

# COLUMBIA LAW REVIEW



## SYMPOSIUM PROPERTY AND EDUCATION

*Michelle Wilde Anderson*  
*LaToya Baldwin Clark*  
*Nicole Stelle Garnett*  
*Yuvraj Joshi*  
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## ABSTRACTS

### ESSAYS

#### WHOSE CHILD IS THIS? EDUCATION, PROPERTY, AND BELONGING

*LaToya Baldwin Clark* 1201

*Previous work suggests that excludability is the main attribute of educational property and residence is the lynchpin of that exclusion. Once a child is non-excludable, the story goes, he should have complete access to the benefits of educational property. This Essay suggests a challenge to the idea that exclusion is the main attribute of educational property. By following four fictional children and their quests to own educational property in an affluent school district, this Essay argues that belonging, not exclusion, best encapsulates a child's ability to fully benefit from a school's educational property. Property as belonging involves a spatial relationship through which property claims are recognized and supported. In staking an unconditional claim for educational property, a child must be recognized as part of a group of entitled claimants and the property rules of the district must "hold up" that claim as legitimate. Simply because a child has a legal claim to access education does not mean that claim is equal to all other claims. Belonging helps us understand why some claims are accorded more security than others. The strength of a child's claim to educational property depends on the extent to which the child belongs, as measured by that child's proximity to the idealized bona fide resident.*

#### WHITE CITIES, WHITE SCHOOLS

*Erika K. Wilson* 1221

*Across the country, violent tactics were employed to create and maintain all-white municipalities. The legacy of that violence endures today. An underexamined space in which that violence endures is within school districts. Many school district boundary lines encompass geographic areas that were created as whites-only municipalities through both physical violence and law. Yet principles that inform how school district boundary lines are drawn fail to account for the harms engendered by geographic spaces that are formerly whites-only municipalities. Legal doctrine and public policies also fail to capture the significance of the historical violence in considering the constitutionality and normative propriety of maintaining school district boundary lines around spaces that encompass formerly whites-only municipalities. This Essay sets forth a framework for rethinking the normative, sociocultural, and legal implications of maintaining*

*school district boundary lines around geographic areas that encompass formerly whites-only municipalities.*

PERSONHOOD, PROPERTY, AND PUBLIC EDUCATION:

THE CASE OF *PLYLER V. DOE*

Rachel F. Moran 1271

*Property law is having a moment, one that is getting education scholars' attention. Progressive scholars are retooling the concepts of ownership and entitlement to incorporate norms of equality and inclusion. Some argue that property law can even secure access to public education despite the U.S. Supreme Court's longstanding refusal to recognize a right to basic schooling. Others worry that property doctrine is inherently exclusionary. In their view, property-based concepts like residency have produced opportunity hoarding in schools that serve affluent, predominantly white neighborhoods. Many advocates therefore believe that equity will be achieved only by moving beyond property-based claims, for instance, by recognizing education as a public good or human right.*

*The Court has upheld a constitutional right of access to public schools on just one occasion. In Plyler v. Doe, the Justices found that Texas could not bar undocumented students from schools or charge them tuition. The Court did not declare education a fundamental right or alienage a suspect classification. Instead, the opinion relied on several rationales, some property-based and some not. Residency, for instance, featured prominently in the case, but so did a trope of childhood innocence. Recently, there have been calls to revisit Plyler, making this an opportune moment to evaluate how its reasoning will fare. Despite growing interest in property-based entitlements as a strategy for inclusion, Plyler's fate will likely turn on considerations that transcend property: the blamelessness of children, the cruelty of relegating them to a lifetime of illiteracy, and the implications that such deliberate indifference has for our democratic integrity.*

BENEATH THE PROPERTY TAXES

FINANCING EDUCATION

Timothy M. Mulvaney 1325

*Many states turn in sizable part to local property taxes to finance public education. Political and academic discourse on the extent to which these taxes should serve in this role largely centers on second-order issues, such as the vices and virtues of local control, the availability of mechanisms to redistribute property tax revenues across school districts, and the overall stability of those revenues. This Essay contends that such discourse would benefit from directing greater attention to the justice of the government's threshold choices about property law and policy that impact the property values against which property taxes are levied.*

*The Essay classifies these choices into three categories: structural choices relating to infrastructure and land use; financial choices relating to subsidies and exemptions; and protective choices relating to forestalling natural and human-induced adversities. This taxonomy reveals that if the government made different choices surrounding the content of property rights, those choices would produce different property values and, thus, different distributions of the property tax revenues that finance public education. The Essay distills a series of norms—*

*circumstance-sensitivity, antidiscrimination, and interconnectedness—that can serve as a useful starting point for a justice-inspired evaluation of these omnipresent choices about property that are inevitably linked to educational opportunity and delivery.*

DECOUPLING PROPERTY AND EDUCATION

Nicole Stelle Garnett 1367

*Over the past several years, the landscape of K–12 education policy has shifted dramatically, thanks in part to increasing prevalence of parental-choice policies, including intra- and inter-district public school choice, charter schools, and private-school choice policies like vouchers and (most recently) universal education savings accounts. These policies decouple property and education by delinking students’ educational options from their residential addresses. The wisdom and efficacy of parental choice as education policy is hotly debated, including among contributors to this Symposium. This Essay takes a step back from these education-policy debates and examines the underappreciated fact that decoupling property and education also advances at least economic development goals. First, they decrease incentives for center-city residents to move from urban neighborhoods to suburban ones in order to secure space for their children in higher-performing suburban public schools. Second, they reduce the likelihood that urban Catholic and other faith-based schools will close, thereby stabilizing important neighborhood community institutions. Third, they lessen legal and economic barriers to mobility between municipalities within metropolitan regions, including exclusionary zoning, thereby addressing the persistent challenge of intrametropolitan economic inequality.*

WEAPONIZING PEACE

Yuvraj Joshi 1411

*American racial justice opponents regularly wield a desire for peace, stability, and harmony as a weapon to hinder movement toward racial equality. This Essay examines the weaponization of peace historically and in legal cases about property, education, protest, and public utilities. Such peace claims were often made in bad faith and with little or no evidence, and the discord they claimed to address was actually the result of hostility to racial equality. For a time, the Supreme Court rejected dominant peace claims for precisely these reasons. This Essay further documents the weaponization of peace in current attempts to restrict Black Lives Matter protests, denigrate calls for police defunding, outlaw critical race theory, and dismantle affirmative action. By linking these historical and contemporary arguments, this Essay finds that dominant logics of peace mask the injustice, frustration, and despair felt by subordinated groups. The Essay urges closer scrutiny of appeals to peace that primarily function to stifle the pursuit of racial justice and to maintain status quo inequality.*

RETHINKING EDUCATION THEFT THROUGH THE  
LENS OF INTELLECTUAL PROPERTY AND  
HUMAN RIGHTS

Peter K. Yu 1449

*This Essay problematizes the increased propertization and commodification of education and calls for a rethink of the emergent concept of “education theft” through the lens of intellectual property and*

*human rights. This concept refers to the phenomenon where parents, or legal guardians, enroll children in schools outside their school districts by intentionally violating the residency requirements. The Essay begins by revisiting the debate on intellectual property rights as property rights. It discusses the ill fit between intellectual property law and the traditional property model, the impediments the law has posed to public access to education, and select reforms that have emerged both inside and outside the property regime. The Essay then turns to the debate on property and education in the human rights context. It argues that the norms and practices relating to the human right to education provide important insights into the debate. It also states that the discussion in the human rights forum will help evaluate the effectiveness and limitations of introducing positive rights to foster public access to education. The Essay concludes by applying the insights gleaned from the debate on property and education in the intellectual property and human rights contexts to the phenomenon surrounding so-called “education theft.” Specifically, the Essay calls for the development of a more sophisticated understanding of property rights in their historical and socioeconomic contexts, a careful evaluation of the expediency of criminalizing residency requirement violations, and an exploration of potential technological solutions to address problems raised by these violations.*

#### ETHNIC STUDIES AS ANTI-SEGREGATION WORK:

LESSONS FROM STOCKTON

Lange Luntao 1507

& Michelle Wilde Anderson

*In 2021, California became the first U.S. state to require that public high schools teach ethnic studies. Given polarized politics over what that mandate might mean, this Essay reflects on the role of ethnic studies curriculum in one place, through the voices of three people. The place is Stockton—the most diverse city in America and home to more than twenty years of grassroots investment in ethnic studies courses. Oral histories from three generations of the leaders who built that local curriculum—each of whom was shaped by their own ethnic studies education—offer a personal window into what the work has been about. Set in a city, like many others, with a long history of neighborhood and school segregation, these Stockton stories provide a chance to reflect on the curriculum’s legal history as a court-ordered remedy for de jure and de facto school segregation. Ethnic studies could not integrate Stockton’s schools but it could, and did, finally integrate the content of their lessons to reflect the people in the room.*

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The *Columbia Law Review* dedicated this symposium issue to examining the relationship between property and education. The *Law Review* thanks the faculty organizers—Professors Timothy M. Mulvaney and LaToya Baldwin Clark—and the contributing authors for their excellent contributions to this subject.



## FOREWORD

### PROPERTY AND EDUCATION

*Timothy M. Mulvaney\** & *LaToya Baldwin Clark\*\**

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Education policy is today a flashpoint in public discourse at both the national and state levels.<sup>1</sup> This focus is for good reason. Public schools are highly segregated.<sup>2</sup> School spending is stratified.<sup>3</sup> The need for

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\*\* Professor of Law, University of California, Los Angeles School of Law. The authors collectively thank Erika K. Wilson, Rachel F. Moran, Nicole Stelle Garnett, Yuvraj Joshi, Peter K. Yu, Lange Luntao, and Michelle Wilde Anderson for their thoughtful contributions to this Symposium issue. They also thank Symposium Editor Alex Vasques and her colleagues on the *Columbia Law Review* for their tremendous efforts in bringing this issue to fruition. Finally, they express gratitude to Texas A&M School of Law and Columbia Law School for their financial support.

1. Ashley Jochim, Melissa Kay Diliberti, Heather Schwartz, Katharine Destler & Paul Hill, Ctr. on Reinventing Pub. Educ., *Navigating Political Tensions Over Schooling: Findings From the Fall 2022 American School District Panel Survey 2* (2023), [https://crpe.org/wp-content/uploads/ASDP\\_Navigating-Political-Brief\\_v6.pdf](https://crpe.org/wp-content/uploads/ASDP_Navigating-Political-Brief_v6.pdf) [<https://perma.cc/X8NB-QHTM>]; Trip Gabriel, *Education Issues Vault to Top of the G.O.P.'s Presidential Race*, N.Y. Times (Feb. 6, 2023), <https://www.nytimes.com/2023/02/06/us/politics/education-republicans-elections.html> (on file with the *Columbia Law Review*); David A. Hopkins, *Why America's Schools Are Getting More Political*, Wash. Post (Feb. 14, 2023), [https://www.washingtonpost.com/business/why-americas-schools-are-getting-more-political/2023/02/14/e82a5874-ac66-11ed-b0ba-9f4244c6e5da\\_story.html](https://www.washingtonpost.com/business/why-americas-schools-are-getting-more-political/2023/02/14/e82a5874-ac66-11ed-b0ba-9f4244c6e5da_story.html) (on file with the *Columbia Law Review*).

2. U.S. Gov't Accountability Off., GAO-22-104737, K-12 EDUCATION: Student Population Has Significantly Diversified, But Many Schools Remain Divided Along Racial, Ethnic, and Economic Lines (2022), <https://www.gao.gov/assets/gao-22-104737.pdf> [<https://perma.cc/KVK2-LUJT>] (reporting that in 2020-2021 “[m]ore than a third of students (about 18.5 million) attended a predominantly same-race/ethnicity school—where 75 percent or more of the student[s] [were] . . . of a single race/ethnicity” and “14 percent . . . attended schools where 90 percent or more of the students were of a single race/ethnicity”).

3. Students in the poorest schools receive only 71% of funding that would be needed to provide those students an adequate education. Sylvia Allegretto, Emma García & Elaine

infrastructural renovations is extensive and expanding.<sup>4</sup> Student debt has reached historic highs.<sup>5</sup> For-profit companies are exploiting school districts' limited resources for everything from curricular content<sup>6</sup> to lunch menus.<sup>7</sup> The list goes on.

This moment presents an opportunity to highlight a threshold issue on which it seems prudent for this discourse to direct greater attention: the interconnections between education and property law. Indeed, decisions surrounding property—crafting district-mapping formulae; devising zoning schemes; setting the baseline conditions for housing and mortgage loans; investing in infrastructure; facilitating teacher and other public employee unionization efforts; and the like—determine in considerable respects the very architecture of our educational system. Whether the extant connections between education and property *should*

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Weiss, Econ. Pol'y Inst., Public Education Funding in the U.S. Needs an Overhaul 8 fig.B (2022), <https://files.epi.org/uploads/233143.pdf> [<https://perma.cc/F6NC-EYHV>] (showing that the poorest schools would need \$18,000 per student per year to provide an adequate education, but that those schools are only spending approximately \$13,000 per student per year). Students in the most affluent schools receive 23% more funding than needed to provide those students an adequate education. Id. (showing that the most affluent schools would need \$8,300 per student per year to provide an adequate education, but that those schools are spending approximately \$10,200 per student per year); Ivy Morgan, Educ. Tr., Equal Is Not Good Enough 4 (2022), <https://edtrust.org/wp-content/uploads/2014/09/Equal-Is-Not-Good-Enough-December-2022.pdf> [<https://perma.cc/PM3B-JKR6>] (reporting that “[a]cross the country, districts with the most students of color on average receive substantially less (16%) state and local revenue than districts with the fewest students of color”).

4. Victoria Jackson & Nicholas Johnson, Ctr. on Budget & Pol'y Priorities, America's School Infrastructure Needs a Major Investment of Federal Funds to Advance an Equitable Recovery 1 (2021), <https://www.cbpp.org/sites/default/files/5-17-21sfp.pdf> [<https://perma.cc/8L7L-4Z2D>] (“Due in part to longstanding federal inaction, the estimated cost of bringing all schools to good condition . . . reached nearly \$200 billion by 2013 . . . [N]eed for improvements is particularly acute in schools with high populations of students from low-income families and of Black, Indigenous, Latino, and other children of color.”).

5. See Brett Holzhauer, Student Loan Debt Hits Another Record High Despite Payment Forbearance, CNBC (May 10, 2022), <https://www.cnbc.com/select/student-debt-hits-another-record-high-what-you-need-to-know/> [<https://perma.cc/P23G-J7K5>] (“Student debt hit another all-time high in the first quarter of 2022, reaching \$1.59 trillion, according to data released by the Federal Reserve Bank of New York . . .”).

6. For example, analysts have suggested that career and technical education, also known as CTE, is being captured by for-profit businesses who sell districts branded curricula. See Jeff Bryant, How Corporations Are Forcing Their Way Into America's Public Schools, Salon (Feb. 11, 2020), [https://www.salon.com/2020/02/11/how-corporations-are-forcing-their-way-into-americas-public-schools\\_partner/](https://www.salon.com/2020/02/11/how-corporations-are-forcing-their-way-into-americas-public-schools_partner/) [<https://perma.cc/6THQ-NUEC>] (“[C]orporations like these can use the rush to CTE to flood schools with new course offerings that require technology the schools have to buy.”).

7. For example, PepsiCo provides school lunches to school districts nationwide. See K–12 Passion to Please, PepsiCo FoodService, <https://pepsicoschoolsource.com/> [<https://perma.cc/3Z7L-DYAH>] (last visited Mar. 27, 2023); see also Jaden Urbi, How Big Brands Like Tyson and PepsiCo Profit From School Lunches (Nov. 14, 2018), <https://www.cnbc.com/2018/11/14/how-big-brands-like-tyson-and-pepsico-profit-from-school-lunches.html> [<https://perma.cc/V3MC-6YRN>].



exist, and, if so, in what shape and form, is a complex question that implicates not only the traditional confines of education and property law but related elements of state and local government law, tax law, immigration law, constitutional law, human rights law, and more. This Symposium brings together a diverse collection of scholars from these and adjacent fields to grapple with this question from various perspectives and research methodologies.

In this Foreword, we classify the Essays in this Symposium issue into three thematic categories: “Educational Boundaries,” “Educational Justice,” and “Educational Resources.” The first features work by LaToya Baldwin Clark, Rachel Moran, and Erika Wilson; the second includes writings of Timothy M. Mulvaney, Nicole Stelle Garnett, and Yuvraj Joshi; and the third comprises scholarship by Peter Yu, Michele Wilde Anderson, and Lange Luntao. We introduce these authors’ Symposium contributions before offering a brief reflection on the intersections between and the role of these thematic categories in education discourse moving forward.

### I. EDUCATIONAL BOUNDARIES

Contrary to popular perception, the lines that divide the nation into thousands of school districts are not incontrovertible. Instead, these lines are what one scholar characterizes as “contingent . . . features of the legal and political landscape.”<sup>8</sup> They are, in other words, affirmative choices about the content of property law. The Essays summarized in this Part emphasize that these government choices on how and where to draw boundaries shape the allocation of social and economic power.<sup>9</sup>

In *Whose Child Is This? Education, Property, and Belonging*, Professor LaToya Baldwin Clark discusses how a child’s access to educational property (i.e., education within a specific school district) relies not only on residence and real property but also on the extent to which the district sees that child as someone who belongs.<sup>10</sup> Baldwin Clark argues that law and policy constrain children’s access to educational property even when the children have a legitimate legal claim to education.<sup>11</sup> The Essay examines the circumstances of four hypothetical children claiming educational property in one predominantly white, middle-class, and highly sought-after school district in which attendance connects to residence: first, a middle-class white girl who is a bona fide resident; second, a Black

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8. Aaron J. Saiger, *The School District Boundary Problem*, 42 *Urb. Law.* 495, 507 (2010).

9. Cf. Robert Hale, *Freedom Through Law: Public Control of Private Governing Power* 3–12 (1952) (contending that by “assigning and enforcing legal rights” of property and contract, the law not only protects economic claims but also contributes to economic inequality).

10. LaToya Baldwin Clark, *Whose Child Is This? Education, Property, and Belonging*, 123 *Colum. L. Rev.* 1201, 1205 (2023).

11. *Id.* at 1210–11.

girl who lives part-time with her grandmother who is a bona fide resident; third, a Black boy who is not a bona fide resident but who has a permit to attend the district's schools; and fourth, a Black boy who is a bona fide resident and receives special education services.<sup>12</sup>

Baldwin Clark describes how all four children have a claim to attend this district's schools, but the basis of those educational property claims—and the likelihood of success of those claims—are related to more than mere residence.<sup>13</sup> She argues that these children's experiences implicate “belonging” as the key to accessing an education.<sup>14</sup> “Belonging” invokes a spatial relationship through which these children's claims are recognized and supported.<sup>15</sup> Even among those who have a colorable legal claim to education, students must establish that they are part of a group of *acceptable* claimants.<sup>16</sup> To do so, they must navigate the property rules of the district that “hold up” their claims.<sup>17</sup> Just because a child is a resident or has a nonresident claim to education does not mean that this child's claim is on equal footing with the claims of others.<sup>18</sup> Instead, the strength of a child's claim to educational property depends on the extent to which the child belongs.<sup>19</sup>

In *White Cities, White Schools*, Professor Erika Wilson details the creation of sundown towns, white spaces characterized by the threat of violence against nonwhite people who remained within the town's borders after the sun set.<sup>20</sup> While the explicit threat of violence in sundown towns is primarily relegated to history, Wilson theorizes how the relationship between sundown towns and the racial segregation resulting from that classification continues to affect children's educational lives today.<sup>21</sup> Wilson refers to sundown towns as “microclimates of racial meaning” that largely have gone underexamined in the discourse surrounding property and education.<sup>22</sup> Specifically, law and policy do not adequately account for the racial terror associated with sundown towns, which helped shape regional geographic places.<sup>23</sup>

Wilson uses Grosse Pointe, Michigan, as an example of the phenomenon she describes. Grosse Pointe is (in)famous for rejecting interdistrict remedies for unconstitutional racial segregation by the State

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12. *Id.* at 1202–04.

13. *Id.* at 1204–05.

14. *Id.* at 1205–06.

15. *Id.* at 1215–16.

16. *Id.* at 1220.

17. *Id.*

18. *Id.* at 1216.

19. *Id.* at 1205–06.

20. Erika Wilson, *White Cities, White Schools*, 123 *Colum. L. Rev.* 1221, 1235–38 (2023).

21. *Id.* at 1241–44.

22. *Id.*

23. *Id.* at 1253–58.

of Michigan.<sup>24</sup> In *Milliken v. Bradley*, the Supreme Court invalidated a plan to reduce segregation in Detroit through interdistrict busing programs.<sup>25</sup> The Court held that because Grosse Pointe, and other suburban Detroit-area districts, did not themselves practice racial segregation, they could not be held responsible for ameliorating segregation in Detroit.<sup>26</sup>

Wilson argues that the Court's finding that Grosse Pointe did not engage in racial segregation fails historical muster.<sup>27</sup> In a prior era, people of color, and especially Black people, were expected to evacuate the town before night fell.<sup>28</sup> In these racialized spaces—white spaces—like Grosse Pointe, racial subordination was practiced and tolerated.<sup>29</sup> Given this history, school district boundaries like that between Grosse Pointe and Detroit are not devoid of racism and discrimination; they cannot be when the district lines themselves are historical markers of racial exclusion.<sup>30</sup> Wilson's Essay sets forth a framework for rethinking the maintenance of school district boundary lines around geographic areas that encompass formerly whites-only municipalities and that explicitly kept nonwhite people out.<sup>31</sup>

In *Person, Property, and Public Education: The Case of Plyler v. Doe*, Professor Rachel Moran revisits the seminal case in which the Supreme Court struck down a Texas law that denied education to undocumented students, the vast majority of whom were of Mexican descent.<sup>32</sup> While the Court did not declare education a fundamental right or alienage a suspect classification, the *Plyler* Court recognized a constitutional right to attend a public school on the basis of residency.<sup>33</sup>

Moran describes how residency-based claims typically create educational-opportunity hoarding in affluent, predominantly white neighborhoods.<sup>34</sup> She acknowledges that the more inclusive understandings of property that have been advanced by scholars of the progressive property movement could hold promise in the realm of education.<sup>35</sup> She focuses here, though, on contributing to the work of scholars and advocates searching for non-property frameworks to achieve meaningful access to public education.<sup>36</sup> Specifically, Moran seeks to

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24. Id. at 1255–56.

25. *Milliken v. Bradley*, 418 U.S. 717, 745 (1974).

26. Id. at 744–45.

27. Wilson, *supra* note 20, at 1222–23, 1244–48.

28. Id. at 1244.

29. Id. at 1244–48.

30. Id. at 1253–65.

31. Id. at 1266–69.

32. Rachel F. Moran, *Personhood, Property, and Public Education: The Case of Plyler v. Doe*, 123 Colum. L. Rev. 1271, 1289–90 (2023).

33. Id. at 1288–89.

34. Id. at 1279–83.

35. Id. at 1276–78.

36. Id. at 1282–86.

elevate a conception of childhood innocence as a potentially viable source of an inclusive, non-property-based claim to education.<sup>37</sup>

## II. EDUCATIONAL JUSTICE

Property rights reflect state-derived decisions that shape some of society's most meaningful social and economic relationships. The Essays in this Part underscore how these decisions rest on federal, state, and local lawmakers' normative judgments as to which relationships are legitimate and which, instead, are beyond the pale in the face of changing times and conditions.

In *Beneath the Property Taxes Financing Education*, Professor Timothy M. Mulvaney explains that, while select states lean heavily on state income and sales taxes to fund public schools, most states continue to turn to local property taxes for this purpose.<sup>38</sup> The Essay sheds light on the reality that the property values against which these property taxes are levied are not simply created and earned by individual efforts but instead are attributable in sizable part to myriad government choices that are reflected in our property laws.<sup>39</sup>

In an effort to illuminate how these government choices influence property values in a variety of different ways, Mulvaney classifies them into three categories: *structural choices* relating to infrastructure and land use (such as building highways, zoning land, and drawing district boundaries),<sup>40</sup> *financial choices* relating to subsidies and exemptions (such as allowing mortgage interest deductions, offering homestead exemptions, and subsidizing flood insurance),<sup>41</sup> and *protective choices* relating to forestalling natural and human-induced adversities (such as allowing nonconforming uses to continue, constructing erosion-control devices, and providing disaster relief).<sup>42</sup>

Mulvaney emphasizes that these choices about the content of property rights are not neutral choices.<sup>43</sup> Rather, they confer power on some people—including in the form of augmenting their property values—at the expense of others.<sup>44</sup> It follows, according to Mulvaney, that if the government made different choices surrounding the content of property rights, those different choices would produce different property values and, thus, different distributions of the property tax revenues that

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37. *Id.* at 1317–22.

