

Part I: Early Legislation & American Education

I Introduction

The American Revolutionary War was a battle against oppression. The American colonists revolted in resistance to the disenfranchisement and domination by the British. A uniquely American society emerged from the ashes of British colonialism. Ironically, this society produced its own system of dominance. A class system emerged which replicated many of the forms of oppression that existed under British rule. Moreover, the American ruling class used the tools domination employed by its former oppressor including the manipulation of education.

An education is a powerful weapon. Historically, the populations in power have used education as a tool for maintaining a position of authority. Privileged populations have used education as a tool for maintaining a position of influence. Moreover, disadvantaged populations have used education a weapon for resisting oppression. Education has historically served as a tool used by these competing interests in the American discourse.

The manipulation of education has produced an ineffective modern American system of education. The modern system is unacceptable and oppressive in a number of ways. For example, significant populations of American children do not have access to a quality education. These children are not being prepared to engage in the global market. Consequently, education reform is the subject of many debates.

In order to effectuate meaningful reform education in America an evaluation of the entire system is required. The evaluation must include the historical, socio-economic and psychological dimensions that form the American educational system.

Unfortunately, the investigative scope of many reform efforts is narrow. Consequently, these initiatives are rarely successful.

Successful reform initiatives will require a comprehensive analysis of all contributing factors. An investigation must be rooted in historical evidence and utilize the available theoretical tools. Moreover, successful reform must begin with the motivations of the parties involved and the competing interests at the forefront of the investigation.

II Thesis

In this paper, I will take a closer look at the American position on education. Specifically, I will analyze instances where the courts and legislature have taken a position on the role of education in American society. These examples illustrate the contradictory positions of the courts and legislature present several foundational questions for consideration. First, is education an important governmental interest? If so, why and how does the interest translate into public policy?

This paper will focus on early American legislation which I believe has played a key role in the current lack of equal access to quality education for all Americans. I believe three primary sources account for the unequal access to education. First, the American approach to education is driven by ideologies of domination. Second, the system reflects of the founder's desires to create the ultimate economic marketplace. Finally, the system issue of education has consistently been ground zero for political pandering. Utilizing theory to analyze the barriers to quality education will likely produce effective reform.

III Theories of Domination

A logical theoretical starting point would be the role governmentality in American education. The concept of “governmentality” is attributed to French philosopher Michael Foucault. Foucault presented his theories as an alternative or perhaps as an improvement to the Marxist approach to governmental domination. Foucault used the concept of ‘governmentality’ to refer to, “the manner in which the conduct of a mass of individuals comes to be implicated, in an increasingly marked manner, in the exercise of sovereign power”.ⁱ Specifically, Foucault drew a correlation between the domination methods used by a governing body itself and of the nature of the governing body as the dominator.ⁱⁱ The concept of governmentality proved to be a transformational framework for understanding the struggles of the disempowered population in a society. Countless political scientists, educators and philosophers have applied Foucault’s theory in a diversity of scholarship.

Governmentality has been defined as, “a way of explaining the establishment and exercise of political power....it also involves the regulation of populations through multiple institutions and technologies in society”.ⁱⁱⁱ Another useful definition of governmentality refers to, “technologies of domination and technologies of the self (which) produce effects that constitute the self”.^{iv} According to Beasley, governmentality is a reference to the acts of a dominant group exerting their power for the purpose of defining, control and utilizing a minority group in order to further the ultimate goals of those in power.^v This definition is particularly useful as a starting point for broad task of evaluating the correlation between hegemonic domination and the experiences of disadvantaged in modern American educational system.

An analysis using governmentalities as a theoretical framework logically leads to a discussion about systems of social dominance. Similar to Foucault, Italian philosopher Antonio Gramsci drew a great deal of his inspiration from Marxist revolutionary thought. For our purposes, the Gramsci's theory of 'cultural hegemony' is particularly useful. For Gramsci, a hegemonic system is one that is democratic in so far as the non-dominant group is receptive to them within the parameters and guidelines established by the dominant group.^{vi} The dominant power frames the discourse which is located at the intersection of "consent and force".^{vii} In other words, those in power will frame situations and discourse to their advantage. "Why should a state relinquish its strategic advantages when these put it in a position conducive to world hegemony?"^{viii}

It is clear from the intersection of these theories, "education is a field where theory and practice, culture and politics inevitably merge together, and where intellectual research and achievement combine with social and political action".^{ix} Monasta concludes that Gramsci's work is necessarily centered on education, and therefore support the assertions of this paper support this conclusion.

The concepts of governmentality and cultural hegemony provide a framework for analyzing the subject of access to education in America. Cultural hegemony is particularly useful for examining the philosophy and doctrines involved in forwarding a hegemonic agenda in the United States. The role of cultural hegemony is clear in America's earliest legislation.

