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THE FIRST, FIFTH, AND FOURTEENTH AMENDMENT RIGHTS
TO ACCESS EQUAL INFORMATION IN AMERICA'S PUBLIC SCHOOLS

BY

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DISSERTATION

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ABSTRACT

America's public school system finds itself strongly challenged at a time when both domestic and world affairs call upon us to rethink the way we develop and prepare our country's citizens. Unfortunately, countless students in school districts across the Nation daily receive unequal access to information in school, resulting from the inequitable distribution of resources caused by property tax based systems of funding public education.

The Supreme Court declared in *Sweatt v. Painter*, 339 U.S. 629 (1950), and *Brown v. Board of Education*, 347 U.S. 483 (1954), that every student is entitled to equal access to equal information undergirding the critical thinking training they receive in schools. However, the Supreme Court sanctioned school funding disparities caused by property tax based systems by claiming that there is no fundamental right to an education in the United States per the Court's ruling in *San Antonio v. Rodriguez*, 411 U.S. 1 (1973). As a result, this paper asserts that the funding disparities resulting from property tax based school funding systems is the chief cause of disparate access to information in schools based purely on where students live. Disparate access to information in schools in turn leads to disparities in critical thinking training since the depth and degree of critical thinking training depends on one's access to information in school. Disparate access to information in America's public schools violates students' First, Fifth, and Fourteenth Amendment rights and adversely affects our children for a lifetime.

*To my grandmother who first believed,
my mother who nurtured,
my father who challenged,
my sisters who encouraged,
and my uncle who set the mark;
to my first Teacher, Mrs. Williams, for charting my path,
to Dean Beverly Wade, who made sure I stayed on it,
to Ivory, for demonstrating it can be done; to Chaneé for supporting me through it all,
and to my graduate and law school mentors, colleagues, and friends for their thoughtful advice,
this Dissertation is dedicated to each of you
for the betterment of every citizen in the United States.*

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CHAPTER 1

INTRODUCTION

“America’s public school system finds itself strongly challenged at a time when both domestic and world affairs call upon us to rethink the way we develop and prepare our country’s citizens.”¹ Unfortunately, countless students in school districts across the Nation daily receive unequal access to information in school, resulting from the inequitable distribution of resources caused by property tax based systems of funding public education.²

The purpose of education is to train students to think critically, no matter the particular subject taught in school. Be it science, mathematics, or reading; art or physical education, the purpose of school is to teach students to think critically about the given subject’s underlying principles. Once taught to think critically in a variety of subjects, individuals then use their training to guide their beliefs and actions post-graduation.³ Though philosophers like Thomas Jefferson, Horace Mann, and others all had varying philosophies on the purpose of education,⁴ the central tenant of all those philosophies is critical thinking.

“Critical thinking is the process of conceptualizing and analyzing information, gathered from observation or communication.”⁵ Given that the purpose of education is to train students to think critically, students must have access to information in order to be trained to conceptualize and analyze it. It follows then that the amount of information one has access to determines the

¹ Ash, Carey Hawkins and Chanee D. Anderson (2013). *The Same but Different: “Post Racial Inequality in American Public Education in The Resegregation of Schools: Education and Race in the Twenty-First Century.* (p. 24). New York, NY: Routledge.

² Ash, Carey Hawkins and Chanee D. Anderson (2013). *The Same but Different: “Post Racial Inequality in American Public Education in The Resegregation of Schools: Education and Race in the Twenty-First Century.* (p. 24). New York, NY: Routledge.

³ In Season 3, Episode 5, at 6:08 of the hit television series “Weeds” created by Jenji Kohan, character Shane Botwin gives this definition of critical thinking in response to his teacher’s questioning. The author finds this to be the most salient and succinct definition of critical thinking training and hereby asserts it forthwith. The episode may be found at: <https://www.youtube.com/watch?v=twj14X1TZI#t=368>. More information on the show itself may be found at: [http://en.wikipedia.org/wiki/Weeds_\(TV_series\)](http://en.wikipedia.org/wiki/Weeds_(TV_series))

⁴ Tozier, S., Senese, G., & Paul, V. (2006). *School and society: Historical and contemporary perspectives.* (5th ed., p. 32). New York, New York: McGraw-Hill; See also Carlton, F. (1908). *Economic influences upon educational progress in the United States, 1820-1850.* (1st ed., p. 55).

Richmond, VA: William Byrd Press, citing *Education and Prosperity*, in Old South Leaflet, No. 144, also 12th Report.

⁵ See footnote 3

depth and degree of one's critical thinking training. As a result, students must have equal access to equal information if they are to be equally trained to think critically.

America's current system of funding public education is primarily based on property taxes. As a result, the amount of revenue a school district generates for the provision of access to information through computers, books, quality teachers, and healthy facilities, among other things, varies widely since the property values undergirding the funding system vary widely by location. Due to the inherent disparities in property values, property tax based school funding systems produce gross disparities in the financial resources necessary to provide students access to information, the essential element of critical thinking training. Thus, this dissertation asserts that the funding disparities produced by property tax based school funding systems is the chief cause of disparate access to information in schools, based purely on where students live. Disparate access to information in schools in turn leads to disparities in critical thinking training, since the depth and degree of critical thinking training depends on access to information. These disparities violate students' First, Fifth, and Fourteenth Amendment rights, and adversely affect children for a lifetime.

Research Questions

The Supreme Court declared in *Sweatt v. Painter*⁶ and *Brown v. Board of Education*,⁷ that every student is entitled to equal access to equal information undergirding critical thinking training in schools, but the Supreme Court sanctions property tax based school funding disparities by claiming that there is no fundamental right to an education in the United States, per the Court's ruling *San Antonio v. Rodriguez*.⁸

⁶ 339 U.S. 629 (1950)

⁷ 347 U.S. 483 (1954)

⁸ 411 U.S. 1 (1973)

Property tax based school funding systems harm adversely impacted students by comparatively restricting the amount of revenue property-poor school districts generate for the provision of access to information, in comparison to their wealthy counterparts. Such restricted access burdens students living in poorer areas with inferior critical thinking training because the comparatively meager funds their school districts generate provide comparatively meager access to information. Since access to information is the fundamental requisite to critical thinking training, property poor districts provide comparatively meager critical thinking training, in comparison to relatively wealthy districts which can afford to provide their students with comparatively enhanced critical thinking training. Therefore, this dissertation endeavors to answer the following two questions:

- (1) What race-neutral federal constitutional grounds, if any, support the proposition that students have the individual right to equal access to equal information in public schools?
- (2) If students possess this individual right and are still denied equal access to equal information in schools, what is the appropriate remedy?

Theoretical Framework and Methodological Approach

The statistics in the next chapter show that minority students of color are most lacking in access to equal information in America's public schools as measured by international standardized test scores. Though at one time, American courts would squarely address racial disparities, today, courts favor a "colorblind" ideology.⁹ As a result, my task is to craft a race neutral argument based on federal constitutional grounds that support the proposition that students have fundamental individual rights to access equal information in America's public

⁹ See "Removing the Rubble: The Voluntary "Mistakes" of Seattle and Louisville" in Ash, Carey Hawkins and Chane D. Anderson (2013). *The Same but Different: "Post Racial Inequality in American Public Education in The Resegregation of Schools: Education and Race in the Twenty-First Century.* (p. 6). New York, NY: Routledge.

schools. To achieve this end, I employ several theoretical frameworks and methodological approaches discussed immediately below.

Critical legal studies, critical race theory, and critical race praxis are the three theoretical frameworks that will be used contextualize the questions above to establish a race-neutral articulation of an individual right to equal access to equal information in America's public schools. These frameworks are important because they give an understanding of the intersection of race and law, which can then be used to excise one from the other. In this context, the application of critical legal studies helps reveal the law's logic and structure in response to society's power relationships to provide an understanding of why the law is structured the way it is.¹⁰ Critical race theory "analyzes ways in which law ignores cultural domination within law's own processes and the ways in which those processes contribute to racial oppression."¹¹ Finally, critical race praxis contributes a critical, pragmatic, socio-legal analysis, which grounds justice in concrete realities.¹² Critical race praxis and rethinks the cultural and communicative dimensions of justice claims,¹³ and facilitates the articulation of a race-neutral paradigm to appease the Supreme Court's current jurisprudential trend.

The harmonious application of these frameworks by one with legal training, while engaged in the practice of law, results in political lawyering: the practice of law, which infuses antiracism strategies with aspects of critical inquiry and pragmatism to transform the political lawyer's legal theory into effective judicial remedies.¹⁴ Legal reasoning is the primary method by which a

¹⁰Critical Legal Studies: An Overview. (n.d.). Retrieved April 7, 2015, from https://www.law.cornell.edu/wex/critical_legal_theory

¹¹ Yamamoto, E. (1997). Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America. *Michigan Law Review*, 95, 868.

¹² Yamamoto, E. (1997). Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America. *Michigan Law Review*, 95, 830.

¹³ Yamamoto, E. (1997). Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America. *Michigan Law Review*, 95, 830.

¹⁴ Yamamoto, E. (1997). Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America. *Michigan Law Review*, 95, 868.

(political) lawyer convinces a court to adopt his legal theory. Legal reasoning requires lawyers to (1) establish the context and meaning of facts through narrative analytic argument; (2) organize facts under legally relevant categories; (3) reason by analogy to previous judicial precedent; (4) frame the scopes of the issues to be decided, and (5) negotiate between the law “as it is” and the law “as it ought to be” through legal argument.¹⁵ Legal reasoning is the primary means by which a race-neutral, individual right to equally access equal information in America’s public schools will be articulated.

Purpose and Significance of Study

Unequivocally establishing the individual right to equal access to equal information in public schools in race-neutral terms would reaffirm *Sweatt*¹⁶ and *Brown’s*¹⁷ equality principle, overturn *San Antonio v. Rodriguez*,¹⁸ and declare unconstitutional property tax based public school funding schemes. States would have to re-think their school funding programs and establish them on a general revenue base, applied equally to all; and because the right to equal access to equal information in public schools would extend from the Federal Constitution on individual liberty grounds, the United States would be obligated to guarantee the right by funding the difference where the states, given their best effort to fully fund their schools on a general revenue basis, still could not supply the funds necessary to ensure each students’ equal access to equal information. The articulation of a race-neutral basis for the fundamental right to equal access to equal information in America’s public schools is important, not only for the individual, but for the country collectively: providing all students with equal access to equal information in schools will ensure America’s preeminence in the global economy for generations to come.

¹⁵ The Harvard Bridge Project: Introduction to Legal Reasoning. (n.d.). Retrieved April 7, 2015, from http://cyber.law.harvard.edu/bridge/r1_intro.htm, and its subsequent pages.

¹⁶ 339 U.S. 629 (1950)

¹⁷ 347 U.S. 483 (1954)

¹⁸ 411 U.S. 1 (1973)

CHAPTER 2

LITERATURE REVIEW

1. The Programme for International Student Assessment's (PISA) Triennial Survey is the Most Salient Indicator of the Current State of Critical Thinking Training in the United States

America's students are being under trained to compete and win for the United States in the global knowledge economy. The Programme for International Student Assessment's (PISA) triennial survey is the most salient indicator of the current state of critical thinking training in the United States. The test is conducted by the Organisation for Economic Cooperation and Development (OECD).¹⁹ "PISA offers insights into how participating countries and economies are beginning to develop their future talent pools by measuring the knowledge and skills of 15-year-olds nearing the end of compulsory education."²⁰ In a global economy, the benchmark for success in education is no longer improvement against state or national standards alone, but increasingly in relation to the best-performing education systems internationally.²¹

"PISA also shows how equitably participating countries and economies are providing education opportunities and realizing education outcomes, *which is an indication of the level of equity in the society, as a whole.*"²² The survey "assesses the extent to which 15-year-old students near the end of compulsory education have acquired key knowledge and skills that are essential for full participation in modern society."²³ "The assessment does not just ascertain whether students can reproduce knowledge; it also examines how well students can extrapolate from what they have

¹⁹ PISA 2012 Results: Excellence through Equity: Giving Every Student the Chance to Succeed, Volume II. (n.d.). Retrieved August 30, 2014, from <http://www.oecd.org/pisa/keyfindings/pisa-2012-results-volume-II.pdf>, p. 19

²⁰ PISA 2012 Results: Excellence through Equity: Giving Every Student the Chance to Succeed, Volume II. (n.d.). Retrieved August 30, 2014, from <http://www.oecd.org/pisa/keyfindings/pisa-2012-results-volume-II.pdf>, p. 26

²¹ PISA 2012 Results: Excellence through Equity: Giving Every Student the Chance to Succeed, Volume II. (n.d.). Retrieved August 30, 2014, from <http://www.oecd.org/pisa/keyfindings/pisa-2012-results-volume-II.pdf>, p. 3

²² PISA 2012 Results: Excellence through Equity: Giving Every Student the Chance to Succeed, Volume II. (n.d.). Retrieved August 30, 2014, from <http://www.oecd.org/pisa/keyfindings/pisa-2012-results-volume-II.pdf>, p. 26 (emphasis added)

²³ United States Country Note - Programme for International Student Assessment (PISA) Results from PISA 2012. (n.d.). Retrieved August 15, 2014, from <http://www.oecd.org/unitedstates/PISA-2012-results-US.pdf>, p. 8

learned and apply that knowledge in unfamiliar settings, both in and outside of school.”²⁴ “This approach reflects the fact that *modern economies reward individuals not for what they know, but for what they can do with what they know.*”²⁵

A. America’s Overall PISA Test Score Performance Is Not Improving

Students in the United States have particular weaknesses in performing tasks that require higher-level critical thinking, “such as taking real-world situations, translating them into mathematical terms, and interpreting mathematical aspects in real-world problems.”²⁶ Over one-fourth (26%) of 15-year-olds in the United States “do not reach the PISA baseline Level 2 of mathematics proficiency,” the level at which students begin to demonstrate the skills that will enable them to compete and be rewarded with property in life.²⁷

Among the 34 OECD countries, the United States performed below average in mathematics in 2012 and is ranked 26 in the world.²⁸ The United States ranks 17 in reading and 21 in science.²⁹ There has been no significant change in these performances over time.³⁰

B. America’s Overall PISA Student Test Scores Vary Widely By Socio-Economic Status

Of all the factors affecting critical thinking training and the resulting PISA test scores, socio-economic background is the most comprehensive, and has a significant impact on student performance in the United States. “Socio-economic status is a broad concept that summarizes

²⁴ United States Country Note - Programme for International Student Assessment (PISA) Results from PISA 2012. (n.d.). Retrieved August 15, 2014, from <http://www.oecd.org/unitedstates/PISA-2012-results-US.pdf>, p. 8

²⁵ United States Country Note - Programme for International Student Assessment (PISA) Results from PISA 2012. (n.d.). Retrieved August 15, 2014, from <http://www.oecd.org/unitedstates/PISA-2012-results-US.pdf>, p. 8 (emphasis added)

²⁶ United States Country Note - Programme for International Student Assessment (PISA) Results from PISA 2012. (n.d.). Retrieved August 15, 2014, from <http://www.oecd.org/unitedstates/PISA-2012-results-US.pdf>, p. 1

²⁷ United States Country Note - Programme for International Student Assessment (PISA) Results from PISA 2012. (n.d.). Retrieved August 15, 2014, from <http://www.oecd.org/unitedstates/PISA-2012-results-US.pdf>, p. 2

²⁸ United States Country Note - Programme for International Student Assessment (PISA) Results from PISA 2012. (n.d.). Retrieved August 15, 2014, from <http://www.oecd.org/unitedstates/PISA-2012-results-US.pdf>, p. 2

²⁹ United States Country Note - Programme for International Student Assessment (PISA) Results from PISA 2012. (n.d.). Retrieved August 15, 2014, from <http://www.oecd.org/unitedstates/PISA-2012-results-US.pdf>, p. 2

³⁰ United States Country Note - Programme for International Student Assessment (PISA) Results from PISA 2012. (n.d.). Retrieved August 15, 2014, from <http://www.oecd.org/unitedstates/PISA-2012-results-US.pdf>, p. 2

many different aspects of a student, school, or system.”³¹ It includes social, racial, and economic status, “which is based on such indicators as parental education and occupation, the number and type of home possessions which are considered proxies for wealth, and the educational resources available at home.”³²

In the United States, two students from different socio-economic backgrounds vary much more in their learning outcomes than is normally the case in other countries.³³ “17% of the variation in student performance in the United States is explained by students’ socio-economic background. This contrasts with just 9% in Canada or Japan,” two benchmark PISA countries.³⁴ “Only Hungary, Belgium, Turkey, Luxembourg, Chile, and Germany show a larger impact of socio-economic background on reading performance than the United States.”³⁵ “It is important to emphasize that the United States, does not necessarily have a more disadvantaged socio-economic student intake than other countries around the world; but that socio-economic differences among students have a particularly strong impact on student learning outcomes” in the United States.³⁶ “The close relationship between the learning outcomes of students in the United States and socio-economic background is not simply explained by a more socio-economically heterogeneous student population or society, but as noted before, [it is] mainly because socio-economic disadvantage [otherwise, being poor] translates more directly into poor educational performance in

³¹ PISA 2012 Results: Excellence through Equity: Giving Every Student the Chance to Succeed, Volume II. (n.d.). Retrieved August 30, 2014, from <http://www.oecd.org/pisa/keyfindings/pisa-2012-results-volume-II.pdf>, p. 37

³² PISA 2012 Results: Excellence through Equity: Giving Every Student the Chance to Succeed, Volume II. (n.d.). Retrieved August 30, 2014, from <http://www.oecd.org/pisa/keyfindings/pisa-2012-results-volume-II.pdf>, p. 37

³³ Strong Performers and Successful Reformers in Education: Lessons from PISA 2012 for the United States. (n.d.). Retrieved August 29, 2014, from <http://www.oecd.org/pisa/46623978.pdf>, p. 230

³⁴ Strong Performers and Successful Reformers in Education: Lessons from PISA 2012 for the United States. (n.d.). Retrieved August 29, 2014, from <http://www.oecd.org/pisa/46623978.pdf>, p. 230

³⁵ Strong Performers and Successful Reformers in Education: Lessons from PISA 2012 for the United States. (n.d.). Retrieved August 29, 2014, from <http://www.oecd.org/pisa/46623978.pdf>, p. 230

³⁶ Strong Performers and Successful Reformers in Education: Lessons from PISA 2012 for the United States. (n.d.). Retrieved August 29, 2014, from <http://www.oecd.org/pisa/46623978.pdf>, p. 34

the United States than is the case in many other countries.”³⁷ The forgoing statistics, as sobering as they are, are even more enlightening when disaggregated by the socio-economic criterion of race.