38. Timothy M. Mulvaney, *Beneath the Property Taxes Financing Education*, 123 *Colum. L. Rev.* 1325, 1326–27 & n.4 (2023).

39. *Id.* at 1339–44.

40. *Id.* at 1345–50.

41. *Id.* at 1350–52.

42. *Id.* at 1352–56.

43. *Id.* at 1357–58.

44. *Id.*

finance public education.<sup>45</sup> His thesis, then, is that critically evaluating the justice of the government's normative choices about property laws that influence property values should be part of the discourse about whether it is just, in a given jurisdiction, to tax those values to finance an essential public service like education.<sup>46</sup>

Building off a framework he crafted in a new article with Professor Joseph W. Singer,<sup>47</sup> Mulvaney brings to bear three norms that can serve as a helpful starting point in undertaking this evaluation: (i) sensitivity to the circumstances of how property law operates in a given community, rather than dependence on assumptions about “typical” communities;<sup>48</sup> (ii) acknowledgment of the current effects of both prior and present-day discriminatory practices surrounding property;<sup>49</sup> and (iii) attention to the ways that property laws exist not in isolation but are intricately integrated with each other.<sup>50</sup>

Centering as it does on deepening the discourse on the prospect of financing education through local property taxes, Mulvaney's piece does not undertake a comparative assessment of the justice of alternative education finance schemes. In this light, his Essay at least leaves open the possibility of a given jurisdiction maintaining a connection between property and education for school financing purposes under the right circumstances.<sup>51</sup>

In her Symposium Essay, though, Professor Nicole Stelle Garnett calls for a full-scale disassociation of the two in *Decoupling Property and Education*.<sup>52</sup> According to Garnett, offering families the opportunity to send their children to school outside the geographic area of their residence through various school choice programs advances urban economic development.<sup>53</sup>

Garnett first offers a helpful tour through the changing landscape of school choice options, ranging from open enrollment in public school districts to charter schools to private-school choice programs.<sup>54</sup> She has been a leading figure in the school choice literature for two decades,<sup>55</sup> and

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45. Id. at 1356.

46. Id. at 1328–29.

47. Timothy M. Mulvaney & Joseph William Singer, Essential Property, 107 Minn. L. Rev. 605 (2022).

48. Mulvaney, *supra* note 38, at 1358–61.

49. Id. at 1361–64.

50. Id. at 1364–65.

51. Id. at 1330–31.

52. Nicole Stelle Garnett, Decoupling Property and Education, 123 Colum. L. Rev. 1367, 1369 (2023) [hereinafter Garnett, Decoupling Property and Education].

53. Id.

54. Id. at 1374–83.

55. See Margaret F. Brinig & Nicole Stelle Garnett, Catholic Schools, Urban Neighborhoods, and Education Reform, 85 Notre Dame L. Rev. 887 (2010); Nicole Stelle Garnett, Are Charters Enough Choice?: School Choice and the Future of Catholic Schools,

she does not take this occasion to recount each and every aspect of what she describes as her “maximalist view” in favor of the types of universal school choice programs recently endorsed by the state legislatures in Arizona and West Virginia.<sup>56</sup> Instead, Garnett focuses here on three economic development advantages of school choice programs, each of which, she contends, will be more extensive the closer a school choice policy gets to universality.<sup>57</sup>

First, she points to reduced incentives for wealthy families in city centers to move out to the suburbs in pursuit of higher-performing schools for their children.<sup>58</sup> These families can, instead, stay put in their urban homes and have their children commute to wherever their preferred high-performing school is located. According to Garnett, cities’ retention of middle-class families in this manner is important in light of the fact that “overall resident wealth is one of the most important indicators of urban success.”<sup>59</sup>

Second, Garnett contends that school choice programs reduce the likelihood that Catholic schools in urban areas will close by “leveling the competitive playing field” between these tuition-driven private schools and tuition-free public district schools and charter schools.<sup>60</sup> This result, she suggests, would be advantageous economically for urban areas in light of what she sees as Catholic schools’ presence as “important, stabilizing community institutions.”<sup>61</sup> Further, Garnett contends that “poor, minority students” will be the primary beneficiaries of efforts to prevent the closure of Catholic schools in light of Catholic schools’ achievement successes across socioeconomic and racial groups.<sup>62</sup>

Third, she contends that school choice programs offer the promise of reducing inequality within metropolitan regions by removing barriers to

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87 Notre Dame L. Rev. 1891 (2012); Nicole Stelle Garnett, *Disparate Impact, School Closures, and Parental Choice*, 2014 U. Chi. Legal F. 289; Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 Vand. L. Rev. 1 (2017).

56. Garnett, *Decoupling Property and Education*, *supra* note 52, at 1369–71.

57. *Id.* at 1369.

58. *Id.* at 1388–90.

59. *Id.* at 1390.

60. *Id.* at 1369. “Universal parental-choice policies, which pair public-school-choice options with charter schools and private-school choice, reduce the sticker shock facing families who would choose to remain in urban neighborhoods if private schools were a realistic option.” *Id.* at 1398.

61. *Id.* at 1369, 1400–02 (citing Margaret F. Brinig & Nicole Stelle Garnett, *Lost Classroom, Lost Community: Catholic Schools’ Importance in Urban America 9–75* (2014)).

62. Garnett believes that Catholic schools’ achievement successes are a product of what she sees as their being “intentional communities with high levels of trust and social capital and high expectations for achievement for all community members, regardless of race or class.” *Id.* at 1399 n.179. She acknowledges, though, that others deem this “success” a result of selection bias. *Id.*

mobility within a given region.<sup>63</sup> In Garnett's view, concerns about maintaining school district quality often drive exclusionary zoning policies that have the effect of driving up housing prices and limiting supply.<sup>64</sup> With such zoning schemes in place, writes Garnett, lower-income residents are unable to secure affordable housing in communities with academically proficient public schools, "fuel[ing] economic and racial segregation."<sup>65</sup> De-linking educational opportunities from residential addresses will, in Garnett's view, disincentivize zoning policies that contribute to such invidious discrimination. Such a course, she asserts, is apt to decrease property values in academically higher-performing suburban areas and increase property values in academically lower-performing urban areas, thereby "weakening the residential stratification of the current public school system."<sup>66</sup>

Professor Yuvraj Joshi's Symposium contribution speaks to a distinct tool of stratification in the educational arena, one he calls the "weaponization of peace." In *Weaponizing Peace*, Joshi draws on both social movements and Supreme Court doctrine to recount claims that peace and harmony justify opposition to racial equality in education and beyond.<sup>67</sup> To Joshi, these appeals are "concerned only with the threat to peace posed by *changes to the status quo*, not with the threat to peace resulting from a *continuation of the status quo*."<sup>68</sup>

The matter of *Cooper v. Aaron* offers one of Joshi's many illustrations. The school board in Little Rock, Arkansas, had proposed a phased integration plan to comport with the Supreme Court's declaration in *Brown v. Board of Education* that racial segregation in public schools is unconstitutional.<sup>69</sup> When a local segregationist group helped to persuade Arkansas's governor to forgo implementing the plan for fear that it would instigate a "breach of the peace," President Dwight D. Eisenhower deployed federal troops to protect the Black students entering Little Rock's previously segregated schools.<sup>70</sup> Mississippi Senator John Stennis wrote to the President deploring the integration plan, asserting that it would eviscerate "generations of peaceful and harmonious cooperation

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63. Id. at 1402–06.

64. Id.

65. Id. at 1404 (internal quotation marks omitted) (quoting Jonathan Rothwell, Brookings Inst., *Housing Costs, Zoning, and Access to High-Scoring Schools 1–2* (2012), [https://www.brookings.edu/wp-content/uploads/2016/06/0419\\_school\\_inequality\\_rothwell.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/0419_school_inequality_rothwell.pdf) [<https://perma.cc/LD22-EUKJ>]).

66. Id. at 1406 (internal quotation marks omitted) (quoting María Marta Ferreyra, *Estimating the Effects of Private School Vouchers in Multidistrict Economies*, 97 *Am. Econ. Rev.* 789, 791 (2009)).

67. Yuvraj Joshi, *Weaponizing Peace*, 123 *Colum. L. Rev.* 1411, 1412 (2023).

68. Id. at 1421.

69. Id. at 1424–25.

70. Id. at 1425 (internal quotation marks omitted) (quoting Courts, 2 *Race Rels. L. Rep.* 931, 937 (1957) (reprinting Arkansas Governor Orval Faubus's proclamation)).

among the people of the two races.”<sup>71</sup> When the case made its way to the Supreme Court, the United States highlighted the fact that, of course, the Black children had not caused the unrest.<sup>72</sup> The Court ultimately agreed, rejecting, in Joshi’s words, “an exclusionary negative peace” that would result in the denial of a constitutional right to equality.<sup>73</sup>

Joshi describes how the tactics of the segregationists in *Cooper* are on display today in the form of opposition to antiracism education and racial inclusion in schools.<sup>74</sup> He describes how an Ohio law banning the teaching of “divisive . . . concepts” such as “intersectional theory” and “diversity, equity, and inclusion learning outcomes” gained traction through dominant groups’ press for “racial harmony.”<sup>75</sup> Similarly, he cites a Texas state legislator’s defense of the state’s anti-critical-race-theory law as fending off “lawlessness, violence, and destruction of private property” that was spawned by protests in support of racial justice.<sup>76</sup> Similar claims, Joshi notes, have been made in the run-up to the Supreme Court’s addressing two affirmative action cases in the current term.<sup>77</sup> Those opposed to affirmative action have deemed the practice “inherently divisive.”<sup>78</sup> According to Joshi, opposition to antiracism education and affirmative action programs allow current and future generations of students to ignore our Nation’s historical truths and dismiss the “salience of race and racism in people’s lives.”<sup>79</sup>

After critiquing these weaponizations of peace, Joshi sets out four questions to help us contemplate “more emancipatory understandings of peace.”<sup>80</sup> They include inquiries into whether a genuine threat to peace exists in a given context, the actual source of any extant unrest, the consequences of accepting claims of weaponized peace, and whether there are alternative claims to “an enduring, positive” peace that outweigh or override the dominant group’s claims to peace.<sup>81</sup> Joshi concludes that “[t]he American experience shows that conflict can be constructive and

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71. *Id.* (internal quotation marks omitted) (quoting Telegram from Senator John Stennis to President Dwight D. Eisenhower (Oct. 1, 1975) (on file with the *Columbia Law Review*)).

72. *Id.* at 1427.

73. *Id.* at 1426.

74. *Id.* at 1435–37.

75. *Id.* at 1441 (internal quotation marks omitted) (quoting H.B. 616, 134th Gen. Assemb., Reg. Sess. (Ohio 2022)).

76. *Id.* at 1442 (internal quotation marks omitted) (quoting Steve Toth, A Plea for Racial Harmony, Tex. Pub. Pol’y Found. (May 6, 2021), <https://www.texaspolicy.com/a-plea-for-racial-harmony/> [<https://perma.cc/948V-TE67>]).

77. *Id.*

78. *Id.* at 1443 (internal quotation marks omitted) (quoting Transcript of Oral Argument at 34, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 21-707 (U.S. Oct. 31, 2022)).

79. *Id.*

80. *Id.* at 1443–47.

81. *Id.* at 1444–46.



even necessary to the achievement of a more just society—and . . . not every peace is worth preserving.”<sup>82</sup>

### III. EDUCATIONAL RESOURCES

The Essays in this final Part present new lenses through which to view both the denial of education based on residency and the prospects of curricula to help students understand more about the communities in which they live.

In *Rethinking Education Theft*, Peter Yu applies insights from intellectual property (“IP”) law and human rights law to the debates about the relationship between property and education. He advocates broadening the discourse on “education theft,” which currently emphasizes residency-related infringements, to include a conversation on all forms of deprivation of educational opportunities, especially from members of marginalized and disadvantaged communities.<sup>83</sup> Yu describes how copyright and patent laws incentivize knowledge production, the creation of innovative materials, and the development of new technologies.<sup>84</sup> Yu argues, however, that IP laws also restrict access to these kinds of educational resources by allowing IP holders to charge exorbitant prices in a less-than-competitive space, making much of what IP law protects inaccessible and unaffordable to many districts and individuals alike.<sup>85</sup>

In questioning the commodification and propertization of education, Yu ultimately makes three interrelated points. First, he describes the poor fit between IP law and traditional property law and highlights how IP law in its current form threatens access to public education.<sup>86</sup> Second, he suggests that human rights norms regarding access to education can help us unpack the poorness of that fit and open new avenues for advocacy in the educational access space.<sup>87</sup> Third, Yu contends that an IP law reimaged through the lens of human rights law can shed further light on the follies of criminalizing violations of property-based rules, such as school district residency requirements.<sup>88</sup>

In their Essay, *Ethnic Studies as Anti-Segregation Work: Lessons From Stockton*, Professor Michelle Anderson and community activist Lange Luntao argue that ethnic studies curricula offer students and teachers an

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82. Id. at 1447–48.

83. Peter K. Yu, *Rethinking Education Theft Through the Lens of Intellectual Property and Human Rights*, 123 Colum. L. Rev. 1449, 1491–93 (2023).

84. Id. at 1451.

85. Id. at 1451–52, 1458–61.

86. Id. at 1454–64.

87. Id. at 1475–88.

88. Id. at 1493–99.

accurate history of the spaces they call home.<sup>89</sup> The Essay meditates on how an ethnic studies curriculum thrived in one of the most diverse cities in the nation: Stockton, California.<sup>90</sup>

Anderson and Luntao focus on the personal narratives of three Stocktonites, each of whom is a generational leader who shaped curricula in ways that reflect their own experiences.<sup>91</sup> These narratives show that ethnic studies can be part of a city's healing from past and present effects of racial segregation in housing and education.<sup>92</sup> Ethnic studies, that is, according to Anderson and Luntao, provide a lens through which students can see themselves and understand others.<sup>93</sup> This mirroring is particularly important in racial majority-minority districts, where students often cannot envision themselves in curricula.<sup>94</sup> Ethnic studies present a diverse set of authors and trailblazers, bringing to the classroom needed context and a rethinking of historical facts that affect these young people's lives.<sup>95</sup> While ethnic studies cannot, on their own, desegregate public schools, they can diversify the curriculum in ways that allow young people to better understand their own experiences.<sup>96</sup>

#### IV. CONCLUSION

The *boundaries* that characterize our district-based educational system are not the result of natural or market-generated processes but, rather, the history-laden product of the exercise of legal powers within the institution of property. And, indeed, drawing boundary lines is just one of the myriad property-related choices that impact the provision of education. As these choices structure the educational system that serves as the backbone of our social and economic lives, we must evaluate them against our contemporary understandings of what constitutes a *just* society. And, in important respects, the *resources* we dedicate to educational opportunities and delivery—be they financial, infrastructural, curricular, or otherwise—help shape that evaluation. A single symposium cannot possibly unpack every aspect of the stratifying challenges that plague public schooling in America; however, these frames—of *boundaries*, of *justice*, and of *resources*—and the contributions thereto that are presented in this collection of Essays offer an essential step toward an improved discourse on education moving forward.

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89. Lange Luntao & Michelle Wilde Anderson, *Ethnic Studies as Anti-Segregation Work: Lessons From Stockton*, 123 Colum. L. Rev. 1507, 1514–16 (2023).

90. *Id.* at 1511–12. California was the first state to require an ethnic studies course for high school graduation. *Id.* at 1510.

91. *Id.* at 1518–30.

92. *Id.* at 1531–32.

93. *Id.* at 1530–32.

94. *Id.*

95. *Id.* at 1511.

96. *Id.* at 1530–32.

# ESSAYS

## WHOSE CHILD IS THIS? EDUCATION, PROPERTY, AND BELONGING

*LaToya Baldwin Clark\**

*Previous work suggests that excludability is the main attribute of educational property and residence is the lynchpin of that exclusion. Once a child is non-excludable, the story goes, he should have complete access to the benefits of educational property. This Essay suggests a challenge to the idea that exclusion is the main attribute of educational property. By following four fictional children and their quests to own educational property in an affluent school district, this Essay argues that belonging, not exclusion, best encapsulates a child's ability to fully benefit from a school's educational property. Property as belonging involves a spatial relationship through which property claims are recognized and supported. In staking an unconditional claim for educational property, a child must be recognized as part of a group of entitled claimants and the property rules of the district must "hold up" that claim as legitimate. Simply because a child has a legal claim to access education does not mean that claim is equal to all other claims. Belonging helps us understand why some claims are accorded more security than others. The strength of a child's claim to educational property depends on the extent to which the child belongs, as measured by that child's proximity to the idealized bona fide resident.*

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\* Assistant Professor, University of California, Los Angeles, School of Law. Thank you to the participants of the Symposium for helpful discussion, Sunita Patel and Guy-Uriel Charles for valuable feedback, and the *Columbia Law Review* editors for their unending patience and support. William, Ahmir, Amina, and Ahmad: I am because you are. All mistakes are mine.

## INTRODUCTION

Imagine four children all living within the boundaries of or in proximity to Hidden Heights, a predominately White,<sup>1</sup> well-resourced school district sitting in a White, well-resourced municipality.<sup>2</sup> Students in Hidden Heights have access to many resources that characterize educational property, including a curriculum that builds their skills, cultural resources that prepare them for middle-class and affluent social life, and resources derived from well-connected social networks.<sup>3</sup> In this community and others like it, community members treat education as private property, a scarce resource deserving of protection like other forms of property. Because education is regarded as property, the community will encourage school officials to make it available only to those who deserve it (i.e., pay for it in property taxes and rent) and unavailable to all others without similar entitlements.

Our first child is Amanda, a White, middle-class girl who is typical of what school attendance laws consider a “bona fide resident.”<sup>4</sup> Amanda lives within the Hidden Heights boundaries with her archetypical family, including two parents, in a house they own.<sup>5</sup> She is the prototypical student for school attendance; because she is a bona fide resident, the district cannot exclude her from its schools<sup>6</sup> and may be obliged to protect her

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1. I choose to capitalize “White” when referring to the racial group. See LaToya Baldwin Clark, *Stealing Education*, 68 *UCLA L. Rev.* 566, 568 n.1 (2021) [hereinafter Baldwin Clark, *Stealing*] (“I believe that capitalizing ‘Black,’ . . . without also capitalizing ‘White’ normalizes Whiteness, while the proper noun usage of the word forces an understanding of ‘White’ as a social and political construct and social identity in line with the social and political construct and social identity of ‘Black.’”).

2. By focusing on a predominately White, well-resourced school district, I do not mean to make a normative claim that such schools are “better” than others. My claim is only that it is these school districts where claims to educational property may be most contested.

3. See LaToya Baldwin Clark, *Education as Property*, 105 *Va. L. Rev.* 397, 401 (2019) [hereinafter Baldwin Clark, *Property*] (“Children need access to social and cultural capital, resources not easily monetized but that educational researchers have shown are integral to success in the modern workplace.” (footnotes omitted)).

4. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973) (holding that schools can restrict education to only bona fide residents).

5. Most White children live in two-parent households, compared to less than 40% of Black children. See Paul Hemez & Chanell Washington, *Number of Children Living Only With Their Mothers Has Doubled in Past 50 Years*, Census Bureau (Apr. 12, 2021), <https://www.census.gov/library/stories/2021/04/number-of-children-living-only-with-their-mothers-has-doubled-in-past-50-years.html> [<https://perma.cc/Z572-GJNM>]. Middle-class children are much more likely to live with two married parents than relatively poorer children. See Richard V. Reeves & Christopher Pulliam, *Middle Class Marriage Is Declining, and Likely Deepening Inequality*, Brookings Inst. (Mar. 11, 2020), <https://www.brookings.edu/research/middle-class-marriage-is-declining-and-likely-deepening-inequality/> [<https://perma.cc/6QT2-VZGS>].

6. See Baldwin Clark, *Stealing*, *supra* note 1, at 590 n.105 (listing state statutes from thirty-three states that require districts to prioritize residents for enrollment); *id.* at 570 (“Only residence within a school district’s jurisdiction confers on a parent a ‘seat license’ unavailable to nonresident parents.”).

educational property by excluding others.<sup>7</sup> In other words, bona fide residents enjoy the right not to be excluded and the privilege of protection through the exclusion of others.

Our second child is Monica, a girl from a Black, working-class family who lives during the school week with her grandmother.<sup>8</sup> While her grandmother is a bona fide resident within the Hidden Heights boundaries, Monica may not be, despite her presence in the district on school days. School attendance laws tend to reject living situations like Monica's as indicative of bona fide residence, partly because most states require that a child's address for school attendance be that of their parents or guardians, regardless of the child's actual living situation.<sup>9</sup> If she is not found to be a bona fide resident, Hidden Heights can exclude her.

Our third child is Malcolm, a Black boy from a low-income family, who lives with his parents right outside the Hidden Heights boundaries in a community not as affluent, or as White, as Hidden Heights. Unlike Amanda and (arguably) Monica, he is not a bona fide resident, and Hidden Heights has no obligation to educate him. But Hidden Heights schools are among the best, and his parents want him to attend its schools. Because they are not residents, their (legitimate) options are few.<sup>10</sup> His parents' best option is to have Malcolm participate in an interdistrict transfer program<sup>11</sup> that breaks the tight connection between school attendance and residence. Available in most states, these programs allow students who do not live inside a district's boundaries to attend that school district's schools.<sup>12</sup> But his continued attendance is conditional and relies on considerations not applicable to resident students including academic and behavioral standards. Unlike bona fide resident children, Malcolm does not enjoy the unconditional right not to be excluded.

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7. See generally Baldwin Clark, Property, *supra* note 3, at 410 (describing how "officials treat education as property by allowing taxpayers to lawfully exclude others, particularly through the coercive machinery of civil and criminal penalties" (emphasis omitted)).

8. See LaToya Baldwin Clark, Family | Home | School, 117 Nw. U. L. Rev. 1, 29 (2022) [hereinafter Baldwin Clark, Family] (explaining how Black children are more likely than White children to be cared for through extended kin relationships, making it a common family form among Black families).

9. *Id.* at 14; see also *id.* at 9–19 (describing "the three components of school residency laws [that determine bona fide residency]: from whom a child's address derives, where a child can call an address a 'home,' and inquiries into why the caregiving adult established that address").

10. Some parents take the step of falsifying an address to afford a nonresident child an education in a district in which a child does not live. In previous work, I referred to this as "stealing" education. See generally Baldwin Clark, Stealing, *supra* note 1 (describing how some nonresident children attend schools by "stealing," or lying about their address to access school).

11. See Micah Ann Wixom, Educ. Comm'n of the States, Open Enrollment 1 (2019), <https://www.ecs.org/wp-content/uploads/Open-Enrollment.pdf> [https://perma.cc/9EXD-L2M3] (describing differences in open enrollment statutes for various states).

12. *Id.*

Our fourth child is Kyle, a middle-class Black boy with a disability who is a Hidden Heights bona fide resident. Like Amanda, his claim should be the most secure, and in some ways, it is. Before the mid-1970s, Kyle may not have had a right to attend school, even as a bona fide resident.<sup>13</sup> Today, federal law requires public schools to educate and accommodate children with disabilities.<sup>14</sup> But like many children with disabilities deemed incompatible with the general education classroom, Kyle spends much of his day in a segregated classroom, away from children who do not live with a disability.<sup>15</sup> Although every child with a disability is entitled to a free appropriate public education in the district in which they reside, the setting of that education need not be in the general education classroom, but only in the “least restrictive environment.”<sup>16</sup> As a result, he has little access to the general education curriculum and social experiences with general education students.

Amanda, Monica, Malcolm, and Kyle all have claims to enjoy the Hidden Heights educational property. Still, the bases for their claims, the possibility of success when those claims are challenged, and the overall security of their claims differ.

Amanda’s claim to education is one of unconditional ownership, access, and benefits available to her if she remains a bona fide resident. Monica’s claim to the educational property is more tenuous than Amanda’s, even though she lives in the same area during the days she

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13. See, e.g., Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400(c)(2) (2018) (explaining how prior to 1975, many children with disabilities were “excluded entirely from the public school system”).

14. Id. § 1412(a)(1) (requiring school districts to provide every child with a disability a free appropriate public education).