IV Early Legislation

There are countless examples of dominance theory in action in the American legislative history. The constitution was written with the intent of establishing a productive economic market. The goal was to enable the new country to compete with

Europe in the international marketplace. The systemic oppression of Africans slaves served as the economic engine. Consequently, access to education in America has historically reflected the desired social and economic model for American society.

America's position in the economic marketplace was largely due to the agriculture of the southern colonies. In contrast, slavery played a limited role in the northern economy. Unlike the south, slavery was expressly prohibited in the north. The contemporary legislation provides insight in the social and economic differences in early America. Although many are familiar with the role of the Constitution; there is little familiarity with its predecessor. There were several contributing factors to the free status of the north, but none as significant as the Northwest Ordinance of 1787.

The Northwest Ordinance of 1787 (herein N.O.) provided the United States government with a method for controlling additional territory outside of the original thirteen colonies.^x The instrument outlined transitional and long-term governmental structure to be used within the territories. The Northwest Territory was made up of the modern states of Illinois, Indiana, Ohio and Wisconsin.

In many respects the N.O. laid the foundations for what would become the United States constitution. However, the instruments were distinct in significant ways. First, the N.O. explicitly prohibited slavery relying on the principle of the equality of all men. Second, the N.O. explicitly identified the education of children as a government interest. These key components of the N.O. address social controversies that persist in the modern American discourse.

Slavery was prohibited in the Northwest Territory prior to President Abraham Lincoln issuance of the Emancipation Proclamation. Under Article VI of the N.O., slavery was expressly prohibited in the Northwest Territory. France and Great Britain

controlled much of the Northwest Territory prior the ceding the land to the United States. Article VI was largely attributed to the relationships between the United States and its more progressive neighbors of France and Great Britain. Under Article VI runaway slaves were to be returned to their owners in slave states. Nevertheless, Article VI may be construed as an early indictment of the American institution of slavery.

Education was identified as critical to the success of the Northwest Territory. Article III explicitly identified education as an important component of society. Under Article III, “religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools shall forever be encouraged.” Schools and education shall forever be encouraged; these strong words failed to find their way into the American Constitution as we know it. An originalist reading that would draw directly from the text of the N.O. would conclude that the founders believed education was a necessary and key component of the emerging American society.

The vast majority of the principles articulated in the N.O. were incorporated into the American Constitution. However, neither Article VI nor Article III was substantively incorporated. The absence of these articles in the constitution, reveal a great deal about the role of hegemonic dominance in America. Unlike the constitution, the states formed under the Northwest Ordinance retained a great deal of the substantive philosophies found in the Ordinance. Despite retaining key principles of the ordinance the states failed to apply the principles in practice. In fact, despite boasting some of the abolitionist movement champions, the northern states had some of the most oppression anti-Black laws in the nation.

The North utilized Black Codes as an instrument of governmentality. Black Codes were the predecessors of well-known Jim Crow Laws in the post-reconstruction south. These laws limited the civic participation and freedoms of freed Blacks prior to the national abolition of slavery. For the purpose of this paper, I decided to analyze the social conditions of Freed Blacks as a disadvantaged population prior to the Civil War in the states of the Northwest Territory. My decision is based on the belief that a comparative analysis of the oppression experienced prior to the passing of the 13th amendment and the oppression experienced in contemporary education will provide a lens for analyzing the educational conditions of populations that are disadvantaged and *free*.

V Legislation of Oppression

Illinois

Slavery was prohibited in Illinois from the state's inception. Article XII § 16 provided, "There shall be neither slavery nor involuntary servitude in this state, except as a punishment for crime, whereof the party shall have been duly convicted." This article feeds the view that the north was fully understood the injustice of the oppression associated with slavery. However, a closer look at early Illinois legislation tells a very different story.

The Slave Code of 1819 was one of the strictest Black Codes in the country. Article VII of the 1848 Constitution provided "The militia of the state of Illinois shall consist of all free male able bodied persons (negroes, mulattoes and Indians excepted)."^{xi} The social exclusion of Freed Blacks also extended to freedom of movement. Blacks were allowed into the state only if they could ensure that they were self-sufficient and

would not become a financial burden on the state as evidenced by a “certificate of freedom”.^{xii} Moreover, under Article XIV of the Illinois Constitution;

“The general assembly shall, at its first session under the amended constitution, pass such laws as will effectually prohibit free persons of color from immigrating to and settling in this state; and to effectually prevent the owners of slaves from bringing them into this state for the purpose of setting them free.”^{xiii}

This article demonstrates that Illinois implemented racial oppression although of a different form.

Indiana

The Indiana Constitution also prohibited Slavery. Under Article VIII § I, “as the holding any part of the human Creation in slavery, or involuntary servitude, can only originate in usurpation and tyranny, no alteration of this constitution shall ever take place so as to introduce slavery or involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted.” Similar to Illinois, the Indiana Constitution was presumably rooted in notions of justice and equity. However, Indiana also passed discriminatory legislation to the contrary of the principles articulated in their Constitution. Under Article XII of Indiana's 1851 Constitution "No Negro or Mulatto shall come into, or settle in, the State, after the adoption of this Constitution."^{xiv} Article VII essentially negated the Constitution’s asserted principles of equality and began what would be a long history of exclusionary practices.