C. America’s Mathematics PISA Test Scores Vary Widely By Race

The OECD mathematics average is 494.³⁸ The United States has an average score of 481, which is a 13-point deficit in comparison to the OECD average.³⁹ However, the average mathematics score of white Americans is 506, 12 points above the OECD average and 25 points above America’s overall domestic average.⁴⁰ Asian Americans fare best at math in the United States with a score of 549, which is 55 points above the OECD average and 68 points above America’s average.⁴¹ Hispanic Americans and African Americans fare the worst at mathematics. The Hispanic American average is 455, which is 39 points behind the OECD average, 26 points behind the overall American average, 51 points behind white Americans, and 94 points behind Asian Americans.⁴² With respect to African Americans, they average just 421 points in mathematics, 73 points behind the OECD average, 60 points behind America’s domestic average, 85 points behind white Americans, and 128 points behind Asian Americans.⁴³ The scores of Hispanic and African Americans place these subgroups in the lower ranks of the world’s

³⁷ Strong Performers and Successful Reformers in Education: Lessons from PISA 2012 for the United States. (n.d.). Retrieved August 29, 2014, from <http://www.oecd.org/pisa/46623978.pdf>, p. 34

³⁸ Table M12. Average scores of U.S. 15-year-old students on PISA mathematics literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_3f_1.asp

³⁹ Table M12. Average scores of U.S. 15-year-old students on PISA mathematics literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_3f_1.asp

⁴⁰ Table M12. Average scores of U.S. 15-year-old students on PISA mathematics literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_3f_1.asp

⁴¹ Table M12. Average scores of U.S. 15-year-old students on PISA mathematics literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_3f_1.asp

⁴² Table M12. Average scores of U.S. 15-year-old students on PISA mathematics literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_3f_1.asp

⁴³ Table M4. Average scores of 15-year-old students on PISA mathematics literacy scale, by education system: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_3a.asp

countries⁴⁴ and makes these students the academic peers of students in countries such as Turkey and Romania, and Malaysia and Mexico, respectively.⁴⁵

D. America's Reading PISA Test Scores Vary Widely By Race

The OECD reading average is 496.⁴⁶ The United States has an average reading score of 498.⁴⁷ White Americans' average reading score is 519, which is 23 points above the OECD average and 21 points above America's domestic average. Asian Americans fare best at reading in the United States with a score of 550, which is 54 points above the OECD average and 52 points above America's average.⁴⁸ Hispanic Americans and African Americans fare the worst at reading. The Hispanic average is 478, which is 18 points behind the OECD average, 20 points behind the overall American average, 41 points behind white Americans, and 72 points behind Asian Americans.⁴⁹ With respect to African Americans, they average 443 points in reading, which is 53 points behind the OECD average, 55 points behind America's domestic average, 76 points behind white Americans, and 107 points behind Asian Americans.⁵⁰ The scores of Hispanic and African Americans place these subgroups in the lower ranks of the world's countries. Their performance in reading makes these students the academic peers of students in countries such as Lithuania and Greece, Costa Rica, and the United Arab Emirates, respectively.⁵¹

⁴⁴ Table M4. Average scores of 15-year-old students on PISA mathematics literacy scale, by education system: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_3a.asp

⁴⁵ Table M12. Average scores of U.S. 15-year-old students on PISA mathematics literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_3f_1.asp

⁴⁶ Table R7. Average scores of U.S. 15-year-old students on PISA reading literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_5e_1.asp

⁴⁷ Table R7. Average scores of U.S. 15-year-old students on PISA reading literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_5e_1.asp

⁴⁸ Table R7. Average scores of U.S. 15-year-old students on PISA reading literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_5e_1.asp

⁴⁹ Table R7. Average scores of U.S. 15-year-old students on PISA reading literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_5e_1.asp

⁵⁰ Table R7. Average scores of U.S. 15-year-old students on PISA reading literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_5e_1.asp

⁵¹ Table R2. Average scores of 15-year-old students on PISA reading literacy scale, by education system: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_5a.asp

E. America's Science PISA Test Scores Vary Widely By Race

The OECD science average is 501.⁵² The United States has an average science score of 497.⁵³ White Americans' average science score is 528, which is 27 points above the OECD average and 31 points above America's domestic average. Asian Americans fare best at science in the United States with a score of 546, which is 45 points above the OECD average and 49 points above America's average.⁵⁴ Hispanic Americans and African Americans fare the worst at science. The Hispanic average is 462, which is 39 points behind the OECD average, 35 points behind the overall American average, 66 points behind white Americans, and 84 points behind Asian Americans.⁵⁵ With respect to African Americans, they average 439 points in science, which is 62 points behind the OECD average, 58 points behind America's domestic average, 89 points behind white Americans, and 107 points behind Asian Americans.⁵⁶ The scores of Hispanic and African Americans place these subgroups in the lower ranks of the world's countries. Their performance in science makes them the academic peers of students in countries such as Turkey, Romania and Cyprus, respectively.⁵⁷

⁵² Table S7. Average scores of U.S. 15-year-old students on PISA science literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_4e_1.asp

⁵³ Table S7. Average scores of U.S. 15-year-old students on PISA science literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_4e_1.asp

⁵⁴ Table S7. Average scores of U.S. 15-year-old students on PISA science literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_4e_1.asp

⁵⁵ Table S7. Average scores of U.S. 15-year-old students on PISA science literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_4e_1.asp

⁵⁶ Table S7. Average scores of U.S. 15-year-old students on PISA science literacy scale, by race/ethnicity: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_4e_1.asp

⁵⁷ Table S2. Average scores of 15-year-old students on PISA science literacy scale, by education system: 2012. (n.d.). Retrieved August 16, 2014, from http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_4a.asp

2. Wide Variations in America’s Test Scores Based on Race and Socioeconomic Status Hinders Students and Costs the United States Trillions of Dollars and Its Competitive Edge in The Global Economy

PISA evaluates what students know and what they can do with that knowledge in comparison to the rest of the world.⁵⁸ Thus, the disaggregation of America’s PISA test scores by race shows that Hispanic and African American students demonstrate comparatively little knowledge, whereas white and Asian Americans demonstrate comparatively more. Based on this comparison, African and Hispanic Americans are not being equitably trained to demonstrate the knowledge and skills that will enable them to compete and win salary, wages, and other property to the fullest degree in life (in comparison to their white and Asian counterparts) given that modern economies reward individuals for what they know and what they can do with what they know.⁵⁹

Additionally, variations in test scores by race and other disparities in achievement impose an invisible, yet recurring, loss on the economy of the United States which puts the United States at a global economic disadvantage.⁶⁰ A study carried out by the OECD, in collaboration with the Hoover Institute at Stanford University, suggests that “a modest goal of having the United States boost its average PISA scores by 25 points over the next 20 years could add 41 trillion dollars to the United States economy over the lifetime of the generation born in 2010.”⁶¹ Narrowing the achievement gap by bringing all students to the baseline level of proficiency for the OECD could increase the gross domestic product of the United States by 72 trillion dollars.⁶² Bringing the

⁵⁸ United States Country Note - Programme for International Student Assessment (PISA) Results from PISA 2012. (n.d.). Retrieved August 15, 2014, from <http://www.oecd.org/unitedstates/PISA-2012-results-US.pdf>, p. 8

⁵⁹ United States Country Note - Programme for International Student Assessment (PISA) Results from PISA 2012. (n.d.). Retrieved August 15, 2014, from <http://www.oecd.org/unitedstates/PISA-2012-results-US.pdf>, p. 8

⁶⁰ Strong Performers and Successful Reformers in Education: Lessons from PISA 2012 for the United States. (n.d.). Retrieved August 29, 2014, from <http://www.oecd.org/pisa/46623978.pdf>, p. 38

⁶¹ Strong Performers and Successful Reformers in Education: Lessons from PISA 2012 for the United States. (n.d.). Retrieved August 29, 2014, from <http://www.oecd.org/pisa/46623978.pdf>, p. 38

⁶² Strong Performers and Successful Reformers in Education: Lessons from PISA 2012 for the United States. (n.d.). Retrieved August 29, 2014, from <http://www.oecd.org/pisa/46623978.pdf>, p. 38

United States up to the average performance of Finland, which is 23 points ahead of the United States, would add gains on the order of 103 trillion dollars.⁶³

In order for America to increase its overall PISA scores to reap the corresponding economic benefits, it must create a successful school system. Education systems that are successful direct the highest-quality resources to where these resources can make the most difference in promoting equity.⁶⁴ In this case, America must directly and ubiquitously dedicate the highest-quality resources to equitably training its Hispanic and African American students to think critically the same as it does its white and Asian American students. The United States must operate a school system that neutralizes the impact race, residence, and the other socio-economic elements have on critical thinking training to immediately begin closing the test score gap to reap the resulting economic benefits for the greater good of the country. However, there is little hope. America will leave trillions of dollars on the table, not because the United States lacks the resources to improve the critical thinking training provided to Hispanic and African Americans,⁶⁵ but because the United States actively maintains a school funding system which fails to provide equal access to equal information to all its students in schools.

The United States has adopted an ideology of inequality with regard to distributing school resources for critical thinking training in contrast to other countries around the world. “It is noteworthy that spending patterns in many of the world’s successful education systems are markedly different from those in the United States.”⁶⁶ Successful systems such as Canada, Finland

⁶³Strong Performers and Successful Reformers in Education: Lessons from PISA 2012 for the United States. (n.d.). Retrieved August 29, 2014, from <http://www.oecd.org/pisa/46623978.pdf>, p. 38

⁶⁴PISA 2012 Results: Excellence through Equity: Giving Every Student the Chance to Succeed, Volume II. (n.d.). Retrieved August 30, 2014, from <http://www.oecd.org/pisa/keyfindings/pisa-2012-results-volume-II.pdf>, p. 28

⁶⁵ Strong Performers and Successful Reformers in Education: Lessons from PISA 2012 for the United States. (n.d.). Retrieved August 29, 2014, from <http://www.oecd.org/pisa/46623978.pdf>, p. 28

⁶⁶ Strong Performers and Successful Reformers in Education: Lessons from PISA 2012 for the United States. (n.d.). Retrieved August 29, 2014, from <http://www.oecd.org/pisa/46623978.pdf>, p. 53

and Shanghai-China “invest money where the challenges are greatest.”⁶⁷ However, the United States makes “the resources that are devoted to schools dependent on the wealth of the local communities” where students live, which results in substantial funding disparities given the wide variation in property values.⁶⁸ Thus, America’s inequities in funding critical thinking training are not the result of happenstance; they are the result of an affirmative choice. In fact, the United States Supreme Court judicially sanctions America’s public school funding disparities based on property values.

3. Wide Disparities in Critical Thinking Training Exist Because *San Antonio v. Rodriguez* Disavows the Fundamental Right to Access Equal Information in America’s Public Schools

*San Antonio v. Rodriguez*⁶⁹ unequivocally expresses America’s current ideology regarding the provision of access to information and the resulting critical thinking training in schools: gross inequities in the distribution of resources which provide access to information in schools are permissible because there is no such thing as the right to equally access that information in America’s public schools.

*San Antonio*⁷⁰ upholds the disparities caused by the property tax based system of funding access to information and the resulting critical thinking training in America’s public schools. In particular, *San Antonio* upheld Texas’ property tax based school finance system which preferentially provided for students residing in the wealthy, majority caucasian, Alamo Heights School District over students living in the poorer, majority Mexican-American, Edgewood School District. When the Supreme Court upheld Texas’ disparate property tax based school

⁶⁷ Strong Performers and Successful Reformers in Education: Lessons from PISA 2012 for the United States. (n.d.). Retrieved August 29, 2014, from <http://www.oecd.org/pisa/46623978.pdf>, p. 53

⁶⁸ Strong Performers and Successful Reformers in Education: Lessons from PISA 2012 for the United States. (n.d.). Retrieved August 29, 2014, from <http://www.oecd.org/pisa/46623978.pdf>, p. 53

⁶⁹ 411 U.S. 1 (1973)

⁷⁰ 411 U.S. 1 (1973)

funding system, the Court upheld gross resource disparities for all school districts operating property tax based funding systems across the country. Because property tax based funding systems make the schools' resources dependent on the varying property values of the local communities where students live, the *San Antonio* Court simultaneously declared in no uncertain terms that students in the United States have no absolute right to the resources which would make their access to information equal with their peers because their property is not valued the same as their peers. Thus, students in property poor districts have no right to the same degree of critical thinking training as their wealthy peers, given the connection between property tax based school funding systems, access to information in schools, and the resulting critical thinking training. This is wholly contrary to the Court's holding in *Sweatt v. Painter*,⁷¹ *Brown v. Board of Education*,⁷² and other Supreme Court cases as argued below. As a result, this paper now turns to argue the existence of students' First, Fifth, and Fourteenth Amendment rights to access equal information in America's public schools.

⁷¹ 339 U.S. 629 (1950)

⁷² 347 U.S. 485 (1954)

CHAPTER 3

EQUAL ACCESS TO EQUAL INFORMATION IN AMERICA'S PUBLIC SCHOOLS IS A FUNDAMENTAL FIRST AMENDMENT RIGHT

1. Equal Access to Information in Public Schools is a Fundamental First Amendment Right Which Is Violated By Property Tax Based School Funding Systems

A. Equal Access to Information Generally is a Fundamental First Amendment Right

The right to receive information⁷³ and ideas is fundamental to our Democracy.⁷⁴ This right vests in the constitutional freedoms of speech and press and is protected from Congressional abridgement by the First Amendment. The right is applied against the states through the Fourteenth Amendment.⁷⁵ Therefore, the First and Fourteenth Amendments collectively protect the right to receive information and ideas.⁷⁶ The First Amendment provides:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

The central goal of the First Amendment is to guarantee the free and equal flow of information,⁷⁷ and such “has long been recognized as a core objective of the First Amendment to the Constitution.”⁷⁸ The Supreme Court has repeatedly noted that the primary function of the First Amendment is “to ensure the widest possible dissemination of information,”⁷⁹ and the “unfettered

⁷³ Information means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics. *Exec. Order No. 13,526*, 75 *Fed. Reg.* 2 (Jan. 5, 2010)

⁷⁴ The Right to Receive Information and Ideas Willingly Offered: First Amendment Protection for the Communication Process, 1 *Cardozo L. Rev.* 497, 504-05 (1979) (citing 9 Writings of James Madison 103 (G. Hunt ed. 1910) on the importance of information in a democracy: “A popular government without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy, or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”

⁷⁵ *Gitlow v. New York*, 268 U.S. 652 (1925).

⁷⁶ The Right to Receive Information and Ideas Willingly Offered: First Amendment Protection for the Communication Process, 1 *Cardozo L. Rev.* 497, 505 (1979), citing generally, T. Emerson, *The System of Freedom of Expression* 3, 650 (1970)

⁷⁷ The Right to Receive Information and Ideas Willingly Offered: First Amendment Protection for the Communication Process, 1 *Cardozo L. Rev.* 497, 506 (1979)

⁷⁸ *Houchins v. KQED, Inc.*, 438 U.S. 1, 30 n.18 (1978) (Stevens, J. dissenting)

⁷⁹ *Associated Press v. United States*, 326 U.S. 1, 20 (1945); See also Litwack, T. (1977). *The Doctrine of Prior Restraint. Harvard Civil Liberties - Civil Liberties Law Review*, 12(3), 520, fn. 8.

interchange of ideas,”⁸⁰ concerning “all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”⁸¹ As a result, the First Amendment protects the total communication process and encompasses recipients’ interests in receiving information and ideas.⁸² *Lamont v. Postmaster General* establishes this principle.⁸³

In *Lamont*, the plaintiff successfully challenged a federal statute prohibiting his receipt of information from abroad. By ruling in *Lamont*’s favor, after granting him independent standing without the speaker conveying the information, the Court “acknowledged that the potential recipients of [information] possess independently assertable first amendment rights.”⁸⁴ This is because “[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them.”⁸⁵

The legitimacy of the right to receive information has been expounded in other Supreme Court decisions. In *Kleindienst v. Mandel*,⁸⁶ the central question addressed the U. S. State Department’s authority to deny a visa to a Marxist scholar. Though the State Department’s authority to grant or deny persons admission to the United States prevailed, the Supreme Court specifically said that First Amendment freedoms “necessarily protect the right to receive information.”⁸⁷ Justice Thurgood Marshall, in dissent, gave this right the most extensive treatment. There he said,

“The First Amendment protects the right to receive information and ideas...The reason for this is that the First Amendment protects a process...and the right to inform others and to be informed...are inextricably part of that process.”⁸⁸

⁸⁰ *Roth v. United States*, 354 U.S. 476, 484 (1957); See also Litwack, T. (1977). The Doctrine of Prior Restraint. *Harvard Civil Rights - Civil Liberties Law Review*, 12(3), 520, fn. 8.

⁸¹ *Thornhill v. Alabama*, 310 U.S. 88, 102 (1946); See also Litwack, T. (1977). The Doctrine of Prior Restraint. *Harvard Civil Rights - Civil Liberties Law Review*, 12(3), 520, fn. 8.

⁸² *Houchins v. KQED, Inc.*, 438 U.S. 1, 30 n.18 (1978) (Stevens, J. dissenting). See also The Right to Receive Information and Ideas Willingly Offered: First Amendment Protection for the Communication Process, 1 *Cardozo L. Rev.* 497, 506 (1979)

⁸³ 381 U.S. 301 (1965)

⁸⁴ The Right to Receive Information and Ideas Willingly Offered: First Amendment Protection for the Communication Process, 1 *Cardozo L. Rev.* 497, 509 (1979)

⁸⁵ *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965)(Brennan, J. concurring)

⁸⁶ 408 U.S. 753 (1972)

⁸⁷ 408 U.S. 753 at 762-63(1972)

⁸⁸ 408 U.S. 753, 775 (1972)

Protecting this process “is a fundamental principle of the American Government.”⁸⁹
The First Amendment means the Government has no power “to abridge the freedoms necessary to make that process work.”⁹⁰

Relying on Justice Marshall’s reasoning in *Kleindienst*, the Supreme Court ultimately determined in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, that the right to receive information is cognizable under the First Amendment because “the protection afforded is to the communication, to its source and to its recipients both.”⁹¹

The breadth and depth of First Amendment rights is evinced by the fact that even prison inmates have the full panoply of First Amendment rights so long as exercising those rights does not cause unrest or disruption. *See Proconier v. Martinez.*⁹² The problem in *Proconier* was one of access to information and ideas.⁹³ There, the Supreme Court reaffirmed Justice Marshall’s reasoning in *Kleindienst* by declaring that the interests of letter writing inmates and their intended recipients are “inextricably meshed.”⁹⁴ The Court flatly rejected any attempt to justify restricting the flow of information “merely by reference to certain assumptions about the legal status of prisoners.”⁹⁵ As a result, the Court turned to decisions dealing with the general problem of incidental restrictions on First Amendment liberties to guide its analysis, not to cases involving questions of a special set of ‘prisoners’ rights.’⁹⁶ Thus, the general rule is the broad application of First Amendment rights to preserve the free and full flow of information between senders and recipients.