15. Approximately one-third of students with disabilities spend less than 80% of their school day in a general education classroom. Specifically,

[a]mong all school-age students served under IDEA, the percentage who spent 80 percent or more of their time in general classes in regular schools increased from 59 percent in fall 2009 to 66 percent in fall 2020.

In contrast, during the same period, the percentage of students who spent 40 to 79 percent of the school day in general classes decreased from 21 to 17 percent, and the percentage of students who spent less than 40 percent of their time in general classes decreased from 15 to 13 percent.

Nat’l Ctr. for Educ. Stat., Students with Disabilities, The Condition of Education 2022, <https://nces.ed.gov/programs/coe/indicator/cgg> [<https://perma.cc/56UA-C55U>] (last updated May 2022).

16. IDEA’s LRE mandate requires that schools,

[t]o the maximum extent appropriate, [ensure that] children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(5)(A).

attends school. Because Monica does not live within the district's boundaries 24/7, her family must jump through evidentiary hoops Amanda's family avoids, proving that Hidden Heights is her true "home" to continue to attend school.<sup>17</sup>

While Malcolm has access to the educational property when he receives permission to attend, his continued access as a nonresident is contingent; Hidden Heights decides the conditions under which it accepts nonresident students and can condition continuing attendance on academics and discipline.<sup>18</sup>

Lastly, Kyle should be most secure in non-excludability, as both a bona fide resident and a child with a disability who has a statutory right to be educated in the district in which he resides. But his access to the educational property, the resources contained in the school's walls, is limited; schools may use his disability label as a justification for his segregation, especially because he is a Black boy.<sup>19</sup>

These children's experiences, where they all have a legal claim to the educational property amassed in this district, complicate the story about education, property, and access. Legal entitlement or permission to attend school does not mean that one can fully benefit from a district's educational property. This Essay suggests that the differences in these children's claims to Hidden Heights educational property are not only about who cannot be excluded and who must be included. Instead, the children's stories illustrate relational positions in the space of the Hidden Heights school district and the extent to which law, policies, and practices support their claims. The students' access to educational property rises and falls on whether they "belong."

A focus on belonging encourages us to see property claims as relational and spatial.<sup>20</sup> Instead of focusing on the Subject and Object of property ("who" owns "what"), belonging attends to the *Space* in which property claims are asserted and the organizational and structural practices that support and legitimate, or undermine and delegitimize, those claims. Accessing educational property is not solely about the individual attributes of students making a claim, but also about the law, policies, and practices that define the space and render determinations about whose claims are legitimate—thus deserving of protection—and whose claims are not.

The degree of a child's belonging depends not only on the legal right to ownership or access but also on the social processes, structures, and networks that support those claims. We can harmonize Amanda's,

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17. See *infra* Part I.

18. See *infra* Part II (explaining how many districts impose academic and behavioral requirements on nonresident students as a condition of continued attendance).

19. See *infra* Part II.

20. See *infra* Part III.

Monica's, Malcolm's, and Kyle's seemingly divergent experiences by considering the extent to which the children belong.

Of course, residence plays an essential role in school attendance and access to educational property. Bona fide resident children are the privileged class with the most substantial claim not to be excluded. As argued below, Amanda is the ideal against which all the other children are judged.

This Essay proceeds as follows: Part I describes the conventional test for who gets to access a district's educational property. That test rises and falls on residency; thus, this Part focuses on Amanda's and Monica's disparate experiences in establishing bona fide residency, relating to family form and living arrangements. Part II describes circumstances in which nonresidents like Malcolm and bona fide resident children with disabilities like Kyle overcome exclusion to develop an inclusive right to educational property. Yet they experience that access very differently from prototypical Amanda.

Finally, Part III suggests how focusing on property as belonging complicates the story of education as property with the central characteristic of exclusion. To belong, the students need to show that not only do they (1) have a legal claim but also that (2) they are genuine members of the group that deserves the property and (3) the law, policies, and practices of the space support those claims. To conclude, this Essay suggests that thinking about access to educational property through the lens of belonging is particularly salient in the school context, in which belonging has long been considered critical to student academic and social success.

## I. EXCLUSION

Residency is, no doubt, the lynchpin of educational provision and educational exclusion. Becoming a bona fide resident—and proving it—is the first step families must take to enroll in a district's schools. When fictional Amanda's parents bought a home within the Hidden Heights boundaries and attempted to enroll Amanda in school, the district would have required them to produce multiple proofs of residency: utility bills, leases, mortgage documents, and driver's licenses, among others.<sup>21</sup> Amanda's parents can quickly meet that burden by providing a mortgage statement listing the parents' address. Those who have "bought in" have what may be considered a commonsense claim to ownership by the fact of purchase: "I bought this; it is mine," and the resulting, "You cannot come in or take advantage of it because you didn't pay for it."<sup>22</sup> Once she's

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21. See, e.g., Baldwin Clark, *Property*, *supra* note 3, at 404–05 (describing the potential documents a school can request to establish bona fide residency).

22. School district officials point to their responsibilities toward taxpayers who pay for the schools. See *id.* at 412 (describing how school officials see themselves as protecting taxpayers' funds by excluding students who are not bona fide residents).



established bona fide residence, the state will require Hidden Heights to prioritize her education and protect it from others.<sup>23</sup>

For some parents, like Amanda's, choosing a well-resourced school means choosing and living in a well-resourced neighborhood.<sup>24</sup> Parents with options adjust how much they are willing to pay for a home (or pay in rent) based on their assessment of the quality of the schools.<sup>25</sup> It is not hard to imagine which groups of students and their families tend to move into a district like Hidden Heights—those with the financial ability to do so. Unfortunately, race- and class-subordinated students and their families are at a grave disadvantage in the Hidden Heights housing market. Given differences in wealth<sup>26</sup> built on a foundation of past<sup>27</sup> and contemporary housing discrimination,<sup>28</sup> race- and class-subordinated groups will disproportionately lack the financial means to purchase a home or pay

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23. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973) (holding that schools can restrict education to only bona fide residents).

24. Elizabeth Warren & Amelia Warren Tyagi, *The Two-Income Trap: Why Middle-Class Parents Are (Still) Going Broke* 8 (2003) (arguing that middle-class parents' "most important possession" is a "house in a decent school district").

25. Shelley McDonough Kimelberg, *Middle-Class Parents, Risk, and Urban Public Schools*, in *Choosing Homes, Choosing Schools* 207, 207–10 (Annette Lareau & Kimberly Goyette eds., 2014) (exploring how middle-class families evaluate risk in choosing schools for their children as they purchase homes and how this evaluation changes depending on the type of school (elementary, middle, or high school) being considered).

26. See Ana Hernández Kent & Lowell R. Ricketts, *Racial and Ethnic Household Wealth Trends and Wealth Inequality*, Fed. Rsv. Bank of St. Louis (Nov. 29, 2022), <https://www.stlouisfed.org/institute-for-economic-equity/the-real-state-of-family-wealth/racial-and-ethnic-household-wealth> [<https://perma.cc/LQ4G-5P7W>] (reporting that in the second quarter of 2022, "Black families had about \$957,000 less wealth, on average, compared with white families, while Hispanic families had about \$982,000 less wealth, on average, than white families"); Joshua Holland, *The Average Black Family Would Need 228 Years to Build the Wealth of a White Family Today*, *Nation* (Aug. 8, 2016), <https://www.thenation.com/article/archive/the-average-black-family-would-need-228-years-to-build-the-wealth-of-a-white-family-today/> (on file with the *Columbia Law Review*) (discussing the role of current policy in maintaining and widening the wealth gap along racial lines, with particularly devastating implications for Black families who experienced three times less growth in wealth than the average White family between 1983 and 2013). See generally Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* (10th ed. 2006) (analyzing private wealth to understand the significant racial wealth gap between Black and White Americans and exploring the failure of public policy to remedy this deep economic inequality).

27. See generally Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) (discussing how federal, state, and local governments deliberately and systematically imposed and enforced residential segregation throughout the twentieth century and the contemporary implications of these policies and practices in places like Ferguson, Missouri, Baltimore, and Maryland).

28. See Elizabeth Korver-Glenn, *Compounding Inequalities: How Racial Stereotypes and Discrimination Accumulate Across the Stages of Housing Exchange*, 83 *Am. Socio. Rev.* 627, 630 (2018) (describing how racial stereotypes encourage inequality in housing at every step in the housing exchange to the disadvantage of non-White housing seekers).

high rents within the boundaries of a well-resourced school district like Hidden Heights.

Geography itself is race- and class-stratified not only due to private preferences in house buying but due to official acts of racism and neglect. The choice by Amanda's family to move to Hidden Heights is not solely of their own making; legal and extralegal forces like housing redlining<sup>29</sup> and White flight<sup>30</sup> have created separate and unequal school districts whereby wealthy and poor districts can exist side by side, separated only by a municipal border.<sup>31</sup> Those with means will (almost) always choose the affluent district.<sup>32</sup>

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29. Historically, "redlining" refers to the Federal Housing Administration's (FHA) practice of assigning colors to geographic zones that represented a risk profile for government mortgage loans. Rothstein, *supra* note 27, at 70–71, 85–86. Those areas with a greater proportion of Black and other non-White people were colored red, indicating those zones that the FHA deemed most risky for granting home loans. *Id.* Today, scholars and practitioners often use "redlining" to refer to all policies and practices of housing discrimination. See, e.g., Candace Jackson, *What Is Redlining?*, N.Y. Times (Aug. 17, 2021), <https://www.nytimes.com/2021/08/17/realestate/what-is-redlining.html> (on file with the *Columbia Law Review*) ("The term has come to mean racial discrimination of any kind in housing . . ."); Erik J. Martin, *What Is Redlining? A Look at the History of Racism in American Real Estate*, Bankrate (Feb. 8, 2023), <https://www.bankrate.com/mortgages/what-is-redlining/> [<https://perma.cc/7FWF-JF5C>] ("Technically, [redlining] refers to lending discrimination that bases decisions on a property's or individual's location, without regard to other characteristics or qualifications. In a larger sense, it refers to any form of racial discrimination related to real estate.").

30. "White flight" refers to the phenomenon by which the perceived "'invasion' of nonwhites quickly leads to the exodus and eventual 'succession' of whites in the creation of all- or predominately minority neighborhoods." Samuel H. Kye & Andrew Halpern-Manners, *Detecting "White Flight" in the Contemporary United States: A Multicomponent Approach*, 51 *Socio. Methods & Rsch.* 3, 4 (2022) (citations omitted). Scholars have pinpointed policies like the FHA's redlining that caused White flight by "claiming that a purchase by an African American in a white neighborhood, or the presence of African Americans in or near such a neighborhood, would cause the value of the white-owned properties to decline." See Rothstein, *supra* note 27, at 270–72.

31. See EdBuild, *Dismissed: America's Most Divisive School District Borders* (2019), <https://edbuild.org/content/dismissed/edbuild-dismissed-full-report-2019.pdf> [<https://perma.cc/3T2Q-KMVS>] (mapping adjacent school districts with distinct and significant differences in racial composition of the student body and school funding). See generally Amy Stuart Wells, Bianca Baldrige, Jacquelyn Duran, Richard Lofton, Allison Roda, Miya Warner, Terrenda White & Courtney Grzesikowski, *Why Boundaries Matter: A Study of Five Separate and Unequal Long Island School Districts* 8–11, 53 (2009), [http://www.longislandindex.org/wp-content/uploads/2015/10/Why\\_Boundaries\\_Matter\\_Final\\_100209.pdf](http://www.longislandindex.org/wp-content/uploads/2015/10/Why_Boundaries_Matter_Final_100209.pdf) [<https://perma.cc/S2H8-Y74B>] (examining segregated and unequal school districts on Long Island and their impact on students, educators, and parents).

32. While she was referring to schools within the public school system, MacArthur Fellow and Pulitzer Prize winner Nikole Hannah-Jones describes why she chose to keep her child in a "lower performing" school despite her ability to choose elsewhere. See Nikole Hannah-Jones, *Choosing a School for My Daughter in a Segregated City*, N.Y. Times (June 9, 2016), <https://www.nytimes.com/2016/06/12/magazine/choosing-a-school-for-my-daughter-in-a-segregated-city.html> (on file with the *Columbia Law Review*).

One basis for exclusion based on residency is purely financial. Taxes on real property constitute 37% of all educational revenue nationally,<sup>33</sup> a significant portion of school revenues and thus spending. Districts in property-rich municipalities will be able to fund their public schools adequately and spend more per student than property-poor districts.<sup>34</sup> While states have striven to equalize funding within their states, the mix of federal, state, and local financing varies significantly by district. Property-tax revenue may be the primary source of school funding in the most affluent districts.<sup>35</sup>

The relationship between education, property, and geography, from where a child lives to how that child's schooling is funded, incentivizes officials in districts like Hidden Heights to aggressively enforce exclusionary residency laws to protect taxpayers.<sup>36</sup> Unauthorized attendance by a child that does not reside within the school's boundaries may be treated as "stealing."<sup>37</sup> Taxpayers and community members may support this aggressive enforcement, arguing that those families who "steal" benefit from something they did not pay for.<sup>38</sup>

To bolster the financial incentives to exclude, many states allow school districts to inflict fines on nonresidents and sue families for back public school "tuition"<sup>39</sup> to compensate the taxpayers. In addition, many states allow for criminal prosecution,<sup>40</sup> sometimes for felonies,<sup>41</sup> to deter

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33. See Nat'l Ctr. for Educ. Stat., Public School Revenue Sources, The Condition of Education 2022, <https://nces.ed.gov/programs/coe/indicator/cma/public-school-revenue> [<https://perma.cc/EC6K-BRJG>] (last updated May 2022) ("In school year 2018-19, elementary and secondary public school revenues totaled \$795 billion in constant 2020-21 dollars. Of this total, 8 percent, or \$63 billion, were from federal sources. Some 47 percent, or \$371 billion, were from state sources and 45 percent, or \$361 billion, were from local sources." (footnotes omitted)).

34. West Ed, From Equity to Adequacy: School Funding 4-5 (2000), [https://www.wested.org/www-static/online\\_pubs/po-00-03.pdf](https://www.wested.org/www-static/online_pubs/po-00-03.pdf) [<https://perma.cc/W898-WTZ3>] (explaining why funding adequacy is a better goal than funding equity).

35. Baldwin Clark, Stealing, *supra* note 1, at 622 (describing how in one affluent district, property tax revenue made up 80% of funding, while a neighboring district derived only 55% of its funding from property taxes).

36. Baldwin Clark, Property, *supra* note 3, at 413 (explaining that school officials conceive of education as an exclusive right of those who pay property taxes in that school district, and therefore believe that enforcing residential status requirements for attending taxpayer-funded schools is in taxpayers' best interest).

37. See generally Baldwin Clark, Stealing, *supra* note 1.

38. See, e.g., *id.* at 412 (quoting a school district official justifying enforcement of residency laws as asserting that "[w]e are responsible to the Board of Education and the Fair Lawn tax-payers to ensure only current residents of our district attend our schools" and that "[n]on-residents who fraudulently attend . . . reduce the number of resources available to the Fair Lawn children" (emphasis omitted)).

39. See Grace Chen, Tuition for Public Schools? Some Districts are Saying Yes, Pub. Sch. Rev., <https://www.publicschoolreview.com/blog/tuition-for-public-schools-some-districts-are-saying-yes> [<https://perma.cc/FZ2F-WSCV>] (last updated Nov. 18, 2019).

40. Baldwin Clark, Stealing, *supra* note 1, at 593.

41. *Id.* at 594 n.136.

nonresident unauthorized attendance.<sup>42</sup> Of course, this monetary and criminal enforcement structure imposes an additional class-based barrier to attending a well-resourced public school. It is conceivable that an affluent family could live outside the district, perhaps in a cheaper area, and choose to pay tuition for their child to attend the preferred school district's schools. But the ability to pay tuition as an option to attend a public school condemns relatively poorer families who cannot move into a district for schools or afford nonresident tuition.<sup>43</sup>

But establishing residency is not nearly as straightforward as Amanda's story suggests. Sometimes states' bona fide residence laws may systematically exclude some residents by claiming that they are not *bona fide* residents to attend school.

When a family's form and function differ from the archetype of the White, middle-class, two-parent household, establishing bona fide residence is complicated. When a child's claim to bona fide resident status is challenged, that family must jump through three evidentiary hoops. To judge bona fide residence, schools interrogate with whom a child lives, where that child calls home, and why the family lives in the district.<sup>44</sup> These laws are not neutral; they standardize what a family looks like and how family functions.<sup>45</sup>

First, residency laws assume children's residences to be those of their parents, regardless of their actual living circumstances.<sup>46</sup> Yet many families, especially racially subordinated families, care for children in extended kin networks, an informal configuration whereby different family members care for children's diverse needs.<sup>47</sup> Monica's family functions this way—she lives with her grandmother during the week when she attends school.

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42. *Id.* at 593 (describing an Illinois law that allows for criminal convictions for unauthorized attendance, described by an official as a “weapon” and “the teeth of a tiger”).

43. *Id.* at 622 (describing how tuition in one district may be higher than tuition in another district if the tuition is pegged to the per-pupil spending derived from property taxes).

44. See generally Baldwin Clark, *Family*, *supra* note 8, at 5 (noting that schools tend to evaluate residency based on the location of the parents, whether that location is in fact a “home,” and whether the parents actually live in the home for reasons other than establishing residency for school eligibility purposes).

45. This is concerning because families are thought to perform a private welfare function, where families are tasked with caring for each other to reduce reliance on public assistance. See Courtney G. Joslin, *Family Support and Supporting Families*, 68 *Vand. L. Rev. En Banc* 153, 168 (2015) (describing how governments provide benefits for families because they serve a private welfare function by “minimizing reliance on state and federal coffers” (internal quotation marks omitted) (quoting Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 *Vand. L. Rev.* 1835, 1866–67 (2014))).

46. See Baldwin Clark, *Family*, *supra* note 8, at 13 n.61.

47. See generally Carol Stack, *All Our Kin* (1974) (documenting the social networks within socioeconomically disadvantaged and minority communities and concluding that extended family and social ties resulted in strong social networks, including in childcare contexts).

She sleeps there, wakes up in the morning there, and returns from school to that home in the district.

Second, and relatedly, bona fide residence laws require parents to establish one and only one “home” where one (and preferably two) adults care for all her needs.<sup>48</sup> But children like Monica may call multiple locations “home” because “home” is where she is cared for. She is at home with her grandmother. She is at home in the space she shares with her parents on the weekends. She is at home in multiple places.<sup>49</sup>

Lastly, attendance laws require that adults establish a child’s residence for any reason other than solely to attend school.<sup>50</sup> This requirement specifically disadvantages families like Monica’s—she would not deny that she lives with her grandmother to attend school. But her family’s choice may not be good enough for school attendance, even though race- and class-privileged families routinely choose where to live based on their preferences for where their children should attend school.<sup>51</sup> Monica’s family’s choice to spread care across multiple sites is not recognized as legitimate.

In sum, despite her living arrangement with a bona fide resident, for Monica to claim educational property, her family must clear evidentiary hurdles not required of families like Amanda’s. Laws impose a norm of home-making that is unrealistic, perhaps undesirable, for many families and disproportionately impacts race- and class-subordinated children. For if Monica is unable to satisfy the residence laws, she may be treated as a nonresident even though she is present in the district five days a week. Her claim to educational property in the place she lives is suspicious.

## II. INCLUSION

While residency is often the lynchpin of school attendance and, in turn, access to a district’s educational property, school districts routinely enroll nonresident students. If Hidden Heights agrees, Malcolm, our Black boy who lives outside of the Hidden Heights boundaries, can access the schools by participating in an interdistrict transfer program, granting him a seat in the district’s schools and presumably access to educational property. In theory, these programs break the official correspondence between school attendance and bona fide residence. In doing so, these programs have the power to disrupt patterns of race- and class-based residential segregation that tends to keep schools looking like the neighborhoods surrounding them.<sup>52</sup> Once a school district chooses to

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48. Baldwin Clark, Family, *supra* note 8, at 14.

49. See *id.* at 32.

50. *Id.* at 16 (noting that residing in a school district only for the purpose of attending public school in that district is insufficient to qualify for residency for school purposes).

51. See *id.* at 26.

52. Because most children attend schools in their neighborhood, the demographics of the schools often closely mirror the demographics of the neighborhoods in which they sit.

enroll nonresident students, it assumes the legal obligation to educate that child. In other words, that permission means that the child cannot be excluded; the district should include that child as it would a bona fide resident.

Except that districts that accept nonresident students need not be so equitable. Nonresident inclusion can be contingent and conditional, separating nonresident students from resident students. While almost all fifty states have some form of attendance transfer provisions within their education statutes, in many states, these are voluntary plans; schools and districts *may* consider nonresident students for enrollment, but they are not required to do so.<sup>53</sup> And even when a district like Hidden Heights participates in an interdistrict transfer program, it does not have to allow nonresident students to enroll. Furthermore, it need not continue to enroll a nonresident child if that student fails to meet academic and behavioral standards, standards not applicable to bona fide resident students.<sup>54</sup>

School districts may condition nonresident attendance in three ways. First, districts must determine how many seats are available in each school while adhering to state-defined class size requirements.<sup>55</sup> When a school has empty seats, it can enroll additional students. Second, schools prioritize filling those seats with bona fide resident children living in the district whose addresses fall outside a school's catchment area.<sup>56</sup> At the most desirable schools in a district, prioritizing bona fide, in-district students may prevent nonresidents like Malcolm from attending a particular school due to space.

Third, even when a nonresident child, such as Malcolm, secures a seat in a school, that child's nonresident status follows him into school. Schools

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See Laura Meckler & Kate Rabinowitz, *The Changing Face of School Integration*, Wash. Post (Sept. 12, 2019), <https://www.washingtonpost.com/education/2019/09/12/more-students-are-going-school-with-children-different-races-schools-big-cities-remain-deeply-segregated/> (on file with the *Columbia Law Review*) (“In highly integrated districts, individual schools most closely reflect the demographics of the district as a whole. In districts that are not integrated, some schools are dominated by one race and others by another. The somewhat integrated districts are in between.”).

53. Wixom, *supra* note 11, at 1.

54. See, e.g., Santa Clara Unified Sch. Dist., *Inter-District Attendance Transfer Request Form* (2020), <https://www.santaclarausd.org/cms/lib/CA49000000/Centricity/Shared//Enrollmet/2020%20Interdistrict%20Transfer%20Form.pdf> [<https://perma.cc/D6WY-CT95>] (last visited Mar. 13, 2023) (specifying that interdistrict transfers “may be revoked at any time that the pupil’s attendance, citizenship, or scholarship is no longer satisfactory to the school and district of attendance”).

55. See, e.g., Cal. Educ. Code §§ 41276, 41378 (2021) (prescribing the maximum class sizes and penalties for those districts with classes that exceed the class size limits established in 1964).

56. See, for example, *id.* § 35160.5(b), which “permits parents to indicate a preference for the school which their child will attend, irrespective of the child’s place of residence within the district, and requires the district to honor this parental preference if the school has sufficient capacity without displacing other currently enrolled students.”

may hold nonresident transfer children to higher academic and behavioral standards than they apply to bona fide resident children.<sup>57</sup> These standards may systematically allow a district to expel students just like Malcolm. Black children are more likely to experience gaps in opportunities to learn and face disproportionate discipline. Indeed, the fact of his Blackness may generate systemic exclusion; heightened requirements schools impose on Black children allow those districts to nominally enroll a child but make it difficult for that child to remain enrolled. Stratified access to learning opportunities and severe discipline practices will tend to frustrate Black children's efforts to meet those expectations, which, again, are not imposed on bona fide resident children.

Despite these contingencies, Malcolm's claim to access is more secure than "stealing" education. But he is not equal to the bona fide residents who attend the district's schools. He is not treated like a bona fide resident, which restricts his ability to fully enjoy and benefit from the district's educational property. Far from treating interdistrict transfer students as non-excludable, districts routinely enact policies and procedures that allow them to revoke those students' permission to attend school. Malcolm's nonresident status and the school's treatment of his Blackness position his claim far from the Amanda ideal.

Lastly, recall Kyle, our Black boy with a disability<sup>58</sup> who is a bona fide resident. As a bona fide resident like Amanda, Hidden Heights must educate him; he cannot be excluded from entering the door. Furthermore, federal law requires districts that receive federal money to provide every child with a disability a "free appropriate public education."<sup>59</sup> Federal law also requires that schools provide that education in the "least restrictive environment" (LRE), generally meaning students with disabilities must be inside a general education classroom with peers who do not live with a disability as much as possible.<sup>60</sup>

The LRE requirement seeks to address the pervasive problem of in-school segregation based on disability, whereby children with disabilities are let into the building but separated from their peers without identified disabilities.<sup>61</sup> The contemporary "inclusion" movement seeks to make LRE

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57. See Santa Clara Unified Sch. Dist., *supra* note 54.