Ohio

The Ohio Constitution was similar to the constitutions of its neighboring states in the Northwest Territory. Similar to its neighbors, slavery was expressly prohibited in Ohio. Article VII§2 of the 1802 Constitution provided “There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes.” The anti-slavery language of the Ohio Constitution was slightly stronger than the language in

the constitutions of its neighbors. Article VII§2 elaborated “Nor shall any indenture of any negro or mulatto, hereafter made and executed out of the State, or if made in the State, where the term of service exceeds one year, be of the least validity, except those given in the case of apprenticeships.”

Wisconsin

Under Article I§2 of the Wisconsin Constitution of 1848 prohibited slavery in the state. The Constitution of Wisconsin is of particular interest for the purpose of this paper. Wisconsin expressly acknowledged the role of governmentality in the developing state. Expressed in the Constitution was the assertion “Governments are instituted among men, deriving their just powers from the consent of the governed.”^{xv}

However, Article III of the constitution outlined the guidelines for suffrage. White males and Indians having been granted citizenship were among those explicitly included. No person under guardianship, non-compos mentis, shall be qualified to vote. One wonders if this was a reference to the states black population.

VI Educational Legislation

Illinois

Illinois established a state supported common school system in 1825.^{xvi} Article IX of the Constitution authorized the Illinois government to act with respects to education. Under this article, “The corporate authorities of counties, township, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same.” This legislation created a

government interest in education and authorized the development of an educational system.

Indiana

Similarly, Indiana's Constitution contained provisions related to education. Article IX§2 of Indiana's Constitution of 1819 relegated government authority related to education. Under Article IX§2 "It shall be the duty of the General assembly, as soon as circumstances will permit, to provide, by law, for a general system of education, ascending in a regular gradation, from township schools to a state university, wherein tuition shall be gratis, and equally open to all."^{xvii} The Indiana Constitution is unique in that it explicitly called for free and equal education.

Ohio

Ohio approached the subject of education in the spirit of the Northwest Ordinance. Under Article VIII§3 of Ohio's constitution, "knowledge being essentially necessary to good government and the happiness of mankind, schools and the means of instructions shall forever be encouraged by legislative provision not inconsistent with the rights of conscience."^{xviii} The Article expressed the government interest in education. Ohio Constitution was in many progressive for its time. The legislature acknowledged the potential for educational disparities on the basis of class. Under Article VIII§25 "no law shall be passed to prevent the poor in the several counties and townships, within this State, from an equal participation in the schools, academies, colleges and universities within this State, which are endowed, in whole or in part, from the revenue arising from donations made by the United States, for the support of schools, academies and universities." This provision of the Ohio Constitution gets to the heart of educational disparities in America today.

Wisconsin

The Wisconsin Constitution of 1848 was undoubtedly the most progressive constitutions of its day. Article X of the Constitution was devoted entirely to the subject of education.^{xix} Under the Constitution “the legislature shall provide by law for the establishment of districts which shall be as nearly uniform as practicable, and such schools shall be without charge for tuition to all children between the ages of four and twenty years.”^{xx}

Article X also provided for a tax based system to provide education to the state’s children. The constitution required each district to contribute to the statewide school fund with tax revenue. The funds were to be distributed in ‘some just proportion’ to the children and youth residents. Interestingly, funding was withheld from districts that fail to raise tax funds.

Conclusion

It is difficult to reconcile the early American legislation with the principles upon which they were founded. The Northwest Ordinance represents the beginning of contradictions in American policy making. A review of the laws governing Freed Blacks in North provides a foundation from which to analyze modern American educational policy. The next step in this investigation should be an analysis focused on the juxtaposition of Freed Blacks and early American common schools within the American hegemonic system. Such an investigation would be a fruitless endeavor absent the historical background I have presented here.

Part II: The Supreme Court & American Education

I Introduction

A mere cursory review of American legislative history makes one matter abundantly clear; American legislative history is replete with systemic discrimination. This argument can be supported by two main points. First, Supreme Court's interpretations of the constitution are inconsistent at best. Second, constitutional interpretations are often applied to reach convenient, yet contradictory results.

Do the policy contradictions permitting discriminatory government action indicate an institutional disregard for the traditional democratic notions of equity; perhaps. A discussion of education in America may shed light on this issue. This discussion reveals the causes and consequences of the government's position on education. I believe current approaches to education policy operate to systemically reinforce a discriminatory social model. Consequently, I believe statutory schemes fail to provide "equal opportunities" to marginalized citizens.

The American educational system is fraught with issues. I would argue that quality education is accessible only to a certain segment of the American population. Consequently, the lack of access to quality education violates equal protection under the 14th amendment. This assertion leads to a key question. Is access to a quality education a constitutionally protected fundamental right? As it stands, the Supreme Court tells us that public education is not a constitutionally protected right.