⁸⁹ 408 U.S. 753, 776 (1972)

⁹⁰ 408 U.S. 753, 776 (1972)

⁹¹ 425 U.S. 748, 756 (1976)

⁹² 416 U.S. 396 (1974).

⁹³ Martha L. Black, Comment: School Library Censorship: First Amendment Guarantees and the Student’s Right to Know, 57 U. Det. J. Urb. L. 523, 536 (1979)

⁹⁴ *Proconier v. Martinez*, 416 U.S. 396, 409 (1974)

⁹⁵ *Proconier v. Martinez*, 416 U.S. 396, 409 (1974)

⁹⁶ *Proconier v. Martinez*, 416 U.S. 396, 409 (1974)

B. Students Have Fundamental First Amendment Rights to Access Information America’s Public Schools

1. *Tinker v. Des Moines* Establishes Students’ First Amendment Rights to Access Information in Public Schools

The United States Supreme Court’s ruling in *Tinker v. Des Moines*⁹⁷ forms the basis of students’ First Amendment rights to access to information in America’s public schools. *Tinker* dealt directly with students’ freedom to affirmatively control their own learning. In *Tinker*, the students themselves were conduits of information.⁹⁸

The *Tinker* Court declared unconstitutional a regulation forbidding students from wearing black armbands in school in silent, non-disruptive protest of the Vietnam War.⁹⁹ The Court viewed the prohibition as an infringement on students’ First Amendment freedoms to impart and receive information in schools.¹⁰⁰

Tinker represents the Supreme Court’s complete abandonment of its earlier judicial deference to the states’ indoctrinating authority¹⁰¹ which allowed the states to curtail students’ First Amendment freedoms based on the premise that local school officials needed broad discretion in shaping young minds to accomplish the goals of socialization and academic achievement.¹⁰² However, *Tinker* uprooted the notion that states “possess absolute authority over their students.”¹⁰³ The Court found that “students in school as well as out of school are persons under our Constitution,”¹⁰⁴ and that students “are possessed of fundamental rights which the state must

⁹⁷ 393 U.S. 503 (1969)

⁹⁸ Sheldon H. Nahmod, First Amendment Protection for Learning and Teaching: The Scope of Judicial Review, 18 Wayne L. Rev. 1479, 1481 (1972)

⁹⁹ 393 U.S. 503 (1969)

¹⁰⁰ Augusta Maria Salem, *Removal of Public School Library Books: The First Amendment Versus the Local School Board*, 34 Vand. L. Rev. 1407, 1412 (1981)

¹⁰¹ See Sheldon H. Nahmod, First Amendment Protection for Learning and Teaching: The Scope of Judicial Review, 18 Wayne L. Rev. 1479, 1481 (1972); See also Martha L. Black, Comment: School Library Censorship: First Amendment Guarantees and the Student’s Right to Know, 57 U. Det. J. Urb. L. 523, 534 (1979)

¹⁰² Martha L. Black, Comment: School Library Censorship: First Amendment Guarantees and the Student’s Right to Know, 57 U. Det. J. Urb. L. 523, 529 (1979)

¹⁰³ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969)

¹⁰⁴ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969)

respect.”¹⁰⁵ Students “may not be regarded as closed-circuit recipients of only that which the state chooses to communicate.”¹⁰⁶

The Court’s departure from deference was grounded in public education’s function, the students’ interests, and the inherent nature of schools.¹⁰⁷ The Court relied on *West Virginia v. Barnette*,¹⁰⁸ to establish the full measure of students’ First Amendment rights, saying:

“The Fourteenth Amendment, as now applied to the states, protects the citizens against the state itself and all of its creatures---Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”¹⁰⁹

Based on this holding, *Tinker* represents a “First Amendment theory of education” which aligns with current educational theories based on students’ needs and interests.¹¹⁰ By emphasizing the transfer and receipt of information as an “inevitable” and “important” parts of the educational process,¹¹¹ the Court did three things: (1) it affirmed students First Amendment rights, (2) it demolished the longstanding indoctrination framework with respect to lower levels of schooling, and (3) it established students’ right to access information in the totality of the school by saying,

“A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions [and receive information].” Under our Constitution, First Amendment rights are not given “only to be so circumscribed that [they] exist in principle but not in fact...The Constitution says that Congress (and the states) may not abridge [First Amendment rights]. This provision means what it says. We do not confine the permissible exercise of First Amendment rights

¹⁰⁵ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969)

¹⁰⁶ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969)

¹⁰⁷ Martha L. Black, Comment: School Library Censorship: First Amendment Guarantees and the Student’s Right to Know, 57 U. Det. J. Urb. L. 523, 534 (1979)

¹⁰⁸ 319 U.S. 624 (1923)

¹⁰⁹ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 507 (1969)

¹¹⁰ Sheldon H. Nahmod, Controversy in the Classroom: The High School Teacher and Freedom of Expression, 39 Geo. Wash. L. Rev. 1032, 1061 (1970)

¹¹¹ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 512 (1969)

to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.”¹¹²

Tinker reinforces the general rule which is the broad application of the First Amendment right to access information, even for students in America’s public schools.

2. *Sweatt v. Painter* and *Brown v. Board of Education* Establish Students’ Right to the Same Degree of Access to the Same Information Being Conveyed to Other Similarly Situated Students in America’s Public Schools

More than *Tinker*,¹¹³ *Sweatt v. Painter*¹¹⁴ and *Brown v. Board of Education*¹¹⁵ establish students’ Constitutional rights to the same degree of access to the same information provided to all other students.

The fundamental right to equally access the same information as provided to all other students was first articulated in the context of legal education in *Sweatt v. Painter*.¹¹⁶ In *Sweatt*, Heman Sweatt was denied admission to the University of Texas Law School because he was African American. The state trial court recognized that the state’s action denying Sweatt the opportunity to access the same information granted to others deprived him of the equal protection of the laws guaranteed by the Fourteenth Amendment.¹¹⁷ However, the trial court did not grant Sweatt’s admission to the law school.¹¹⁸ Instead, the court continued the case for six months to allow the state to establish separate but substantially equal facilities.¹¹⁹ In December, 1946, at the expiration of the six month continuance, the court denied Sweatt’s claim for admission on the showing that the authorized university officials adopted an order calling for the

¹¹² *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 512-13 (1969)

¹¹³ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969)

¹¹⁴ 339 U.S. 629 (1950)

¹¹⁵ 347 U.S. 483 (1954)

¹¹⁶ 339 U.S. 629 (1950)

¹¹⁷ *Sweatt v. Painter*, 339 U.S. 629, 631-32 (1950)

¹¹⁸ *Sweatt v. Painter*, 339 U.S. 629, 631-32 (1950)

¹¹⁹ *Sweatt v. Painter*, 339 U.S. 629, 631-32 (1950)

opening of a law school for African Americans beginning February, 1947.¹²⁰ Though the separate law school for African Americans was made available, Sweatt refused to enroll there.¹²¹

The University of Texas Law School, which refused to admit Sweatt, “was staffed by a faculty of sixteen full-time and three part-time professors, some of whom were nationally recognized authorities in their field.”¹²² Its student body numbered 850 and its library contained over 65,000 volumes.¹²³ Among the other offerings available to the students were a law review, moot court facilities, scholarship funds, and an Order of the Coif affiliation.¹²⁴ Moreover, the school’s alumni occupied the most distinguished positions in the private practice of law and in public life in the state of Texas.¹²⁵ The school was properly considered one of the nation’s ranking law schools.¹²⁶

By contrast, the University of Texas had no plans for an independent faculty or for a comparable library for the African American law school.¹²⁷ Teaching was to be conducted by four members of the University of Texas Law School faculty who would maintain their offices at the University of Texas Law School while teaching at both institutions.¹²⁸ Additionally, few of the 10,000 volumes ordered for the library (in comparison to the University of Texas’ 65,000 volumes) had arrived by the time the school was set to open, nor was there any full-time librarian. Moreover, the African American law school lacked accreditation.¹²⁹ In comparing the two schools, the United States Supreme Court held:

“We cannot find substantial equality in the educational opportunities offered white and [African American] law students by the state. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student

¹²⁰ *Sweatt v. Painter*, 339 U.S. 629, 631-32 (1950)

¹²¹ *Sweatt v. Painter*, 339 U.S. 629, 631-32 (1950)

¹²² *Sweatt v. Painter*, 339 U.S. 629, 632-33 (1950)

¹²³ *Sweatt v. Painter*, 339 U.S. 629, 632-33 (1950)

¹²⁴ *Sweatt v. Painter*, 339 U.S. 629, 632-33 (1950)

¹²⁵ *Sweatt v. Painter*, 339 U.S. 629, 632-33 (1950)

¹²⁶ *Sweatt v. Painter*, 339 U.S. 629, 632-33 (1950)

¹²⁷ *Sweatt v. Painter*, 339 U.S. 629, 632-33 (1950)

¹²⁸ *Sweatt v. Painter*, 339 U.S. 629, 632-33 (1950)

¹²⁹ *Sweatt v. Painter*, 339 U.S. 629, 632-33 (1950)

body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.”¹³⁰

With this comparison in mind, the Supreme Court ultimately determined that Sweatt was entitled to his full constitutional right: equal access to information and the resulting critical thinking training “equivalent to that offered by the state to students of other races.”¹³¹ The Supreme Court determined that all students are entitled to the same degree of access to the same information provided to all other students, and that an assessment of whether students are being provided the same degree of access, turns on the measurement of access to both tangible and intangible inter-school factors.

What *Sweatt*¹³² did for legal education, *Brown v. Board of Education*¹³³ did for elementary and secondary education. The United States Supreme Court in *Brown* specifically identified students’ rights to the same degree of access to the same information being provided to all other students.

The question put squarely before the *Brown* Court was whether states are obligated to provide the same degree of access to the same information being provided to all other students enrolled in public schools. The *Brown* Court unequivocally declared that states are forbidden from providing disparate access and disparate information to students because doing so violates students’ Fourteenth Amendment rights to equal protection of the laws. As a result, the Supreme Court ruled that Linda Brown was entitled to the same degree of access to the same information

¹³⁰ *Sweatt v. Painter*, 339 U.S. 629, 633-34 (1950)

¹³¹ *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)

¹³² 339 U.S. 629 (1950)

¹³³ 347 U.S. 485 (1954)

provided to all other students similarly situated in America's public schools. The *Brown* Court relied on *Sweatt* to say,

“In *Sweatt v. Painter*, in finding that a segregated law school for [African Americans] could not provide them equal [access to information], this Court relied in large part on ‘those qualities which are incapable of objective measurement but which make for greatness in a law school.’ In *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), the Court, in requiring that a [African American] admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ...his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.’¹³⁴ Such considerations apply with added force to children in grade and high schools.”¹³⁵

The *Brown* Court then emphasized its ultimate point by speaking *affirmatively* into the Ages:

“Today, [the transmission of information in schools] is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity [to equally access equal information in schools]. Such an opportunity, where the state has undertaken to provide it, *is a right which must be made available to all on equal terms.*” *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 493 (1954) (emphasis added).

*Sweatt*¹³⁶ and *Brown*,¹³⁷ and those following in its line, “redefined equality in American law and set forth a conception of equal rights unprecedented in American history.”¹³⁸ By the Court's ruling in *Sweatt* and *Brown*, states are obligated to provide the same degree of access to the same information being provided to all other students enrolled in their public schools. The Supreme Court determined that anything which hinders a student's “ability to study, to engage in

¹³⁴ [otherwise, to receive and transmit information]

¹³⁵ *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 493-94 (1954)

¹³⁶ 339 U.S. 629 (1950)

¹³⁷ 347 U.S. 483 (1954)

¹³⁸ Anderson, J. (2006). A tale of two "Browns": Constitutional equality and unequal education. *Yearbook of the National Society for the Study of Education*, 105(2), 22.

discussions and exchange views with other students, and, in general, to learn,” otherwise, to access and exchange information generally, violates the U.S. Constitution. Indeed, when the U.S. Supreme Court outlawed “separate but equal” education, it clearly established that all students have equal Constitutional rights to access the same information and the same information bearing conduits to the same degree as all other students in schools, and that this right is on par with any other Constitutional right granted textually therein.¹³⁹ Noted education scholar, Beverly Tatum, emphasizes this point by saying,

“When African Americans pressed for an end to legalized school segregation in the years leading up to the 1954 *Brown v. Board of Topeka* decision, it was not the companionship of white children they were seeking for their children: It was access to educational resources. The schools white children attended had better facilities, better equipment and supplies, more curricular options, and often (although not always) more highly trained teachers than those serving black children. Black parents believed that equal access to those publicly funded resources was their children’s birthright. Attending the same schools white children did seemed the most likely means to achieve it.”¹⁴⁰

Thus, by the rulings of the Supreme Court in *Tinker*, *Sweatt*, and *Brown*, all public school students have equal Constitutional rights to (1) the same degree of access (2) to the same conduits of information (3) to ultimately be provided with the same information in America’s public schools.

¹³⁹ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 274). New York, NY: Harper & Row Publishers.

¹⁴⁰ Kozal, J., Tatum, B. D., Eaton, S., & Gándara, P. (2010). What’s the answer? *Educational Leadership*, 68(3), 28–31.

C. Property Tax Schemes of Funding Public Schools Are Prior Restraints Which Violate Students' First Amendment Rights by Limiting Certain Students' Access to Information in Schools

1. Tax Schemes that Limit Access to the Conduits of Information are Prior Restraints Which Violate First Amendment Rights

Government actions that “significantly curtail the dissemination of information and ideas” are prior restraints and are “the primary evil against which the First Amendment was directed.”¹⁴¹ For this reason, the Supreme Court disallows burdens on the conduits transferring information, because the First Amendment affords great protection to the total information transfer process.

Grosjean v. American Press Co. stands for the proposition that an individual has the right “to be free in the enjoyment of all his faculties” resulting from transmitting and receiving information.¹⁴² In *Grosjean*, the Supreme Court invalidated a Louisiana state tax on newspapers finding that the issue went to “the heart of the natural right of the members of an organized society to impart and acquire information.”¹⁴³

The *Grosjean* Court noted that for more than a century prior to the adoption of the First Amendment, there was a persistent effort on the part of the British Government to prevent or abridge the free flow of information, and that the struggle between the measures' proponents and those who asserted the free right “was continuous and unceasing.”¹⁴⁴ When Parliament taxed the primary information bearing conduits of the time, specifically newspapers and advertisements, “there followed more than a century of resistance to, and evasion of the taxes, and of agitation for their repeal.”¹⁴⁵ These taxes “constituted one of the factors that led the American colonists to

¹⁴¹ *Near v. Minnesota*, 283 U.S. 697, 716 (1931); See also Litwack, T. (1977). *The Doctrine of Prior Restraint. Harvard Civil Rights - Civil Liberties Law Review*, 12(3), 519. 522.

¹⁴² *Grosjean v. American Press Co.*, 297 U.S. 233 at 244 (1936)

¹⁴³ *Grosjean v. American Press Co.*, 297 U.S. 233 at 243 (1936)

¹⁴⁴ *Grosjean v. American Press Co.*, 297 U.S. 233 at 245 (1936)

¹⁴⁵ *Grosjean v. American Press Co.*, 297 U.S. 233 at 246 (1936)

protest against taxation for the purposes of the home government; and that the Revolution really began when, in 1765, that government sent stamps for newspaper duties to the American colonies.”¹⁴⁶ The Court explained that:

“These duties were quite commonly characterized as “taxes on knowledge,” a phrase used for the purpose of describing the effect of the exactions and at the same time condemning them. That the taxes had, and were intended to have, the effect of curtailing the [free flow of information]...went almost without question, even on the part of those who defended the act.”¹⁴⁷

The *Grosjean* Court noted that “the aim of the struggle was not to relieve taxpayers from a burden,” but instead to establish and preserve the People’s “*right to full information*,”¹⁴⁸ because the taxes were “effectual in limiting the circulation of [information].”¹⁴⁹ Thus, after carefully considering the effect of the newspaper tax, the Court found it sufficient that the Louisiana statute was *likely* to “curtail the opportunity for the acquisition of knowledge,” and so held the tax to be an impermissible and unconstitutional prior restraint.¹⁵⁰

“The major reason for application of the prior restraint doctrine to *Grosjean* was the significant curtailment of the dissemination of ideas engendered by the tax.”¹⁵¹ As a result, it is “impossible to believe that [the First Amendment] was not intended to bring within the reach of [its] words such modes of restraint” as are embodied in taxes schemes which restrict the circulation of information to the citizenry. It is in this context that the *Grosjean* court definitively ruled:

“The tax here involved is bad not because it takes money from the pockets of the appellees...It is bad because, in light of its history and of its present setting, it... limits the circulation of information to which the public is entitled in virtue of the constitutional guarantees.”¹⁵²

¹⁴⁶ *Grosjean v. American Press Co.*, 297 U.S. 233 at 246 (1936)

¹⁴⁷ *Grosjean v. American Press Co.*, 297 U.S. 233 at 246-47 (1936)

¹⁴⁸ *Grosjean v. American Press Co.*, 297 U.S. 233 at 247 (1936) (emphasis supplied)

¹⁴⁹ *Grosjean v. American Press Co.*, 297 U.S. 233 at 246-47 (1936); See also Litwack, T. (1977). The Doctrine of Prior Restraint. *Harvard Civil Rights - Civil Liberties Law Review*, 12(3), 523

¹⁵⁰ *Grosjean v. Am. Press Co.*, 297 U.S. 233, 247 (1936)

¹⁵¹ Litwack, T. (1977). The Doctrine of Prior Restraint. *Harvard Civil Rights - Civil Liberties Law Review*, 12(3), 524

¹⁵² *Grosjean v. American Press Co.*, 297 U.S. at 250 (1936)

2. Property Tax Based Schemes of Funding Public Schools are Prior Restraints Which Violate Students' First Amendment Rights by Limiting Their Access to the Same Information Bearing Conduits as Other Similarly Situated Students in Public Schools

The Supreme Court's precedent in *Grosjean* teaches that "it is the likely effect, rather than the form, of a governmental intrusion" upon First Amendment freedoms that is the touchstone of "whether such an intrusion amounts to a prior restraint."¹⁵³ As the *Grosjean* court noted, tax schemes that "curtail the opportunity for the acquisition of knowledge by the people"¹⁵⁴ are invalid under the Constitution. As a result, this section asserts that effect of property tax based systems of funding public education curtail the opportunity of adversely impacted students to access conduits of information in schools, and as such, is an impermissible prior restraint on students' First Amendment freedoms. In order to apply the highest level of judicial scrutiny to this prior restraint, it must be shown that: (1) property tax based systems of funding public education are likely to substantially restrict students' access to particular conduits of information, and (2) that the information students to access is at least arguably protected by the First Amendment.¹⁵⁵ Once the tax system is demonstrated as: (1) likely curtail students' access to information and (2) that the information students seek to access in schools is protected by the First Amendment, property tax based systems of funding public education must be deemed unconstitutional unless the system is necessary to achieve a compelling government interest.¹⁵⁶

¹⁵³ Litwack, T. (1977). The Doctrine of Prior Restraint. *Harvard Civil Rights - Civil Liberties Law Review*, 12(3), 523

¹⁵³ Litwack, T. (1977). The Doctrine of Prior Restraint. *Harvard Civil Rights - Civil Liberties Law Review*, 12(3), 527

¹⁵⁴ *Grosjean v. American Press Co.*, 297 U.S. 233 at 247 (1936); See also Litwack, T. (1977). The Doctrine of Prior Restraint. *Harvard Civil Rights - Civil Liberties Law Review*, 12(3), 534

¹⁵⁵ Litwack, T. (1977). The Doctrine of Prior Restraint. *Harvard Civil Rights - Civil Liberties Law Review*, 12(3), 552

¹⁵⁶ Litwack, T. (1977). The Doctrine of Prior Restraint. *Harvard Civil Rights - Civil Liberties Law Review*, 12(3), 552

A. Property Tax Based Systems of Funding Public Education Restrict Students' Access to Conduits of Information in Public Schools

The connection between school districts' limited financial resources and the resulting limits on a students' access to the necessary conduits of information in public schools was most recently elucidated in *Williams v. State of California*.¹⁵⁷ *Williams* was filed on the 46th anniversary of *Brown v. Board of Education*,¹⁵⁸ on May 17, 2000, by nearly one hundred California schoolchildren who attended public schools in substandard learning conditions.¹⁵⁹ The plaintiffs sued the State of California, the California Board of Education, the California Department of Education, and the California Superintendent of Schools collectively as defendants.¹⁶⁰ The plaintiffs claimed that overwhelming disparities in school funding result in deprivations of access to the essential conduits, which circulate the information necessary to equal critical thinking training in public schools.¹⁶¹

Williams is important because the plaintiffs called upon a host of nationally renown experts to define the necessary conduits of information to which all students must have equal access to in public schools.¹⁶² The experts further showed how access to those conduits is premised on a school district's access to financial resources.¹⁶³ The experts' reports were synthesized by Professor Jeannie Oakes, Presidential Professor of the Graduate School of Education and Information Studies at the University of California at Los Angeles and are cited in relevant portions in the section immediately below. The experts determined that "qualified teachers, relevant instructional materials that students may use in school and at home, and clean, safe, and

¹⁵⁷ Order Regarding Approval of Settlement Notice and Schedule in *Williams v. State of California*. San Francisco County Superior Court. No. 312236 (8/13/2004).