58. In this Essay, I am assuming that Kyle has a disability that impairs his access to the general education curriculum without accommodation and support. The issue of which label applies in this context is different from the concern of Black children being labeled as disabled when they are in fact not.

59. See 34 C.F.R. § 300.101 (2017) ("Each State must ensure that [free appropriate public education] is available to any individual child with a disability who needs special education and related services.").

60. See 20 U.S.C. § 1412(5)(A) (2018).

61. Nat'l Council on Disability, IDEA Series: The Segregation of Students with Disabilities 13 (2018), [https://ncd.gov/sites/default/files/NCD\\_Segregation-SWD\\_508.pdf](https://ncd.gov/sites/default/files/NCD_Segregation-SWD_508.pdf) [<https://perma.cc/MJ7Q-8ZYZ>].

a reality for every child with a disability, pressuring schools to see children with disabilities as first and foremost general education students who require special education accommodations. Inclusion “involves supporting students with disabilities through individual learning goals, accommodations, and modifications so that they are able to access the general education curriculum (in the general education classroom) and be held to the same high expectations as their peers.”<sup>62</sup> In other words, the inclusion model rejects special education as distinct from general education. For a child with a disability to be included, he must have more than a seat in the school; the school must incorporate him in all aspects of the general education experience.<sup>63</sup>

While school districts struggle with providing inclusion for all disabilities, they have shown particular challenges with including children with the most stigmatized disabilities.<sup>64</sup> Children labeled as having an “intellectual disability”<sup>65</sup> or experiencing “emotional disturbance”<sup>66</sup> are the least likely to be integrated into the general education experience than children labeled with other disabilities. These labels that question a child’s intellectual capabilities and ability to emotionally regulate tend to provoke the greatest reluctance to place those children in general education classrooms.<sup>67</sup> Furthermore, Black children like Kyle are disproportionately branded with these labels and thus disproportionately experience segregation within their schools.<sup>68</sup> Educated in a separate classroom, Kyle will not receive equal access to the general education curriculum,<sup>69</sup> hindering his academic success. His lack of meaningful engagement with children who do not live with disabilities may impede his social and

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62. What Is Inclusion and Why Is It Important?, Iris Ctr., <https://iris.peabody.vanderbilt.edu/module/inc/cresource/q1/p01/> [<https://perma.cc/Q26D-X88X>] (last visited Feb. 5, 2023).

63. Jan Doolittle Wilson, *Reimagining Disability and Inclusive Education Through Universal Design for Learning*, *Disabilities Stud. Q.*, Spring 2017, at 1, 3 (describing how proponents of inclusion argue that children are entitled to every aspect of the educational experience).

64. LaToya Baldwin Clark, *Beyond Bias: Cultural Capital in Anti-Discrimination Law*, 53 *Harv. C.R.-C.L. L. Rev.* 381, 401 (2018) [hereinafter Baldwin Clark, *Beyond Bias*].

65. 34 C.F.R. § 300.8 (2021) (defining “intellectual disability” as a “significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child’s educational performance”).

66. *Id.* § 300.8(c)(4)(i) (defining “emotional disturbance” as a catch-all category for a student with what may colloquially be called “difficult” behaviors that are not explained by other disabilities).

67. Baldwin Clark, *Beyond Bias*, supra note 64, at 401.

68. *Id.* at 383.

69. See LaToya Baldwin Clark, *The Problem with Participation*, 9 *Mod. Am.*, no. 1, 2013, at 20, 20 (explaining that the impact of placement in “special day classes” is particularly damaging for Black children, as seen through statistics showing that more of these students “drop out of school altogether than receive a regular diploma”).



behavioral success.<sup>70</sup> Indeed, Black boys labeled as intellectually inferior and behaviorally uncontrollable are likely to fall behind academically in school and even drop out.<sup>71</sup> Thus while state general education laws require districts to educate bona fide residents, practices that exclude children with disabilities mean that schools may deny even bona fide residents complete access to the educational property of the district.

The children's experiences recounted above illustrate that while "residence" is crucial in understanding educational access, residence alone does not explain the divergent struggle to obtain the full benefits of a district's educational property. Instead, as the next Part argues, the key to unlocking educational property is not residence per se but the extent of one's proximity to the ideal bona fide resident that signals belonging.

### III. BELONGING

How can we harmonize these children's experiences as they attempt to claim an entitlement to educational property? All four have a legal entitlement to attend Hidden Heights schools, but only Amanda's claim is unconditional and secure.

This Part suggests that access to a district's educational property is not solely based on residence but on belonging. To belong is for others to recognize that you are "meant 'to be' in a place";<sup>72</sup> in schools, bona fide residency is a proxy for that belonging. Belonging describes not only the entitlement to property but also the relationship of an individual claiming property to the space and others in that space, as well as the legal and organizational practices that support or fail to support that claim.

Belonging is a "relationship of connection, of part to whole."<sup>73</sup> Conceptualizing property as belonging shifts the focus from the individual subject and the thing to be owned to the space and network of relationships where the claim to ownership is made, supported, and legitimated. Property and belonging center not only the legal entitlement but the spaces in which practices that support that entitlement occur.

Belonging has three components: the "subject-object" relationship, the "part-whole" relationship, and the extent to which the space "holds up" those relationships.<sup>74</sup> The "subject-object" relationship, which is the conventional orientation toward property, says that Subject Y has a claim

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70. *Id.*

71. *Id.*

72. See Kathleen Mee & Sarah Wright, *Geographies of Belonging*, 41 *Env't & Plan. A: Econ. & Space* 772, 772 (2009).

73. Davina Cooper, *Opening Up Ownership: Community Belonging, Belongings, and the Productive Life of Property*, 32 *Law & Soc. Inquiry* 625, 629 (2007).

74. Sarah Keenan, *Subversive Property: Reshaping Malleable Spaces of Belonging*, 19 *Soc. & Legal Stud.* 423, 426 (2010) ("Theorizing property in terms of belonging rather than exclusion shifts the focus away from the subject and onto the broader spaces, relations and networks that constitute property.").

to Object X.<sup>75</sup> The “part-whole” relationship refers to the Subject’s positionality in a network of relations: the extent to which the Subject is part of the group of persons that lay legitimate claims to Object X.<sup>76</sup> “Holding up” involves routinized practices that structure the relationship between the Subject, the Object, and the Space.<sup>77</sup> In particular, when an individual is not Part of the Whole, and the routines and practices of the Space question her claims, her claim to belonging is strained, and so too is her claim to the property.

Belonging helps to unpack why Monica’s claim to the educational property is contested; attendance laws question whether she belongs to the group with unconditional access because her family form differs from the archetypical resident child. Belonging affects Malcolm because he is not a bona fide resident and thus clearly not a part of the whole which is entitled; the law, policies, and practices place conditions on his claims and exclude him if he fails to live up to the standards applied only to him. And while Kyle is a bona fide resident, through law and practice his status as a child with a disability marks him as the “other,”<sup>78</sup> not a part of the whole, and not entitled to all benefits afforded to other bona fide residents, those without disabilities.

Understanding property through the lens of belonging is particularly central to explaining the children’s experience because this framework centers the Space in which claims are made. Crucially, Space is not merely the backdrop to claims-making. Instead, “space is part of that action,”<sup>79</sup> created and changed by the law, practices, and policies that set the rules of engagement. The Space in which school attendance is policed is far from static; schooling itself is tied to race, class, and geography—all three themselves malleable and unstable.<sup>80</sup>

Belonging facilitates Amanda’s ease in claiming educational property; she is the prototype by which all other educational claims are made. Amanda has a legal claim to education by virtue of her geographic relationship to the school district (“subject-object”). She is also a bona fide resident, meaning she is a member of a networked community that, generally, cannot be excluded (“part-whole”). And practices of the school

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75. See *id.*

76. See *id.*

77. *Id.* (“In order to constitute property, that set of networked relations must not only include one of belonging between either subject and object or part and whole, but must also be structured in such a way that that relation is recognized and respected, or ‘held up’ by the surrounding space.”).

78. Joan Susman, *Disability, Stigma and Deviance*, 38 *Soc. Sci. & Med.* 15 (1994) (describing how people with disabilities both are seen as deviant (negatively different) and experience stigma (adverse response)).

79. Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* 7–8 (2015).

80. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *Harv. L. Rev.* 1841, 1845 (1994) (discussing how race and class are intrinsically tied to geography in the United States).

district “hold up” her claim. As a White middle-class girl in a predominately White school, she is not likely to be questioned or surveilled about her residence once her family provides a mortgage statement. Her race and class additionally establish her as an inconspicuous member of the community, clearly part of the whole who is entitled to benefit from education.

Understanding Amanda’s claim as the prototype of belonging shows how the other children’s claims lack security. For example, take Monica’s claim. If she is found to be a bona fide resident, then Hidden Heights cannot exclude her. But she will struggle to prove that relationship. Her family form, common in Black families<sup>81</sup> and other racially subordinated groups, distinguishes her from the whole of which she seeks to be a part. Monica’s claim, while it should legally be as strong as Amanda’s, in practice, is not. The law of the Space requires her to prove her bona fides because her family deviates from the archetypal norm.

Monica’s experience establishing bona fide residency illustrates how belonging is “deeply intertwined with societal hierarchies of power” and “is deeply political and racialized.”<sup>82</sup> Her family form invites suspicion about residence not simply because of the arrangement but also because this non-archetypal family form has long been associated with Black mother heads of household. Adaptive family forms that feature single Black mothers are perpetually demonized and used to prove how different Black people are from others. The infamous Moynihan Report blamed Black economic and cultural inferiority on Black-single-mother-headed households.<sup>83</sup> Bill Clinton championed welfare reform in so-called “welfare-to-work” legislation; Black single mothers flanked him as he signed the bill, suggesting the critical demographic targeted were “welfare queens.”<sup>84</sup>

In addition, Monica is conspicuously a racial other, inviting speculation as to whether she “truly” is a bona fide resident, a part of the whole. Her claim may not be “held up” even with a legal entitlement because the practices and routines for determining bona fide residence systematically create suspicion as to whether she belongs.

Belonging helps us understand Malcolm’s tenuous claim to a Hidden Heights education. Even if he establishes a legitimate subject–object claim to education by gaining permission to attend the district’s schools, his nonresident identity follows him into the district. Nonresidents like

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81. Baldwin Clark, Family, *supra* note 8, at 29 (describing how Black families, beginning in slavery and into the present, use kinship care as a fully functioning adaptation to the family-breaking structures of racial inequality).

82. Mariana Souto-Manning, On the Abolition of Belonging as Property: Toward Justice for Immigrant Children of Color, *Urb. Educ. OnlineFirst*, at 2 (2021), <https://doi.org/10.1177/00420859211017967> [<https://perma.cc/CDQ6-GH8M>].

83. Daniel Moynihan, *The Negro Family: The Case for National Action* 9–12 (1965).

84. N.Y. Times, *Welfare and the Politics of Poverty*, YouTube, at 3:55 (June 7, 2016), [https://www.youtube.com/watch?v=Y9lfuqqNA\\_g](https://www.youtube.com/watch?v=Y9lfuqqNA_g) (on file with the *Columbia Law Review*).

Malcolm are the last to be considered for attendance, and districts may hold nonresident students to academic and behavioral standards that do not apply to resident students. Resident students can continually fail or engage in discipline-worthy behaviors but still not be excludable.<sup>85</sup>

Furthermore, as discussed above, as a Black boy, these conditions place Malcolm at a further disadvantage in claiming belonging. His claim is not held up not only because he is not a bona fide resident but also because he is a Black boy in a predominately White school district, already subjected to subordinating practices that restrict access to educational property.

His experience in school might be tarred by well-documented race- and gender-based academic opportunity<sup>86</sup> and discipline gaps.<sup>87</sup> Black boys tend to have lower reading proficiency by the third grade,<sup>88</sup> resulting in future denials of learning opportunities. Children who are not proficient readers by third grade struggle to keep up in school and often drop out altogether.<sup>89</sup> He may also face disproportionate discipline; Black boys

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85. For example, Marin County in Northern California requires parents and students attending school pursuant to the district grant of a transfer to agree that the student must “[d]emonstrate positive, productive behavior in classes and school activities while on school grounds, while going to or coming from school, during the lunch period, whether on or off campus, and during or while going to or from a school-sponsored activity, with no more than two office referrals of detentions.” Mary Jane Burke, Marin Cnty. Superintendent of Schs., Interdistrict Attendance Transfers: Procedural Guidelines 36, [https://www.marinschools.org/cms/lib/CA01001323/Centricity/Domain/113/InterdistrictTransfer\\_12062022.pdf](https://www.marinschools.org/cms/lib/CA01001323/Centricity/Domain/113/InterdistrictTransfer_12062022.pdf) [<https://perma.cc/TH2X-V6JW>] (last updated Dec. 6, 2022). Bona fide resident students do not face the prospect of not being able to attend their school due to detention.

86. Educational scholarship refers to “opportunity gaps” instead of “achievement gaps” to highlight the ways in which children’s opportunities to learn are stratified by social identities such that some identities are seen as lacking “achievement” when the true issue is that some groups do not have equal opportunities to achieve. See generally Kevin G. Welner & Prudence L. Carter, *Achievement Gaps Arise From Opportunity Gaps*, in *Closing the Opportunity Gap: What America Must Do to Give Every Child an Even Chance* 1, 1–10 (Prudence L. Carter & Kevin G. Welner eds., 2003).

87. The “discipline gap” refers to the phenomenon that Black children and especially Black boys are punished more often than other children. See generally Daniel Losen, Cheri Hodson, Michael A. Keith II, Katrina Morrison & Shakti Belway, *Are We Closing the School Discipline Gap?* (2015), [https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap\\_FINAL221.pdf](https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf) [<https://perma.cc/4X6Q-P3TY>]; U.S. Dep’t of Educ., Off. for C.R., *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017–18 School Years* (2021), <https://ocrdata.ed.gov/assets/downloads/crdc-exclusionary-school-discipline.pdf> [<https://perma.cc/A4GX-M5DJ>] (showing how Black children at all levels of school are more likely to be disciplined than other children).

88. *Students Who Don’t Read Well in Third Grade Are More Likely to Drop Out or Fail to Finish High School*, Annie E. Casey Found. (Apr. 8, 2011), <https://www.aecf.org/blog/poverty-puts-struggling-readers-in-double-jeopardy-minorities-most-at-risk> [<https://perma.cc/8G8A-576U>].

89. *Id.*

experience the highest discipline rates among public school children.<sup>90</sup> These heightened academic and behavioral requirements for interdistrict transfers stack the deck against nonresident Black children who wish to remain enrolled in a district's schools. In this way, not only is Malcolm not part of the whole of "residents," but he's also not part of the race-class ideal typified by children like Amanda. In this space, he does not belong.

Even though he is a bona fide resident, Kyle will also struggle with belonging. His claim should be as strong as Amanda's because his bona fide resident status marks him as a part of the whole which cannot be excluded from school. Indeed, his claim should be even more secure because the school space should "hold up" that claim; remember, he has a federal statutory right to receive a free appropriate public education in the least restrictive environment in his district of residence. But other practices that serve to segregate and deny access to the general education curriculum undermine, rather than support, his claim.

His status as a child with a disability categorically sets him apart from his classmates. His entitlement to LRE is only "[t]o the maximum extent appropriate."<sup>91</sup> Children ostensibly cannot be excluded from the general education classroom unless "the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."<sup>92</sup> In other words, Kyle's access to the general education curriculum is conditional on evaluations of his compatibility with the general education classroom—that is, whether he belongs.<sup>93</sup>

Like Malcolm, Kyle's race and gender are additional markers of non-belonging. Kyle is more likely than White children to be labeled with intellectual or behavioral disabilities, the categories that also have the lowest rates of incorporation into general education classrooms.<sup>94</sup> Black boys like Kyle, who may be labeled as such, get very little access to the general education curriculum, are segregated for long periods of their days, and face disciplinary actions at rates far greater than their general education peers.<sup>95</sup> Kyle, by nature of his race and disability status, deviates

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90. While Black children make up less than 15% of all public school students, in the 2017–2018 school year, Black children made up 34% of all students receiving one out-of-school suspension, almost 45% of all students receiving more than one out-of-school suspension, and 37% of all students expelled. U.S. Dep't of Educ., Off. for C.R., Civil Rights Data Collection, 2017–2018 State and National Estimations: Discipline, <https://ocrdata.ed.gov/estimations/2017-2018> (on file with the *Columbia Law Review*) (last visited Feb. 14, 2023).

91. 20 U.S.C. § 1412(5)(A) (2018).

92. *Id.*

93. See Mitchell Yell, *Least Restrictive Environment, Inclusion, and Students with Disabilities*, 28 *J. Special Educ.* 389, 402 (1995) (explaining the legal parameters for school districts to exercise their discretion in determining a child's educational setting).

94. See *supra* notes 65–70 and accompanying text.

95. See *supra* notes 65–70 and accompanying text.

from the ideal of the middle-class White (and presumably non-disabled) child like Amanda, even as a bona fide resident.

In sum, while residence is the lynchpin of school entitlements, some bona fide residents, because of factors like family form and disability status, do not enjoy an unqualified right to educational property. They should be part of the whole, but their deviation from the ideal sets them apart. Furthermore, school and district policies and practices make it difficult for these children to claim to belong by imposing evidentiary barriers and conditioning access on compatibility. And although nonresidents can access educational property, that nonresidence automatically marks them as not a part of the whole. School district practices like enhanced academic and behavioral requirements fail to “hold up” nonresidents’ claims even though they have a legal right to the education.

Focusing on belonging is particularly apt in the school context. When a child belongs in their school environment, that child “matters[] [and] is valued or appreciated.”<sup>96</sup> School belonging is the “extent to which students feel personally accepted, respected, included and supported by others in the school environment.”<sup>97</sup> Children who feel they belong have better academic performance, fewer behavioral infractions, and more positive school connections.<sup>98</sup>

## CONCLUSION

Focusing on belonging helps us understand how neither exclusion nor inclusion alone can explain how students who all have a legal entitlement to attend school can have different experiences of that entitlement. Belonging directs our attention to not just what people own but also how the policies and practices of space support or undermine property claims.

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96. Emily Grant, *Belongingness*, 54 *Conn. L. Rev. Online Ed.* 1, 4 (2022), <https://connecticutlawreview.law.uconn.edu/archive/online-edition-3/> [<https://perma.cc/V79L-LAAU>] (internal quotation marks omitted) (quoting Terrell L. Strayhorn, *College Students’ Sense of Belonging* 32 (2d ed. 2019)). “[B]elongingness is about more than just academic performance, in the educational environment, students need to feel they belong in a variety of spaces—in the classroom, in the institution at large, and in their chosen profession.” *Id.* (footnote omitted).

97. Christopher D. Slaten, Jonathan K. Ferguson, Kelly-Ann Allen, Dianne Vella-Brodrick & Lea Waters, *School Belonging: A Review of the History, Current Trends, and Future Directions*, 33 *Educ. & Developmental Psych.* 1, 3 (2016).

98. *Id.* at 4–5.

# WHITE CITIES, WHITE SCHOOLS

Erika K. Wilson\*

*Across the country, violent tactics were employed to create and maintain all-white municipalities. The legacy of that violence endures today. An underexamined space in which that violence endures is within school districts. Many school district boundary lines encompass geographic areas that were created as whites-only municipalities through both physical violence and law. Yet principles that inform how school district boundary lines are drawn fail to account for the harms engendered by geographic spaces that are formerly whites-only municipalities. Legal doctrine and public policies also fail to capture the significance of the historical violence in considering the constitutionality and normative propriety of maintaining school district boundary lines around spaces that encompass formerly whites-only municipalities. This Essay sets forth a framework for rethinking the normative, sociocultural, and legal implications of maintaining school district boundary lines around geographic areas that encompass formerly whites-only municipalities.*

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*The most desirable neighborhood for the raising of children, according to these Grosse Pointe real estate dealers and brokers . . . is one in which the children shall never see a Negro except in the role of a porter or a shoeshine boy, never encounter any human being who believes in a faith other than Christianity, never hear a foreign accent. . . . Jesus Christ could never qualify for residence in Grosse Pointe.<sup>1</sup>*

#### INTRODUCTION

During the formative years of American suburbanization, various mechanisms—including restrictive covenants, collusion among real estate brokers, and blatant violence—created whites-only suburban enclaves outside of racially diverse cities.<sup>2</sup> Grosse Pointe, Michigan—a suburb that lies approximately six miles outside of Detroit, Michigan—provides an instructive example. Grosse Pointe contains five subcommunities.<sup>3</sup> All five subcommunities were “sundown towns”—towns that historically excluded nonwhite people, most frequently Black people, from remaining in town after sunset by threat of violence.<sup>4</sup> Grosse Pointe real estate brokers played a significant role in ensuring that Grosse Pointe remained a whites-only suburb. They implemented a race-based point system to determine whether a homebuyer was qualified to purchase a home in Grosse Pointe.<sup>5</sup>

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1. Harold Schachern, *Klan Standards Prevail in G.P., Rabbi Charges*, *Detroit News*, May 14, 1960, at 6A (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Rabbi Leon Fram).

2. See Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 36–37 (1993); Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 31–33 (2017).

3. See Emma Maniere, *A “Most Conscientious and Considerate Method”: Residential Segregation and Integrationist Activism in Grosse Pointe, Michigan, 1960–1970*, *J. Urb. Hist. OnlineFirst*, at 1, 3 (2022).

4. See James W. Loewen, *Sundown Towns: A Hidden Dimension of American Racism* 116–17 (2005) (defining sundown towns and listing Grosse Pointe subcommunities as sundown towns).

5. Kathy Cosseboom, *Grosse Pointe, Michigan: Race Against Race* 5–6 (1972).



The point system favored classes of Europeans while disfavoring others, excluding Black and Asian buyers altogether.<sup>6</sup> The point system remained officially in place until 1960.<sup>7</sup>

The residual effects of Grosse Pointe's origins as a whites-only city persist today. As of the 2020 census, 92% of Grosse Pointe residents are categorized as white, while 8% are categorized as nonwhite.<sup>8</sup> Grosse Pointe is known as one of the most exclusive suburban areas in the country and has well-regarded public schools.<sup>9</sup> Grosse Pointe's fortunes stand in stark contrast to those of its neighbor Detroit, which is 77% Black<sup>10</sup> and has a well-documented struggle with its schools, infrastructure, and lack of services, due in large part to a diminished tax base after white residents fled Detroit for suburbs like Grosse Pointe.<sup>11</sup> A physical wall separates the two cities, and some Detroit residents have suggested that the wall is meant to protect Grosse Pointe from incursions by Detroit residents.<sup>12</sup>

The material dissonance between two cities in such close proximity to one another is not an anomaly. As local government law scholars acknowledge, historic conditions created racially identifiable spaces of haves and have-nots within the same metropolitan areas across the country.<sup>13</sup> Municipalities with racially exclusionary origins present a paradigmatic problem of spatial inequality. They exist as pockets of white, affluent communities with municipal boundary lines insulating them and

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6. Id.

7. Id.

8. See U.S. Census Bureau, QuickFacts: Grosse Pointe City, Michigan, <https://www.census.gov/quickfacts/fact/table/grossepointecitymichigan/PST045221> [<https://perma.cc/4NVK-L6Z2>] [hereinafter U.S. Census Bureau, Grosse Pointe City] (last visited Feb. 8, 2023).

9. See Jessica Strachan, Grosse Pointe School Among Best in State, Says Niche, Patch (Aug. 8, 2019), <https://patch.com/michigan/grossepointe/grosse-pointe-school-among-best-state-says-niche> [<https://perma.cc/33KK-WYP3>].

10. See U.S. Census Bureau, QuickFacts: Comparison Between Detroit City, Michigan, and Grosse Pointe City, Michigan, <https://www.census.gov/quickfacts/fact/table/detroitcitymichigan,grossepointecitymichigan/PST045221> [<https://perma.cc/RA8C-GFXG>] (last visited Feb. 8, 2023).