American courts have repeatedly asserted the importance of a quality education in society. In order to explain why education is not viewed as, it is necessary to look at the country history from a social and cultural perspective. Throughout this paper, I propose that dominance theories are at the core of the American educational philosophy.

The Supreme Court rulings directly impact American society. The Supreme Court has addressed a variety of controversies involving equal access to education. The social impact of judicial holdings illustrates the Court's role in the scheme of American governmentality. As the entity responsible for articulating the supreme law of the land, the Supreme Court occupies a key position in the American hegemonic system. For the purposes of this paper, I have selected four cases decided by the Supreme Court. These cases focus on distinct controversies and illustrate the Court's function in maintaining hegemonic dominance when determining a ruling based upon the hegemonic value system. My inquiry into the Court's role in unequal access to education will focus on *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954); *San Antonio School Dist. v. Rodriguez* 411 U.S. 1 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982); *Gratz et al. v. Bollinger et al.* (2003).

In *Brown*, the plaintiff parents brought a claim under the 14th claiming that racial segregations of schools violated their rights under the equal protection. The Court reasoned that despite 'equal facilities' institutional racial segregation is inherently unequal. Consequently, laws mandating racial segregation in American schools are unconstitutional.

In *San Antonio*, the plaintiff parents brought a claim under 14th claiming the disproportionate allocation of school funds deprived them of their equal protection of rights. The Court reasoned that under the defendant state's constitution, the state was required only to provide 'basic education'. Consequently, the Court held that unequal spending within a given school district was constitutional.

In *Plyler*, the plaintiff parents brought a claim under the 14th amendment asserting the state law prohibiting illegal alien status students from attending public

school. The Court reasoned that children of an alien status may at some point become citizens; therefore, state concerns based on the potential financial burdens that may be created by the children were an insufficient interest to support depriving the children from a public education. Consequently, the Court held laws depriving illegal children from public education are unconstitutional.

In *Grutter*, the plaintiff student brought a claim under the 14th claiming that the law school admissions policy favoring minorities deprived her of equal protection of rights. The Court reasoned that policies that encourage school diversity represent a valid government interest. The Court ruled that a narrowly tailored admission scheme was constitutional.

In each of these cases, the level of judicial review applied by the Court varied. This paper focuses on the extreme discretion available to the Court. As we breakdown the components of the rulings in these cases, I will argue that the Court's holdings often reflect the intersection of policy and politics. Additionally, my investigation is concerned with the lack of access for disadvantaged populations rather than a concern racial or ethnic minority populations.

II

The Government Interest in Education

Our first point of analysis focuses on whether the government has an interest in education in the first place. The courts and legislature have clearly answered to the affirmative. A cursory review of cases involving education illustrates the degree to which education is viewed as within the realm of government interest. Concepts and doctrines announced by the judiciary have established a clear governmental interest

regarding education in American society with the Court identifying education as the key to maintaining the American way of life.

Education is representational of the American values contained in our constitution. In *Brown*, the Court reasoned that, “education is perhaps the most important function of state and local governments.”^{xxi} The reasoning was based upon the degree of state resources allocated to education as well as school attendance laws. The Court looked to the surrounding circumstances to reach their conclusion. The Court reasoned, “The great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.” *Brown* is undeniably the landmark case treating the role of equality in American education.

Education creates the free thought necessary for a free society to prosper. The Supreme Court has looked to public policy considerations when determining the existence of a government interest in education. The Court posited in *San Antonio*, “An abiding respect for the vital role of education in a free society and our historic dedication to public education” The Court’s reasoning in this case apparently began with the presumption of education’s role in America. The Court reasoned, “the grave significance of education both to the individual and to our society cannot be doubted.”^{xxii} In other words, the government interest in education is closely related to societal concerns.

Additionally, education is significantly related to freedom of thought. The Supreme Court has focused on the formation of the citizen when determining a government interest in education. In *Plyler*, the Court reasoned that Americans have always regarded education the acquisition of knowledge as matters of supreme importance.^{xxiii} The Court looked to the general belief that there is a significant

relationship between education and freedom of thought. Consequently, the Court found that education permits constructive and logical thoughts of the citizen.

Education furthers the spirit and values of the United States Constitution. The Supreme Court has looked to education's ability to promote an American society characterized by equality and justice. In *Grutter*, the Court reasoned that schools occupy a unique 'niche' in the American constitutional tradition. The constitutional space occupied by schools is a consequence of the association between the important purpose of public education and the expansive freedoms of speech and thought.^{xxiv} The Court asserted, "Ensuring that public institutions are open and available to all segments of American society represents a paramount government objective."^{xxv}

The Supreme Court has repeatedly asserted a government interest in education. Education is not explicitly addressed in the Constitution. Further, under the 10th amendment of the Constitution, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." If the role of the Supreme Court is to interpret the Constitution, how can the Court justify a government interest in education?