¹⁵⁸ 347 U.S. 483 (1954)

¹⁵⁹ Notice of Settlement in *Williams v. State of California*. San Francisco County Superior Court. No. 312236 (8/13/2004), p. 2

¹⁶⁰ Notice of Settlement in *Williams v. State of California*. San Francisco County Superior Court. No. 312236 (8/13/2004), p. 2

¹⁶¹ Plaintiff's First Amended Complaint, *Williams v. State of California*. San Francisco County Superior Court. No. 312236, at 6

¹⁶² See Experts, *Decent Schools for California – Williams v. State of California*, <http://decentschools.org/experts.php>.

¹⁶³ See Experts, *Decent Schools for California – Williams v. State of California*, <http://decentschools.org/experts.php>.

educationally appropriate facilities are fundamentally important to students' education."¹⁶⁴ These conduits transfer the information "that the state has specified as important."¹⁶⁵

1. Qualified Teachers are Essential Conduits of Information in Public Schools

"A wealth of scholarly studies demonstrate the relationship between teacher quality and student achievement."¹⁶⁶ In fact,

"Among the school resource measures, the level of teacher experience and a related measure—the percentage of teachers without a full credential—are the variables most strongly related to student achievement. Teachers' level of education, measured by the percentage of teachers with a master's degree or higher, in some cases is positively and significantly related to test scores but not nearly as uniformly as the measures of teacher experience. Similarly, a higher percentage of teachers with only a bachelor's degree within a given grade is negatively related to student achievement."¹⁶⁷

Moreover, the best available research shows that subject-specific teacher training directly affects student achievement.¹⁶⁸ "Students of teachers who are not fully certified in mathematics perform less well than students whose teachers are certified in math."¹⁶⁹ There is also a proven correlation between teacher certification, teacher experience, and teacher preparation, and student achievement which holds even after the effects of student poverty are factored out.¹⁷⁰ As a result, the relationship between qualified teachers and student achievement is made plain: as student achievement in the modern age is measured by standardized test scores, and as standardized tests are based on the amount and quality of the information *transmitted* to and

¹⁶⁴ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 1. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁶⁵ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 1. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁶⁶ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 5. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁶⁷ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 6. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁶⁸ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 6. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁶⁹ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 7. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁷⁰ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 7. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

retained by students, teachers, therefore, are conduits of information in schools because they are essential to transferring the information the states require students to know.

2. Textbooks and Instructional Materials are Essential Conduits of Information in Public Schools

Instructional materials are conduits of information that are just as critical to the information transfer process as teachers.¹⁷¹ “Not only is the textbook the central tool in almost all forms of schooling, it is accepted internationally as a necessary tool for learning.”¹⁷² For example, the World Bank considers textbooks “a critical part of education, as necessary as the classroom itself, as indispensable as the classroom teacher.”¹⁷³ Moreover, international organizations such as the Organization of Economic Cooperation and Development and the United Nations Educational, Scientific, and Cultural Organization “stipulate that textbooks are an important indicator of educational quality and use a standard of one textbook for each pupil in every subject as the standard for an adequate supply.”¹⁷⁴

Textbooks and curriculum materials are so “consistently related to student learning in part because having a textbook to take home makes it possible for students to complete meaningful homework.”¹⁷⁵ As a result, “if students have access to textbooks and curriculum materials to use at home,” they then have continuing access to information and can use the information they received to research, complete practice activities and exercises, and can further

¹⁷¹ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 7 Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁷² Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 7. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁷³ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 7. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁷⁴ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 7. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁷⁵ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 7. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

use the information they gain to prepare for class and tests.¹⁷⁶ Without access to information at home via textbooks and other instructional materials, “teachers have a difficult time assigning out-of-school learning experiences that require students to have access to the [information] included in the text, and students, particularly those with few books and learning resources at home, have difficulty completing such assignments.”¹⁷⁷ Trained teachers and instructional materials are particularly important because they are the primary conduits by which students *receive* the information necessary to knowledge and skill production that they might pass high stakes tests.¹⁷⁸

3. School Facilities are Essential Conduits of Information in Public Schools

“The condition of school buildings, including but not limited to temperature, acoustics, and overcrowding” also impact the transmission of information in schools.¹⁷⁹ “Researchers have repeatedly found a difference of between 5-17 percentile points between achievement of students in poor buildings and those students in above-standard buildings, when the socioeconomic status of students is controlled.”¹⁸⁰

“The condition of a school building influences student learning directly, as well as indirectly,” as facilities may enhance or inhibit the effectiveness of a teacher’s *transmission of information*.¹⁸¹ Poor school facilities diminish the transfer of information, which, in turn,

¹⁷⁶ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 7. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁷⁷ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 7. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁷⁸ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 8. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁷⁹ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 8. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁸⁰ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 8. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁸¹ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 8. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

negatively impacts student performance.¹⁸² For example, “[t]eachers in buildings in poor condition stated that the design and appearance of the facility had a negative impact upon the learning climate. Conversely, teachers in buildings in good condition reported the building had a positive influence upon the learning climate.”¹⁸³ As the learning climate is the environment in which the transmission of information takes place, the school itself is a conduit of information, as deficiencies in the school’s facility adversely impact the transmission of information therein.

4. Property Tax Based Systems Substantially Restrict School Financial Resources Which Purchase Information Conduits for Some Students but Generously Endow Others

Property tax based systems of funding public education substantially restrict financial resources for some school districts but generously endow others. The facts of *San Antonio v. Rodriguez*,¹⁸⁴ best illustrate this point.

When the Supreme Court considered *San Antonio* in 1973, Texas operated (and today still operates) its public elementary and secondary schools from contributions at both the state and local levels through the “Texas Minimum Foundation School Program”.¹⁸⁵ Nearly fifty percent of the total educational expenditures in Texas were funded through this program to ensure a minimally basic education for all students enrolled in the state’s public school system.¹⁸⁶ At the local level, each district contributed to financing its schools through property tax revenue generated within the district.¹⁸⁷

¹⁸² Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 8. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁸³ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 8. Retrieved March 1, 2015, from http://decentschools.org/expert_reports/oakes_report.pdf

¹⁸⁴ 411 U.S. 1 (1973)

¹⁸⁵ 411 U.S. 1 at 9 (1973)

¹⁸⁶ 411 U.S. 1 at 9 (1973)

¹⁸⁷ 411 U.S. 1 at 10 (1973)

San Antonio's plaintiffs asserted that Texas' system of public school finance favored the rich through its emphasis on property taxation.¹⁸⁸ The claim was based on the substantial inter-district disparities in per-pupil expenditures, which result foremost from differences in the value of assessable property between the Edgewood Independent School District and the Alamo Heights Independent School District.¹⁸⁹

A comparison between Edgewood (least affluent) and Alamo (most affluent) school districts serves to highlight the substantial financial disparities caused by using property taxes to fund public education.¹⁹⁰ When the Supreme Court decided *San Antonio*, the Edgewood School District enrolled approximately 22,000 students in its twenty-five elementary and secondary schools all of which are located in an inner-city area having little commercial or industrial property.¹⁹¹ Further, the district's residents were predominately Mexican-American.¹⁹² As a result, approximately 90% of the Edgewood student population was Mexican-American with over 6% being African American.¹⁹³ The average assessed property value for students in the district was valued at \$5,960.00 per pupil with a median family income of \$4,686.00.¹⁹⁴ Both of these figures were the lowest in the metropolitan area.¹⁹⁵ Taxed at an "equalized rate of \$1.05 per \$100.00 of assessed property—the highest [tax rate] in the metropolitan area—the [Edgewood] district contributed \$26.00 to the education of each child."¹⁹⁶

In contrast, Alamo Heights educated approximately 5,000 students in an affluent residential community quite unlike the Edgewood District.¹⁹⁷ Alamo Heights' school population was overwhelmingly caucasian with a Mexican-American population of 18% and an African American

¹⁸⁸ 411 U.S. 1 at 5 (1973)

¹⁸⁹ 411 U.S. 1, 11-12 (1973)

¹⁹⁰ 411 U.S. 1, 11-12 (1973)

¹⁹¹ 411 U.S. 1, 11-12 (1973)

¹⁹² 411 U.S. 1, 11-12 (1973)

¹⁹³ 411 U.S. 1, 11-12 (1973)

¹⁹⁴ 411 U.S. 1, 11-12 (1973)

¹⁹⁵ 411 U.S. 1, 12 (1973)

¹⁹⁶ 411 U.S. 1, 12 (1973)

¹⁹⁷ 411 U.S. 1, 12 (1973)

population of less than 1%.¹⁹⁸ The assessed property value per student in the Alamo district exceeded \$49,000.00 (more than 8 times that of Edgewood) with a median family income of \$8,001.00 (more than 1.5 times that of Edgewood).¹⁹⁹ Accordingly, at a local tax rate of \$.85 per \$100.00 (in comparison to \$1.05 per \$100 in Edgewood), Alamo Heights raised a \$333.00 per pupil contribution for pupil instruction in comparison to Edgewood's \$26.00, which equates to a \$307.00 differential per student.²⁰⁰ Multiplying this \$307.00 differential by the 22,000 students then enrolled in the Edgewood School District means that at the time *San Antonio* was filed, the property tax based system of funding public education disadvantaged Edgewood in its efforts to provide access to information to its students to the tune of six-million, seven-hundred fifty-four thousand dollars (\$6,754,000.00) in comparison to Alamo Heights which received the \$6.75 million dollar benefit. Thus, the effect of property tax based school funding systems is this: those residing in areas with diminished property values must tax themselves at the highest rate to produce fewer financial resources to provide access to the conduits of information for their students, whereas the affluent, residing in areas with increased property values, may tax themselves at a significantly lower rate, but still produce an over-abundance of financial resources to provide their students with greater access to information in public schools.

5. The Financial Restrictions Imposed by Property Tax Based School Funding Systems Restrict Students' Access to Information Bearing Conduits in Public Schools in Violation of Students' First Amendment Rights

School districts need financial resources to provide equal access to the conduits *Williams* defines in order to satisfy students' First Amendment rights. However, *San Antonio* shows how property tax based systems limit the ability of some districts to generate revenue, while generously

¹⁹⁸ 411 U.S. 1, 12-13 (1973)

¹⁹⁹ 411 U.S. 1, 13 (1973)

²⁰⁰ *San Antonio v. Rodriguez*, 411 U.S. 1, 13 (1973)

providing substantially enhanced purchasing power for others. In order to subject this system to the highest level of judicial scrutiny, it must first be shown that property tax based systems of funding public education are likely to substantially restrict students' access to the conduits of information.

Taken together, *Williams* determined that schools must be ubiquitously equipped with the following conduits in order to for it to be said that equal access to equal information is being provided.²⁰¹

A) Each student must have his or her own reasonably current textbook or educational materials, in useable condition, in each core subject (1) to use in class without sharing with another student; or (2) to use at home each evening for homework;

B) Each student must have a qualified teachers such that (1) the student attends a class or classes for which a permanent teacher is assigned; or (2) the student attends a school in which no more than 20% of teachers do not have full, non-emergency teaching credentials; or (3) the student is an English Language Learner ("ELL") and is assigned a teacher who has been specially qualified by the state to teach ELL students;

C) Each student must have adequate, safe and healthful school facilities such that (1) the student attends classes in one or more rooms in which the temperature does not fall outside the 65-80 degrees Fahrenheit range; or (2) the student attends classes in one or more rooms in which the ambient or external noise levels do not regularly impede verbal communication between students and teachers; (3) there are sufficient numbers of clean, stocked and functioning toilets and bathrooms; and (4) there are no unsanitary and unhealthful conditions, including the presence of vermin, mildew or rotting organic material;

D) No lack of educational resources such that (1) the school offers academic courses and extracurricular offerings in which the student can participate without paying a fee or obtaining a fee waiver; and (2) the school provides the student with access to research materials necessary to satisfy course instruction, such as a library or the Internet;²⁰²

E) No overcrowded schools such that (1) the student is subject to a year-round, multi-track schedule that provides for fewer days of annual instruction than schools on a traditional calendar provide; (2) the student is not bused excessive distances

²⁰¹ Order Regarding Approval of Settlement Notice and Schedule in *Williams v. State of California*. San Francisco County Superior Court. No. 312236 (8/13/2004), Exhibit A, p. 1

²⁰² The author additionally asserts that advanced placement courses, computer and science labs, and physical recreational facilities should also be included.

from his or her neighborhood school; and (3) the student attends classes in one or more rooms that are not so overcrowded that there are insufficient seats for each enrolled student to have his or her own seat or where the average square footage per student is not less than 25 square feet.

A school district must have enough money to purchase the necessary conduits of information listed above if students are to access them in schools. For example, limited funding restricts a school district's ability to provide "competitive teacher salaries and high quality working conditions," which impairs districts' ability to offer incentives to recruit highly qualified teachers into the most needed areas like "mathematics, science, computer technology, special education, and bilingual education development, where there are genuine under-supplies of candidates."²⁰³ Limited funding further restricts districts' abilities provide "additional compensation, support and training that would attract and retain highly qualified teachers in schools where students are most at risk."²⁰⁴ With respect to textbooks and other instructional materials, a lack of funding means that districts cannot "purchase materials in sufficient quantities for all students to have them in every core subject for use in class and at home."²⁰⁵ As to facilities, "school districts who are unable to pass a school bond measure or are unable to afford the indebtedness associated with repayment of a school bond measure...are less likely to meet local needs [because]...low wealth districts will need to levy a higher tax rate in order to repay a bond of equal magnitude issued by a high property wealth district,"²⁰⁶ as shown in the tax rate comparison of Edgewood and Alamo Heights.

Therefore, given the fact that the amount of money a district has determines its ability to provide its students with access to the necessary conduits of information, a tax scheme that endows

²⁰³ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 35. Retrieved March 1, 2015, from http://decentsschools.org/expert_reports/oakes_report.pdf

²⁰⁴ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 35. Retrieved March 1, 2015, from http://decentsschools.org/expert_reports/oakes_report.pdf

²⁰⁵ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 35. Retrieved March 1, 2015, from http://decentsschools.org/expert_reports/oakes_report.pdf

²⁰⁶ Oakes, J. (2005, April 1). Education Inadequacy, Inequality, and Failed State Policy: A Synthesis of Expert Reports Prepared for Williams v. State of California at 35. Retrieved March 1, 2015, from http://decentsschools.org/expert_reports/oakes_report.pdf

certain districts' with the ability to purchase the necessary conduits but restrains others', violates the adversely affected students' First Amendment rights to access the same conduits and same information as the other similarly situated students as established collectively by *Tinker*, *Sweatt*, and *Brown*. In effect, the tax limits the circulation of information in some schools by failing to provide the conduits that circulate information, while providing wide access to those conduits for others. In this way, property tax based systems of funding public education operate as impermissible prior restraints because the tax scheme results in the failure of districts to provide access to information for some students while granting uninhibited access for others.

B. The Information Students Seek to Access in Public Schools is Protected by the First Amendment Because the Information is Not Obscene, Does Not Incite Imminent Lawless Action, and Is Not Commercial Speech

The information students seek to access in public schools must be protected by the First Amendment if the prior restraint imposed by property tax based school funding systems is to be subjected the highest level of judicial scrutiny.²⁰⁷ There are primarily three categories of information that are not protected by or receive less than full First Amendment protection. These categories are: (1) obscenity, (2) speech intended to incite imminent lawless action, and (3) commercial speech.²⁰⁸ If the information transmitted to students in public schools falls into any of these three categories, the First Amendment will not protect the information and strict scrutiny, the highest level of judicial scrutiny, will not attach. If the information transmitted in schools falls outside these categories, the First Amendment will protect the information students seek to access in schools and strict scrutiny will attach. If strict scrutiny attaches, the government

²⁰⁷ Litwack, T. (1977). The Doctrine of Prior Restraint. *Harvard Civil Rights - Civil Liberties Law Review*, 12(3), 552

²⁰⁸ *Chemerinsky*, Constitutional Law, 3d, at 1321

will have to show that the comparative denial of access to information for some students and not others in public schools is necessary to achieve a compelling government interest.²⁰⁹

1. The Information Transferred in Public Schools is Not Obscene

The Supreme Court articulated the test for obscenity in *Miller v. California*.²¹⁰ There, the Court held that the basic guidelines for determining whether information is obscene is whether the average person, applying contemporary community standards would find that the information, taken as a whole, (a) appeals to the prurient interest; (b) that the information depicts or describes sexual conduct in a patently offensive way; and (c) that the information, taken as a whole, lacks serious literary, artistic, political, or scientific value.