11. Scott Beyer, Why Has Detroit Continued to Decline?, *Forbes* (July 31, 2018), <https://www.forbes.com/sites/scottbeyer/2018/07/31/why-has-detroit-continued-to-decline/?sh=26866cc33fbc> (on file with the *Columbia Law Review*) (noting that Detroit's problems with infrastructure and attracting residents stemmed from its "demographic character—which is largely poor and black" resulting from government-engineered "urban renewal, subsidized highways and discriminatory loan policies [that] drove white people to the suburbs, and kept black people inside the core").

12. See Alana Semuels, At Detroit's Border, a Barrier Separates the Haves From Have-Nots, *L.A. Times* (Oct. 18, 2014), <https://www.latimes.com/nation/la-na-borders-detroit-20141019-story.html> (on file with the *Columbia Law Review*).

13. See Richard Briffault, The Local Government Boundary Problem in Metropolitan Areas, 48 *Stan. L. Rev.* 1115, 1142 (1996); Sheryll D. Cashin, Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism, 88 *Geo. L.J.* 1985, 2015–22 (2000); Richard Thompson Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 *Harv. L. Rev.* 1841, 1847–52 (1994).

their resources from in-need, and often racially diverse, municipalities within the same metropolitan areas.<sup>14</sup>

The spatial inequality problem is extrapolated onto the public schools through the use of school district boundary lines that track municipal boundary lines.<sup>15</sup> Indeed, nearly two-thirds of racial and economic segregation in schools is attributable to school district boundary lines, with students segregated between districts rather than within districts.<sup>16</sup> In some metropolitan areas, patterns of interdistrict school segregation exist whereby predominantly white and affluent school districts are situated in the middle of racially and economically diverse metropolitan areas.<sup>17</sup> In a previous article, this Essay's author used the term "white island districts" to describe such patterns of interdistrict racial segregation.<sup>18</sup> The author theorized that white island school districts are intentionally constructed, a product of what sociologists refer to as "social closure"—a process of subordination whereby an in-group hoards a resource by constructing that resource as scarce and curtailing an out-group's access to it.<sup>19</sup> White students in the island districts are situated as members of the in-group, students of color in the neighboring districts as members of the out-group, and high-quality schools as the resource constructed as scarce.<sup>20</sup> Notably, scarcity of high-quality schools is not natural or inevitable.<sup>21</sup> Instead, high-

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14. See Cashin, *supra* note 13, at 2003–12 (describing a "favored quarter" composed of predominantly white and affluent municipalities that garner a disproportionate share of infrastructure and resources within a metropolitan area while hoarding access to the municipality and its resources).

15. See Aaron J. Saiger, *The School District Boundary Problem*, 42 *Urb. Law.* 495, 501 (2010) (describing spatial inequality created by school district boundary lines when "[g]eneral local governments, like school districts, restrict their franchise to their own residents and allow the officials selected by that limited group to tax local resources to pay for local benefits restricted to local citizens").

16. See Tomas Monarrez, Brian Kisida & Matthew Chingos, *Urb. Inst.*, *When Is a School Segregated?: Making Sense of Segregation 65 Years After *Brown v. Board of Education* 2–3* (2019), [https://www.urban.org/sites/default/files/publication/101101/when\\_is\\_a\\_school\\_segreated\\_making\\_sense\\_of\\_segregation\\_65\\_years\\_after\\_brown\\_v\\_board\\_of\\_education\\_0.pdf](https://www.urban.org/sites/default/files/publication/101101/when_is_a_school_segreated_making_sense_of_segregation_65_years_after_brown_v_board_of_education_0.pdf) [<https://perma.cc/P5LQ-CVCG>].

17. Erika K. Wilson, *Monopolizing Whiteness*, 134 *Harv. L. Rev.* 2382, 2424–25 (2021) [hereinafter *Wilson, Monopolizing Whiteness*].

18. *Id.* at 2424.

19. *Id.* at 2384–400.

20. *Id.*

21. For example, scholars recognize that many of the disparities in the quality of public education available to students are directly correlated with the connection between school funding, school assignment, and the neighborhood in which one resides. See, e.g., Social Capital Project, *Joint Econ. Comm.—Republicans*, 116th Cong., SCP Rep. No. 6-19, *Zoned Out: How School and Residential Zoning Limit Educational Opportunity 2–6* (2019), [https://www.jec.senate.gov/public/\\_cache/files/f4880936-8db9-4b77-a632-86e1728f33f0/jec-report-zoned-out.pdf](https://www.jec.senate.gov/public/_cache/files/f4880936-8db9-4b77-a632-86e1728f33f0/jec-report-zoned-out.pdf) [<https://perma.cc/4T5Y-9BAL>] (chronicling the ways in which housing determines access to educational opportunities and finding that cities with less restrictive residential zoning do a better job delivering access to high-quality public schools).

quality schools are scarce because school district boundary lines are drawn to track state-facilitated, racially segregated housing patterns<sup>22</sup> and local property taxes from the property within the district boundary lines are used to fund schools.<sup>23</sup> The net result is that white island school districts are able to monopolize the greatest quality schools in racially diverse metropolitan areas.<sup>24</sup>

This Essay broadens the lens on patterns of interdistrict school segregation that create white island districts. It contextualizes such patterns within the larger milieu of racialized spatial inequality, examining the connection between white island districts and formerly whites-only municipalities. The term “whites-only cities” or “whites-only municipalities” is used throughout this Essay to mean cities or municipalities that formally and informally excluded Black and some other nonwhite residents.<sup>25</sup> This Essay provides a lens through which to question the normative, sociocultural, and legal implications of maintaining school district boundary lines around geographic areas that encompass formerly whites-only cities, particularly when the boundary lines create white island districts. It adds to the body of scholarship making the connection between geographic space and racial inequality.<sup>26</sup>

The Essay advances two claims. First, it makes the normative claim that principles that inform how school district boundary lines are drawn fail to account for the harms engendered by geographic spaces that are formerly whites-only cities. School district boundary lines are often conceived of as “space,” in the sense of location or physical geography.<sup>27</sup> Yet with historical context, a “space” is transformed into a “place”<sup>28</sup> with deeper meaning or cultural identity—a concept often underexamined within legal literature.

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Disrupting the connection between school funding, school assignment, and residence would help to ameliorate the disparities and allow for the possibility of providing all students with a quality education. *Id.* at 14–15.

22. Wilson, *Monopolizing Whiteness*, *supra* note 17, at 2398–400.

23. *Id.* at 2402–03.

24. *Id.* at 2400–04.

25. Cities may have formally excluded nonwhite residents by passing laws that prohibited nonwhite residents from buying or renting homes in the municipality. They may have informally excluded nonwhite residents by threatening or inflicting violence on nonwhite persons who attempted to reside in the municipality. For a more thorough discussion of the ways in which formal and informal exclusion occurred, see *infra* sections I.B–C.

26. See, e.g., Michelle Adams, *Radical Integration*, 94 Cal. L. Rev. 261, 267 (2006); Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. Rev. 401, 437 (2010); Ford, *supra* note 13, at 1849; Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 San Diego L. Rev. 295, 299 (1999); John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. Rev. 791, 812 (2008).

27. See Alisha Butler & Kristin A. Sinclair, *Place Matters: A Critical Review of Place Inquiry and Spatial Methods in Education Research*, 44 Rev. Rsch. Educ. 64, 66–67 (2020) (describing research that defines “space” as location or locale).

28. *Id.* at 68 (defining “place as a complex interplay of location, locale, and the meaning people make of a location and also as a key component in understanding systems of power”).

This Essay sheds light on the relevance of “place” to school district boundary lines. It suggests that formerly whites-only cities should be considered what Professor Geoff Ward calls “microclimates of racial meaning,” or environments created by present racial violence and the legacy of past racial violence.<sup>29</sup> Cities that are microclimates of racial meaning contain “overlapping mechanisms through which historical racial violence retains environmental influence,”<sup>30</sup> particularly for the “place” elements of the present-day municipality. When school district boundary lines encompass formerly whites-only cities, the school district inherits the same environmental influences that infect the present-day municipality.

For example, formerly whites-only cities often contain intergenerational exchanges of advantage, meaning modern residents accrue tangible and intangible benefits that are linked to the cities’ racially exclusionary origins.<sup>31</sup> School districts that encompass formerly whites-only cities also benefit from intergenerational exchanges of advantage. One such intergenerational exchange of advantage is what this Essay calls a positive reputational property interest.

Parents with means and status select where to live based on the reputation of the school district.<sup>32</sup> Because of the material and intangible value associated with whiteness,<sup>33</sup> whether a school district has a reputation as a “good” school district is contoured by race. White parents in particular are more likely to select a school in which their children will be in the racial majority because they associate majority-white schools with greater resources and better educational opportunities.<sup>34</sup> Thus, a positive reputation is concomitant with being a majority-white school district.

White island districts that encompass formerly whites-only cities are majority-white districts in large part because of their racially exclusionary origins. These districts not only accrue a positive reputational property interest because of their exclusionary origins, but the interest is also protected by school district boundary lines that both exclude those who

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29. Geoff Ward, *Microclimates of Racial Meaning: Historical Racial Violence and Environmental Impacts*, 2016 *Wis. L. Rev.* 575, 603 [hereinafter Ward, *Microclimates of Racial Meaning*].

30. *Id.* at 606–07.

31. *Id.* at 611 (describing examples of intergenerational exchanges of advantage).

32. See Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 *Harv. Educ. Rev.* 177, 201–03 (2002).

33. See Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707, 1726 (1993) [hereinafter Harris, *Whiteness as Property*] (characterizing white identity as a valuable form of property and noting that, historically, white identity has “conferred tangible and economically valuable benefits and was jealously guarded as a valued possession, allowed only to those who met a strict standard of proof”).

34. See Amy Stuart Wells & Allison Roda, *School Choice Policies and Racial Segregation: Where White Parents’ Good Intentions, Anxiety, and Privilege Collide*, 119 *Am. J. Educ.* 261, 278–79 (2013) (“[W]hite parents want a critical mass of other white students in their children’s schools and classrooms. This preference is related to the symbolic meaning of whiteness and the parents’ habitus as it is related to race and class.”).

do not live within the boundaries and serve to recruit white families to move to the districts.<sup>35</sup> The exclusion and recruitment functions played by the district boundary lines entrench the district as a white island district, enabling it to capitalize on its racially exclusionary origins.<sup>36</sup>

The second claim this Essay makes is that legal doctrine and public policies related to school district boundary lines fail to capture the significance of “place” in analyzing the constitutionality and normative propriety of maintaining school district boundary lines around formerly whites-only cities. A municipality’s status as formerly all-white creates what Professor Daria Roithmayr refers to as a racial “path dependence.”<sup>37</sup> Racial Path Dependence is the notion that early historical events related to racial segregation and exclusion determine modern outcomes.<sup>38</sup> For instance, the property values in formerly whites-only cities are higher precisely because of their racially exclusionary origins, providing the white island districts that encompass them with a more ample local property tax base from which to draw, while lessening the tax base of the neighboring, more racially diverse districts.<sup>39</sup> The positive reputational property interest the white island districts accrue also makes it more likely that residents with means and status will flock to these districts, increasing both the actual and social capital within them.<sup>40</sup>

Yet legal doctrine and state public policies conceive of the geographic area encompassed by school district boundary lines as race-neutral spaces. They fail to capture the ways in which Racial Path Dependence impacts school districts that encompass formerly whites-only cities. Indeed, the Supreme Court in *Milliken v. Bradley* failed to consider the history of the suburban municipalities as whites-only municipalities when declining to

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35. See Gregory R. Weiher, *The Fractured Metropolis: Political Fragmentation and Metropolitan Segregation* 81–82 (1991) (“Policy decisions in the past which have resulted in the creation of racially polar municipalities will be perpetuated by the tendency of the boundaries to structure the information that is available to persons making locational decisions.”).

36. Wilson, *Monopolizing Whiteness*, supra note 17, at 2396–400.

37. Daria Roithmayr, *Locked In Inequality: The Persistence of Discrimination*, 9 *Mich. J. Race & L.* 31, 39–41 (2003) [hereinafter Roithmayr, *Locked In Inequality*]; see also Daria Roithmayr, *Reproducing Racism: How Everyday Choices Lock In White Advantage* 93–99, 116–19 (2014) [hereinafter Roithmayr, *Reproducing Racism*].

38. Roithmayr, *Locked In Inequality*, supra note 37, at 39–41.

39. See Loewen, supra note 4, at 369–70 (describing the tax-base advantages for formerly segregated sundown towns and the impact on schooling within the metropolitan area in which the sundown town is located).

40. *Id.* at 362–66 (describing the impact of sundown towns on present residential patterns and noting that they both cause difficulties in fostering integrated neighborhoods and facilitate white flight).

abrogate suburban school district boundary lines for the purpose of desegregating Detroit's public schools.<sup>41</sup> Although thirteen of the fifty-three suburbs included in the *Milliken* trial court desegregation order had roots as formerly whites-only, sundown municipalities,<sup>42</sup> the Court failed to consider that history and instead focused on the lack of intentionally discriminatory actions taken by the suburban school districts.<sup>43</sup> Further, state legislative policies regarding school district boundary lines allow boundary lines that encompass formerly whites-only cities to persist unimpeded, despite the legislatures' plenary authority to enact policies that would further equity.<sup>44</sup> As a result, the path dependence wrought by formerly whites-only municipalities goes unaddressed as a matter of both law and public policy, helping to lock in racial advantage for white island school districts.

The dual normative and legal claims made by this Essay set forth a framework for rethinking the connection between white island districts and formerly whites-only cities. Using the Grosse Pointe, Michigan, school district as an example, this Essay makes the normative and legal case for altering white island school district boundary lines that encompass formerly whites-only cities.

The Essay proceeds as follows: Part I examines the construction of whites-only suburban municipalities. It highlights the normative and legal machinations of their creation. It then introduces Professor Ward's theory of microclimates of racial meaning. It makes the claim that whites-only suburban municipalities should be considered microclimates of racial meaning that detrimentally influence the "place" elements of a municipality. Part II uses Grosse Pointe, Michigan, as a case study. It situates the geographic areas that comprise Grosse Pointe as a microclimate of racial meaning. It then demonstrates how Grosse Pointe's status as a microclimate of racial meaning impacts the "place" elements of its school district,

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41. See 418 U.S. 717, 745 (1974) ("[A]n interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race.").

42. Compare *Bradley v. Milliken*, 345 F. Supp. 914, 918 (E.D. Mich. 1972), *aff'd in part, vacated in part*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974) (listing Allen Park, Birmingham, Dearborn, Dearborn Heights, Fraser, Grosse Pointe, Livonia, Royal Oak, Southgate, Taylor, Troy, Warren, and Wyandotte as part of the fifty-three suburbs to be included in an interdistrict school desegregation order), with Historical Database of Sundown Towns: Michigan, Hist. & Soc. Just., <https://justice.tougaloo.edu/location/michigan/> [<https://perma.cc/7DWJ-VLQW>] (last visited Feb. 8, 2023) (listing Allen Park, Birmingham, Dearborn, Dearborn Heights, Fraser, Grosse Pointe, Livonia, Royal Oak, Southgate, Taylor, Troy, Warren, and Wyandotte, so far, as confirmed former sundown towns).

43. 418 U.S. at 745 ("[I]t must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. . . . [W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.").

44. See *infra* section II.B.

enabling it to become a white island district. Part III analyzes general principles of law and public policy related to school district boundary lines. It then introduces Professor Roithmayr's theory of Racial Path Dependence as a lens through which to consider how laws and policies surrounding school district boundary lines fail to account for geographic microclimates of racial meaning that racialize each school district's "place." It proposes a new remedial path forward, making legal and normative arguments for restructuring school district boundary lines that encompass formerly whites-only suburban municipalities, particularly when the boundary lines create white island school districts.

## I. THE CONSTRUCTION OF WHITES-ONLY MUNICIPALITIES

Across the United States, municipal boundary lines fragment metropolitan areas.<sup>45</sup> Metropolitan fragmentation provided a conduit to create municipalities that used legal methods and extralegal violence to exclude Black and some other nonwhite residents.<sup>46</sup> As a result, the topography in most metropolitan areas today consists of predominantly white municipalities adjacent to racially diverse cities.<sup>47</sup> Localized responsibility for education results in school district boundary lines transposing the same pattern to school districts. Yet as a matter of law and policy, the sordid history of the creation of all-white spaces is often overlooked in considering the legal and normative propriety of the placement of school district boundary lines. This Part lays the groundwork to examine the connection between formerly all-white municipalities and school district boundary lines, particularly school district boundary lines that create white island districts. It begins by providing an overview of how all-white suburbs were created. It then examines the modern normative implications of such suburbs.

### A. *The Mechanics of Whites-Only Municipalities*

1. *Normative Underpinnings of Whites-Only Municipalities.* — To understand how municipalities came to exist as all-white havens, one must first contextualize their existence within the historical arc of race and migration patterns. Outside of the South, many states viewed the presence of Black residents as undesirable or problematic.<sup>48</sup> Prior to the Civil War, several states passed statutes or included language in their state constitutions

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45. See generally Weiher, *supra* note 35 (describing the way in which municipal boundary lines fragment major metropolitan areas in the United States, resulting in segregation by race and class between municipalities).

46. *Id.* at 168.

47. *Id.* at 7–9.

48. See Eric Foner, *Reconstruction: America's Unfinished Revolution* 26 (1988) ("[P]olitical conflict between free and slave societies seemed to deepen racial anxieties

banning migration of Black residents to their states.<sup>49</sup> After the Civil War, the Reconstruction period ushered in an ideological shift in attitudes about Black people, leading to some easing of Black migration restrictions.<sup>50</sup>

Between 1910 and 1970, during a period known as the Great Migration, millions of Black Americans migrated out of the South for better treatment and opportunities in the North, Midwest, and West.<sup>51</sup> The Black population in many northern and midwestern cities doubled.<sup>52</sup> There was such a substantial dispersal of Black residents that, in 1910, 90% of Black Americans lived in the South, but by 1960, only 50% of Black Americans lived in the South.<sup>53</sup> Many of them settled in major metropolitan cities such as Chicago, Detroit, Los Angeles, New York, and Philadelphia.<sup>54</sup>

The Great Migration also coincided with an influx of southern and eastern European immigrants to major metropolitan cities.<sup>55</sup> They were considered white, but racially inferior to other groups of Europeans with

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within the North.”); Loewen, *supra* note 4, at 37–38 (describing how segregation and exclusion of Black people led white people to demonize Black people and to see them as, by nature, inferior and not worthy of possessing the same rights as white people).

49. See, e.g., Off. Ill. Sec’y of State, Illinois 1953 Black Law, 100 Most Valuable Documents at the Ill. State Archives, [https://www.cyberdriveillinois.com/departments/archives/online\\_exhibits/100\\_documents/1853-black-law.html](https://www.cyberdriveillinois.com/departments/archives/online_exhibits/100_documents/1853-black-law.html) [https://perma.cc/646X-GYGT] (last visited Mar. 14, 2021); see also Foner, *supra* note 48, at 26 (noting that Iowa, Illinois, and Oregon closed their borders to Black people for fear of an influx of Black migrants).

50. Loewen, *supra* note 4, at 27–30 (describing efforts by Northern towns to welcome the newly freed, formerly enslaved Black persons).

51. See generally James R. Grossman, *Land of Hope: Chicago, Black Southerners, and the Great Migration* (1989) (describing how the large influx of Black Americans to new areas led to new policies and economic changes); Alferdteen Harrison, *Black Exodus: The Great Migration From the American South* (1991) (discussing “some of the forces that emerged in the segregated lifestyle of the South and encouraged the ‘Great Migration’”); *The Great Migration in Historical Perspective: New Dimensions of Race, Class, and Gender* (Joe William Trotter, Jr. ed., 1991) (providing historical discussions of Black migration to northern and western cities during the first half of the twentieth century).

52. Loewen, *supra* note 4, at 31 (“[T]he new hyphenated Americans immediately learned that it was in their interest to be considered ‘white[] [people],’ differentiated from ‘black[] [people].’ . . .”).

53. See David A. Gerber, *Black Ohio and the Color Line, 1860–1915*, at 470 (1976) (describing the effect of the Great Migration in Cleveland); Grossman, *supra* note 51, at 4 (noting that, as a result of the Great Migration, “New York’s black population grew from 91,709 in 1910 to 152,467 in 1920; Chicago’s, from 44,103 to 109,458; Detroit’s small black community of 5,741 in 1910 mushroomed to 40,838 in a decade”).

54. Christine Leibbrand, Catherine Massey, J. Trent Alexander, Katie R. Genadek & Stewart Tolnay, *The Great Migration and Residential Segregation in American Cities During the Twentieth Century*, 44 *Soc. Sci. Hist.* 19, 20 (2020).

55. Thomas A. Guglielmo, *White on Arrival: Italians, Race, Color, and Power in Chicago, 1890–1945*, at 5–8, 14–15, 44 (2003); Matthew Frye Jacobson, *Special Sorrows: The Diasporic Imagination of Irish, Polish, and Jewish Immigrants in the United States* 222–30 (1995).



Anglo-Saxon roots.<sup>56</sup> Initially, Black residents were no more segregated within the cities than these newly arriving immigrants.<sup>57</sup> Yet, as other scholars argue, America's race relations and racial hierarchy are, in part, the product of racial beliefs and ideology constructed to justify maintaining a social order in which treating Black people differently and disparately is justifiable.<sup>58</sup> To that end, imagery within American popular culture constructed Black people as intellectually inferior, morally lascivious, and fit for only certain kinds of labor.<sup>59</sup> Whiteness, on the other hand, was constructed as working hard, having restraint, and being a "real" American.<sup>60</sup> European immigrants looking to be accepted as fully American and white embraced these tropes about racial difference.<sup>61</sup>

More critically, "blackness and whiteness assumed a spatial definition."<sup>62</sup> As the number of Black residents migrating to northern cities increased, the southern and eastern European immigrants sought to distance themselves from Black migrants and to establish themselves as white within the American racial hierarchy.<sup>63</sup> Their distancing strategy revolved around performing whiteness,<sup>64</sup> which included disavowing association

56. Cybelle Fox & Thomas A. Guglielmo, *Defining America's Racial Boundaries: Blacks, Mexicans, and European Immigrants, 1890–1945*, 118 *Am. J. Socio.* 327, 342 (2012).

57. Loewen, *supra* note 4, at 80 ("As a rule, American cities had not been very racially segregated in the nineteenth century."); Massey & Denton, *supra* note 2, at 22 (explaining that during the late 1800s "Black-white segregation scores . . . [were] not terribly different from those observed for European immigrant groups in the same period").

58. See Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 *Am. Pol. Sci. Rev.* 75, 79–80 (2005) (providing an example of Oregon voters in 1857 rejecting slavery but excluding Black people from the state to suggest widespread "beliefs in black inferiority, fear of racial strife, and desires to reserve power for those with whom [white people] identified racially").

59. Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* 8 (1996) ("Discriminatory attitudes and actions were constructed and justified in part by the images of African Americans to which white city-dwellers were exposed. . . . [R]acial identities rested on widely held assumptions about the inferior intelligence of black[] [people], notions that black[] [people] were physiologically better suited for certain . . . work, and [other] stereotypes . . .").

60. *Id.* at 9.

61. *Id.* ("[A]ssumptions about racial difference were nourished by a newly assertive whiteness, born of the ardent desire of the 'not-yet-white ethnics' (many of them Roman Catholic, second- and third-generation southern and eastern European immigrants) to move into the American mainstream.").

62. *Id.*

63. David M.P. Freund, *Colored Property: State Policy and White Racial Politics in Suburban America* 24 (2007) ("[T]he nation's suburbs embraced and actively welcomed a much broader range of 'white' people. Suburban growth helped confirm the whiteness of the 'new' European immigrants.").

64. As other scholars note, the term "performing whiteness" encapsulates performative and substantive acts required to fit within the white racialization category, including, but not limited to, associating with white people, exercising rights and privileges prescribed only for white people, and conforming one's conduct in accordance with expected social norms regarding one's gender. See Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 *Yale L.J.* 109, 156–76 (1998).

with Black persons, particularly in their private associational preferences such as housing. As such, racial segregation within major metropolitan cities to which Black people had migrated was commonplace.<sup>65</sup>

While racial segregation within cities was the norm in the early- to mid-twentieth century, a post-World War II proliferation of newly created suburbs indelibly changed the political geography of metropolitan areas in the United States. A revolution in the political landscape of municipal land use aided the post-World War II suburb boom.<sup>66</sup> An exhaustive account of the reasons for the municipal land use political revolution is beyond the scope of this Essay, but some factors include advances in transportation, congested cities, and a desire for private homeownership.<sup>67</sup> Indeed, residents' attraction and exodus to the suburbs was fueled by a desire for better living and prestige.<sup>68</sup> Residents believed that suburbs with more space and less congestion were better places to raise children and would provide better amenities and services. Their ability to relocate to the suburbs was also a marker of upward mobility and a heightened social status. Better living begot a higher social status.<sup>69</sup> Both of these rationales, however, were inextricably connected to race. Prestige and living better came to mean excluding those deemed undesirable, particularly Black residents. Black people were deemed to have low prestige; living in close proximity to them diminished one's status.<sup>70</sup> Some municipalities applied a similar rationale to Jewish people and disfavored Europeans.<sup>71</sup> For disfavored ethnic white people, however, the ability to enter and exit certain suburbs helped them transition into American whiteness, to shed their disfavored ethnic identity for a piece of American whiteness and all the benefits that came with it.