III Rationale Supporting a Government Interest in Education

Education prepares children to be productive members of society. The Supreme Court has focused on the skill sets attained through education as supporting a government interest. In *Brown*, the Court reasoned, "It is required in the performance of our most basic public responsibilities, even service in the armed forces." The Court further determined that education ultimately serves as the foundation of good citizenship.

Education provides students with basic civic knowledge. The Court has continually looked to education as the social space for developing civic awareness. In *San Antonio*, the Court echoed the educational sentiments asserted in *Brown*. The Court reasoned, “Education is required in the performance of our most basic public responsibilities, even service in the armed forces.” The Court claimed that education is the very foundation of good citizenship instills cultural values in America’s children. Further, the Court reasoned that schools prepare children to be trained professionally and to adjust normally in American society.

Consequently, education helps to define the meaning of being ‘American’. It appears the Court has assumed the role of defining the concept of ‘American’. The Court in *Plyler*, described education as pivotal to “sustaining our political and cultural heritage” with a fundamental role in maintaining the fabric of society. Moreover, the Court asserted that education provides the, “tools by which individual leads an economic product lives to the benefit of us all.” Essentially, the Court seems to view knowing what it means to be ‘American’ as a highly desirable.

The education is the key to America’s future success. The Court has repeatedly emphasized the preparatory role of American education. In *Grutter*, the Court reasoned that “overriding importance of preparing students for work and citizenship, the diffusion of knowledge and opportunity through public institutions (sic) education must be accessible to all individuals.” The Court’s view is that education is the means by which full participation in American society is realized. The Court reasoned, “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”

The Court has asserted a number of reasonable reasons to support a government interest in education. Further, the Court has clearly established a government interest in education, *despite* the Constitution's silence on the issue. As such, I now turn to the consequences of a failed American education.

III Consequences

Recognizing the importance of education, unequal access to education may result in significant consequences. The Court has identified potential consequences that may result from faulty government actors. Ironically, the consequences identified by the Court have failed to curb contradictory holdings in cases involving education.

Educational disparities produce undesirable long-term psychological effects in children. The Court has looked to the societal implications of government actions related to education. In *Brown*, the Court reasoned, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Here, the Court was concerned with how a discriminatory government action affects the nation's children. The Court reasoned that such actions "generate a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Further the Court found that educational disparities with the sanction of law; retard educational development, mental development and deprive children of a number of educational benefits. This landmark case focused on racial discrimination. The Court reasoned the separation from others of similar age and qualifications "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The Court ultimately concluded that equal physical facilities and other "tangible" factors do not

necessarily protect the disadvantaged children from the deprivation of equal educational opportunities.

Educational disparities have a direct impact on child's potential for success. Ultimately, a lack of education operates as a barrier to reaching one's potential. In *San Antonio*, the Court determined that, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Education can be denied in a variety of ways. For example, "Systems of school financing can produce discrimination against certain groups or classes as the result of decades of experience as the product of responsible studies by qualified people." It would appear that the Court is concerned with ensuring that government actions do not create barriers to opportunity for America's children.

Educational disparities can effectively maintain an oppressive status quo while limiting the scope of a child's life potential. America was founded on the idea that an individual's success is determined by their potential rather than their family social status. In *Plyler*, the Court held, "the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement." I believe that *Plyler* decision best illustrates the use of education as an instrument of governmentality. In dicta the Court outlined the serious consequences of depriving a child of a basic education. The Court concluded the inability to read and write operates to handicap an individual each and every day of his life. The Court contended the Nation socially suffers certain groups are deprived of the intellectual foundations "upon which our social order rests." Perhaps unknowingly, the Court addressed the issues arising from a hegemonic system of education. The Court reasoned;

“By depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. Already disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, (and) will become permanently locked into the lowest socio-economic class.”

Educational disparities prevent the social and economic progress of disadvantaged populations. The Court has increasingly acknowledged the role hegemonic dominance as it relates to access to education. In *Grutter*, the Court reasoned, “oppression is still visible in our society, and the determination to hasten its removal remains vital.” The Court determined in dicta disadvantaged populations often lack available professional networks and opportunities. Consequently, the Court concluded it is difficult for these populations improve their socio-economic conditions in the absence of these resources.

IV Educational Safeguards & Remedies

As illustrated by these cases, the Supreme Court has established the importance of education and provided support for their findings of a government interest. The question remains. How can the judiciary safeguard the asserted government interest in education while simultaneously functioning as an instrument of governmentality? The selected cases highlight several measures and remedies asserted by the Supreme Court.

The Court will issue mandates to resolve educational controversies. Public education must be equally assessable. The ruling in *Brown* provided for remedies where education has failed to be available on equal for everyone. The holding of *Brown* mandated, “education, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” The Court mandated the full assistance of the parties in formulating decrees. Interestingly, the measures mandated by the Court were largely left in the hands of local authorities.

