvement in the public schools or it, as an institution fundamental to democracy, may be harmed or

permanently impaired. This in turn will threaten liberty, equality of opportunity, and ultimately the republican form of government.

The public common school concept rests on the belief that a knowledgeable people will be better able to perpetuate a republican form of government than will persons of little or marginal knowledge. The object and interest of the people is to have a virtuous government that will protect liberty and advance equality. This is best accomplished in a republican form of government that rests on the foundation of an informed citizenry. Public common schools are the principal vehicles fashioned by the people to maintain a knowledgeable electorate.

The term *common schools* envisages free schools which all persons rich and poor attend and from which all benefit in common. The common school concept further requires that all persons pay in common through general taxation to support the schools.

Public instruction was a response to the recognized limitation and inadequacies of private schools to meet the needs of a modern nation. In creating public schools, the people of the United States implicitly decided that all children were children of the republic with equal rights and opportunities. The meaning of the word *common* encompasses all the presumptions necessary to provide mass universal education.

The term *system* is an important aspect of public common schools. Early in this country, states employed piecemeal approaches to the provision of education, utilizing inadequate devices such as rate bills, pauper schools, and quasi-public academies in endeavoring to redress a prevailing cognizance of the need for universal education. These methods failed because they were not systems of incremental education. Moreover, they failed to provide uniformity or thoroughness across the state.

As envisaged by the American founders, a system of public schools has the attributes of uniformity, thoroughness, and equality. Moreover, the founders saw universal public education as a great machine which operates with harmony and efficiency in the conveyance of knowledge and prosperity. Public schools were seen as a vehicle to reduce inequalities in society and to make the foundations of the social system rest on merit rather than privilege.

Public school precepts may be summarized as follows: to be of the public; to be a system, an organic whole; to be free and common to all; to be secular; to be financed from general taxation; to be equitable; to be equal regardless of location; to be efficient; and to be the responsibility of the state.

KEY TERMS

- Public education
- Public schools
- Public instruction
- Public school virtues
- *The Enlightenment*
- Public reason
- Common schools
- System of schools
- Public school precepts
- Polity
- Body politic
- Sectarian schools
- Secular schools
- Private schools

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CHAPTER 2

Fundamental Rights and State School Finance Litigation

TOPICAL OUTLINE OF CHAPTER

- Fundamental Rights
- Knowledge and Right
- Education as a Positive or Negative Right
  - The Price Tag
- Fundamental Right of Education and the U.S. Constitution
- State Constitutions in the United States
  - Entitlements and Prescriptions
- State Education as a Fundamental Right
- States Where Education Is Not a Fundamental Right and Plaintiffs Prevailed
- National Access Network
- Universal Declaration of Human Rights
- European Convention on Human Rights

INTRODUCTION

What is a fundamental right? What does it mean to have a fundamental right to education? What has state financing to do with a fundamental right? These are basic issues that have been addressed by legislatures and the courts in different ways and constitute illusive fiscal and legal concepts. Foremost, however, with regard to education finance, the recognition that acquisition of knowledge is of primary worth to the human being is "a value for its own sake, a basic value, and should be funded liberally by the government."[1] The right of the human being to knowledge is self-evident. Knowledge

is peremptory of other rights, for without knowledge there can be no understanding as to the meaning of important human rights such as liberty and equality. Without knowledge one is unable to determine truth, and matters of human worth cannot be judged correctly.[2] Obviously, to reason without knowledge is a futile exercise, and that which is reasonable cannot be ascertained in a shade of ignorance. This chapter will explain the rationale for holding that for the acquisition of knowledge, education is fundamental and, as such, requires public funding as a principle of *positive* law. Further, the chapter will identify and classify those states in the United States where education is a fundamental right.

BOX 2.1

Self-Evidence of Knowledge as a Good in Natural Law

The basic practical principle that knowledge is good need hardly ever be formulated as the premise for anyone's actual practical reasoning . . . Is it not the case that knowledge is really a good, an aspect of authentic human flourishing, and that the principle which expresses its value formulates a real (intelligent) reason for action? It seems clear that such, indeed, is the case, and that there are no sufficient reasons for doubting it to be so. The good of knowledge is self-evident, obviously. It cannot be demonstrated, but equally it needs no demonstration.

John Finnis

Source: John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 64.