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65. Massey & Denton, *supra* note 2, at 32–34.

66. *Id.* at 186–216 (describing federal government policies that restructured the market for private lending to make it easier for white people to qualify for loans to buy homes); Rothstein, *supra* note 2, at 70–75 (describing how Federal Housing Administration financing policies contributed to creating exclusively white enclaves).

67. Freund, *supra* note 63, at 143–54 (describing how calls for private homeownership shaped federal government policies to stimulate private lending that would lead to private homeownership); Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States 175–76* (1985) (describing the impact of the automobile on suburban growth and government transportation policies).

68. Freund, *supra* note 63, at 330 (“For countless white[] [people], suburban residence had come to represent a sanctuary from the overcrowding and degradation of city life, from outdated forms of urban planning and government, and from black people.”); Loewen, *supra* note 4, at 119 (“Americans saw suburbs as the solution to two problems: having a family and having prestige.”).

69. Loewen, *supra* note 4, at 119.

70. See Freund, *supra* note 63, at 330 (recounting views that Black residents weakened a city's value).

71. Loewen, *supra* note 4, at 125 (“After 1900, most elite suburbs quickly moved beyond barring black[] [people] to bar Jews, and a few banned Catholics, especially if they were from southern or eastern Europe and looked ‘swarthy.’”).

White exodus to the suburbs was thus an important part of the racialization process.<sup>72</sup> Suburbs became what Professors Robert Chang and Keith Aoki termed “racial microclimates,” or discrete local geographic areas with particular social and political dynamics that aided in the racialization processes.<sup>73</sup> Stated differently, local geography became coextensive with both race and the process of racialization. Moving to the suburbs meant more than getting a new home. It meant cementing a place within American whiteness. The geographic exclusion of Black and other disfavored nonwhite residents was thus part of a dynamic process that racialized individuals as white while also entrenching a racial hierarchy that favored white identity.

From this perspective, white exodus to the suburbs can be viewed through the lens of status-based group theory. The theory posits that “people perceive themselves as deriving individual status from the status of the groups to which they belong, and therefore compete to enhance the status of those groups, and to diminish the status of other groups.”<sup>74</sup> Discriminating against Black and “undesirable” nonwhite people became an act of “consumption, or more precisely, . . . a good that permit[ted] the white consumer to ‘produce’ the commodity of greater status.”<sup>75</sup> Greater status was inextricably tied to whites-only cities. As the next section details, law and policy both supported and facilitated white people’s efforts to exclude those raced as undesirable racial minorities.

2. *Law and Policy Underpinnings of Whites-Only Municipalities.* — As a matter of law and policy, two interventions by the federal government buttressed the race–status connection in ways that ineradicably shaped metropolitan areas. First, the federal government promoted a restrictive zoning doctrine that encouraged and empowered homeowners to exclude from their communities residents and developments that the government deemed “incompatible.”<sup>76</sup> Incompatibility was loosely defined but closely tethered to race and maintaining a racial hierarchy.<sup>77</sup> Second, the federal government created a racialized market for home mortgages that fueled suburban growth. From basic redlining to requiring property owners to incorporate restrictive covenants into their deeds in order to qualify for a

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72. This Essay uses the term “racialization” to mean the process through which groups come to be designated as being part of a particular race. See Michael Omi & Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s*, at 111 (1986) (“We define racialization as *the extension of racial meaning to a previously racially unclassified relationship, social practice, or group.*”).

73. See Robert S. Chang, Keith Aoki’s Theory of Racial Microclimates, 45 *U.C. Davis L. Rev.* 1913, 1920 (2012).

74. Richard H. McAdams, *Relative Preferences*, 102 *Yale L.J.* 1, 96 (1992).

75. *Id.* at 100.

76. Freund, *supra* note 63, at 72–81 (describing the ways in which federal government policies influenced state and local zoning practices).

77. *Id.* at 80 (“The Department of Commerce helped set the stage for decades of exclusionary zoning theory and practice by providing federal sanction to an emerging land-use science that would view black occupancy as a threat to white people.”).

federally subsidized mortgage,<sup>78</sup> federal government policies ensured that the post–World War II exodus to the suburbs would be available for white people only.

Critically, the racialized market was justified on the grounds that nonwhite, particularly Black, occupancy in an area diminished the value of the property. Federal government policies “created an institutional and fiscal architecture that defined racial minorities, from the outset, as incapable of maintaining private property and thus as ineligible to receive benefits.”<sup>79</sup> Consequently, the government created a market for all-white municipalities. White residents flocked to these municipalities with the understanding that keeping the area all-white was not just socially desirable but also necessary to protect the value of their property. In line with that rationale, municipalities competed for residents by advertising how white they were.<sup>80</sup> White people in metropolitan regions believed that “enjoyment of [suburban] growth and the prosperity it embodied was their racial prerogative” tied to their status as homeownership citizens.<sup>81</sup>

Violence, including lynch-mob violence, was employed to enforce the municipalities’ status as all-white and justified as ethically necessary to protect homeowners’ property values. After the Supreme Court held that court enforcement of racially restrictive covenants was unconstitutional,<sup>82</sup> white residents resorted to firebombing, arson attacks, and cross burnings—among other forms of extralegal violence—to keep Black residents out, while reasoning that such actions were necessary to protect their property values.<sup>83</sup> The violence employed allowed municipalities to develop a reputation for being overwhelmingly white and inhospitable to Black people. Such a reputation continues to make Black residents wary of locating to these municipalities long after the use of legal and extralegal means to exclude them has ended.<sup>84</sup> This reputation also, in turn, increases the municipalities’ social status as all-white. White residents were not only

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78. *Id.* at 112–14 (describing the ways in which the Home Owners’ Loan Corporation (HOLC) created maps, eventually adopted by private lending institutions, that color-coded neighborhoods based on desirability and were used to refuse loans in areas that were colored red, which were predominantly Black neighborhoods); Ford, *supra* note 13, at 1848 (“Federally subsidized mortgages often *required* that property owners incorporate restrictive covenants into their deeds.”).

79. Freund, *supra* note 63, at 156.

80. Loewen, *supra* note 4, at 48.

81. Freund, *supra* note 63, at 32.

82. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

83. See Loewen, *supra* note 4, at 274–75.

84. See, e.g., Shelia Poole & Adrienne Murchison, *Increasingly Diverse, Forsyth County Faces Racist Past*, Atlanta J.–Const. (Mar. 24, 2022), <https://www.ajc.com/news/increasingly-diverse-forsyth-county-faces-racist-past/LWI6YMTG5FD65ANCFVG5HUPU5A/> (on file with the *Columbia Law Review*) (describing a history of extreme racial violence against Black people in Forsyth County and its lasting impact on current Black residents of Forsyth County).

purchasing homes in suburbs outside of racially diverse metropolitan cities, but also creating a concept of space that defined them as superior.<sup>85</sup> A symbiotic relationship thus occurs wherein a municipality's origin as all-white becomes self-reinforcing, drawing in more white people while repelling Black and some other nonwhite people. Sorting patterns linked to a municipality's status as formerly all-white have lingering implications for school districts within metropolitan regions.<sup>86</sup>

In sum, laws and government policies created a racially exclusionary mortgage market that enabled suburban expansion for white people only. White residents flocked to suburbs due to a normative desire for social status and better living, which they linked to excluding nonwhite, and particularly Black, people. The net result was the creation of a racial stratification within metropolitan areas, concentrating advantage in suburban municipalities that excluded nonwhite people. The residual effects of formerly whites-only municipalities persist today. The sections that follow provide a framework for understanding the lingering impacts of whites-only municipalities.

#### B. *Whites-Only Municipalities as Microclimates of Racial Meaning*

Geographic spaces marred by a legacy of racial violence have contemporary implications for the locality.<sup>87</sup> The term “racial violence” is subject to contestation.<sup>88</sup> Within the law, the term is often used to mean physical harm inflicted by an individual actor who was motivated by racial animus.<sup>89</sup> This Essay uses a broader definition. It adopts the definition set forth by sociology professor Mary Jackman to mean “[a]ctions that inflict, threaten, or cause injury, [which actions may be] corporal, written, or verbal [while the] injuries may be corporal, psychological, material, or

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85. See Andrew Wiese, *Places of Their Own: African American Suburbanization in the Twentieth Century* 41–43 (2004) (arguing that suburban expansion racialized urban space thereby “evolving racial hierarchy, limiting access, cementing advantage and disadvantage”).

86. See *infra* Part III.

87. See Robert DeFina & Lance Hannon, *The Legacy of Black Lynching and Contemporary Segregation in the South*, 38 *Rev. Black Pol. Econ.* 165, 166 (2011) (finding a connection between lynching in southern states and patterns of housing segregation in the South); Robert L. Reece & Heather A. O’Connell, *How the Legacy of Slavery and Racial Composition Shape Public School Enrollment in the American South*, 2 *Socio. Race & Ethnicity* 42, 43 (2016) (finding that localities within the South that had larger concentrations of enslaved people in 1860 had greater disparities in Black–white public school enrollment).

88. For a review of the literature on defining racial violence and a reconceptualization of the definition of racial violence, see generally Kathleen M. Blee, *Racial Violence in the United States*, 28 *Ethnic & Racial Stud.* 599 (2006).

89. See generally L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 *Ohio St. J. Crim. L.* 115, 118 (2014) (critiquing the ways in which racial violence is defined within the law and arguing that racial violence can occur even in the absence of malicious racial intent on the part of individuals).

social.”<sup>90</sup> In adopting a broad definition, this Essay jettisons the individual-perpetrator-and-intent paradigm that dominates conceptions of racial violence within the law. It does so because that paradigm not only limits the scope of what is considered racial violence but also limits the conception of who is harmed to individuals only, obscuring the impact of racial violence on marginalized groups, institutions, and societal structures. Finally, the definition adopted by this Essay presupposes that actions are committed against a racially subordinated group by a racially dominant group.

Using that definition, racial violence as defined by this Essay includes, but is not limited to, lynchings, mob violence, exclusion from spaces or opportunities, verbal abuse, threats, and even microaggressions. Racial violence may be committed by the state or by private actors with the sanction of the state, exemplified as state inaction in failing to stop or punish the acts of violence. Indeed, in some whites-only municipalities, state officials tacitly encouraged violence by expressing support for white people’s right to exclude nonwhite, and particularly Black, people.<sup>91</sup> Critically, the broader definition adapts to social norms of the time, capturing actions by a racially dominant group that are not unlawful, but still cause geographically localized injury to a racially subordinated group. For example, while employing acts of physical violence against Black persons as a means of keeping them out of certain municipalities is no longer socially acceptable or legal,<sup>92</sup> it is socially acceptable and legal for police to identify legitimate but pretextual reasons to stop motorists based on their race, particularly in areas where they do not expect Black motorists to exist.<sup>93</sup> Both actions may have the effect of geographically localizing injurious harm against Black persons, such that Black persons may avoid the geographic area.<sup>94</sup>

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90. Mary R. Jackman, *Violence in Social Life*, 28 *Ann. Rev. Socio.* 387, 405 (2002).

91. See, e.g., William Serrin, *Mayor Hubbard Gives Dearborn What It Wants—and Then Some*, *N.Y. Times*, Jan. 12, 1969, at SM26 (explaining former Dearborn Mayor Orville Hubbard’s support for segregationist policies as a form of “freedom of association,” while also using derogatory language to describe Black people).

92. Indeed, physical violence and the threat thereof was a major tool in deterring Black and other disfavored nonwhite residents from entering sundown towns. See Loewen, *supra* note 4, at 10–12 (describing the ways violence was socially and legally sanctioned as a method to both drive and keep Black residents out of sundown towns throughout the Midwest).

93. See *United States v. Whren*, 53 F.3d 371, 372 (D.C. Cir. 1995), *aff’d*, 517 U.S. 806 (1996) (finding that an otherwise legitimate search or arrest would not be invalidated even if an officer’s decision to act was based on race).

94. Modern-day Black motorists’ aversion to previous sundown towns or areas where Black motorists are likely to be stopped by police is well documented. See David A. Harris, *Driving While Black: Racial Profiling on Our Nation’s Highways*, ACLU (1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways> [<https://perma.cc/24ZU-NQC4>] (describing Black motorists’ aversion to certain highways as a consequence of rampant racial profiling); Ade Onibada, *Sundown Towns Are Still a Problem for Black Drivers*, *BuzzFeed News* (July 22, 2021), <https://www.buzzfeednews.com/article/adeonibada/sundown-towns-racism-black-drivers-tiktok> [<https://perma.cc/3Q5N-SHKV>] (chronicling Black motorists’ aversion to former sundown towns).

But only the broad definition adopted by this Essay would define both actions as racial violence. The broad definition adopted by this Essay acknowledges that racial violence is a “multifaceted genus of behaviors whose component elements vary on continua.”<sup>95</sup>

Professor Ward offers a helpful analytical framework through which to assess the lasting impact of racial violence on geographic spaces.<sup>96</sup> He notes that his framework, like the broad definition of racial violence adopted by this Essay, captures “violence directly related to the maintenance of white racial domination.”<sup>97</sup> His framework analogizes geographic spaces marred by racial violence to microclimates. “Microclimates” is a geological term used to “describe environmental distinctions of small or restricted areas.”<sup>98</sup> He adds the descriptor “of racial meaning” to describe geographic places where racism was ensconced through racial violence to create and maintain white dominance.<sup>99</sup> Thus, according to Professor Ward, microclimates of racial meaning are distinct geographic pockets that differ from the areas adjacent to them in significant ways such as demographics, culture, or even environmental sustainability.<sup>100</sup> The distinction of the area is specifically linked to its history of past racial violence.

Critically, if a geographic area fits the definition of a microclimate of racial meaning, one might then start to connect the area’s past racial violence to present conditions. For example, in explaining structural inequality in post-apartheid South Africa, he suggests, “Losses of land, wages, homes, businesses, schools, families, and related material and emotional well-being—and *corresponding benefits among dominant* groups—represent intergenerational exchanges of disadvantage and advantage, respectively, key to enduring structural implications of historical racial violence.”<sup>101</sup>

The efficacy of the microclimate of racial meaning framework, therefore, is that it helps to identify “spatial variation in the trivialization of black life and to target[] remedial efforts in specific milieus.”<sup>102</sup> Put another way, the framework provides a lens through which to identify

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95. Jackman, *supra* note 90, at 405.

96. See Ward, *Microclimates of Racial Meaning*, *supra* note 29, at 585 (describing how racism leads to the formation of “microclimates of racial meaning”). Sociologists and historians have also utilized a racial microclimate framework. See, e.g., Gerald Horne, *Black and Brown, African Americans and the Mexican Revolution, 1910–1920*, at 57–58 (Neil Foley, Kevin Gaines, Martha Hodes & Scott Sandage eds., 2005); Phylis Cancilla Martinelli, *Undermining Race: Ethnic Identities in Arizona Copper Camps, 1880–1920*, at 83 (2009).

97. Ward, *Microclimates of Racial Meaning*, *supra* note 29, at 612.

98. *Id.* at 603.

99. *Id.* at 583.

100. *Id.* at 600–08.

101. *Id.* at 611 (emphasis added).

102. *Id.* at 583.

particular racialized harms in geographic locations that continue to influence the area today. Indeed, it is one thing to acknowledge that the Deep South has a history of lynching that impacts modern race relations, but another to examine a municipality within the Deep South and see how a history of lynching in that municipality impacts residential migration or policing patterns today.<sup>103</sup>

The framework's focus on geographic concentration of racial violence provides a diagnostic tool to better connect past racial violence in a geographic area to specific racialized harms occurring today in that same geographic area. It also illuminates the need to fashion laws and policies that remediate rather than exacerbate the harms of past racial violence. Finally, as the next section describes, the framework also highlights the critical nexus between past racial violence in a geographic area and the geographic area's "place," particularly when the geographic area is encompassed by school district boundary lines.

### C. *Microclimates of Racial Meaning and the Meaning of Place*

When a geographic area fits the definition of a microclimate of racial meaning, it impacts the "place" elements of the geographic area. The term "place" is broadly defined in the scholarly literature as a "meaningful location" that is culturally constructed and can be made and remade, depending upon one's social positionality.<sup>104</sup> This Essay defines the term "place" to mean the historical and contemporary social interactions that give meaning to a space or geographic location; the ideological premises that draw residents to a space or geographic location; and, most importantly, the public and private policies that define what kinds of residents can access the space or geographic location.

This definition derives from geography theorists who suggest that place is "the consequence of social processes" and "a social construct."<sup>105</sup> It also derives from geography theorists who situate place as a historically contingent process in which historical interactions within a space influence contemporary social practices and norms, thereby defining the space's identity.<sup>106</sup> Historical interactions influence the space's "place" by affecting the generative rules and power relations in the space, and they continue to do so unless there is some break in the rules or power relations

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103. See *id.* at 581–83 (describing the lasting import of lynchings in Marion, Indiana).

104. See Butler & Sinclair, *supra* note 27, at 66–67.

105. Charles W.J. Withers, Place and the "Spatial Turn" in Geography and in History, 70 *J. Hist. Ideas* 637, 641 (2009).

106. See, e.g., Allan Pred, Place as Historically Contingent Process: Structuration and the Time-Geography of Becoming Places, 74 *Annals Ass'n Am. Geographers* 279, 289–91 (1984) (theorizing that place is the result of historically contingent processes and social practices).



that changes the continuum of interactions between individuals who enter or occupy the space.<sup>107</sup>

From that perspective, spaces that are microclimates of racial meaning may have a sense of place shaped by the past history of racial violence unless specific affirmative steps are taken to disrupt and reorganize interactions within the space. The geographic area's "place" provides residents with a preview of what human interactions in the space may be like. It also shapes the behavioral norms and expectations within the geographic space. For example, in a geographic area that meets the definition of a microclimate of racial meaning, Black people may expect to be formally or informally excluded from the area, to experience microaggressions, or to be frequently stopped by police.<sup>108</sup> In contrast, white residents in the same geographic space may develop an expectation of not seeing Black residents and may view them as interlopers who need to be monitored or policed.<sup>109</sup> The net result of this place element is to recruit or repel—welcome or dissuade—residents to or from entering the space. A geographic area's place can thus serve as a catalyst for contemporary migration patterns. Consequently, spaces that formerly excluded nonwhite residents by law or threat of violence no longer have to do so in order to maintain their whites-only status. Instead, the geographic area's entrenched sense of place does the same work, though in a manner much less obvious than laws or threats of violence.

Moreover, racialization of a geographic space's place may occur.<sup>110</sup> The racialization of a place consists of a process whereby "residential location and community are carried and placed on racial identity."<sup>111</sup> Plainly stated, this means the space or geographic location itself becomes an integral part of the process of hegemonic racial formation. Similar to the process of racialization that occurred when certain white ethnic groups moved to the suburbs, attraction to a geographic location because it is a racialized place serves as a conduit for lawfully establishing a racial hierarchy. To the extent that the place elements, rather than law or violence, contribute to migration patterns, the geographic space provides an ostensibly race-neutral vehicle through which to organize along racial lines, societal structures, lived experiences, and access to resources. Geographic

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107. *Id.* at 291 ("[T]he historically specific manner in which the establishment, reproduction, and transformation of power relations contributes to the becoming of place is contingent upon the interconnections existing between micro-level, or person-to-person, and macro-level, or inter-institutional, expressions of those relations.").

108. See Elijah Anderson, *The White Space*, 1 *Socio. Race & Ethnicity* 10, 15–16 (2015); Geoff Ward, *Living Histories of White Supremacist Policing: Towards Transformative Justice*, 15 *Du Bois Rev.* 167, 174 (2018).

109. Anderson, *supra* note 108, at 13–15.

110. See Boddie, *supra* note 26, at 437; John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope From a Mountain of Despair"*, 143 *U. Pa. L. Rev.* 1233, 1235 (1995).

111. Calmore, *supra* note 110, at 1235.

spaces that are racialized places “correlate with and reinforce cultural norms about spatial belonging and power,” or lack thereof.<sup>112</sup> A racialized place affirms one’s membership in a particular race via access to the geographic space. When a geographic location can aptly be characterized as a microclimate of racial meaning, racialization of the place is nearly inevitable. As the next Part demonstrates, school districts that encompass formerly whites-only municipalities provide a window into the intersection between microclimates of racial meaning, racialized places, and the educational distributional consequences thereof.

## II. GROSSE POINTE, MICHIGAN: A CASE STUDY

Many suburban municipalities throughout the country are aptly characterized as formerly whites-only cities, particularly those in the midwestern parts of the United States.<sup>113</sup> Today many of those suburbs remain predominantly white, creating patterns of racialized spatial inequality in that region.<sup>114</sup> The school districts in those areas often replicate the same patterns of racialized spatial inequality.<sup>115</sup> Such is the case because school districts in the Midwest tend to be fragmented, meaning the boundary lines of the school districts track municipal boundary lines.<sup>116</sup> As a result, the Midwest region not only has high levels of interdistrict racial segregation<sup>117</sup> but also egregious examples of white island districts, again defined as predominantly white and affluent school districts that are situated in the middle of racially and economically diverse metropolitan areas.<sup>118</sup> Yet the existence of such districts is seen, both normatively and as a matter of law, as a byproduct of individual choices in residential location, as opposed to intentional racial discrimination.

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112. Boddie, *supra* note 26, at 438; Ronald Wheeler, 108 *Law Libr. J.* 321, 323 (2016) (describing Black people’s avoidance of Dearborn, Michigan, because of its history of hostility to Black people and citing one nearby resident’s experiences of their father’s harassment by the Dearborn police and fear for his children’s safety if the children even rode their bikes into Dearborn).

113. See Loewen, *supra* note 4, at 59–67 (describing sundown towns in the Midwest and finding that all-white communities were prevalent throughout the Midwest).

114. See *id.* at 410–16 (describing the sundown history of suburbs throughout the Midwest and noting that those suburbs have maintained “almost an iron curtain” dividing municipalities in that region by race).

115. See *infra* section II.A.

116. See Kendra Bischoff, *School District Fragmentation and Racial Residential Segregation: How Do Boundaries Matter?*, 44 *Urb. Affs. Rev.* 182, 197 (2008) (describing the connection between school district fragmentation and racial segregation in schools in the Midwest).

117. See Halley Potter, *School Segregation in U.S. Metro Areas*, Century Found. (May 17, 2022), <https://tcf.org/content/report/school-segregation-in-u-s-metro-areas/> [<https://perma.cc/RBH2-ZHNS>] (examining interdistrict school segregation in U.S. metropolitan areas and finding that 58% of school segregation in the Midwest is caused by interdistrict segregation).

118. Wilson, *Monopolizing Whiteness*, *supra* note 17, at 2433.

The Part that follows provides a general overview of how microclimates of racial meaning intersect with racialized places when enclosed by school district boundary lines. It then applies the microclimates of racial meaning framework to a formerly whites-only municipality—Grosse Pointe, Michigan—to reframe the normative narrative and highlight the consequences of maintaining school district boundary lines around a formerly whites-only municipality. It concludes by demonstrating the ways in which Grosse Pointe’s origins as a whites-only enclave and microclimate of racial meaning have far-reaching implications for Grosse Pointe’s school district.

A. *School Districts as Microclimates of Racial Meaning and Racialized Places*

School districts that encompass formerly whites-only municipalities illustrate the symbiotic relationship between microclimates of racial meaning and racialized places. They do so in two important ways. First, states afford school districts a great deal of power and autonomy.<sup>119</sup> Given the autonomy and power afforded a school district, the geographic area encompassed by the district dictates a great deal about the way the district can operate. When a district consists of a geographic area that is a microclimate of racial meaning, the history of that area influences the district’s ability to marshal economic, social, and human capital. In the case of districts that encompass formerly whites-only municipalities, when the municipalities remain white in contemporary times, the school districts become racialized as white places.