Often, the Court will defer to local authorities in educational controversies regarding the implementation of remedies. In *San Antonio*, the Court recognized the existing disparities involved in the case. The Court reasoned, “The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax.” The Court also addressed the relationship between the funding disparities and the quality of education. The Court stated in dicta, “innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity.” With the local authority as the cause of the educational disparity, the effectiveness of the resulting remedy it is difficult to imagine.

The Supreme Court has used broad-based approaches when evaluating the merits of an educational controversy. In *Plyler* the Court reasoned that it is necessary to consider the entirety of a situation rather than simply focusing on how a group could potentially burden an economy. By taking this approach, the Court established a scheme that would not limit the judicial review to narrow considerations when addressing complex issues.

In contrast, the Court has applied narrow approaches when evaluating the merits of an educational controversy. According to the holding in *Grutter*, “narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or §1981.” This approach looks not only to correct an immediate controversy but also addresses methods for achieving the desired American society. While recognizing potential ‘administrative challenges’, the Court ultimately determined narrowly tailored plans targeted at improving educational

opportunities for disadvantaged populations are a ‘necessary recourse’ in certain instances.

V Conclusion

There is no doubt that the Supreme Court has determined there is a government interest in education. The Court has explicitly asserted the government’s interest in a variety of cases and controversies. The Court has side-stepped the 10th amendment by providing a non-exhaustive list of factors supporting the government’s interest in the education of the nation’s children. Further, the Court has identified numerous consequences of educational disparities and offered numerous remedies. However, the Court’s assertions say little about the current state of American education.

Despite the Court’s assertions related to the government interest in education, very little has been done to increase equal access to quality education. Further discussion is required to truly evaluate the role of the Supreme Court as the ultimate instrument of governmentality. I believe that the Court decides cases using the American hegemonic value system. Consequently, the Court takes a strong stand in cases that in the forefront of the social discourse. Conversely, outlier controversies are reviewed and decided in the interest of the dominant groups in American society. Further investigations should seek viable approaches to reform, but only after addressing the role of the Supreme Court as a key component of the hegemonic system of dominance in American.

ⁱ Curtis, 2002, p 17

ⁱⁱ *Id.*

ⁱⁱⁱ Mitchell, 2004, p 389

^{iv} Beasley, 2005, p 17

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- v *Id.*
- vi Gramsci, 1926
- vii Gramsci, 1929, p 43
- viii *Id.*
- ix Monasta, 1993, p 597
- x Northwest Ordinance 1787
- xi Illinois Constitution of 1848
- xii Chapters in the history of social legislation in the United States to 1860 By Henry W. Farnam, Clive Day
p220
- xiii Illinois Constitution of 1848
- xiv Indiana Constitution of 1852
- xv Wisconsin Constitution 1848, Art. I
- xvi *Id.* At 148
- xvii Indiana Constitution of 1819
- xviii Ohio Constitution of 1802
- xix Wisconsin Constitution of 1848
- xx
- xxi BROWN V. BOARD OF EDUCATION, 347 U.S. 483 (1954)
- xxii SAN ANTONIO SCHOOL DISTRICT v. RODRIGUEZ, 411 U.S. 1 (1973)
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- xxiii PLYLER v. DOE, 457 U.S. 202 (1982)
- xxiv GRATZ et al. v. BOLLINGER et al. 2003
- xxv *Id.*

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education will focus on *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954); *San Antonio School Dist.*

v. Rodriguez 411 U.S. 1 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982); *Gratz et al. v. Bollinger*

et al. (2003).

In *Brown*, the plaintiff parents brought a claim under the 14th claiming that racial segregations of schools violated their rights under the equal protection. The Court reasoned that despite 'equal facilities' institutional racial segregation is inherently unequal. Consequently, laws mandating racial segregation in American schools are unconstitutional.

In *San Antonio*, the plaintiff parents brought a claim under 14th claiming the disproportionate allocation of school funds deprived them of their equal protection of rights. The Court reasoned that under the defendant state's constitution, the state was required only to provide 'basic education'. Consequently, the Court held that unequal spending within a given school district was constitutional.

In *Plyler*, the plaintiff parents brought a claim under the 14th amendment asserting the state law prohibiting illegal alien status students from attending public school. The Court reasoned that children of an alien status may at some point become citizens; therefore, state concerns based on the potential financial burdens that may be created by the children were an insufficient interest to support depriving the children from a public education. Consequently, the Court held laws depriving illegal children from public education are unconstitutional.

In *Grutter*, the plaintiff student brought a claim under the 14th claiming that the law school admissions policy favoring minorities deprived her of equal protection of rights. The Court reasoned that policies that encourage school diversity represent a valid government interest. The Court ruled that a narrowly tailored admission scheme was constitutional.