FUNDAMENTAL RIGHTS[3]

A fundamental right is a "good," a "basic good," for human well-being. A sentient being is, by definition, alive; thus, self-preservation, or the value of "life," is first among basic human goods, values, and rights.[4] Knowledge is second only to life.[5] It is beyond argument that life and knowledge are fundamental. Education to procure knowledge is the means for a person to gain "capacity" in order to exercise liberty. Nozick explains that "only a person with the capacity to so shape his life can have or strive for a meaningful life."[6] According to Henkin, in his book *Human Rights*, a fundamental right is inherent in the individual and constitutes a protected claim that need not be earned; rather, it is immanent in the human being as an entitlement;[7] its foundation is found in moral law. Since education is a fundamental right, everyone is entitled to obtain it by virtue of being human. As Henkin has written, "When a society recognizes that a person has a right, it affirms, legitimates, justifies that entitlement, and incorporates and establishes it in the society's system of values, giving it important weight in competition with other societal values."[8]

BOX 2.2

Fundamental Right

A right is a morally fundamental right if it is justified on the ground that it serves the rightholder's interest in having that right inasmuch as that interest is considered to be of ultimate value, i.e., inasmuch as the value of that interest does not derive from some other interest of the rightholder or of other persons.

Joseph Raz

Source: Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986), p. 192.

Individual or human rights that carry the appellation of "fundamental" are therefore basic and essential to the life and dignity of each individual.[9] Yet, even fundamental rights are not absolute and can be abridged; but to override them requires special circumstances by which the government must show that society at large is in some way enhanced by the denial of an individual's right.

A fundamental right enjoys a special place in the social contract between the individual and the state. Standing at the nexus of the social contract, a right enjoys a *prima facie* or presumptive inviolability, and by its nature "trumps" other less important public goods.[10] Individual human rights cannot be denied or sacrificed merely because the majority of society is inconvenienced or has preference or a disposition to deny the right; a fundamental right can only be denied for a compelling reason.

According to Ronald Dworkin, fundamental human rights are claims on society.[11] Where education is elevated to the level of a fundamental human right, there are accompanying obligations for the government and society to satisfy.

BOX 2.3

Universal Principle of Right

Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.

Immanuel Kant

Source: Immanuel Kant, *The Metaphysics of Morals*, first published in 1797 (Cambridge: Cambridge University Press, 1991), translated by Mary Gregor.

KNOWLEDGE AND RIGHT

Jefferson, among political philosophers, best explains that knowledge is an incontrovertible rule of liberty, in his Preamble to his Virginia "Bill for the More General Diffusion of Knowledge," 1779, where he expresses *The Enlightenment* ideal that education is not only a natural right but that it is the *a priori* condition for liberty and freedom. Pointedly, he says in his *Bill* that to "illuminate as far as practical the minds of the people at large, and more especially to give them knowledge" is the best safeguard against tyranny; knowledge as a first principle promotes "publick happiness." Importantly, for Jefferson, the ultimate goal of all human beings is "happiness."

Condorcet, in 1791, as we noted in Chapter 1, wrote extensively on the necessity of "public instruction" to instill "public virtues,"[12] on the road to happiness, maintaining that universal public instruction is the "only effective remedy" for the ills of society. Condorcet reinforced the idea that public instruction is necessary for achieving freedom and equality of the individual. He said in his memoirs that "public instruction is the only viable means to achieve the 'equality of rights,' and it is only public instruction that can make equality real."[13]

One can easily see the "close kinship"[14] among the three seminal documents, the American Declaration of Independence (1776), the French Declaration of the Rights of Man (1789), and the United States Bill of Rights (1791), from the American Revolution and the French Revolution – documents that were the epitomes of *The Enlightenment's* legacy of individual rights, democracy, and happiness.

Horace Mann, the first Secretary of Education in Massachusetts, 1837, often referred to as the father of public education in America, wrote that education is an "absolute right," or a "natural right."

> We can cite no attributes or purpose of the divine nature, for giving birth to any human being, and then inflicting upon that being the curse of ignorance, of poverty and of vice, with all their attendant calamities.[15]

Mann argued that natural ethics requires the creation of public common schools in fulfillment of a state's duty to pass along to each succeeding generation all the knowledge and wealth of the preceding generation.[16] The paramount law of nature requires that children should come into possession of all knowledge of the earlier generation.[17]

It was Mann's view that knowledge was the property and wealth of each individual. To Mann, the public schools were the means by which the state ensures the efficient and just transfer of knowledge to the next generation: "[t]he claim of a child, then, to a portion of the preexistent property begins with the first breath he draws . . . He is to receive this, not in the form of lands, or of gold and silver, but in the form of knowledge and training to good habits."[18]