Places racialized as white have greater prestige and material resources because of the value associated with whiteness.<sup>120</sup> Indeed, being characterized as white has tremendous value both as a normative matter and as a matter of accumulating tangible property.<sup>121</sup> The normative and tangible

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119. See *infra* section III.A.

120. See Harris, *Whiteness as Property*, *supra* note 33, at 1747–48 (describing the value associated with being characterized as white and noting that “[b]ecause of white supremacy, whiteness was not merely a descriptive or ascriptive characteristic—it was property of overwhelming significance and value”).

121. As a normative matter, people recognize the benefits of existing within American society as a white, rather than a nonwhite, person. A lawsuit in which a woman sued for wrongful birth after a sperm mix-up which led to her giving birth to a Black biracial child instead of a white child illustrates the normative value of being characterized as white. *Cramblett v. Midwest Sperm Bank, LLC*, 230 F. Supp. 3d 865, 868 (N.D. Ill. 2017) (articulating harms of having a nonwhite child, including racial prejudice). As a matter of tangible property, being raced as white can bring substantial material benefits, such as increasing the value of one’s home reappraisal. See, e.g., Debra Kamin, *Widespread Racial Bias Found in Home Appraisals*, *N.Y. Times* (Nov. 2, 2022), <https://www.nytimes.com/2022/11/02/realestate/racial-bias-home-appraisals.html> (on file with the *Columbia Law Review*) (examining neighborhoods where the only discernible differences in the communities was their racial composition and finding that “[w]hite homeowners can expect their homes’ values to increase at twice the rate of homeowners of color”).

value is imbued upon geographic spaces that are predominantly white.<sup>122</sup> The reasons for this are varied and complex. An important one worth highlighting is the way in which the law legitimizes the accumulation of tangible benefits linked to the racially exclusionary origins of a geographic area.

Stated differently, people historically moved to racially exclusionary municipalities for greater prestige and access to more amenities and resources.<sup>123</sup> The whiteness of a geographic area thus simultaneously served as a marker of higher prestige and substantively afforded residents more resources because businesses and people with means moved into those areas.<sup>124</sup> This in turn created a cyclical relationship between white geographic areas and access to greater material resources. When school district boundary lines encompass areas that originated as whites-only municipalities, this engrained relationship allows residents to realize the expected gains associated with whites-only geographic areas and to capitalize on the violent history of racial exclusion. Such a situation also perversely incentivizes maintaining the racial homogeneity of the geographic area. Thus, as Professor Cheryl Harris notes, the value of whiteness is both constructed and reified by the state insofar as “[l]egality places the power of the state behind particular expectations and legitimates them, notwithstanding their violent racial origins.”<sup>125</sup>

Second, and most critically, when a place is racialized as white, that place may also develop a positive reputation that is concomitant with its white demographics. The term “reputation” is defined in this context to mean enhanced social status and respect of others. The positive reputation may in turn become entrenched as a tangible property interest<sup>126</sup> for the residents of the municipality such that they are incentivized to maintain

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122. Kamin, *supra* note 121 (“The higher the proportion of white residents in each community, the higher the appraised value of individual homes.”); see also Faith Abubey, Study: Walmart Stores in “White” Neighborhoods Are Better, *USA Today* (Sept. 7, 2016), <https://www.usatoday.com/story/money/nation-now/2016/09/07/study-walmart-stores-better-white-neighborhoods/89948300/> [<https://perma.cc/5SYH-37RD>] (chronicling a study showing that Walmart stores in predominantly white neighborhoods were cleaner and better organized and staffed).

123. See *supra* Part I.

124. See Freund, *supra* note 63, at 197 (“Public policies generated comparable market activity, development patterns, and wealth creation in metropolitan regions nationwide.”).

125. Cheryl I. Harris, Reflections on *Whiteness as Property*, 134 *Harv. L. Rev. Forum* 1, 8 (2020).

126. While the law does not formally recognize reputation as a property interest, scholars have made compelling arguments across a variety of contexts that the law should recognize it as such, or at least should recognize it as something valuable that can be traded upon and protected. See, e.g., Joseph Blocher, Reputation as Property in Virtual Economies, 118 *Yale L.J. Forum* 120, 123 (2009) (arguing that status and reputation online are a form of property).

the demographics as a means of protecting their property interest.<sup>127</sup> White people who exist in these places then “organize to protect racially identified communities and the maldistribution of resources that skews in their favor.”<sup>128</sup> Belonging within the space such that one feels comfortable and a part of the community is also pegged to being raced as white.<sup>129</sup> The ideological premises that draw people to the space are very much intertwined with the perceived and actual benefits of the space being predominantly white. The historical interactions that created the all-white space thus are reproduced such that they reify the space as a white place.

Importantly, in places racialized as white, a phenomenon that Professor Elise Boddie calls “racial territoriality” occurs wherein the space is both “claimed [and] defended because of [its] conscious or unconscious racial associations” with whiteness.<sup>130</sup> People in turn classify the spaces based on “racialized perceptions, attitudes, and cultural norms.”<sup>131</sup> If a space encompassed by a school districts is perceived as a white space and place, intrusions on that space and place by those raced as nonwhite are viewed as “theft.”<sup>132</sup> Indeed, children of color are disproportionately reported for potential improper enrollment in predominantly white school districts.<sup>133</sup>

The way in which the state regulates—or fails to regulate—school district boundary lines contributes substantially both to racialization of place and to racial territoriality in school districts that encompass formerly whites-only municipalities. This is especially true in the context of schools because reputation plays a pivotal role in constructing high-quality

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127. See, e.g., LaToya Baldwin Clark, *Education as Property*, 105 Va. L. Rev. 397, 410 (2019) (“[O]fficials treat education as *transferrable*, such that a taxpayer, by virtue of his contribution to the school district, assigns his . . . interest in public education to the children in the district. Allowing children who do not live in the district to attend the district’s schools violates this taxpayer right.”).

128. Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. Rev. 1540, 1547 (2012).

129. Cf. Anderson, *supra* note 108, at 16 (“[B]eing white is a fundamental requirement for acceptance and a sense of belonging in the white space.”).

130. Boddie, *supra* note 26, at 446.

131. *Id.* at 443.

132. See LaToya Baldwin Clark, *Stealing Education*, 68 UCLA L. Rev. 566, 625 (2021) (arguing that residency laws that equate improper enrollment in a district as theft rely upon “racial stereotypes that brand poor Blackness as inferior [and] justify the hoarding by residence because ‘nonresident’ and ‘Black and poor’ correspond”).

133. See Avi Wolfman-Arent, *Suburban Schools’ Residency Enforcement Mostly Affects Kids of Color*, WHYY (May 1, 2018), <https://whyy.org/segments/suburban-schools-residency-enforcement-disproportionately-affects-kids-of-color/> [<https://perma.cc/7QRD-92A8>] (“[T]he pool of disenrolled students and the pool of students who received residency notifications [in Philadelphia-area school districts] always had a greater percentage of minority students than the districts as a whole.”).

schools, particularly by attracting residents and high-quality teachers.<sup>134</sup> It becomes a self-fulfilling prophecy: The whiter the schools, the more tangible and intangible resources they have, allowing them to continue producing high-quality educational outputs and being considered high-quality schools.

As the sections that follow demonstrate, applying the microclimates of racial meaning framework to Grosse Pointe, Michigan, elucidates the connections between past racial violence and persistent racial segregation in districts like the Grosse Pointe Public School System (GPPSS). A subsequent examination of GPPSS illustrates the ways in which bounding a geographic space that is a microclimate of racial meaning with school district boundary lines results in racialization of the school district place, allowing the district to become ensconced as a white island district.

### B. *Situating Grosse Pointe as a Microclimate of Racial Meaning*

Private action, state action (or lack thereof), and violence all shaped Grosse Pointe's origin story. Indeed, Grosse Pointe began as a sundown town, prohibiting nonwhite groups from living within it or even being within the suburb's borders after sunset.<sup>135</sup> While some nonwhite domestic staff were tolerated, nonwhite, and particularly Black, residents, were strictly prohibited.<sup>136</sup>

More critically, during the post–World War II suburbanization boom, private action shaped Grosse Pointe's origins as a whites-only city. The National Association of Real Estate Boards adopted a code of ethics that enjoined members from “introducing into a neighborhood . . . members of any race or nationality . . . whose presence will clearly be detrimental to property values.”<sup>137</sup> The Grosse Pointe Realtor's Association fully embraced the national ethical code, developing a scientific method to ensure compliance. In 1945, they adopted a point system to rank the desirability of potential homebuyers. The system used point-based categories to create a community that furthered a specific brand of white, Anglo-Saxon, Protestant Americanness. The categories included an assessment of whether the potential buyer's name and way of living were “typically American”; how “swarthy” their skin tone was; how “pronounced” their

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134. See Wilson, *Monopolizing Whiteness*, *supra* note 17, at 2399–400 (“The combination of the political, economic, and social functions of school district boundary lines leads to their conveying critical information that influences residential sorting choices and allows people to fulfill associational preferences.”).

135. See *supra* note 4 and accompanying text.

136. *Cosseboom*, *supra* note 5, at 61 (“Although some Grosse Pointe families claimed to be proud of the black domestics who had ‘become almost like a member of the family,’ . . . [they] balked at the idea of a black[] [people] living in the house next door.”).

137. *Wiese*, *supra* note 85, at 41 (alterations in original) (quoting *The Realtors Code of Ethics*, *Nat'l Real Estate J.*, Apr. 20, 1939, at 40).

accent was; how “slovenly” or “flashy” their dress was; and whether their familial status accorded with a heteronormative ideal.<sup>138</sup>

To be eligible to purchase a home, the prospective homebuyer had to meet a minimum number of points based on their ethnicity: “[P]eople of Polish descent required only 50 to 55 points; Irish 55; Italians, Greeks, Spanish, and Lebanese 75; and Jews 85.”<sup>139</sup> People of less-favored ethnicities received fewer points for meeting the same criteria. For example, “conservative dress earned a Jewish person three points, as opposed to four for a non-Jewish person.”<sup>140</sup> Asian and Black prospective homebuyers were excluded altogether from the point system, making them ineligible to buy in Grosse Pointe.<sup>141</sup> If a prospective homebuyer failed to accumulate the necessary points, their name was circulated among local real estate agents and those agents would not sell them a home in Grosse Pointe.<sup>142</sup> If brokers sold to persons who did not meet the required points, the brokers were required to forfeit the commission or were expelled from the brokers’ association.<sup>143</sup>

The consequence of Grosse Pointe’s point system was to create a particularized notion of elite suburban whiteness that drew on previously entrenched hierarchical categories of race and ethnicity. The point system tethered racial boundaries with geographic boundaries, allowing families with the greatest racial advantage to be concentrated in one geographic location within the metropolitan area. It also tethered racial malleability—or lack thereof—with geography. Eligibility to purchase in Grosse Pointe was synonymous with being admitted into American whiteness; ineligibility meant denial of entry into American whiteness.

The point system remained in place until early 1960 when its existence was made public during the course of a civil lawsuit.<sup>144</sup> Public outcry regarding the discriminatory point system was fierce. Brokers and Grosse Pointe residents defended the point system on the grounds that it protected property values because the presence of nonwhite, particularly Black, residents lowered property values.<sup>145</sup> In response, an administrative rule prohibiting broker discrimination in selling property was enacted—though it was later ruled unconstitutional by the Michigan Supreme Court.<sup>146</sup>

After the point system was formally demolished, the spirit of the point system remained. It wasn’t until 1966 that the first Black family purchased

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138. Maniere, *supra* note 3, at 3.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 6–8 (recounting specific interviews with residents and brokers).

146. *McKibbin v. Mich. Corp. & Sec. Comm’n*, 119 N.W.2d 557, 566 (1963).

a home in Grosse Pointe.<sup>147</sup> Even then, the family had to use a white man as a straw buyer to purchase the home for them.<sup>148</sup> When it was discovered the house would be occupied by a Black family, the Michigan Civil Rights Commission collaborated to impress upon residents the Black family's middle class status and elite credentials.<sup>149</sup> They also emphasized that the family purchased the home because it was a great place to raise a family and because of the city's great recreational facilities, not because they sought to make any kind of political statement.<sup>150</sup> By emphasizing the family's socioeconomic status and shared sensibilities, the Commission hoped to allay white residents' fears that the presence of a Black family would diminish the municipality's elite status and to preempt violence.<sup>151</sup> Residents of Grosse Pointe nonetheless protested their presence with violence. Men, women, and teenagers drove by the home in rotating shifts shouting racial slurs, made menacing phone calls to the Black family, and attempted to firebomb the house.<sup>152</sup> The family moved after residing in the house for only four months.<sup>153</sup> It took six years for another Black family to purchase a home in Grosse Pointe in 1972.<sup>154</sup> Though they did not experience the same violence as the prior family, the Grosse Pointe mayor agreed to deploy city resources to protect them on their move-in day.<sup>155</sup>

While the point system and citizen violence played an instrumental role in constructing Grosse Pointe as a whites-only suburb, inaction by the state of Michigan and the Grosse Pointe local government ensured that the municipality would remain predominantly white. The Michigan state legislature failed to pass several proposed bills to limit discrimination in housing, including a bill that would have prohibited brokers from engaging in the blatant race-based discrimination that occurred with the Grosse Pointe point system.<sup>156</sup> Incentivized by the Detroit rebellions in the summer of 1967 and a desire to preempt further violence, Michigan finally passed a fair housing bill prohibiting discrimination in the sale and rental of housing in 1968.<sup>157</sup> Yet the passage of a prohibitory fair housing law

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147. Cosseboom, *supra* note 5, at 48.

148. *Id.* at 51.

149. Maniere, *supra* note 3, at 9–10.

150. *Id.*

151. *Id.*

152. See Cosseboom, *supra* note 5, at 52–56 (describing racial harassment levied against the family, as well as police response and the lack thereof); Sidney Fine, *Michigan and Housing Discrimination*, 23 *Mich. Hist. Rev.* 81, 106 (1997) (“The family was welcomed by some but opposed by others, including motorists who paraded in front of the house shouting [racial slurs].”).

153. Maniere, *supra* note 3, at 11 (noting that the family moved because of a change in jobs).

154. *Id.* at 13.

155. *Id.*

156. Fine, *supra* note 152, at 86–87 (describing proposed housing antidiscrimination legislation rejected by the Michigan state legislature).

157. *Id.* at 109.



merely opened up housing markets and was arguably never intended to facilitate meaningful integration.<sup>158</sup> Indeed, few Black residents had the financial means to purchase a home in a suburb like Grosse Pointe. Legislators passing prohibitory fair housing laws were aware of that reality.<sup>159</sup>

Fair housing laws at the state level thus masked a significant structural lever of racial exclusion: socioeconomic status. At the local level, Grosse Pointe further compounded the problem by refusing to pass a local fair housing ordinance in four out of its five subcommunities.<sup>160</sup> If all five subcommunities had passed a local fair housing ordinance, it would have conveyed an important symbolic message that all were welcome. More substantively, it would have also subjected realtors who violated the ordinance to criminal rather than civil penalties.<sup>161</sup> The failure to unanimously pass such an ordinance reified Grosse Pointe's reputation as an exclusive haven for white people only.

The point system, verbal and physical threats, and most importantly limited state and local government action should be considered forms of racial violence that operated to construct Grosse Pointe as a whites-only municipality. The geographic concentration of that racial violence may have attracted white residents with means while repelling Black and some other nonwhite groups.<sup>162</sup> While the exact environmental influence of the racial violence cannot be precisely quantified, Grosse Pointe's reputation was and remains contoured by race.<sup>163</sup> Indeed, Grosse Pointe's origin story as a whites-only sundown town continues to impact the municipality today. The five subcommunities that compose Grosse Pointe remain overwhelmingly white.<sup>164</sup> Racial violence aimed at the small number of Black residents

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158. Cf. Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 *UCLA L. Rev.* 1140, 1180 (2019) (critiquing the Fair Housing Act because it “utilized a limited prohibitory approach and promoted a very limited form of integration when it advanced housing laws that, in theory, opened up housing markets to everyone regardless of race”).

159. Evidence from the Congressional Record shows that legislators at the federal level were aware that structural racial disparities would keep all but a small number of Black residents from accessing white suburbs. See 114 *Cong. Rec.* 2279 (1968) (statement of Sen. Brooke) (“Fair housing does not promise to end the ghetto; . . . but it will make it possible for those *who have the resources* to escape the stranglehold now suffocating the inner cities of America.” (emphasis added)).

160. Maniere, *supra* note 3, at 14.

161. *Id.* at 15.

162. See Cosseboom, *supra* note 5, at 94 (quoting a Black teacher who explained that “[t]he houses in Grosse Pointe are priced so you won’t find black[] [people] running out even if it were open, and since it has been ‘closed’ the black[] [people] with enough money have gone elsewhere and had their beautiful homes” (internal quotation marks omitted)).

163. See Alana Semuels & Nat’l J., *This Is Where White People Live*, *Atlantic* (Apr. 17, 2015), <https://www.theatlantic.com/business/archive/2015/04/this-is-where-white-people-live/425220/> (on file with the *Columbia Law Review*).

164. U.S. Census Bureau, *Grosse Pointe City*, *supra* note 8.

who live there still occasionally occurs.<sup>165</sup> Owing to the racial wealth gap, financial barriers continue to preclude meaningful numbers of nonwhite residents from locating in Grosse Pointe. From this perspective, Grosse Pointe could be considered a microclimate of racial meaning.

Conversely, the actions and inaction of the state created the modern-day predominantly Black and economically struggling city of Detroit. During the Great Migration, Black migrants flocked to Detroit.<sup>166</sup> Owing to racial discrimination, they were locked out of the higher-paying jobs that would enable them to access better housing; even those who could afford better housing were stymied by restrictive covenants, discriminatory real estate brokers, and banks.<sup>167</sup> Black people in Detroit were confined to the worst housing stock in the city and could not obtain loans to improve their properties, causing city officials to condemn many areas as blighted.<sup>168</sup> The net result offered convincing evidence to white homeowners that Black people would ruin a white neighborhood, thereby incentivizing white flight and violence to maintain predominantly white suburbs like Grosse Pointe.<sup>169</sup> Consequently, this process of housing segregation in both Detroit *and* Grosse Pointe “set into motion a chain reaction that reinforced patterns of racial inequality”<sup>170</sup> still felt today.

### C. *Grosse Pointe Public School District as a Racialized Place*

The geographic boundary lines of GPPSS were established in 1921.<sup>171</sup> The boundary lines encompass the five subcommunities within Grosse Pointe—Grosse Pointe Park, Grosse Pointe City, Grosse Pointe Shores, Grosse Pointe Farms, Grosse Pointe Woods—and portions of the city of Harper Woods.<sup>172</sup> All six municipalities began as whites-only municipalities

165. See, e.g., Ingrid Kelley & Fox 2 Staff, *Grosse Pointe Police Say 15-Year-Old Made Makeshift Noose in Panera Bathroom*, Fox 2 Detroit (Jan. 5, 2023), <https://www.fox2detroit.com/news/grosse-pointe-police-say-15-year-old-made-makeshift-noose-in-panera-bathroom> [<https://perma.cc/L9CH-HXT2>] (describing how a fifteen-year-old made a makeshift noose and left it in a restaurant bathroom as a message to the establishment’s majority-Black workforce); Randy Wimbley & David Komer, *Grosse Pointe Park Man Hangs KKK Flag in Window Facing Black Neighbor Sparking Outrage*, Fox 2 Detroit (Feb. 17, 2021), <https://www.fox2detroit.com/news/grosse-pointe-park-man-hangs-kkk-flag-in-window-facing-black-neighbor-sparks-outrage> [<https://perma.cc/F8XZ-GU4W>] (last updated Feb. 27, 2021).

166. Sugrue, *supra* note 59, at 23–24 (describing the influx of Black migrants as part of the Great Migration, noting that “the majority of Detroit’s black population was confined to a densely populated, sixty-square-block section of the city’s Lower East Side which the migrants named . . . Paradise Valley”).

167. *Id.* at 34.

168. *Id.* at 36.

169. *Id.*

170. *Id.* at 34.

171. Brief for Petitioner the Grosse Pointe Public School System at 14, *Milliken v. Bradley*, 418 U.S. 717 (1974) (No. 73-436), 1974 WL 185673.

172. *Strehlke v. Grosse Pointe Pub. Schs. Sys.*, No. 14-11183, 2014 WL 4603482, at \*1 (E.D. Mich. Sept. 15, 2014).

and sundown towns.<sup>173</sup> As such, the GPPSS boundaries encompassed municipalities that, by law and through violence, excluded nonwhite people. The territorial base encompassed by GPPSS thus fit the description of a microclimate of racial meaning.<sup>174</sup> For those reasons, GPPSS's place origins were racialized as white.

Despite fair housing laws that make it possible for all persons to move into the GPPSS boundary lines, GPPSS's place status remains racialized as white. For starters, the demographics of the five Grosse Pointe subcommunities are 80% or more white.<sup>175</sup> In Harper Woods, white flight led to an infusion of Black residents to the point that white people are no longer the majority.<sup>176</sup> But only a small portion of Harper Woods's more racially diverse population lives within the GPPSS boundary lines. Even then, predominantly Black Harper Woods residents report being culturally constructed as outsiders, viewed as gratuitously gifted a GPPSS education for their children, rather than as citizens who live and pay taxes within the GPPSS boundary lines.<sup>177</sup> To be sure, the racial demographics of the district—in which 83% of GPPSS students are white, and much of the nonwhite enrollment consists of students who live in Harper Woods—contribute to the outsider cultural construction.<sup>178</sup>

Further, GPPSS is considered one of the best school districts both in the state of Michigan and nationally. People may move to Grosse Pointe

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173. See Loewen, *supra* note 4, at 117.

174. See *supra* section II.B.

175. Compare U.S. Census Bureau, Grosse Pointe City, *supra* note 8 (90.5% white residents), U.S. Census Bureau, QuickFacts: Grosse Pointe Farms City, Michigan, <https://www.census.gov/quickfacts/fact/table/grossepointefarmscitymichigan/SBO010217> [<https://perma.cc/RHG4-9JPV>] (last visited Feb. 9, 2023) (92.2% white residents), U.S. Census Bureau, QuickFacts: Grosse Pointe Park City, Michigan, <https://www.census.gov/quickfacts/grossepointeparkcitymichigan> [<https://perma.cc/R2JF-84SW>] (last visited Feb. 28, 2023) (84.3% white residents), and U.S. Census Bureau, QuickFacts: Grosse Pointe Woods City, Michigan, <https://www.census.gov/quickfacts/grossepointewoodscitymichigan> [<https://perma.cc/D6HN-4Z6L>] (last visited Feb. 9, 2023) (90.4% white residents), with U.S. Census Bureau, QuickFacts: Harper Woods City, Michigan, <https://www.census.gov/quickfacts/harperwoodscitymichigan> [<https://perma.cc/QT6E-P8JX>] (last visited Feb. 9, 2023) (30.1% white residents).

176. Nicquel Terry, Black Influx Changes Face of Some Metro Area Suburbs, *Detroit News* (Nov. 15, 2016), <https://www.detroitnews.com/story/news/local/macomb-county/2016/11/15/black-influx-changes-face-metro-area-suburbs/93940394/> [<https://perma.cc/3PNP-EERD>] (reporting that the City of Harper Woods experienced a 383% increase in Black residents over a fourteen-year span beginning in the 1990s).

177. See, e.g., Alex Harring, As Grosse Pointe Weighs School Closures, Tensions Rise in the Community, *Detroit Metro Times* (June 19, 2019), <https://www.metrotimes.com/news/as-grosse-pointe-weighs-school-closures-tensions-rise-in-the-community-21931693> [<https://perma.cc/RRF9-5HH2>] (describing tensions between Harper Woods and Grosse Pointe residents contoured by race and class and quoting a school board trustee as saying that “Harper Woods residents are ‘given the gift of a Grosse Pointe education’”).