In each of these cases, the level of judicial review applied by the Court varied. This paper focuses on the extreme discretion available to the Court. As we breakdown the components of the rulings in these cases, I will argue that the Court's holdings often reflect the intersection of policy and politics. Additionally, my investigation is concerned with the lack of access for disadvantaged populations rather than a concern racial or ethnic minority populations.

II

The Government Interest in Education

Our first point of analysis focuses on whether the government has an interest in education in the first place. The courts and legislature have clearly answered to the affirmative. A cursory review of cases involving education illustrates the degree to which education is viewed as within the realm of government interest. Concepts and

doctrines announced by the judiciary have established a clear governmental interest regarding education in American society with the Court identifying education as the key to maintaining the American way of life.

Education is representational of the American values contained in our constitution. In *Brown*, the Court reasoned that, “education is perhaps the most important function of state and local governments.”ⁱ The reasoning was based upon the degree of state resources allocated to education as well as school attendance laws. The Court looked to the surrounding circumstances to reach their conclusion. The Court reasoned, “The great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.” *Brown* is undeniably the landmark case treating the role of equality in American education.

Education creates the free thought necessary for a free society to prosper. The Supreme Court has looked to public policy considerations when determining the existence of a government interest in education. The Court posited in *San Antonio*, “An abiding respect for the vital role of education in a free society and our historic dedication to public education” The Court’s reasoning in this case apparently began with the presumption of education’s role in America. The Court reasoned, “the grave significance of education both to the individual and to our society cannot be doubted.”ⁱⁱ In other words, the government interest in education is closely related to societal concerns.

Additionally, education is significantly related to freedom of thought. The Supreme Court has focused on the formation of the citizen when determining a government interest in education. In *Plyler*, the Court reasoned that Americans have always regarded education the acquisition of knowledge as matters of supreme

importance.ⁱⁱⁱ The Court looked to the general belief that there is a significant relationship between education and freedom of thought. Consequently, the Court found that education permits constructive and logical thoughts of the citizen.

Education furthers the spirit and values of the United States Constitution. The Supreme Court has looked to education's ability to promote an American society characterized by equality and justice. In *Grutter*, the Court reasoned that schools occupy a unique 'niche' in the American constitutional tradition. The constitutional space occupied by schools is a consequence of the association between the important purpose of public education and the expansive freedoms of speech and thought.^{iv} The Court asserted, "Ensuring that public institutions are open and available to all segments of American society represents a paramount government objective."^v

The Supreme Court has repeatedly asserted a government interest in education. Education is not explicitly addressed in the Constitution. Further, under the 10th amendment of the Constitution, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." If the role of the Supreme Court is to interpret the Constitution, how can the Court justify a government interest in education?

III

Rationale Supporting a Government Interest in Education

Education prepares children to be productive members of society. The Supreme Court has focused on the skill sets attained through education as supporting a government interest. In *Brown*, the Court reasoned, "It is required in the performance of our most basic public responsibilities, even service in the armed forces." The Court further determined that education ultimately serves as the foundation of good citizenship.

Education provides students with basic civic knowledge. The Court has continually looked to education as the social space for developing civic awareness. In *San Antonio*, the Court echoed the educational sentiments asserted in *Brown*. The Court reasoned, “Education is required in the performance of our most basic public responsibilities, even service in the armed forces.” The Court claimed that education is the very foundation of good citizenship instills cultural values in America’s children. Further, the Court reasoned that schools prepare children to be trained professionally and to adjust normally in American society.

Consequently, education helps to define the meaning of being ‘American’. It appears the Court has assumed the role of defining the concept of ‘American’. The Court in *Plyler*, described education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. Moreover, the Court asserted that education provides the, “tools by which individual leads an economic product lives to the benefit of us all.” Essentially, the Court seems to view knowing what it means to be ‘American’ as a highly desirable.

The education is the key to America’s future success. The Court has repeatedly emphasized the preparatory role of American education. In *Grutter*, the Court reasoned that “overriding importance of preparing students for work and citizenship, the diffusion of knowledge and opportunity through public institutions (sic) education must be accessible to all individuals.” The Court’s view is that education is the means by which full participation in American society is realized. The Court reasoned, “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”

The Court has asserted a number of reasonable reasons to support a government interest in education. Further, the Court has clearly established a government interest in education, *despite* the Constitution's silence on the issue. As such, I now turn to the consequences of a failed American education.

III Consequences

Recognizing the importance of education, unequal access to education may result in significant consequences. The Court has identified potential consequences that may result from faulty government actors. Ironically, the consequences identified by the Court have failed to curb contradictory holdings in cases involving education.

Educational disparities produce undesirable long-term psychological effects in children. The Court has looked to the societal implications of government actions related to education. In *Brown*, the Court reasoned, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Here, the Court was concerned with how a discriminatory government action affects the nation's children. The Court reasoned that such actions "generate a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Further the Court found that educational disparities with the sanction of law; retard educational development, mental development and deprive children of a number of educational benefits. This landmark case focused on racial discrimination. The Court reasoned the separation from others of similar age and qualifications "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The Court ultimately concluded that equal physical facilities and other "tangible" factors do not

necessarily protect the disadvantaged children from the deprivation of equal educational opportunities.