First, the information transferred in public schools does not appeal to the prurient interest. Schoolchildren only seek to access the information critical to their intellectual growth and development. As reading, writing, and arithmetic do not of themselves encourage an excessive interest in sexual matters, it cannot be said that the “dominant theme”²¹¹ of the information conveyed in schools appeals to the prurient interest. Students only seek the information essential to their passing standardized tests.

Nor is the information transmitted in schools patently offensive; the information circulated in schools “affronts [no] contemporary community standards” as learning offends no one, but instead, is aspired to by every one.²¹²

Finally, the great literary, artistic, political, and scientific value of the intellectual scholastic information conveyed in the Nation’s classrooms is so plainly obvious that it need not

²⁰⁹ *Chemerinsky*, Constitutional Law, 3d, at 943

²¹⁰ 413 U.S. 15 at 24 (1973)

²¹¹ *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972)

²¹² *Miller v. California*, 413 U.S. 15, 24 (1973); *See also A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Com. of Mass.*, 383 U.S. 413, 418 (1966)

be discussed.²¹³ As a result, it *cannot* be said that the information transmitted in schools is obscene and thus not protected by the First Amendment.

2. The Information Transferred in Public Schools Is Not Likely to Produce Imminent Lawless Action

Second, the transmission of schoolhouse information is not directed to inciting or producing imminent lawless action, nor is the transmission of information regarding science, math, and history, likely to incite or produce such action.²¹⁴ In fact, U.S. history reveals the exact opposite. It has been those times when equal access to equal measures of schoolhouse information has been denied to individuals that we have seen the greatest, and some times violent, agitation for its wide dissemination. For example, President Eisenhower was compelled to federalize the Arkansas National Guard and directed the 101st Airborne Division of the United States Army to protect the “Little Rock Nine” from blatant and belligerent racists as those students sought equal access to the information being provided at Central High School.²¹⁵ Thus, because it cannot be said that the academic information sought by students in schools is of itself likely to incite or produce imminent lawless action, First Amendment protection for the information sought in schools cannot be denied on these grounds.

3. The Information Transferred in Public Schools Is Not Commercial Speech

Finally, it cannot be said that the information being offered in schools is commercial speech and should therefore receive less than full First Amendment protection.

²¹³ *Miller v. California*, 413 U.S. 15, 24 (1973)

²¹⁴ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

²¹⁵ See Smith, Jean Edward (2012). Eisenhower in War and Peace. Random House. p. 723.

Commercial speech is the conveyance of information that proposes a purely commercial transaction.²¹⁶ By contrast, information is transmitted to students in schools to expand ideas and enable students to pursue “truth, science, morality, and arts in general,”²¹⁷ not to convince students to buy a product. As a result, the proposition that in-school information is unprotected because it is commercial speech cannot be reasonably sustained.

C. The Prior Restraint Imposed by Property Tax Based School Funding Systems Fail to Meet Strict Scrutiny and Must Fall Because The Information Transmitted in School is Protected by the First Amendment

The foregoing shows that the First Amendment protects the information transmitted in public schools because the information being transferred: (a) is not obscene; (b) is not likely to incite imminent lawless action; and (c) does not propose a commercial transaction. Thus, the information students seek to access in schools is protected by the First Amendment.²¹⁸ The above also shows how property tax based school funding systems restrict the circulation of information in schools by failing to provide access to the necessary conduits of information for some students, while ubiquitously providing that access for others. Based on these two showings, property tax based systems of funding public education are prior restraints on students’ access to information in public schools as the information students seek to access is (1) protected by the First Amendment and (2) property tax based school funding systems restrict the circulation of protected information.

Having established the prior restraint, the government must show that the prior restraint meets the highest test of judicial scrutiny, known as strict scrutiny, in order to be upheld. To meet this test, the government must show that the prior restraint is necessary to achieve a

²¹⁶ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)

²¹⁷ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)

²¹⁸ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969)

compelling government interest.²¹⁹ As a result, this section turns to examine whether a state's restriction of the circulation of information in schools by failing to provide access to the necessary conduits of information for some students, while ubiquitously providing that access for others, meets the strict scrutiny standard or is otherwise defensible.

Plyler v. Doe stands for the proposition that there is no rational basis for state action depriving an individual access to information in public schools.²²⁰ The rational basis test is the minimal level of scrutiny that all challenged government actions must meet.²²¹ “The basic requirement is that a law meets rational basis review if it is rationally related to a legitimate government purpose.”²²² Because *Plyler* holds there is no rational basis for denying an individual access to information in public schools, the prior restraint imposed by property tax based school funding systems cannot meet strict scrutiny, and thus, cannot be upheld.

In *Plyler*, the Supreme Court held unconstitutional a Texas statute that withheld funds from local school districts that provided access to information for individuals who were not legally admitted into the United States.²²³ The law further authorized local school districts to deny enrollment to such individuals, leaving them completely without access to information in the state's public schools.²²⁴ Though the *Plyler* Court attempted to reinforce *San Antonio's* premise that access to information in schools is not a fundamental right because it is not explicitly written in Constitution,²²⁵ the Court nonetheless distinguished access to information in public schools from run-of-the-mill state sponsored programs which *are* subject to arbitrary denial. The Court said that access to information in public schools is not “merely some governmental benefit

²¹⁹ *Chemerinsky*, Constitutional Law, 3d, at 943

²²⁰ *Plyler v. Doe*, 457 U.S. 202 (1982)

²²¹ *Chemerinsky*, Constitutional Law, 3d, at 723

²²² *Chemerinsky*, Constitutional Law, 3d, at 723

²²³ *Plyler v. Doe*, 457 U.S. 202, 205 (1982)

²²⁴ *Plyler v. Doe*, 457 U.S. 202, 205 (1982)

²²⁵ *Plyler v. Doe*, 457 U.S. 202, 221 (1982)

indistinguishable from other forms of social welfare legislation.”²²⁶ The *Plyler* Court reiterated that “[b]oth the importance of [access to information in public schools] in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.”²²⁷ The Court explained that:

“The American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance. We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests. As ... pointed out early in our history ... some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. And these historic perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”²²⁸

The Supreme Court could not ignore the effects of arbitrarily denying individuals equal access to information in public schools. As a result, the Court subjected the state’s action to judicial scrutiny by applying the rational basis test.²²⁹ The rational basis test is the lowest, most basic level of judicial review whose basic requirement is that the challenged law be *rationally related to any legitimate government purpose*.²³⁰ If a law fails rational basis scrutiny, it cannot meet strict scrutiny, the highest level of judicial review, which requires the challenged law to be necessary to achieve a compelling government interest.

²²⁶ *Plyler v. Doe*, 457 U.S. 202, 221 (1982)

²²⁷ *Plyler v. Doe*, 457 U.S. 202, 221 (1982)

²²⁸ *Plyler v. Doe*, 457 U.S. 202, 221 (1982)(internal quotations omitted)

²²⁹ *Plyler v. Doe*, 457 U.S. 202, 224 (1982)

²³⁰ *Chemerinsky*, *Constitutional Law*, 3d, at 723

In assessing whether there was a rational purpose for the denial, the Court considered the “costs to the Nation and to the innocent children who would [be the states’] victims” if states are allowed to arbitrarily pick and choose which individuals have access to information in America’s public schools.²³¹ The Court said that by denying individuals access to information in public schools, “we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”²³² The Court concluded:

“It is difficult to understand precisely what the state hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children [equal access to information in schools], they are wholly insubstantial in light of the costs involved to these children, the state, and the Nation.”²³³

This cost-benefit-analysis led the Court to find no conceivably legitimate purpose for arbitrarily depriving students of equal access to equal information in America’s public schools. The Court specifically held that the state’s action in denying access to information in schools can “hardly be considered rational...”²³⁴ Even Texas’ claims of limited resources were not enough to justify deprivations of access.²³⁵

As a result, states fundamentally lack the authority to deprive individuals of access to information in public schools because such deprivation has no legitimate government purpose.²³⁶ Thus, neither complete nor comparative state deprivations of access to information provided by public schools can be sustained, no matter the reason, because there is no conceivable rational basis for such an action. Because denials of equal access to equal information in schools fails to

²³¹ *Plyler v. Doe*, 457 U.S. 202, 224 (1982)

²³² *Plyler v. Doe*, 457 U.S. 202, 223 (1982)

²³³ *Plyler v. Doe*, 457 U.S. 202, 230 (1982)

²³⁴ *Plyler v. Doe*, 457 U.S. 202, 224 (1982)

²³⁵ *Plyler v. Doe*, 457 U.S. 202, 227 (1982); See also *Brief for the Appellants* at 8, 13-14, 22, 26.

²³⁶ *Plyler v. Doe*, 457 U.S. 202, 224 (1982)

meet rational basis scrutiny, such denials cannot withstand strict scrutiny. Thus, property tax based school funding systems, which inherently deny equal access to equal information as shown above, cannot meet strict scrutiny and must fall.

By contrast, it will be argued that *Plyler* should be read narrowly and that it stands only for the proposition that complete, but not comparative, denials of access to information are forbidden by the Federal Constitution. It will be argued that so long as the state provides *some* access to *some* information for all, the respective degrees of access each individual enjoys is irrelevant. However, this distinction is a nonsensical distinction without a difference: a complete denial of access to information to one individual as opposed to others is a comparative denial as between them. Moreover, even a slight²³⁷ deprivation as between individuals is still a comparative deprivation as between them as one party would have greater access to information than the other, which is forbidden by *Sweatt*²³⁸ and *Brown*.²³⁹ The *Plyler* Court recognized this principle, saying, “If the state is to deny a discrete group of innocent children the *free* [access to information] that it offers to other children in schools, that denial must be justified by a showing that it furthers some substantial state interest.”²⁴⁰ Scarcity of resources is not enough.²⁴¹

As a result, it cannot be doubted that *Plyler* stands for the proposition that comparative deprivations of access to information in public schools, whether great or small, are equally forbidden, because any arbitrary deprivation of any measure of access to information in school is inherently irrational. For this reason, the *Plyler* Court was able to repeat the maxim held in *Brown v. Board of Education*²⁴²:

²³⁷ *de minimis*

²³⁸ 339 U.S. 629 (1950)

²³⁹ 347 U.S. 483 (1954)

²⁴⁰ *Plyler v. Doe*, 457 U.S. 202, 230 (1982); “Free” as used here is interpreted as unfettered *Plyler*’s context in which the plaintiff raised no issue of cost, but only one of access, which was fettered by the state law prohibiting enrollment of non-residents.

²⁴¹ *Plyler v. Doe*, 457 U.S. 202, 227 (1982); See also *Brief for the Appellants* at 8, 13-14, 22, 26.

²⁴² 347 U.S. 483 (1954)

“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity [to access equal information in public schools]. Such an opportunity, where the state has undertaken to provide [access to information in schools], is a right which must be made available to all *on equal terms*.”²⁴³

Thus, because property tax based school funding systems deny equal access to equal information in America’s public schools, they are impermissible prior restraints on students’ First Amendment rights to access information in public schools. Since these systems cannot meet strict scrutiny, and their deprivations fail to meet rational basis, they must be declared unconstitutional.

²⁴³ 457 U.S. 202, 222-23 (1982)(emphasis added)

CHAPTER 4

DENIALS OF EQUAL ACCESS TO EQUAL INFORMATION IN AMERICA'S PUBLIC SCHOOLS VIOLATE STUDENTS' FIFTH AND FOURTEENTH AMENDMENT PROPERTY RIGHTS

1. Property Tax Based School Funding Systems Violate Students' Fifth And Fourteenth Amendment Substantive Due Process Rights To Property

Having shown how property tax based systems of funding public education violate students' First Amendment rights, this paper now turns to elaborate how deprivations of equal access to equal information in schools violates students' Fifth and Fourteenth Amendment substantive due process rights to property. The Fifth and Fourteenth Amendments provide:

Fifth Amendment:

"No person shall be...deprived of life, liberty, or property without due process of law."

Fourteenth Amendment:

"No State shall...deprive any person of life, liberty, or property without due process of law."

The existence of an individual right triggers two distinct burdens on the government.²⁴⁴ One is procedural: the government must provide adequate procedures when it takes away a person's life, liberty, or property. The other is substantive: the government must justify an infringement by showing that its action is sufficiently related to an adequate justification.²⁴⁵ Litigation and judicial decision making in cases about the substantive portions of individual rights is best understood as addressing the following questions: (1) Is there a fundamental right? (2) Is the right infringed? (3) Is the government's action justified by a sufficient purpose?²⁴⁶ This section generally focuses on establishing the violation of the substantive due process property rights

²⁴⁴ See *Chemerinsky*, Constitutional Law, 3d, at 945.

²⁴⁵ See *Chemerinsky*, Constitutional Law, 3d, at 945.

²⁴⁶ See *Chemerinsky*, Constitutional Law, 3d, at 946.

inherent in equal access to equal conduits of information provided in public schools by answering each of these three questions in turn.

A. Equal Access to Equal Information in America’s Public Schools is a Fundamental Property Right

Goss v. Lopez,²⁴⁷ establishes the property interest inherent in equal access to information in America’s public schools. The question in *Goss* was whether denying students’ access to the information circulated in school for ten days violated their procedural due process property rights under the Fourteenth Amendment. The Fifth Amendment also protects this same right to property at the Federal level.

The state of Ohio contended in *Goss* that because there is no textual constitutional right to an education, the due process clause does not protect against the state’s deprivations of access to schoolhouse information.²⁴⁸ However, the Court explicitly rejected this analysis, saying that the state’s position wholly “misconceives the nature of the issue.”²⁴⁹ The Court explained that the Fourteenth Amendment forbids state deprivations of any person’s life, liberty, or property without due process of law.²⁵⁰ With respect to property, the Court noted that the Constitution itself does not create property interests, but that property interests are “created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits.”²⁵¹ In making this distinction, the Court made it clear that though states may not be Constitutionally obligated to establish and maintain public school systems, where they do so and require their children to attend, the student has a “*legitimate entitlement*”²⁵²

²⁴⁷ 419 U.S. 565 (1975)

²⁴⁸ *Goss v. Lopez*, 419 U.S. 565, 572 (1975)

²⁴⁹ *Goss v. Lopez*, 419 U.S. 565, 572 (1975)

²⁵⁰ *Goss v. Lopez*, 419 U.S. 565, 572 (1975)

²⁵¹ *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975)

²⁵² *Goss v. Lopez*, 419 U.S. 565, 574 (1975)(emphasis added)

to access the full and equal measure of information provided in public schools,²⁵³ for “a public education is a property interest which is protected by the Due Process Clause.”²⁵⁴ As a result, it is the Constitutional *entitlement* to access the full and equal measure of information in public schools, commensurate with all others, that is the property interest inherent in the compelled receipt of public education.

The *Goss* Court was clear in its pronouncement that equal access to equal information in public schools is a fully protected property interest, as such access is a legitimate entitlement protected by the Constitution. However, the state of Ohio was adamant that its position was correct. Ohio argued that “even if there is a right to a public education protected by the due process clause generally, the clause comes into play only when the state subjects a student to a severe detriment or grievous loss.”²⁵⁵ The state claimed that 10 days’ deprivation of access to the information transmitted in schools was “neither severe nor grievous” and therefore the due process clause is “of no relevance.”²⁵⁶ Again, the Court corrected the state’s error by saying that the state’s argument:

“is again refuted by our prior decisions; for in determining whether due process requirements apply in the first place, we must look not to the weight but to the nature of the interest at stake. [The students] were excluded from [accessing schoolhouse information] temporarily, it is true, but the length and consequent severity of a deprivation...is not decisive... The Court’s view has been that as long as a property deprivation is not [too trivial or minor to merit consideration],²⁵⁷ its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. A 10-day suspension from school is not [too trivial or minor to merit consideration]²⁵⁸ in our view and may not be imposed in complete disregard of the Due Process Clause.”²⁵⁹

²⁵³ *Tinker*, 393 U.S. 503 (1969); *Sweatt*, 339 U.S. 629 (1950); and *Brown*, 347 U.S. 483 (1954)

²⁵⁴ *Goss v. Lopez*, 419 U.S. 565, 574 (1975)

²⁵⁵ *Goss v. Lopez*, 419 U.S. 565, 575 (1975)

²⁵⁶ *Goss v. Lopez*, 419 U.S. 565, 575 (1975)

²⁵⁷ *de minimis*

²⁵⁸ *de minimis*

²⁵⁹ *Goss v. Lopez*, 419 U.S. 565, 575-76 (1975)

By this holding above, *Goss* firmly established students' entitlement to access information in schools as a property interest that cannot be infringed in the absence of due process.

B. Property Tax Based School Funding Systems Deprive Students of Their Property Rights By Compelling Their Attendance In Schools Which Deny Them Equal Access to Equal Information

1. Property Tax Based School Funding Systems Infringe Students' *Goss* Given Entitlement to Access Equal Information in Public Schools

Schools, and the components therein, are conduits of information.²⁶⁰ *San Antonio* shows how the property tax system of funding schools curtails the amount of revenue realized for a school's transmission of information to its students. *Williams* shows how curtailed funding restricts access to the conduits that circulate the necessary information in schools. *Goss* shows how restricting access to information in public schools without due process of law violates students' property rights.

Property tax based school funding systems favor some students by providing increased revenue for their schools, which gives them greater access to the necessary conduits of information. On the other hand, the same system daily restricts other students' access to those conduits, without any legal proceeding, by curtailing the resources that would otherwise provide them with equitable access. Thereby, students residing in districts that the property tax based funding system does not favor are daily restricted from accessing information to the same degree as their favored peers. In fact, compulsory school attendance laws force disfavored students, under penalty of state law, to attend schools that injure their property right by failing to provide equal access equal information as all other similarly situated. Therefore, if under *Goss*, a ten-day restriction of access from the information undergirding critical thinking training provided in schools is not insignificant and violates students' property rights, then the sum of forced, daily

²⁶⁰ *Tinker*, 393 U.S 503 (1969)

restrictions of access from equal information over the entirety of a student's learning experience is even more an impermissible assault on students' entitlement based property rights. As a result, the cumulative effect of the daily deprivations of access to equal information in school caused by property tax based school funding systems is not insignificant and thus violates students' property rights under *Goss*.

2. Property Tax Based School Funding Systems Deny Students Their General Right to Access Property In America's Meritocratic Knowledge Economy By Denying Them Equal Access to Equal Information in America's Public Schools

Property tax based school funding systems infringe students' property right to access equal information by failing to provide the resources necessary for each student to equally access the necessary conduits of information as shown collectively through *San Antonio*,²⁶¹ *Tinker*,²⁶² *Sweatt*,²⁶³ *Brown*,²⁶⁴ *Williams*, and *Goss*.²⁶⁵ In particular, the *Goss* court noted that the deprivation of equal access to information in schools "interfere[s] with later opportunities for higher education and employment."²⁶⁶ However, the impact of depriving students of their legitimate entitlement to access equal conduits of information is of greater weight than the *Goss* Court had room to fully discuss. As a result, this section expounds the substance of the holding that access to information in schools "interfere[s] with later opportunities for higher education and employment,"²⁶⁷ to more thoroughly show the weight of the property interest at stake in the infringement of students' entitlement to access equal information in America's public schools. This section shows the immense irreparable harm caused by depriving students of their fundamental property right to access equal information in the Nation's public schools.