Mann believed natural ethics required that the state has an obligation to every child to enact a code of laws establishing free public schools. These laws governing education become "the fundamental law of the State."[19] Mann's rationale for fundamentality of education and the duty of the state are:

1. The successive generations of men, taken collectively, constitute one great Commonwealth.

2. The property of this commonwealth is pledged for the education of all its youth, up to such a point as will save them from poverty and vice, and prepare them for the adequate performance of their social and civil duties.
3. The successive holders of this property are trustees, bound to the faithful execution of their trust, by the most sacred obligations . . .[20]

The obligations under these inviolate propositions that form the philosophical foundation for the intergenerational transfer of knowledge require the establishment of a system of public instruction in public common schools.[21]

EDUCATION AS A POSITIVE OR NEGATIVE RIGHT

The Bill of Rights and the Fourteenth Amendment to the U.S. Constitution enunciate *negative* rights or *negative* liberties that the government "shall not" deny. The Constitution alone does not provide for *positive* rights or liberties. However, if either the federal or state government decides through legislation to provide for education, it, thereby, creates a "claim"[22] for all persons similarly situated, an entitlement of benefit, creating a liberty and property interest, a *positive* right that cannot be taken away without procedural due process. To understand education as a right or liberty requires reliance on moral philosophy as much as law and economics.

Isaiah Berlin has best explained the two concepts of rights or liberties, *negative* rights and *positive* rights. Berlin writes that education is fundamental to individual freedom in that a world of options may be wide open to an individual yet that individual may be restrained by ignorance or poverty and thereby have no freedom to exercise those options.[23] This lack of capability to access liberty emanates, in fact, in nearly all instances, from a deficiency in knowledge. Berlin asks "What is freedom to those who cannot make use of it? Without adequate conditions for the use of freedom, what is the value of freedom?"[24] Berlin first elaborated his concept of *positive* and *negative* rights in 1958,[25] the same idea of which was subsequently applied to legal theory by Charles Reich in a *Yale Law Journal* article in 1964,[26] and was given judicial recognition in the U.S. Supreme Court's landmark decision in *Goldberg v. Kelly*.[27] But the U.S. Supreme Court has since rejected any affirmative or *positive* right to government aid for education[28] or welfare.[29]

Thus, Berlin, in his essay, *Two Concepts of Liberty*,[30] identifies two kinds of liberty, *negative* and *positive*. Negative liberty or freedom means that a person "should be left to do or be what he is able to do or be, without interference of other persons,"[31] freedom *from*. Negative liberty is the liberty that John Stuart Mill defined in his classic work, *On Liberty*,[32] where he analyzed the social and political world in terms of "a struggle between liberty and authority."[33] The authority for which Mill was most concerned was the government and organized religion, both of which had historically exercised "dominion," temporal and spiritual, over human beings in body and mind.[34] Protection against these two powers is the "negative freedom" that Berlin calls "keeping authority at bay."[35] This is "liberty *from*" that Mill concludes is "The only freedom which deserves the name is that of pursuing your own good in your own way."[36] Such liberties are frequently termed *civil* and *political* rights. These are the rights against

government usurpation that are enshrined in the *Bill of Rights* of the United States Constitution, rights to freedom *from* government interference, freedom of religion, speech, association, privacy, etc. Such rights are also found in the French *Rights of Man* and in various provisions of the *Universal Declaration of Human Rights of the United Nations,* the *Preamble to the Universal Declaration,* and the *European Convention on Human Rights*, each of which ensures the liberties of speech and belief.

Negative liberties are also the rights expounded by Locke and Jefferson, freedom from government interference. As Henkin writes, Locke and Jefferson apparently did not contemplate *positive rights*, "that the social contract between the people and government might include an obligation on government to help people meet their basic needs if they were unable to satisfy them from their own resources."[37]

Berlin encapsulates it best. *Positive* liberty concerns the issue of "what can I do with my freedom?" Thus, accordingly, "the *positive* conception of liberty is not freedom *from*, but freedom *to*";[38] freedom to form a particular of life, freedom to become an autonomous human being, freedom to have equal prospects in life. This *positive* conception of liberty, the responsibility of government to enhance and secure the general welfare of the people, is credited in the philosophical sense to Kant in his *The Metaphysics of Morals*.[39] He explains that *rights* are divided in two parts. The first, *natural rights*, moral rights, or innate rights; these are Berlin's "negative rights, freedom from government, the 'shalt nots,' rights that government cannot invade or abrogate. This 'innate' right belongs to everyone by nature."[40] The second are *civil rights* that are given to all persons by a social contract as expressed in government legislative acts.[41] Encompassed within this meaning of right is the idea of *duty*, that is, duty to oneself and *duty* to others.[42] Kant's classification of rights comes down to this: a right in the state of nature is the *private right* of autonomy; and the second is, according to Kant, the right to benefits in *civil society* that "secure what is mine or yours by public laws."[43] Civil rights, therefore, are the *positive rights* of economic and social benefits that are deemed necessary to ensure human dignity "and to make negative rights meaningful."[44]