Educational disparities have a direct impact on child's potential for success. Ultimately, a lack of education operates as a barrier to reaching one's potential. In *San Antonio*, the Court determined that, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Education can be denied in a variety of ways. For example, "Systems of school financing can produce discrimination against certain groups or classes as the result of decades of experience as the product of responsible studies by qualified people." It would appear that the Court is concerned with ensuring that government actions do not create barriers to opportunity for America's children.

Educational disparities can effectively maintain an oppressive status quo while limiting the scope of a child's life potential. America was founded on the idea that an individual's success is determined by their potential rather than their family social status. In *Plyler*, the Court held, "the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement." I believe that *Plyler* decision best illustrates the use of education as an instrument of governmentality. In dicta the Court outlined the serious consequences of depriving a child of a basic education. The Court concluded the inability to read and write operates to handicap an individual each and every day of his life. The Court contended the Nation socially suffers certain groups are deprived of the intellectual foundations "upon which our social order rests." Perhaps unknowingly, the Court addressed the issues arising from a hegemonic system of education. The Court reasoned;

“By depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. Already disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, (and) will become permanently locked into the lowest socio-economic class.”

Educational disparities prevent the social and economic progress of disadvantaged populations. The Court has increasingly acknowledged the role hegemonic dominance as it relates to access to education. In *Grutter*, the Court reasoned, “oppression is still visible in our society, and the determination to hasten its removal remains vital.” The Court determined in dicta disadvantaged populations often lack available professional networks and opportunities. Consequently, the Court concluded it is difficult for these populations improve their socio-economic conditions in the absence of these resources.

IV Educational Safeguards & Remedies

As illustrated by these cases, the Supreme Court has established the importance of education and provided support for their findings of a government interest. The question remains. How can the judiciary safeguard the asserted government interest in education while simultaneously functioning as an instrument of governmentality? The selected cases highlight several measures and remedies asserted by the Supreme Court.

The Court will issue mandates to resolve educational controversies. Public education must be equally assessable. The ruling in *Brown* provided for remedies where education has failed to be available on equal for everyone. The holding of *Brown* mandated, “education, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” The Court mandated the full assistance of the parties in formulating decrees. Interestingly, the measures mandated by the Court were largely left in the hands of local authorities.

Often, the Court will defer to local authorities in educational controversies regarding the implementation of remedies. In *San Antonio*, the Court recognized the existing disparities involved in the case. The Court reasoned, “The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax.” The Court also addressed the relationship between the funding disparities and the quality of education. The Court stated in dicta, “innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity.” With the local authority as the cause of the educational disparity, the effectiveness of the resulting remedy it is difficult to imagine.

The Supreme Court has used broad-based approaches when evaluating the merits of an educational controversy. In *Plyler* the Court reasoned that it is necessary to consider the entirety of a situation rather than simply focusing on how a group could potentially burden an economy. By taking this approach, the Court established a scheme that would not limit the judicial review to narrow considerations when addressing complex issues.

In contrast, the Court has applied narrow approaches when evaluating the merits of an educational controversy. According to the holding in *Grutter*, “narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or §1981.” This approach looks not only to correct an immediate controversy but also addresses methods for achieving the desired American society. While recognizing potential ‘administrative challenges’, the Court ultimately determined narrowly tailored plans targeted at improving educational

opportunities for disadvantaged populations are a ‘necessary recourse’ in certain instances.

V Conclusion

There is no doubt that the Supreme Court has determined there is a government interest in education. The Court has explicitly asserted the government’s interest in a variety of cases and controversies. The Court has side-stepped the 10th amendment by providing a non-exhaustive list of factors supporting the government’s interest in the education of the nation’s children. Further, the Court has identified numerous consequences of educational disparities and offered numerous remedies. However, the Court’s assertions say little about the current state of American education.

Despite the Court’s assertions related to the government interest in education, very little has been done to increase equal access to quality education. Further discussion is required to truly evaluate the role of the Supreme Court as the ultimate instrument of governmentality. I believe that the Court decides cases using the American hegemonic value system. Consequently, the Court takes a strong stand in cases that in the forefront of the social discourse. Conversely, outlier controversies are reviewed and decided in the interest of the dominant groups in American society. Further investigations should seek viable approaches to reform, but only after addressing the role of the Supreme Court as a key component of the hegemonic system of dominance in American.

ⁱ BROWN V. BOARD OF EDUCATION, 347 U.S. 483 (1954)

ⁱⁱ SAN ANTONIO SCHOOL DISTRICT v. RODRIGUEZ, 411 U.S. 1 (1973)
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ⁱⁱⁱ PLYLER v. DOE, 457 U.S. 202 (1982)

^{iv} GRATZ et al. v. BOLLINGER et al. 2003

^v *Id.*