²⁶¹ 411 U.S. 1 (1973)

²⁶² 309 U.S. 503 (1969)

²⁶³ 339 U.S. 629 (1950)

²⁶⁴ 347 U.S. 483 (1954)

²⁶⁵ 419 U.S. 565 (1975)

²⁶⁶ *Goss v. Lopez*, 419 U.S. 565, 575 (1975)

²⁶⁷ *Goss v. Lopez*, 419 U.S. 565, 575 (1975)

A. America is a Meritocratic Knowledge Society with a Meritocratic Knowledge Economy in Which Access to Property is Distributed Based on an Individual's Access to the Information Circulated in Schools

The distribution of property in American society is based on the distribution of knowledge and skill because America is a “meritocracy.”²⁶⁸ Meritocracy is a notion based on Thomas Jefferson’s “natural aristocracy,” a social theory which is rooted in the principle that *knowledge* and *skill*, instead of birth and wealth, will ensure that property flows to those who ‘merit’ it by putting to use the information they accessed in schools.²⁶⁹ It is taken for granted, without plausible refute, that information, and access to it, is the basis of knowledge.

Today, knowledge is an economic commodity distributed to the Nation’s students by the Nation’s public schools as schools provide access to information.²⁷⁰ Though knowledge and skill are distributed in ways other than through the educational system, if they were not distributed to anyone in any degree by the system, then the system of schools could not be claimed to be an educational system.²⁷¹ For example,

“If no one ever learned through the educational system to read, to calculate, or to exercise any number of other skills, then we might continue to say that the system is a means of child custodianship or that it is a device for controlling the size of the labor force, but we could not give any clear sense to the claim that it is an *educational* system. *Educational benefits then, are those goods whose distribution by the system is a logically necessary condition for the system to be regarded as educational*”²⁷²

Because schools provide access to information, all the Nation’s schools are implicated in the distribution at least two kinds of goods or benefits: (1) educational benefits and (2) non-

²⁶⁸ Tozier, S., Senese, G., & Paul, V. (2006). *School and society: Historical and contemporary perspectives*. (5th ed., p. 36). New York, New York: McGraw-Hill.

²⁶⁹ Tozier, S., Senese, G., & Paul, V. (2006). *School and society: Historical and contemporary perspectives*. (5th ed., p. 36). New York, New York: McGraw-Hill.

²⁷⁰ Green, T. (1980). *Predicting the behavior of the educational system*. (1st ed., p. 41). Syracuse: Syracuse University Press.

²⁷¹ Green, T. (1980). *Predicting the behavior of the educational system*. (1st ed., p. 41). Syracuse: Syracuse University Press.

²⁷² Green, T. (1980). *Predicting the behavior of the educational system*. (1st ed., p. 41). Syracuse: Syracuse University Press. (emphasis in original)

educational social goods.²⁷³ These goods and benefits are distributed based on the measure of access students have to the information they receive in schools.

Knowledge and skill are the primary educational benefits resulting from accessing information in schools.²⁷⁴ By contrast, non-educational social goods are things such as income, occupational opportunity, status, prestige, and power.²⁷⁵ In a word, non-educational social goods are property in its various forms. Property is not distributed by the educational system.²⁷⁶ However, American society distributes property based on the knowledge and skill an individual possesses. This is because America is a meritocracy: our fundamental, capitalistic principle is that knowledge and skill, instead of birth and wealth, will ensure that property flows to those who ‘merit’ it by putting to use the information they accessed in school.²⁷⁷

B. Denying Access to Equal Information in Schools Denies Access To Property by Irreparably Injuring Students’ Ability to Compete in America’s Meritocratic Knowledge Economy in Violation of Students’ Fifth and Fourteenth Amendment Property Rights

All of the industries of the modern age are based on knowledge.²⁷⁸ In fact, the whole of the technology of the twenty-first century “embraces and feeds off the entire array of human knowledge.”²⁷⁹ “Equally important and equally new is the fact that every one of the new emerging industries is squarely based on knowledge. Not a single one is based on experience.”²⁸⁰

Knowledge “has become the foundation of the modern economy.”²⁸¹ In 1955, the knowledge industries, “which produce and distribute ideas and information rather than goods and

²⁷³ Green, T. (1980). *Predicting the behavior of the educational system*. (1st ed., p. 41). Syracuse: Syracuse University Press.

²⁷⁴ Green, T. (1980). *Predicting the behavior of the educational system*. (1st ed., p. 41). Syracuse: Syracuse University Press.

²⁷⁵ Green, T. (1980). *Predicting the behavior of the educational system*. (1st ed., p. 42). Syracuse: Syracuse University Press.

²⁷⁶ Green, T. (1980). *Predicting the behavior of the educational system*. (1st ed., p. 42). Syracuse: Syracuse University Press.

²⁷⁷ Tozier, S., Senese, G., & Paul, V. (2006). *School and society: Historical and contemporary perspectives*. (5th ed., p. 36). New York, New York: McGraw-Hill.

²⁷⁸ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 38). New York, NY: Harper & Row Publishers.

²⁷⁹ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 38). New York, NY: Harper & Row Publishers.

²⁸⁰ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 40). New York, NY: Harper & Row Publishers.

²⁸¹ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 264). New York, NY: Harper & Row Publishers.

services,” accounted for twenty-five percent of the United States’ gross national product.”²⁸² A decade later, the knowledge sector was one-third of a much larger national product, and in the 1970’s it accounted for one-half the national product.²⁸³ In 1997, it accounted for sixty-seven percent of the national product.²⁸⁴ We are now many years hence. This statistical trend supports the proposition that “knowledge has become the central factor of production in an advanced, developed economy” such as the United States.²⁸⁵ As a result, knowledge has become the primary industry and is “the essential and central resource of production.”²⁸⁶

Most importantly, entering the knowledge society constituted “a real revolution both in the productivity of work and in the life of the worker.”²⁸⁷ “Because the knowledge worker tends to be a good deal better paid than the manual worker, and also to have much greater job security, knowledge has become the central cost...the main investment, and the main product of the advanced economy and the livelihood of the largest group in the [American] population.”²⁸⁸ However, the greatest impact of entering the new knowledge society is “changing society from one of predetermined occupations into one of choices for the individual.”²⁸⁹ For example, less than two centuries ago, “even the educated man could only make a living through knowledge in a few narrowly circumscribed “professions”: clergyman, physician, lawyer, and teacher—plus the one newcomer—civil servant.”²⁹⁰ However, “most of mankind through the ages has had no choice at all [as] son followed father.”²⁹¹ Moreover, peasantry was the one and only occupation for most of mankind.²⁹² But now, in the present knowledge society, it is possible to “make one’s

²⁸² Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 263). New York, NY: Harper & Row Publishers.

²⁸³ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 263). New York, NY: Harper & Row Publishers.

²⁸⁴ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 263). New York, NY: Harper & Row Publishers.

²⁸⁵ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 264). New York, NY: Harper & Row Publishers.

²⁸⁶ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 264). New York, NY: Harper & Row Publishers.

²⁸⁷ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 272). New York, NY: Harper & Row Publishers.

²⁸⁸ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 264). New York, NY: Harper & Row Publishers.

²⁸⁹ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 272). New York, NY: Harper & Row Publishers.

²⁹⁰ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 273). New York, NY: Harper & Row Publishers.

²⁹¹ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 273). New York, NY: Harper & Row Publishers.

²⁹² Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 273). New York, NY: Harper & Row Publishers.

living, and a good living at that, doing almost anything one wants to do and plying almost any knowledge,” *so long as one possesses it.*²⁹³

The modern industries, therefore personify the new economic circumstances: “knowledge, that is, organized formal education, has replaced experience—acquired traditionally through apprenticeship—as the foundation for productive capacity and performance.”²⁹⁴ On this point, Drucker notes that the new industries:

“[d]iffer from the traditional “modern” industries in that they will employ predominately knowledge workers rather than manual workers. Computer programming, for example, with its enormous employment opportunities, is semiskilled work. All that is needed to be a programmer is junior high school arithmetic, three months of training and six months of practice. But while the skill is not a very elevated one, it is based on knowledge rather than on experience or manual training.”²⁹⁵

He continues,

“The same goes for the other employment opportunities the new industries are likely to create. In number of jobs, they may be very large. Some of them will certainly be highly skilled...but in every case, the foundation of the job, whether skilled or unskilled, will be knowledge. The preparation for it will be a course of study rather than apprenticeship. The productivity of the worker will depend on his ability to put to work concepts, ideas, theories—that is, *things learned in school*—rather than skills acquired through experience.”²⁹⁶

As a result, America’s economy is a knowledge economy,²⁹⁷ and because America is a meritocracy, there exists a social state of affairs in which persons may access greater shares of property on grounds that they possess “greater knowledge and skill as attested to by the educational system.”²⁹⁸ Conversely, meritocracy is likewise the same grounds on which the denial of access to property is justified: those who have received unequal, and thereby inferior,

²⁹³ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society.* (p. 273). New York, NY: Harper & Row Publishers.

²⁹⁴ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society.* (p. 40). New York, NY: Harper & Row Publishers.

²⁹⁵ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society.* (p. 40). New York, NY: Harper & Row Publishers.

²⁹⁶ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society.* (p. 40-41). New York, NY: Harper & Row Publishers(emphasis added)

²⁹⁷ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society.* (p. 286). New York, NY: Harper & Row Publishers.

²⁹⁸ Green, T. (1980). *Predicting the behavior of the educational system.* (1st ed., p. 42). Syracuse: Syracuse University Press.

access to information, have less knowledge and skill, and therefore will not receive greater incomes, opportunities, status, and other forms of property.²⁹⁹ To deny this is to deny the long-held and present belief in the pay-off of attending school.³⁰⁰

In conclusion, America's meritocracy grants property to those individuals who have greater access to information in schools. As a result, one must have equal access as all others to the information undergirding critical thinking training in order to have equal access to property in the United States. Thus, to deny equal access to information in schools is to deny equal access to property in terms of (1) the Supreme Court recognized legitimate entitlement to access information in public schools under *Goss* and (2) future access to all other forms of property resulting from knowledge based employment in the new knowledge economy. For this reason, "the state is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause,"³⁰¹ because denying equal access to equal information in schools without due process of law denies equal access to property, in all its other forms, without due process of law. As property tax based school funding systems have been shown above to deny equal access to the necessary conduits of information in schools without due process of law, property tax based school funding systems thereby impermissibly infringe students' vested entitlement property right per *Goss*,³⁰² and further impermissibly restricts their fundamental Fifth and Fourteenth Amendment rights to equitably access to property in all its other forms given the connection between access to information, knowledge, employment, and property in America's meritocratic knowledge economy. *Goss* expressly forbids this.³⁰³

²⁹⁹ Green, T. (1980). *Predicting the behavior of the educational system*. (1st ed., p. 43). Syracuse: Syracuse University Press.

³⁰⁰ Green, T. (1980). *Predicting the behavior of the educational system*. (1st ed., p. 45). Syracuse: Syracuse University Press.

³⁰¹ *Goss v. Lopez*, 419 U.S. at 574 (1975).

³⁰² *Goss v. Lopez*, 419 U.S. at 574 (1975).

³⁰³ *Goss v. Lopez*, 419 U.S. at 574 (1975).

C. There is No Justification for the Government’s Deprivation of Students’ Property Rights Given the Magnitude of the Harm

“If the State is to deny a discrete group of innocent children the [access to information] that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.”³⁰⁴

Plyler establishes that a lack of funding is no justification for providing disparate access to information in schools.³⁰⁵ As such, it is reasonably foreseeable that the government will next claim that its substantial interest in providing some students with greater access to information than it does others is to ensure that all students receive what the state considers to be a minimally basic or adequate education. This argument must be squarely addressed where it is asserted.

A state’s prescribed curriculum, that is, the required courses that a state orders must be taught in a state’s schools, constitutes that particular state’s determination of a “minimally basic education.” For this reason, each state’s definition of what constitutes a minimally basic education is different from all others, because the courses each state mandates students take varies from state to state. However, the issue of what curriculum the state chooses to provide is fundamentally different from the issue of whether the state is providing equal access to the information undergirding the curriculum it chooses to provide. The distinction here is important because it marks the difference in jurisprudential analysis.

States are not allowed to conflate their determination of what constitutes a minimally basic education with the question of whether they provide equal access to the information undergirding that curriculum in attempts to avoid responsibility for their provision of inequitable access; the United States Supreme Court has consistently maintained for more than a half-

³⁰⁴ *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

³⁰⁵ *Plyler v. Doe*, 457 U.S. 202, 227 (1982); See also *Brief for the Appellants* at 8, 13-14, 22, 26.

century that equal access to equal conduits of information is the standard of minimal adequacy with respect to access to information in schools no matter what the state decides its curriculum is. See *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) and *Brown v. Board*, 347 U.S. 483, 493 (1954).³⁰⁶ Thus, because the question does not turn on the adequacy of the states' curriculums, but instead turns on whether the property tax based system of funding schools provides equal access to equal conduits of information undergirding whatever curriculum the state has decided to provide, the government cannot justify disparities in access to information in schools on grounds that it is providing a minimally basic education.

Even if the above analysis is rejected, states nonetheless lack a substantial interest in denying equal access to information in schools for some while providing it for others. *Plyler v. Doe* stands for the proposition that there is no rational basis for state action depriving an individual equal access to equal information in public schools.³⁰⁷ The rational basis test is the minimal level of scrutiny that all challenged government actions must meet.³⁰⁸ “The basic requirement is that a law meets rational basis review if it is rationally related to a legitimate government purpose.”³⁰⁹ Because *Plyler* holds there is no rational basis for denying an individual equal access to information in public schools, property tax based school funding systems, which deny individuals their vested property right of equal access to equal conduits of information in public schools, cannot meet strict scrutiny, and thus, property tax based school funding systems cannot be upheld in violation of students' property rights.³¹⁰

³⁰⁶ “In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of [critical thinking training]. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

³⁰⁷ *Plyler v. Doe*, 457 U.S. 202 (1982)

³⁰⁸ *Chemerinsky*, *Constitutional Law*, 3d, at 723

³⁰⁹ *Chemerinsky*, *Constitutional Law*, 3d, at 723

³¹⁰ *Plyler v. Doe*, 457 U.S. 202 (1982)

CHAPTER 5

DENIALS OF EQUAL ACCESS TO EQUAL INFORMATION IN AMERICA'S PUBLIC SCHOOLS VIOLATE STUDENTS' FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO PHYSICAL LIBERTY

1. Property Tax Based School Funding Systems Violate Students' Substantive Due Process Rights to Physical Liberty

Having shown how property tax based systems of funding public education violate students' substantive due process property rights, this paper now turns to elaborate how unequal access to information in schools violates students' substantive due process rights to liberty. In order to prove a violation it must be shown (1) that there is a liberty interest at stake in accessing information in public schools (2) students' rights to liberty are infringed by inequitable access to information in public schools, and (3) that the government's action in infringing students' right to liberty is not justified by any sufficient purpose.³¹¹

A. Students Have Fundamental Physical Liberty Interests at Stake in Compulsory Education

*O'Connor v. Donaldson*³¹² establishes the general rule that states cannot constitutionally confine "a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." Moreover, *Rone v. Fireman*³¹³ specifically lays out the authority under which involuntary civil confinement may be ordered. There are "two purposes for involuntary civil commitment advanced by a state: (1) fulfillment of its historic *parens patriae* function; and (2) accomplishment of its police power

³¹¹ See *Chemerinsky*, Constitutional Law, 3d, at 946.

³¹² 422 U.S. 563, 576 (1975)

³¹³ 473 F. Supp. 92, 118 (N.D. Ohio 1979)

objectives.”³¹⁴ The continuing validity of compulsory school attendance laws, which fall within the states’ *parens patriae* function, are at issue here.³¹⁵

Pursuant to the *parens patriae* rationale, involuntary confinement “is based upon the need for care and treatment or protection from harm.”³¹⁶ Here, states “act as the individual’s parent or guardian, and determine that in his best interest he requires or would benefit from treatment.”³¹⁷ In those instances where the *parens patriae* rationale is invoked to justify the individual’s confinement to receive care, treatment, or training, such training, care, or treatment must be provided, or the restrained individual must be released.³¹⁸ Normally, only minimally adequate treatment is required in cases of involuntary confinement in mental institutions, hospitals, or other training or treatment facilities.³¹⁹ However, in the unique context of public education, where the law compels individuals to receive formal critical thinking training in public schools, the training received by the confined individuals *must be equal* to that received by those similarly situated elsewhere per the Supreme Court’s ruling in *Sweatt v. Painter*,³²⁰ and *Brown v. Board*.³²¹ Otherwise, compulsory school attendance laws must fall, for:

“There can be no doubt that...involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law. Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, *confinement must cease when those reasons no longer exist*.”³²²

³¹⁴ *Rone v. Fireman*, 473 F. Supp. 92, 118 (N.D. Ohio 1979)

³¹⁵ See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944): “Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance...”

³¹⁶ *Rone v. Fireman*, 473 F. Supp. 92, 118 (N.D. Ohio 1979)

³¹⁷ *Rone v. Fireman*, 473 F. Supp. 92, 118 (N.D. Ohio 1979)

³¹⁸ *Rone v. Fireman*, 473 F. Supp. 92, 118 (N.D. Ohio 1979)

³¹⁹ See *O’Connor v. Donaldson*, 422 U.S. 563, 581 (1975).

³²⁰ 339 U.S. 629, 635 (1950)

³²¹ 347 U.S. 483, 493 (1954): “In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of [critical thinking training]. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

³²² *O’Connor v. Donaldson*, 422 U.S. 563, 580, (1975) (emphasis added; internal quotations omitted).