Positive rights were set forth best by Jefferson in his Virginia *Bill for the More General Diffusion of Knowledge* (1779), and later in the Land Ordinance of 1785 and Northwest Ordinance of 1787, under the old Articles of Confederation, to allocate lands in the public domain for education. In France, these same rights were recognized by Condorcet in his plan for compulsory primary education paid for by the state and implemented during the French Revolution in 1793.[45] Later, the *positive* rights of social security, first provided in Germany by Bismarck in 1884, and a few years later for national health care, equipped disability health care insurance in 1889.[46] Bismarck's old age pension programs created "the first modern welfare safety net in the world, which still forms part of modern Germany's 'social security' system."[47]

Explained another way, a *positive right* is the opportunity to protect human dignity, the right to be respected by others, usually thought to include personal security, work, and a means of earning a reasonable wage – an adequate standard of living, including shelter, food, clothing, health care, and, of course, education. Dignity, worth, and respect, in being human, cannot be fulfilled without the essentials that all humans owe to each other, and governments are obligated by their authority and power to provide for these *positive* or *dignity* rights by creating legislation for the essentials of human existence. The idea that the state must help fiscally to provide for the essentials

of human welfare was not fully developed until the twentieth century, at which time it was realized that, as a matter of morals and ethics, human worth and dignity are implicit in the social contract, requiring more of the state than to merely leave people alone.

Positive rights, therefore, define a basic moral imperative encompassing the individual's opportunity to succeed in life, which should not be denied simply because the state will not provide sufficient fiscal resources. Jeremy Waldron clearly explained the economic and social aspects of this *positive* right:

> It is no longer widely assumed that human rights must be pinned down to the protection of individual *freedom*. Humans have other needs as well related to their health, survival, culture, *education*, and ability to work. We all know from our own case how important these needs are . . . It is now widely (though not universally) accepted that material needs generate moral imperatives which are as compelling as those related to democracy and civil liberty. If we want a catalogue of what people owe each other as a matter of moral priority, we should look not only to liberty but also to the elementary conditions of material well-being . . . Everyone has a right to a standard of living adequate for health and well-being of himself and his family. [emphasis added][48]

The Price Tag

Accommodation of dignity rights have a *price tag* that government may be unwilling to bear. Governments cannot legitimately justify denial of such rights on the grounds that they are too cumbersome, too administratively difficult, or too costly. This is especially true in the case of *positive* or *dignity rights* related to economic well-being for the reason that large governmental programs such as mass public education are major budget items. In this regard, Dworkin sees denial of adequate government funding for a *positive* right as "a grave injustice," and essential to human happiness.

> So if rights make sense at all, then the invasion of a relatively important right must be a very serious matter. It means treating a man as less than a man, or as less worthy of concern than other men. The institution of rights rests on the conviction that this is a grave injustice, and that it is worth paying the *incremental cost* in social policy or efficiency that is necessary to prevent it. [emphasis added][49]

FUNDAMENTAL RIGHT OF EDUCATION AND THE U.S. CONSTITUTION

Whether education is a fundamental right in the United States has been a contentious and litigious issue in school finance since 1973 when the U.S. Supreme Court rendered a decision in the case of *San Antonio Independent School District v. Rodriguez*[50] holding that education is not a fundamental right under the First and Fourteenth Amendments to the U.S. Constitution. The Court said, "Education . . . is not among the rights afforded explicit protection under our federal Constitution. Nor do we find

any basis for saying it is implicitly so protected." In so holding, the Court rejected the essential reasoning of plaintiff children from a property poor school district where the quality of education was directly related to property wealth disparities. The plaintiff's case hinged on the reasoning that knowledge is a prerequisite to the exercise of other rights. The Court rejected this "nexus" argument:

> They [plaintiffs] insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligence utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively . . . That the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate and utilize available knowledge.[51]

The Court, in rejecting this rationale of the peremptory force of knowledge, bifurcated the question saying that this is not a complaint that the legislature "has unconstitutionally denied or diluted anyone's right . . . but rather that the legislature violated the Constitution by not extending the relief " available to others.[52] The Court, therefore, rejected the argument that there was a nexus between education and the exercise of other fundamental rights or liberties, and in so doing implicitly separated individual rights into two categories, the first being that government "shalt not" deny a person's acquisition of education, and the second, that government "shalt" affirmatively extend a benefit in some corrective way that mitigates inequalities or corrects "imperfections" in the distribution of a state's financial resources.[53]

Foremost in the mind of the Burger Court in *Rodriguez* were two issues, neither directly related to a right: *first*, federalism and the *second*, taxation. Regarding the former, the Supreme Court said that "the maintenance of the principles of federalism is a foremost consideration" in examining state action. Concerning the latter, the Burger Court made it clear in *Rodriguez* that it would not intervene to correct inadequacies in state systems of school financing where "fundamental constitutional rights or liberties" were not at stake,[54] and that, therefore, the Court would not "nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon . . . relative wealth."[55]

After *Rodriguez*, the Supreme Court found it necessary to hedge and explain its position in another Texas case, *Plyler v. Doe*,[56] where the state, by law, absolutely denied public education to undocumented immigrant children. With Justice Brennan writing for the majority, the Court ruled that while education is not a fundamental right neither is it "merely some government 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions and the lasting impact of its deprivation in the life of the child mark the distinction."[57] Justice Brennan, who had earlier dissented in *Rodriguez*, but writing for the majority in *Plyler*, could not garner the votes to hold that education is fundamental, but he made a valiant effort by holding that even though education is not a "fundamental right,"[58] it, nevertheless, "has a pivotal role in maintaining the fabric of our society,"[59] and, further, that to deny education to children will attach a "stigma of illiteracy" that will "mark them for the rest of their lives."[60]

Importantly, Brennan's reference to "stigma" takes the issue into the realm of constitutional questions regarding substantive due process of law, another aspect of constitutional law which the Court later expounds on in the case of *Goss v. Lopez.*[61] In *Goss*, the Court had said that for government to attach a "stigma" to one's reputation involves the denial of a "liberty" interest, and to take away educational benefits of a public education is to also deprive the student of a "property interest," under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution. The Court in *Goss* relies on an earlier precedent, *Board of Regents v. Roth,*[62] in which the Court's concept of the "penumbras" of liberty and property rights "relate to the whole domain of social and economic fact" and that to "impose a stigma" is a denial of liberty without due process.[63] Citing a much earlier precedent that expanded the implication and the meaning of liberty and property, the Court reached back to a 1923 case, *Meyer v. Nebraska*, where it had held that liberty is "not merely freedom from bodily restraint but also the right of the individual to . . . acquire useful knowledge" [emphasis added].[64]

What, then, does this all mean regarding the issue of whether education is a fundamental constitutional right under the U.S. Constitution? The answer is this: *First,* education is not a fundamental right under the Equal Protection Clause. This means that for a state not to provide education at all to anyone would not violate the Equal Protection Clause. *Second*, the Equal Protection Clause is not offended if a state, in providing for public education, permits funding disparities because of variations in local wealth or uneven economic conditions. To do so would require that the Court hold that education is a *positive* right. *Third*, where a state provides for education, it cannot arbitrarily deny such benefit to some children while providing it for others. The Due Process Clause prohibits the federal or state governments in provision of education to deny education to some children while permitting it for others. To do so would stigmatize the disadvantaged child in violation of a liberty interest and would also deny a property interest by deprivation of useful knowledge, and as such would ignore a constitutionally protected *negativ*e right.

STATE CONSTITUTIONS IN THE UNITED STATES

Berlin's *negative* and *positive* constructs of rights and liberties help explain the shortcoming of the U.S. Constitution with regard to education. Concerning the denial of education *per se*, *sans* race, the U.S. Constitution does not set forth *positive* requirements concerning education. Any *positive* law entitling a person to education at the federal level must come about through statutory law of Acts of Congress pursuant to the authority vested in it in the Spending Clause or, possibly, through the Commerce Clause of the Constitution.

However, the federal system in the United States creates another broad dimension to school funding via the state in that the states have their own constitutional requirements, structured provisions that are unique to the particular state. These constitutions have both Berlin's *negative* provisions, "the shalt nots" and *positive* provisions, "the shalts" that when invoked by courts set forth conditions for the funding of public schools.[65] The state constitutions include in their structural provisions language