B. Property Tax Based School Funding Systems Violate Students' Rights to Physical Liberty By Failing to Provide Equal Access to Equal Information in Schools

1. The State's Justification for Forcibly Confining Students In Schools is to Train Each Student to Think Critically So They May Be Economically Independent

“If the purpose of commitment is training and treatment, due process requires, at the least, the provision of [that] training and treatment,” otherwise the individual is entitled to his freedom.³²³ In the case of compulsory schooling, the states have invoked the *parens patriae* rationale to compel students to receive information in schools on grounds that training students to conceptualize and analyze the information observed and communicated in school is in the students' best interests. In other words, the states have determined that they may forcibly confine and compel students to receive critical thinking training because the ability to conceptualize and analyze information gathered from observation and communication is the essence of critical thinking.³²⁴

The states' legitimate interest in compelling students to receive critical thinking training is so that (1) “each individual may attain economic independence” to prevent their enrollment on the public dole and (2) that the individual be trained to “grant minimum obedience to civil law.”³²⁵ This has been the states' reason for compulsory critical thinking training since 1642. Massachusetts' Law of 1642, which compelled parents to educate children, is the oldest compulsory education statute in the Nation. It reads:

“[T]aking into consideration the great neglect of many parents and masters in training up their children in learning, and labor, and other imployments [sic] which may be proffitable [sic] to the common wealth, do hereupon order and decree, that in euery [sic] town the chosen men appointed for managing the prudentiall [sic]

³²³ *Rone v. Fireman*, 473 F. Supp. 92, 118 (N.D. Ohio 1979); *See also Donaldson v. O'Connor*, 493 F.2d 507, 521 (5th Cir. 1974), vacated and remanded, 422 U.S. 563 (1975).

³²⁴ In Season 3, Episode 5, at 6:08 of the hit television series “Weeds” created by Jenji Kohan, character Shane Botwin gives this definition of critical thinking in response to his teacher's questioning. The author finds this to be the most salient and succinct definition of critical thinking training and hereby asserts it forthwith. The episode may be found at: <https://www.youtube.com/watch?v=twgj14X1TZI#t=368>. More information on the show itself may be found at: [http://en.wikipedia.org/wiki/Weeds_\(TV_series\)](http://en.wikipedia.org/wiki/Weeds_(TV_series))

³²⁵ Green, T. (1980). *Predicting the behavior of the educational system*. (1st ed., p. 22). Syracuse: Syracuse University Press.

affajres [sic] of the same shall henceforth stand charged with the care of the redresse [sic] of this evill [sic]... and for this end they...shall have power to take account from time to time of all parents and masters and of their children...especially of their ability to read and understand the principles of religion and the capitall lawes [sic] of this country...”³²⁶

As a result, the states must train each student to the degree that they might each attain economic independence and grant obedience to civil law, as such is the states’ reason for forcibly confining them. Where the state fails in either of these two duties, it loses its justification to confine students and they must be released in accordance with their liberty interest, per *Rone*.³²⁷

2. Securing Property Through Gainful Employment Based on the Application of Knowledge Gained from Accessing the Information Provided in School Establishes Economic Independence in America’s Knowledge Economy.

It cannot be doubted that securing property in all its forms fundamentally equates economic independence, given the reality that economic independence increases with the amount of property one possesses. Further, *gainful* employment is the primary means through which property is secured; the other alternatives are theft, gift, or bequest, but these alternatives are not engaged here.

Access to information is the basis of knowledge. Thus, access to information is prerequisite to securing gainful employment because gainful employment is based on the application of knowledge in the present knowledge economy. As Drucker notes,

“The new jobs that open up in the economy start out with theoretical and conceptual knowledge acquired systematically and in a “course.” Old jobs [have] either be[en] changed to knowledge jobs or will be replaced by knowledge jobs. We can expect, in other words, that we [have] develop[ed] a true knowledge economy, as we have already developed a knowledge workforce. A good deal of this knowledge work...[is]

³²⁶ See Callahan, R. (1960). *An introduction to education in American society: A text with readings*. (2nd ed., pp. 114). Canada: Random House; See also Nathaniel B. Shurtleff, ed., *Records of the Governor and Company of Massachusetts Bay in New England* (Boston, 1853-1854), vol. II. pp. 6-7. Note also that the establishment of compulsory education was reinforced five years later in 1647 in Massachusetts’ “Old Deluder Satan Law,” which required communities of at least fifty households to appoint a teacher to train individuals to read and write to defeat the “chief project of that old deluder Satan to keep men from the knowledge of the scriptures...” See Fraser, J. (2010). *The School in the United States: A Documentary History*, (2nd ed., p. 8).

³²⁷ *Rone v. Fireman*, 473 F. Supp. 92 (N.D. Ohio 1979)

semiskilled rather than highly skilled. *But even then it require[s] a knowledge foundation acquired in school.*³²⁸

This emphasis on work based on knowledge is only expected to increase in the future, especially where skills based on knowledge are required for employment. Therefore, if access to information is prerequisite to knowledge, and if possessing knowledge (as verified by certificates, degrees, diplomas, transcripts, test scores, and occupational licenses, etc., which are given by schools) is prerequisite to gainful employment in the knowledge economy, it follows then that access to information in schools is prerequisite to economic independence through the subsequent attainment of property, because access to information in schools is now prerequisite to gainful employment in ways unlike the past. Thus, where states fail to provide equal access to information in schools, adversely affected students cannot apply the information the state withheld from them, and thus will not have equal access to *gainful* employment, and will thereby lack economic independence equally as their well-trained peers in the present knowledge economy. As a result, where the state fails to provide equal access to equal information in public schools, states impermissibly inhibit individuals' ability to "attain economic independence" given that equal access to information is essential to equal access to gainful employment and its resulting property in America's knowledge economy. Thus, where the states fail to provide equal access to equal information in public schools, they fail to train each of their students to think critically, equally as their peers, and thereby fail to train the adversely affected students to secure property and economic independence equally as their peers, contrary to the states' averred purpose of their confinement.

³²⁸ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 286). New York, NY: Harper & Row Publishers. (emphasis added)

C. States Cannot Legally Compel Students To Attend Schools Which Fail to Provide Equal Access to Equal Information Because Such Confinement is Contrary to the States' Justification For Their Confinement in Violation of Students Rights to Liberty.

San Antonio shows how property tax based systems of funding students' critical thinking training curtails the amount of revenue realized for a school's transmission of information to its students. The information transferred in schools is the basis knowledge, and equal access to that information is the basis of equal critical thinking training as recognized in *Tinker*.³²⁹ Equal critical thinking training is prerequisite to establishing equal economic independence as shown above.

Williams, shows how curtailed funding restricts access to the conduits that circulate the information necessary to equal critical thinking training. *Goss* established the connection between the information accessed in schools and property, and further establishes that restricting access to information in public schools without due process of law violates students' property rights. *O'Connor v. Donaldson*, read with *Brown* and *Sweatt*, means that students have equal rights to access equal information undergirding critical thinking training so that each student may be economically independent through securing property to the fullest extent possible, as all others, *for such is the states' reason for confining them*.

Property tax based school funding systems, operating in light of compulsory school attendance laws, force disfavored students, under penalty of law, to attend schools which lack the resources necessary to give them the same access to the same information equally as their peers. Where the state restricts equal access to information for students in schools by failing to provide the necessary resources, it likewise hinders their ability to establish economic independence because access to the information provided in schools is essential to economic independence in

³²⁹ 309 U.S 503 (1969)

the present knowledge economy. Therefore, because the disparities produced by property tax based school funding systems restrict students' access to information in schools, such funding systems ultimately hinder students' ability to establish economic independence given the connection between access to information, critical thinking training, and gainful employment in the present knowledge economy.

Schools, and the components therein, are conduits of information; they transfer information to students as part and parcel of students' critical thinking training. As knowledge has become the economy's "central resource," it follows then that critical thinking training is the economy's central resource.³³⁰ Capital, otherwise, property "flows in response to greater opportunities created by the greater productivity of new knowledge, both of workers and managers."³³¹ It is noted that:

Today's knowledge worker is the successor to the manual worker, "skilled or unskilled."³³² Though the knowledge worker does not labor in the traditional sense, in that he is paid for "applying his knowledge, exercising his judgment, and taking responsible leadership," he is nonetheless "dependent on his salary, on the pension benefits and health insurance that go with it, and altogether on having a job and getting paid."³³³ Thus, in the knowledge society, the worker's choice "is not between irksome jobs—which are irksome because they are "jobs"—and an illusory freedom. The choice is between jobs that have opportunity and are paid well" resulting from the possession and application of knowledge, or those which provide a "bare subsistence."³³⁴

Thus, by failing to provide equal access to equal information in schools, the states defeat their own purported interest in confining students so that they *each* be individually trained in critical thinking so they "may attain economic independence" to the fullest extent possible, given the connection between access to information and gainful employment in the knowledge

³³⁰ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 152). New York, NY: Harper & Row Publishers.

³³¹ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 151). New York, NY: Harper & Row Publishers.

³³² Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 276). New York, NY: Harper & Row Publishers.

³³³ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 276). New York, NY: Harper & Row Publishers.

³³⁴ Drucker, P. (1968). *The age of discontinuity: Guidelines to our changing society*. (p. 277). New York, NY: Harper & Row Publishers.

economy.³³⁵ As a result, students suffering the injustice of unequal access to information must be released from their compulsory attendance, because compelling their attendance in schools that deny them equal access to information fails to train them to critically think such that they may be economically independent as their peers, which is altogether contrary to the states' reason for confining them.

D. There Is No Justification for Violating Students' Liberty Interests by Compelling Their Attendance in Schools Which Do Not Provide Them with Equal Access to Information

Because the fundamental right of liberty is at stake here, government action infringing this right must be necessary to achieve a compelling government interest.³³⁶ Where the states' actions fail to achieve their asserted compelling interest, those actions are not necessary to achieve that interest, and thus, the states' actions are unconstitutional.

Failing to provide all involuntarily confined students with equal access to equal information in schools, as their peers, violates students' fundamental rights to liberty as their compelled denial of equitable access is incompatible with the states' compelling interest for their confinement, which is to train each student to think critically, equally as their peers, so they may equally attain economic independence in the present knowledge economy. Where states fail to provide equal access to equal information such that students are equally trained to think critically, the state fails to train each student so they may equally attain economic independence in the present knowledge economy given the link between access to information and gainful employment. Thus, where States do not or cannot provide equitable access to the information undergirding critical thinking training to all confined students, the States have lost their grounds to curtail students' liberty in schools. *See O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975).

³³⁵ Green, T. (1980). *Predicting the behavior of the educational system*. (1st ed., p. 22). Syracuse: Syracuse University Press.

³³⁶ *Chemerinsky*, Constitutional Law, 3d, at 943

By contrast, the states will argue that their compulsory school laws should be upheld; that all students, whether they be equally trained or not, should be forced to remain in schools, regardless of whether or not the states provide equal critical thinking training to their students as the systems' goal is to provide a minimally adequate training. This "minimally-adequate-something-is-better-than-nothing" argument must be disregarded. Courts may not assume that simply receiving training is sufficient to justify confinement, least of all on grounds that equality of training is a 'nonjusticiable' question that must be left to the discretion of the profession.³³⁷ "The right to treatment doctrine is one that permits the Court to intervene where there is an absence or inadequacy of a program of treatment for an entire group of people who have found themselves in state custody or care. It is the absence or inadequacy of the program that permits a federal court to intervene."³³⁸ Adequacy in the context of the provision of critical thinking training in public schools is determined by equality of access to equal conduits of information. This has been the Supreme Court's rule for over a half century. *See Sweatt*, 339 U.S. 629 (1950) and *Brown*, 347 U.S. 483 (1954).

As a result, the conclusion is this: either students will be provided equal access to equal information undergirding critical thinking training for all students so that each may be economically independent through securing property to the fullest extent possible per the states' articulated reason for the students' forced confinement, or the students must be released. If states cannot equally train all students, then the students must be given their freedom, for otherwise the states bless some with the training necessary to secure vast economic independence through securing property, and curse others to lives of little economic liberty by curtailing their ability to secure property through inferior critical thinking training. Additionally, it matters not whether

³³⁷ *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975)

³³⁸ *Patton v. Dumpson*, 425 F. Supp. 621, 624 (S.D.N.Y. 1977).

the compulsory school laws were originally founded upon a constitutionally adequate basis.³³⁹ Thus, even if at one time the states provided all students with equal access to information in schools, where the states presently fail to provide all involuntarily confined students with equal access to information in schools, equal to their peers, they violate students' rights to liberty.³⁴⁰ Their denial of equal access to equal information is incompatible with the states' justification for their confinement, and so the students must be released.³⁴¹

³³⁹ *O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975)

³⁴⁰ *O'Connor v. Donaldson*, 422 U.S. 563, 575-76, (1975)

³⁴¹ *O'Connor v. Donaldson*, 422 U.S. 563, 574-75, 581 (1975)

CHAPTER 6

DENIALS OF EQUAL ACCESS TO EQUAL INFORMATION IN AMERICA'S PUBLIC SCHOOLS VIOLATE STUDENTS' FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO LIBERTY BY IMPOSING AN IRREPARABLE STIGMA UPON THEM

1. Compelled Receipt of Unequal Access to Information Imposes a Judicially Cognizable Stigma Which Violates Students' Liberty Interests

As shown above, denying equal access to equal information in public schools restricts students' access to gainful employment in the modern knowledge economy. This denial of access imposes a stigma on the adversely affected students, further violating their liberty interests. In order to show stigmatic injury, the violation of "some concrete interest" which can independently be asserted, must first be shown.³⁴²

A. Property Tax Based School Funding Schemes Independently Violate Students First, Fifth, and Fourteenth Amendment Rights to Access Information, Property, and Liberty

The earlier sections show how the states' use of property tax based school funding systems fail to provide equal access to equal information in violation of students' First Amendment rights to access to information in America's public schools, per *Tinker v. Des Moines*. The forgoing sections also show that equal access to information is essential to equal critical thinking training.

Further, the sections discussing *Goss v. Lopez* show how the denial of equal access to equal information in schools violates students' property rights as students have legitimate entitlements to equally access equal information in public schools per *Sweatt v. Painter* and *Brown v. Board*. Finally, the sections immediately above show how denying equal access to equal information in public schools also infringes students' physical liberty and general property

³⁴² *Allen v. Wright*, 468 U.S. 737 (1984)

interests resulting from the connection between equal access to equal information in schools and gainful employment in the modern knowledge economy. As a result, the preexisting concrete injury to independent fundamental rights is shown in that states' failure to provide equal access to information by operating property tax based school funding systems results in inequitable critical thinking training which acts as a prior restraint to the free exercising of students First, Fifth, and Fourteenth Amendment rights, in violation of those rights themselves.

Having established the independent violations of concrete fundamental rights, this paper now turns to show how property tax based school funding systems impose an impermissible stigma on adversely affected students by denying them equal access to equal information in America's public schools.

B. Freedom of Occupation is a Liberty Interest

The concept of liberty was given great breadth and scope as contemplated by the framers of the United States Constitution.³⁴³ For example, President James Madison, one of the principal framers "maintained that liberty is the counterbalance that holds an overbearing government in check."³⁴⁴ However, the Virginia State Supreme Court gave the most complete definition of the constitutional meaning of "liberty" in 1903 in *Young v. Commonwealth*.³⁴⁵ There, the court said:

"The word "liberty," as used in the Constitution of the United States and the several states, has frequently been construed, and means more than mere freedom from restraint. It means not merely the right to go where one chooses, but to do such acts as he may judge best for his interest, not inconsistent with the equal rights of others; that is, to follow such pursuits as may be best adapted to his faculties, and which will give him the highest enjoyment. The liberty mentioned is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, and for

³⁴³ Alexander, K., & Alexander, M. (2012). *American Public School Law* (8th ed., p. 867). Belmont, CA: Wadsworth Cengage Learning.

³⁴⁴ Alexander, K., & Alexander, M. (2012). *American Public School Law* (8th ed., p. 867). Belmont, CA: Wadsworth Cengage Learning.

³⁴⁵ 101 Va. 853 (1903)

that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purpose above mentioned. These are individual rights, formulated as such under the phrase “pursuit of happiness” in the Declaration of Independence, which begins with the fundamental proposition that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.”

*Roth v. Board of Regents*³⁴⁶ and *Meyer v. Nebraska*,³⁴⁷ are touchstone cases in the Supreme Court’s liberty jurisprudence. In *Roth*, the Court stated that liberty is a broad and majestic term; it is among the great constitutional concepts purposely left to gather meaning from experience, and that liberty relates to the whole domain of social and economic fact.³⁴⁸ *Roth* echoes *Meyer*, which held that, “Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual...*to engage in any of the common occupations of life* [and] to acquire useful knowledge... and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”³⁴⁹ As a result, the United States Supreme Court holds that there is a liberty interest in an individual’s ability to (1) acquire useful knowledge and (2) to engage in the common occupations of life.

C. Property Tax Based School Funding Systems Restrict Students’ Ability to Acquire Useful Knowledge and Inhibit Their Freedom to Engage in the Common Occupations of Life by Failing to Provide Equal Access to Equal Information in Public Schools

Property tax based school funding systems restrain students’ access to equal information in schools, which inhibits their ability to acquire useful knowledge, which further restricts their ability to freely engage in the common occupations of life, in violation of their rights to liberty. Impermissible restraints on an individual’s freedom of occupational liberty impose stigmas of inferiority and involuntary servitude on adversely affected students.

³⁴⁶ 408 U.S. 564 (1972)

³⁴⁷ 262 U.S. 390

³⁴⁸ *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972)

³⁴⁹ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added)

Certificates, degrees, diplomas, transcripts, test scores, and occupational licenses are tokens distributed by the states through their educational systems.³⁵⁰ They are not knowledge and critical thinking skills themselves, but they are representative of fact that the individual bearing them has received access to information in schools, and retained enough information, such that their token is both valid and valuable. Such validation “serves an essential role in establishing the medium of exchange” between individuals, organizations, and entities, as these credentials are most often exchanged for gainful employment.³⁵¹ These tokens are essential to what it means for education to be a “system”³⁵²

Securing employment in the present knowledge economy is based on certificates, degrees, diplomas, transcripts, and occupational licenses, all of which are issued by the states after individuals have shown they have sufficiently retained the information state allowed them to access in schools by passing a standardized test. Thus, employment in the present knowledge economy is based on the amount and quality of the information students (1) access in schools and (2) retain, because receipt of the credentials listed above depends on access to and retention of information. It follows then that where the states fail to provide equal access to information in schools, they undercut the students’ ability to show that they have retained that information on standardized tests, because students cannot retain the information state inhibits them from accessing.

Even where students do secure credentials from schools that provide them with inferior access to information, such a credential is still not as esteemed as those from other schools, which provide greater access to information. This is evidenced, for example, by the U.S. Department of Education’s distinction of “Blue Ribbon Schools.” These schools are “Exemplary

³⁵⁰ Green, T. (1980). *Predicting the behavior of the educational system*. (1st ed., p. 45). Syracuse: Syracuse University Press.

³⁵¹ Green, T. (1980). *Predicting the behavior of the educational system*. (1st ed., p. 45-46). Syracuse: Syracuse University Press.

³⁵² Green, T. (1980). *Predicting the behavior of the educational system*. (1st ed., p. 46). Syracuse: Syracuse University Press. (emphasis in original).

High Performing” and have “their state’s highest high school graduation rates and the highest achieving students (the top 15%) in English and mathematics, measured by state assessments.”³⁵³

Needless to say, the students and the credentials of Blue Ribbon Schools will be highly sought after with respect to college admissions and subsequent employment than students of inferior schools, because students of Blue Ribbon Schools represent the individuals who have had the greatest access to information, and its resultant critical thinking training as evinced by test scores, whereas others increasingly have not.

As a result, the states’ failure to provide equal access to equal information in schools comparatively burdens those not receiving equal access in ways unlike those who receive superior access: even if those receiving comparatively inferior access to information in schools do secure their credentials from schools which provide them with inferior access, their credentials will still carry comparatively diminished market value with respect to securing gainful employment in contrast to those who are given superior access, like the students of Blue Ribbon Schools. In this way, property tax based school funding systems’ failure to provide equal access to equal information for all students limits the adversely affected students’ freedom to choose their occupation by restricting their attainment of credentials and critical thinking training equal to those of their peers, who receive comparatively superior training and credentials resulting from greater access to information provided in their schools. This circumstance violates the adversely affected students’ fundamental rights to occupational freedom because property tax based school funding systems compels adversely affected students to go without equal access to the information undergirding their critical thinking training which diminishes the market value of their subsequent credential, unlike their peers.

³⁵³ About Us. (n.d.). Retrieved April 4, 2015, from <http://www.nationalblueribbonschools.com/home/about-us/>

D. Restricted Freedom of Occupational Liberty Imposes The Stigmas of Inferiority and Involuntary Servitude.

Under the most basic definition of American liberty, students have right to be free from the compelled receipt of inequitable access to information in schools for it is a form of government interference which negatively impacts their labor. For example, one cannot become a doctor or lawyer where one cannot access the information necessary to comprehend the fields' complex terminology or chemical formulas, no matter how strong the individual's desire to be so employed. Additionally, one cannot become a physicist or biologist where the individual has never accessed the information laboratories and the accompanying resources contain, no matter the strength of the individual's ambition.

The tenets of classical liberalism, the foundation of the American democracy, provide that nothing is of "greater prominence than the notion of the dignity of labor."³⁵⁴ For this reason, Justice Field concluded his thoughts on the Fourteenth Amendment in the *Slaughter-House Cases* by saying that the Fourteenth Amendment:

"protects every citizen of the United States against hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different states...There is no more sacred right of citizenship than the right to pursue *unmolested* a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor."³⁵⁵

As shown in comparison to the history of the United States, today, equal access to information in schools is undeniably linked to labor in ways quite unlike America's Agrarian and Industrial Eras. On this point, Frank Levy notes,

"[I]n the 1950s the continuing mechanization of agriculture both made farming more efficient and displaced large numbers of farm laborers. Often however, farm laborers could get on a bus to a city where they could find factory jobs at higher

³⁵⁴ Tozier, S., Senese, G., & Paul, V. (2006). *School and society: Historical and contemporary perspectives*. (5th ed., p. 31). New York, New York: McGraw-Hill.

³⁵⁵ *Slaughter-House Cases*, 83 U.S. 36, 100-101, 106 (1872)(emphasis added)

pay. In other words, the 1950's economy was not skill-biased: Low skilled workers displaced in one industry could get good jobs in another and so incomes automatically grew throughout the distribution...Today, the economy favors the better educated over the less educated. When computerization or international trade displaces a semi-skilled worker, the move to a good job means acquiring the training to become a computer repairman or a laboratory technician, a much harder move than getting on a bus."³⁵⁶

Thus, where students do not receive equal access to information, their liberty to choose the calling in which they will labor is restricted in ways unlike ever before, given the intimate coupling between knowledge and work in the present knowledge economy. As a result, students not receiving equal access to equal information are relegated to positions of involuntary servitude because a lack of access to equal information restricts their freedom of choice of occupation. Though at first glance the verbiage "involuntary servitude" appears an anachronism of the past, consider Justice Field's statement in his dissent in *Slaughterhouse*. There he stated that the Constitution:

"prohibits slavery and involuntary servitude, except as a punishment for crime...the language...is general and universal in its application..."

The words 'involuntary servitude' have not been the subject of any judicial or legislative exposition...It is, however, clear that *they include something more than slavery* in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. Nor is this the full import of the terms. The abolition of slavery and involuntary servitude was intended to make every one born in this country a freeman, and as such to give to him *the right to pursue the ordinary avocations of life without other restraint than such as affects all others*, and to enjoy equally with them the fruits of his labor. *A prohibition to him to pursue certain callings, open to others of the same age, condition, and sex...would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude.* A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit only in one direction,

³⁵⁶ Shapiro, T. (2001). *Great Divides: Readings in Social Inequality in the United States* (2nd Edition). Mountain View, CA: Mayfield Publishing Company. p. 22

or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude. ... *'wherever a law of a state, or a law of the United States, makes a discrimination between classes of persons, which deprives the one class of their freedom or their property...there involuntary servitude exists within the meaning of the thirteenth amendment.'*³⁵⁷

Justice Field ultimately concluded that it is the government's encroachment upon the unfettered freedom to choose one's occupation, conversely, the government's active or passive deprivation of rights, that places an individual in a state of involuntary servitude. In making this point, Justice Field recounted the legislative history of the Thirteenth Amendment, saying,

*"This legislation was supported upon the theory that citizens of the United States as such were entitled to the rights and privileges enumerated, and that to deny to any such citizen equality in these rights and privileges with others, was, to the extent of the denial, subjecting him to an involuntary servitude. Senator Trumbull, who drew the act and who was its earnest advocate in the Senate, stated, on opening the discussion upon it in that body, that the measure was intended to give effect to the declaration of the amendment, and to secure to all persons in the United States practical freedom. After referring to several statutes passed in some of the southern states, discriminating between the freedmen and white citizens, and after citing the definition of civil liberty given by Blackstone, the Senator said: 'I take it that any statute which is not equal to all, and which deprives any citizen of civil rights, which are secured to other citizens, is an unjust encroachment upon his liberty; and it is in fact a badge of servitude which by the Constitution is prohibited.'*³⁵⁸

San Antonio v. Rodriguez,³⁵⁹ and *Williams* show how property tax based school funding systems operate as a restraint that affects some and not all others with respect to providing access to information in America's public schools. As shown above, the connection between such access, the resultant critical thinking training and credentials, and employment in the present knowledge economy are so intimately intermeshed that denying access to equal information in schools denies equal freedom in choice of occupation. As a result, funding disparities, which deny equal access to

³⁵⁷ *Slaughter-House Cases*, 83 U.S. 36, 89-91 (1872).(emphasis added)

³⁵⁸ *Slaughter-House Cases*, 83 U.S. 36, 91-92 (1872)(emphasis added)

³⁵⁹ 411 U.S. 1 (1973)

equal information, operate as a restraint on the individual's right to acquire useful knowledge and pursue the ordinary avocations of life.

San Antonio v. Rodriguez shows how the property tax system school funding system restricts the amount of revenue realized for a school's transmission of information to its students, and *Goss* establishes that restricting students' access to information in public schools without due process of law violates students' property rights. Wherever a law makes a distinction which deprives a person of property, "there involuntary servitude exists within the meaning of the [Constitution]."³⁶⁰ Thus, the stigma of involuntary servitude attaches to students lacking equal access to equal information in schools because they are denied their property right to access such equal information, which is essential to equal critical thinking training, credentials, and the subsequent freedom of choice of occupation, given that their ability to freely choose their later occupation in the knowledge economy depends on the measure of their present access to information in schools, which the states restrict by using property tax based systems to fund schools.

2. Imposition of the Stigma is Not Justified.

"A constitutionally protected liberty interest exists where there is some stigma attached to one's good name, reputation, or integrity, but only when coupled with some "tangible" interest that is affected or a legal right that is altered, such as the loss of present or future employment."³⁶¹ Since the imposition of involuntary servitude is a stigma impacts fundamental liberty and property interests, and future employment, the state must show that its imposition is necessary to achieve a compelling government interest. In other words, the state must show that depriving students equal

³⁶⁰ *Slaughter-House Cases*, 83 U.S. 36, 89-91 (1872)

³⁶¹ 16C Corpus Juris Secundum, Constitutional Law § 1512 (2010)

access to equal information in schools and thereby imposing the resulting stigma upon them is necessary to achieve some higher purpose.

This author conceives no plausible reason, let alone compelling argument, that has not already been discussed and defeated above that justifies the states' providing greater access to information to some of its children than it does its others. *Goss* has already determined that denials of equal access to information in schools without due process of law "interfere[s] with later opportunities for higher education and employment"³⁶² and *Slaughterhouse* conclusively states that such interference infringes liberty interests.³⁶³

Because there is no legitimate reason for the state to provide unfettered access to information to some of its students, but wholly deny the same to others, especially in light of the subsequent liberty and property interests affected as explicated above, property tax based school funding systems must fall in light of students First, Fifth, and Fourteenth Amendment rights to access equal information in America's public schools.

³⁶² *Goss v. Lopez*, 419 U.S. 565, 575 (1975)

³⁶³ *Slaughter-House Cases*, 83 U.S. 36, 89-91 (1872).

CHAPTER 7

THE FEDERAL GOVERNMENT MUST AFFIRMATIVELY ACT TO PROTECT STUDENTS' FIRST, FIFTH, AND FOURTEENTH AMENDMENT RIGHTS TO ACCESS EQUAL INFORMATION IN AMERICA'S PUBLIC SCHOOLS

1. The Federal Government Must Guarantee Public Schools Students' Equal Access to Equal Information in Accordance First Amendment, Liberty, and Property Interests

A. The Fourteenth Amendment Prohibits States from Infringing Students' Information Access, Liberty, and Property Rights

The Fourteenth Amendment provides that “No State shall...deprive any person of life, liberty, or property without due process of law.” As a result, the Fourteenth Amendment is an affirmative prohibition against the states’ infringement of an individual’s rights to life, liberty or property.³⁶⁴ Specifically, in the context of this paper, the Fourteenth Amendment means that states are prohibited from failing to provide all students with equal access to equal conduits of information in America’s public schools, because the failure to provide equal access to information in schools violates students’ rights to access information, their property rights, and physical and stigmatic liberty interests, as shown in the pages above.

The Supreme Court observed in *Ex parte Commonwealth of Virginia* that the Fourteenth Amendment “was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to *enforce* its provisions by appropriate legislation.”³⁶⁵ Thus, even though public education is generally in the states’ domain, Congress is authorized to intervene to remedy the access disparities caused by property tax based school funding systems, even though the statutes authorizing property tax based school funding systems are facially valid, in that they do not textually discriminate between individuals or groups.

³⁶⁴ *Ex parte Commonwealth of Virginia*, 100 U.S. 339, 346 (1879)

³⁶⁵ *Ex parte Commonwealth of Virginia*, 100 U.S. 339, 347 (1879)(emphasis in original)

Williams defines the necessary conduits to which all students must have access to in order for it to be said that all students are being provided equal access to equal information in public schools. Additionally, where states fail to provide students with equal access to equal conduits of information in accordance with their First Amendment right to access information, their liberty interests, and property rights, the states violate their prohibition per the Fourteenth Amendment, given the effects resulting from failing to provide each student with equal access to equal information.

A. Congress Has the Authority to Remedy Past and Prevent Future State Violations of the Fourteenth Amendment Rights to Liberty and Property

Section 5 of the Fourteenth Amendment provides that Congress shall have the power to enforce the Fourteenth Amendment by appropriate legislation. This enforcement power is a “broad power indeed”³⁶⁶ and grants Congress “the authority both to remedy and to deter violations of rights guaranteed by the Fourteenth Amendment”³⁶⁷ The Supreme Court has “repeatedly affirmed that Congress *may* enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”³⁶⁸ However, authorization to exercise a granted power does not equate a mandate to use that power. As a result, a court order is necessary to compel action to remedy the violation of rights caused by property tax based school funding systems. A court order is necessary because Congress “cannot decree the *substance* of the Fourteenth Amendment’s restrictions on the states. ... It has [only] been given the power ‘to enforce,’ not the power to determine *what constitutes* a constitutional violation. The ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch.”³⁶⁹ As a result,

³⁶⁶ *Tennessee v. Lane*, 541 U.S. 509, 518 (2004)

³⁶⁷ *Tennessee v. Lane*, 541 U.S. 509, 518 (2004)

³⁶⁸ *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (emphasis added)

³⁶⁹ *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (emphasis in original)

the right to equal access to equal information in schools must first be vindicated in the Supreme Court for only a declaration of rights by the Nation's highest court can compel Federal government action. Once the right is declared, then the appropriate remedy can be fashioned.

B. The Appropriate Remedy is One Where the States Retain Their Primacy in Curricular Decisions but the Federal Government Freely and Directly Subsidizes the States' Educational Efforts To Prevent the States' Fourteenth Amendment Default

It is a legal truth that the states' lack of funding is no excuse for failing to provide equal access to equal information in public schools per *Plyler v. Doe*.³⁷⁰ However, it is manifest reality that a state's lack of funds will prevent it from remaining within the Fourteenth Amendment's prohibition, for if a state, or its subsidiary, lacks the necessary funds, equal access to equal information simply cannot be provided. Thus, a state will perpetually violate its Fourteenth Amendment prohibition, so long as it lacks the funds to provide equal access to equal conduits of information in public schools. It is the Federal Government's responsibility to prevent this perpetual default.

Should a court find that property tax based school funding systems violate students' fundamental rights as described in this paper, then the states must first be enjoined from operating school funding systems that (1) produce gross funding disparities and (2) fail to provide equal access to equal information to each student in every school;³⁷¹ (3) the states must be enjoined to craft revised funding systems which provide *Williams'* conduits to each student, based completely on general revenue streams, the allocations from which are based on the real cost differences in serving different communities and students, not errant property values.³⁷²

³⁷⁰ *Plyler v. Doe*, 457 U.S. 202, 227 (1982); See also *Brief for the Appellants* at 8, 13-14, 22, 26.

³⁷¹ The conjunction "and" is important here. Gross disparities in school funding may be necessary to provide equal access to equal information to all students. For example, more funding may be necessary to provide computers and highly qualified teachers in schools where there are none. Other schools, which have these conduits

³⁷² It is highly likely that this plan may substantially reduce the taxpayers' property tax burdens.

However, it is duly noted that the states may still fall short in producing the funds necessary to provide each student with *Williams*' conduits even with revised school funding programs. Nonetheless, the states' funding schemes must still be revised to draw from a general revenue base and allocate based on the real cost of educating its students because property tax based school funding systems independently violate students' rights to access equal information, and their liberty and property rights under the Fourteenth Amendment; but because the access, liberty, and property rights affected apply with equal force to the Federal Government through the Fifth Amendment, the Federal Government is then affirmatively obligated to guarantee that the states do not violate their prohibition by ensuring that the states have the resources to outfit every student with equal access to equal conduits of information in public schools.

The Fifth Amendment reads as the Fourteenth: "No person shall be...deprived of life, liberty, or property without due process of law." As a result, once the rights described above are declared, where the Federal Government fails to prevent the states from violating their Fourteenth Amendment prohibition, it will subsequently violate its own Fifth Amendment prohibition by being complicit in the states' denials of fundamental rights and freedoms. Thus, the Federal Government will be in violation of students' First Amendment and Fifth Amendment rights to where it allows the states to persist in violating students' rights to access information, liberty, and property by failing to assist the states in fully funding their education systems such that every student has equal access to equal conduits of information, per their rights under *Tinker*, *Goss*, *Sweatt*, and *Brown*. Providing direct and detached financial assistance to the states, so they can fully fund their education systems such that each student has equal access to equal information in schools is an appropriate measure which the Constitution commands be taken to

protect students' First, Fifth, and Fourteenth Amendment rights, and to prevent the states' continuing default as shown above.

This proposed remedy may not be perfectly stated, but its gist is this: (1) the states should be ordered to calculate the actual cost of providing equal access to equal information based on *Williams'* criteria for each of its students in public school; (2) the states should next be ordered to design general revenue based funding schemes which generate and allocate resources based on the real cost to provide *Williams'* conduits to each student based on the differences inherent in serving different communities and students; and (3) because it is very likely that the actual cost of providing *Williams'* conduits to each student will be beyond the states' reach, given even their best efforts in redesigning their funding schemes to provide *Williams'* conduits to each student, the Federal Government must freely supply the difference to ensure that the states' education systems are fully funded,³⁷³ so that no student's rights are violated, and the Fourteenth Amendment's prohibition against the states is maintained. At no point under this remedy should the federal funds given be used to coerce changes in the states' curriculums. The states must always retain wide freedom as laboratories of innovation.³⁷⁴ Therefore, it is repeated: the proper role of the Federal Government here is to serve as the guarantor of fundamental rights, as it has always done, by ensuring that the states' education systems are fully funded so that the *Williams'* conduits are accessible to every student, so that no student's rights are violated, and the Fourteenth Amendment's prohibition against the states is maintained.

³⁷³ "fully funded" means "as measured by the presence of *Williams'* conduits for each student enrolled in America's public schools"

³⁷⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)

CHAPTER 8

CONCLUSION

This Dissertation presents viable legal arguments to show how property tax based school funding schemes violate students' First, Fifth, and Fourteenth Amendment fundamental rights to access equal information in America's public schools. This effort was engaged because:

“The time has long since passed when America could afford to make distinctions of any type, be it race, class, or residence. As we have now fully taken our place in the digital, globalized age, the remaining countries of the world are passing us by, outranking us in education while we factionalize our education system on the basis of where we live.”³⁷⁵

The fundamental truth is this: America's students, the next generation of world leaders, each deserve the best education our country can provide *no matter where they live, not because of where they live*, and this principle must be manifested if America is to once again rank first in the world in education.³⁷⁶ *San Antonio v. Rodriguez* upholds the most unreasonable premise that disparities in critical thinking training are permissible because there exists no fundamental right to an education in the United States. However, we must reject the premise that the system we currently have is the system we will always have,³⁷⁷ for it is “beyond argument that the right to receive a public education is a basic personal right” held equally by all.³⁷⁸ Therefore, it is my great hope, that the collection of thoughts printed on these pages will be the catalyst in one day guaranteeing equal access to equal information for all the Nation's students by overturning *San Antonio* and establishing their fundamental right to equal educational opportunity in the United States.

³⁷⁵ Ash, Carey Hawkins and Chanee D. Anderson (2013). *The Same but Different: “Post Racial Inequality in American Public Education in The Resegregation of Schools: Education and Race in the Twenty-First Century*. (p. 24). New York, NY: Routledge.

³⁷⁶ Ash, Carey Hawkins and Chanee D. Anderson (2013). *The Same but Different: “Post Racial Inequality in American Public Education in The Resegregation of Schools: Education and Race in the Twenty-First Century*. (p. 24). New York, NY: Routledge.

³⁷⁷ Ash, Carey Hawkins and Chanee D. Anderson (2013). *The Same but Different: “Post Racial Inequality in American Public Education in The Resegregation of Schools: Education and Race in the Twenty-First Century*. (p. 24). New York, NY: Routledge.

³⁷⁸ *Ordway v. Hargraves*, 323 F.Supp.1155, 1158 (1971)

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