178. Grosse Pointe Public Schools, Michigan, MI, Nat'l Ctr. for Educ. Stat., <https://nces.ed.gov/Programs/Edge/ACSDashboard/2625740> [<https://perma.cc/F2X4-AHGL>] (last visited Feb. 9, 2023).

communities specifically to access the public schools. In this context, GPPSS may be capitalizing on a positive reputational property interest linked to GPPSS's territorial base consisting of formerly whites-only municipalities. Stated differently, residents may be flocking to GPPSS schools because of the racially exclusionary origins upon which the district continues to capitalize.<sup>179</sup> This claim is supported by the research showing that "good" school districts are socially constructed to mean districts with more white students and fewer nonwhite, particularly Black, students.<sup>180</sup> Further, the reputation of a school district as a "good district" is more important than test scores or any tangible measure of school quality in some parents' enrollment decisions.<sup>181</sup> Given that the territorial base that encompasses GPPSS is a microclimate of racial meaning, the school district's reputation is undoubtedly colored by that history and further influences migration patterns. Compounding the race-based social construction problem is the symbiotic relationship between school district demographics and home values: the whiter the school district, the higher the home prices in the district.<sup>182</sup> These realities all aid in GPPSS being racialized as a white place.

In addition, GPPSS's place is also racialized as white due to ostensibly race-neutral laws and policies that entrench prior white advantage. For example, financial limitations linked to the racial wealth gap and racialized income gaps keep nonwhite, particularly Black, residents from being able to purchase or rent homes within the GPPSS boundary lines.<sup>183</sup> Moreover, high home prices in Grosse Pointe arguably reflect the spatial effects of racial exclusion. Stated differently, high property values in Grosse Pointe were shorn through constructing a suburb modeled on exclusivity. The

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179. See, e.g., Nancy Derringer, *Fortress Grosse Pointe: In World of School Choice, Community Says 'Stay Out'*, *Bridge Mich.* (June 16, 2013), <https://www.bridgemi.com/talent-education/fortress-grosse-pointe-world-school-choice-community-says-stay-out> [<https://perma.cc/Y89Z-C5TQ>] (describing citizen opposition to Detroit students joining GPPSS and quoting one resident as saying, "I moved from Detroit to get away from those thugs, and I don't want them in my schools" (internal quotation marks omitted)).

180. See Holme, *supra* note 32, at 194 ("The parents in this study surmised a great deal about a school's quality by the status of its students: [T]hose schools serving higher-status (Whiter and/or wealthier) students were presumed to be good, while those serving lower-status students (lower income and/or students of color) were presumed to be unsatisfactory.").

181. *Id.* at 190.

182. See, e.g., Amy Stuart Wells, Douglas Ready, Lauren Fox, Miya Warner, Allison Roda, Tameka Spence, Elizabeth Williams & Allen Wright, *Ctr. for Understanding Race & Educ., Divided We Fall: The Story of Separate and Unequal Suburban Schools 60 Years After Brown v. Board of Education* 14 (2014) (examining home values in Nassau County, New York, and finding the same house in a high minority enrollment district was worth half as much as the home in a low minority enrollment district).

183. See William "Sandy" Darity & Kirsten Mullen, *Black Reparations and the Racial Wealth Gap*, *Brookings Inst.* (June 15, 2020), <https://www.brookings.edu/blog/up-front/2020/06/15/black-reparations-and-the-racial-wealth-gap/> [<https://perma.cc/7YRK-LSFX>] ("The average Black household has a net worth \$800,000 lower than the average white household. This, in turn, corresponds to a vast chasm in capabilities and opportunities between Black[] [people] and White[] [people].").

exclusivity of the suburb was arguably forged by intentionally excluding nonwhite residents.<sup>184</sup> Historic exclusion of nonwhite residents from a municipality or neighborhood can have modern consequences for home values in that municipality or neighborhood. For example, recent empirical research demonstrates that race continues to impact home values, with homes in predominantly white areas valued higher.<sup>185</sup> Researchers suggest this occurs in part because “appraisers continue to use neighborhood racial composition to help determine which homes are comparable . . . [thereby] constructing a racialized housing market” that favors historically white neighborhoods.<sup>186</sup> Thus, the modern-day high property values in Grosse Pointe that serve as a barrier to nonwhite people accessing the neighborhood arguably reflect the suburbs’ racial homogeneity. Price is racialized because the space is racialized.

State laws that limit school attendance to those who live within the boundary lines of the district compound the racial inequality problem. Further, heavy reliance on local property taxes to finance schools ensures that GPPSS schools remain predominantly white and well resourced.<sup>187</sup>

GPPSS also enacts policies to police its borders in ways that ensure the district remains predominantly white. Although the district is facing declining and low enrollment, it refuses to participate in a statewide interdistrict school choice program<sup>188</sup> that would allow students from Detroit to enroll in GPPSS schools.<sup>189</sup> It also invests in a substantial infrastructure to catch and expel non-GPPSS residents who attend GPPSS

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184. See William K. Stevens, *Newcomers Alter Face of Exclusive Grosse Pointe*, N.Y. Times, Nov. 5, 1974, at 37 (on file with the *Columbia Law Review*) (describing Grosse Pointe as synonymous with money, influence, and “a particular brand of snobbish racism and specular consumption”).

185. See Junia Howell & Elizabeth Korver-Glenn, *The Increasing Effect of Neighborhood Racial Composition on Housing Values, 1980–2015*, 68 Soc. Probs. 1051, 1068–69 (2021) (detailing the impact of racial composition on housing values and noting that “since 1980, homes in White neighborhoods appreciated \$194,000 more than comparable homes in otherwise comparable communities of color”).

186. *Id.*

187. See Mich. Comp. Laws Ann. § 211.1 (West 2023) (“[A]ll property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation.”); Mich. Comp. Laws Ann. § 380.1218 (West 2023) (“School taxes shall be assessed, levied, and collected in the manner provided in Act No. 206 of the Public Acts of 1893, as amended, being sections 211.1 to 211.157 of the Michigan Compiled Laws.”).

188. See Mich. Comp. Laws Ann. § 388.1705c (West 2023) (“[A] district shall determine whether or not it will accept applications for enrollment by nonresident applicants residing in a district located in a contiguous intermediate district for the next school year.”).

189. Kevin Mahnken, *Falling Birth Rates Spur Clash Over Race and School Choice in Michigan*, The74 (June 24, 2021), <https://www.the74million.org/article/falling-birth-rates-spur-clash-over-race-and-school-choice-in-michigan/> [<https://perma.cc/9A2R-RX55>] (chronicling GPPSS’s refusal to participate in the state school choice program and noting that they are “in clear need of more children to educate, but unwilling to accept the predominantly nonwhite and low-income pupils nearest to them”).

schools by, among other things, establishing an anonymous tip line to report nonresidents and paying private investigators to tail students suspected of living outside the GPPSS borders.<sup>190</sup> Such policies have the effect of stridently policing the GPPSS boundary lines in ways that ensure GPPSS continues to be racialized as a white place. It also sends a message regarding who is or is not welcome in the district.

Finally, a critical component of an area being a racialized place is that it is significantly different from the surrounding area. One can see such a difference with GPPSS, a clear example of a white island school district.<sup>191</sup> It is situated next to the predominantly Black Detroit public school district, which, in stark contrast to GPPSS, suffers from a lack of funding, lack of high-quality and fully certified teachers, and dilapidated facilities.<sup>192</sup> GPPSS's status as a predominantly white district is arguably the product of a social closure process that enables it to monopolize the highest quality schools in the metropolitan area.<sup>193</sup> GPPSS's territorial base encompassing a microclimate of racial meaning that influences the district's "place" may aid in the social closure process.

Yet neither law nor public policy recognizes the relevance of a district encompassing a space that is a microclimate of racial meaning, or the impact such a situation has on the district's place. The white racialization of the place elements of GPPSS (or any school district that encompasses formerly whites-only municipalities) has important normative and legal implications that are not captured by legal doctrine or public policies related to school district boundary lines. The problem is especially acute for white island districts like GPPSS. Part III considers the doctrinal and policy payoff of acknowledging the existence of a racial microclimate of meaning and its effect on a school district's place. It provides a framework through which to situate the significance of microclimates of racial meaning and place within legal doctrine and public policies related to school district boundary lines.

### III. WHITE MUNICIPALITIES, WHITE SCHOOL DISTRICTS: RACIAL PATH DEPENDENCE

The prior Part identified formerly whites-only municipalities as microclimates of racial meaning and analyzed the impact on school districts that encompass formerly whites-only municipalities as their primary territorial base. The microclimates of racial meaning framework helps one identify the nexus between racial violence ensconced within localized geography

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190. Rebecca Golden, *Public Schools Use Anonymous Tips, Detectives to Eject Children*, Patch (Dec. 15, 2017), <https://patch.com/michigan/grossepointe/public-schools-use-anonymous-tips-detectives-eject-children> [<https://perma.cc/RW6S-K4K9>] (describing tactics used by GPPSS to detect and expel suspected non-residents).

191. Wilson, *Monopolizing Whiteness*, *supra* note 17, at 2426–28.

192. *Id.*

193. *Id.*

and present-day racial advantage within that same localized geography. While identification is important, the next step is to prescribe points of intervention to alter the connection between geography and present-day racial advantage. Two immediate points of intervention warrant consideration: the Fourteenth Amendment doctrine on school district boundary lines and public policy shaping school district boundary lines.

Before one can see what the interventions might look like, one must first understand the current Fourteenth Amendment and public policy landscape regarding school district boundary lines. The section that follows does that work. It then applies a theoretical lens that helps elucidate what Equal Protection doctrine and state public policies miss, laying the groundwork for proposing new legal and policy frameworks.

#### A. *School District Boundary Lines Laws and Policies*

A school district is a “territorial unit within a state that has responsibility for the provision of public education within its borders.”<sup>194</sup> As a matter of law, it is a creature of the state and possesses only the powers the state affords it.<sup>195</sup> Yet laws and policies related to school district boundary lines treat the geographic areas that encompass the districts as race-neutral spaces, ignoring the mutually constitutive relationship between race and geography. They fail to account for the ways in which geographic areas bound by school district boundary lines can be microclimates of racial meaning that racialize the school district’s place.<sup>196</sup> Consequently, school district boundary lines effectuate spatialized containment of racialized advantage (or disadvantage) that is codified through law and policy and insulated from constitutional scrutiny. Stated differently, ostensibly race-neutral geographic boundary lines are legally permitted to institutionalize white advantage while also perpetuating racial exclusion and subordination. They do so in the following ways.

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194. Richard Briffault, *The Local School District in American Law*, in *Besieged: School Boards and the Future of Education Politics* 24, 25 (William G. Howell ed., 2005) [hereinafter Briffault, *The Local School District*].

195. See, e.g., *Perritt Ltd. v. Kenosha Unified Sch. Dist. No. 1*, 153 F.3d 489, 493 (7th Cir. 1998) (“[I]n Wisconsin, school districts are creatures of state law with express powers granted by statute and implied powers as necessary to execute the powers expressly given.”); *Boyd v. Gulfport Mun. Separate Sch. Dist.*, 821 F.2d 308, 310 (5th Cir. 1987) (“[S]chool districts are considered agencies of the state in Mississippi. Municipal Separate School Districts are creatures of the state just as all other school districts and the boards of trustees have the same powers.”); *Tecumseh Sch. Dist. No. 7 v. Throckmorton*, 403 P.2d 102, 103–04 (Kan. 1965) (“[S]chool districts are purely creatures of the legislature and subject not only to its power to create but its power to modify or dissolve.”); *Silver v. Halifax Cnty. Bd. of Comm’rs*, 805 S.E.2d 320, 341 (N.C. Ct. App. 2017) (“Our [state’s] Supreme Court has long recognized the plenary power of the General Assembly over counties and over the creation and organization of school districts . . .”).

196. See *supra* section I.C.

First, most laws and policies governing school district boundary lines are ideologically committed to local district sovereignty. Every state constitution articulates a right to a free public education, but almost every state delegates the responsibility for providing that education to local school districts.<sup>197</sup> The practical effect of such delegation is that, although school districts are creatures of the state, in practice they have a great deal of power and autonomy to give meaning to the place<sup>198</sup> elements of the district.<sup>199</sup> For example, districts are given the power to decide which students they will allow to receive an education and which students they will generally restrict access to—even if those students reside within the district’s borders.<sup>200</sup> The districts are also permitted to raise and spend money solely for the students who reside within the district, with local revenue for schools generated by the property taxes collected from within the school district.<sup>201</sup> Indeed, almost every state affords local districts the ability to tax, spend, budget, hire, fire, and set curriculum.<sup>202</sup>

Yet for school districts that encompass formerly whites-only municipalities, the territorial base upon which the district relies—to generate revenue, furnish a pool of students, enact curricular programing to meet the needs of those students, and hire teachers and staff to serve those students—is contoured by race. This means that, owing to the correlation between race and wealth (or lack thereof), white and affluent districts are able to tax themselves at a lower rate but spend more local money per pupil.<sup>203</sup> The municipality’s historical origins as exclusively white may

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197. Briffault, *The Local School District*, supra note 194, at 29.

198. Recall the term “place” as used in this Essay means the historical and contemporary social interactions that give meaning to a space or geographic location; the ideological premises that draw residents to a space or geographic location; and, most importantly, the public and private policies that define what kinds of residents can access the space or geographic location. See supra section I.C.

199. See Briffault, *The Local School District*, supra note 194, at 39–40 (describing the ideological commitment to local control and the ways in which it results in school districts enjoying more autonomy than their formal status as creatures of the state suggests they should).

200. See, e.g., *Martinez v. Bynum*, 461 U.S. 321, 328 (1983) (finding that a Texas bona fide resident statute that allowed the state to only educate students who resided within the school district’s borders, with a bona fide intent to remain living there, did not violate the Fourteenth Amendment’s Equal Protection Clause).

201. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 45–56 (1973) (upholding as constitutional a school-financing scheme that allowed schools to be funded based on taxes collected from the property within the school district).

202. See Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. Rev. 857, 864 (2006) (“States’ sweeping grants of authority to districts generally include power to tax (a power primarily exercised through the property tax); to budget and to spend; to hire and to fire . . . ; to set curricula; and to establish general policies for the conduct of all aspects of the educational program.”).

203. See, e.g., EdBuild, *Building Equity: Fairness in Property Tax Effort for Education* 21–22 (2017), <https://edbuild.org/content/building-equity/report.pdf> [<https://perma.cc/>



mean that the property values are higher than those in surrounding areas.<sup>204</sup> They are able to hire and attract the most-qualified teachers, as high-quality teachers are attracted to whiter and wealthier districts.<sup>205</sup> They are able to offer more advanced curricular offerings that attract residents with means.<sup>206</sup> Thus, the racial history of the geography upon which the district is based means that district sovereignty creates a self-fulfilling cycle: White districts get more resources and generate higher-quality outputs, creating a place that attracts white and affluent residents. The legal and policy framework that prioritizes district sovereignty appears neutral, but when contextualized within the substantive realities of race, class, and geography, it entrenches formerly whites-only municipalities as white places.

Moreover, federal constitutional challenges seeking to dismantle the boundary lines of school districts racialized as white places have failed. In *Milliken v. Bradley*, after finding that Detroit's public schools were intentionally segregated as a result of state action, the Court struck down as unconstitutional an interdistrict desegregation plan that would have included formerly whites-only suburban districts, including GPPSS.<sup>207</sup> The Court reasoned that an interdistrict remedy would only be appropriate if it could be shown that "there [was] a constitutional violation within one district that produces significant segregative effect in another district."<sup>208</sup>

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Y3WD-85WQ] (describing regressive taxation schema in which "[d]istricts in the top quartile of property valuation per household paid taxes for education at average effective rates at least 10% lower than those paid in bottom-quartile districts"); Pub. Sch. F. of N.C., 2020 Local School Finance Study 3–4 (2020), <https://www.ncforum.org/wp-content/uploads/2020/02/2020-Local-School-Finance-Study3.pdf> [<https://perma.cc/LY29-RDW3>] (examining school financing in North Carolina and finding that "because wealthier counties have more taxable resources, they are able to keep tax rates low while still generating significant revenue").

204. See, e.g., Bruce Mitchell & Juan Franco, NCRC Rsch., *HOLC Redlining Maps: The Persistent Structure of Segregation and Economic Inequality* 11 (2018), [https://ncrc.org/wp-content/uploads/dlm\\_uploads/2018/02/NCRC-Research-HOLC-10.pdf](https://ncrc.org/wp-content/uploads/dlm_uploads/2018/02/NCRC-Research-HOLC-10.pdf) [<https://perma.cc/AHB9-H2M9>] ("High percentages of the HOLC-graded 'Best' and 'Desirable' areas are majority non-Hispanic white, with the highest percentage of 'Best' being in the West").

205. See C. Kirabo Jackson, *Student Demographics, Teacher Sorting, and Teacher Quality: Evidence From the End of School Desegregation*, 27 *J. Labor Econ.* 213, 248 (2009) ("Researchers have found that teachers, particularly those with more experience, in schools with low-achieving students move to higher-achieving schools—leaving districts that have high shares of low-income ethnic minority students with vacancies and unqualified instructors."); Benjamin Scafidi, David L. Sjoquist & Todd R. Stinebrickner, *Race, Poverty, and Teacher Mobility*, 26 *Econ. Educ. Rev.* 145, 145 (2007) (finding that "teachers are much more likely to exit schools with large proportions of minority students").

206. Kayla Patrick, Allison Socol & Ivy Morgan, *Educ. Tr., Inequities in Advanced Coursework: What Is Driving Them and What Can Leaders Do* 11 (2019), <https://edtrust.org/wp-content/uploads/2014/09/Inequities-in-Advanced-Coursework-Whats-Driving-Them-and-What-Leaders-Can-Do-January-2019.pdf> [<https://perma.cc/G6P9-Q6K7>] (finding schools that serve mostly Black and Latinx students do not have as many seats in advanced classes as schools that serve fewer Black and Latinx students).

207. 418 U.S. 717, 745 (1974).

208. *Id.* at 744–45.

Such a showing could be made by demonstrating “racially discriminatory acts of the state or local school districts, or of a single school district [were] a substantial cause of interdistrict segregation.”<sup>209</sup> The Court found that no such showing was made by the state.<sup>210</sup>

Significantly, the Court’s reasoning was buttressed by its normative belief in the importance of local district sovereignty as indispensable to the health of public education.<sup>211</sup> The Court, however, failed to consider the ways in which the local geography over which the district retained sovereignty was forged through state-endorsed racial violence that ensured whites-only suburbs, like Grosse Pointe, were closed to Black and some other nonwhite residents. Instead, the Court acknowledged that Detroit was all Black, but determined that the reasons for its all Black demographics were “caused by *unknown and perhaps unknowable* factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears.”<sup>212</sup>

The factors leading to Detroit’s demographic make-up, however, are quite known and identifiable, including state action that perpetuated racial violence and ensured suburban school districts like GPPSS would be racialized as white places. The lower court acknowledged as much.<sup>213</sup> Yet the Supreme Court refused to consider such evidence in declining to abrogate school district boundary lines that encompassed formerly all-white municipalities.<sup>214</sup> *Milliken’s* holding ensures that school district boundary lines drawn around formerly whites-only municipalities are impervious to federal Equal Protection challenges.<sup>215</sup> Indeed, to date, only a small number of plaintiffs have been able to prevail in meeting the arduous legal standard set forth by *Milliken*.<sup>216</sup> State constitutional challenges seeking to

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209. *Id.* at 745.

210. *Id.* at 746.

211. *Id.* at 741–42 (“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”).

212. *Id.* at 756 n.2 (Stewart, J., concurring) (emphasis added).

213. See *Bradley v. Milliken*, 338 F. Supp. 582, 587 (E.D. Mich. 1971), *aff’d*, 484 F.2d 215 (6th Cir. 1973), *rev’d*, 418 U.S. 717 (1974) (finding that governmental action and inaction established and maintained racial segregation in Detroit, which all have continuing effects on the community and corresponding effects on the racial composition of residents and students).

214. *Milliken*, 418 U.S. at 717.

215. See *id.* at 746–47 (“Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students residing in the Detroit District to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so.”).

216. See, e.g., *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 778 F.2d 404, 407–08 (8th Cir. 1985); *United States v. Bd. of Sch. Comm’rs*, 637 F.2d 1101, 1116–17 (7th Cir. 1980); *Evans v. Buchanan*, 582 F.2d 750, 756 (3d Cir. 1978); *Newburg Area Council, Inc. v. Bd. of Educ.*, 510 F.2d 1358, 1359–61 (6th Cir. 1974).

disrupt the connection between school district boundary lines and racialized places on state constitutional equal protection grounds have also been unsuccessful.<sup>217</sup>

State and federal court emphasis on district sovereignty over geographic spaces contoured by racial violence has not only legal implications but sociocultural implications as well. As legal scholar Richard Briffault suggests, situating school districts as legally sovereign creates a cultural context wherein school district boundary lines are viewed as “organically connected to local parents and not as state-created boundaries dividing the larger metropolitan community.”<sup>218</sup> In simpler terms, this means that the prerogative of local parents, rather than a state’s obligation to ensure equity, predominates in policymaking decisions regarding district boundary lines. Local parents’ desire to exclude nonresidents who are culturally constructed as outsiders due to their race or socioeconomic status makes state legislators reluctant to require districts to enact policies that would mitigate the impact of residential segregation by making school boundary lines more permeable.

The reluctance is evident in discourse regarding state policies related to interdistrict choice programs and laws regarding school district consolidation, mergers, and annexation. For example, throughout the country many low-wealth school districts with majority student-of-color populations are situated in close proximity to affluent, predominantly white school districts.<sup>219</sup> The boundary lines serve as barriers to sharing resources. State legislatures have plenary legal authority to change boundary lines through consolidations, mergers, or annexations—or at least allow for permeability in the form of interdistrict transfer policies—to increase equity.<sup>220</sup> Yet legislators often make interdistrict choice programs voluntary to mitigate parental concerns about state intrusion on what they perceive to be their

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217. See, e.g., *Silver v. Halifax Cnty. Bd. of Comm’rs*, 821 S.E.2d 755, 756 (N.C. 2018) (rejecting plaintiff’s claim that a three-school-district configuration in which the district boundary lines encompassed two majority Black areas and one historically whites-only municipality violated the state right-to-education clause).

218. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *Colum. L. Rev.* 346, 386 (1990).

219. Empirical researchers found that, across the United States, there are “969 school district borders that create both revenue gaps of at least 10% and differences in racial makeup of 25 percentage points or more” and that have substantial differences in funding and resources for the predominantly low-income and minority districts. EdBuild, *Dismissed 1–3* (2019), <https://edbuild.org/content/dismissed/edbuild-dismissed-full-report-2019.pdf> [<https://perma.cc/CL4F-P2S6>].

220. School districts as local governments are creatures of the state, and the state can exercise against the local school district the same powers as it can exercise against other local governments, including authority over boundary lines. Cf. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907) (“The state . . . may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation.”).

school districts.<sup>221</sup> They also require consolidations, annexations, and mergers to be approved by both the geographic area to be joined and the geographic area to be merged or consolidated.<sup>222</sup> Fierce parental opposition to school district boundary-line changes often colors legislative attempts to make changes.<sup>223</sup> The nature of policymakers' legislative choices in making district boundary changes voluntary or requiring voter approval suggests a deference to perceived parental ownership over school district boundary lines and an abdication of the state's power and responsibilities.

In sum, laws and policies surrounding school district boundary lines reify, reproduce, and protect racial segregation and exclusion incumbent to formerly whites-only cities. Equal protection jurisprudence is ineffective at addressing the problem because it prioritizes local district sovereignty, failing to capture or curtail the harms wrought by school districts encompassing geographic areas that are microclimates of racial meaning and racialized places. State-level public policies are undergirded by sociocultural norms of parental rather than state ownership over school district boundary lines. Consequently, new legal and policy frameworks that can account for formerly whites-only municipalities being microclimates of racial meaning and racialized places are needed.

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221. See, e.g., Educ. Comm'n of the States, *50-State Comparisons: Open Enrollment Policies* (2022), <https://www.ecs.org/50-state-comparison-open-enrollment-policies/> [<https://perma.cc/AQF4-6XWR>] (noting that twenty-seven of the fifty states (plus D.C. and Puerto Rico) have policies permitting intradistrict open enrollment, but of that twenty-nine, nine make the programs voluntary while seventeen make them mandatory, and three have variations of both); Nancy Kaffer, *Opinion, School Choice Not the Right Choice for Our Kids*, *Detroit Free Press* (Oct. 2, 2016), <https://www.freep.com/story/opinion/columnists/nancy-kaffer/2016/10/02/choice-schools-michigan/91240656/> [<https://perma.cc/ZP4Y-7WU6>] (explaining Grosse Pointe opposition to participating in interdistrict transfer program because educating nonresident students “would require the schools to adopt lower curriculum standards to maintain the district’s graduation rate [and] negatively impact both the city’s property values and quality of life”).

222. See EdBuild, *Stranded: How States Maroon Districts in Financial Distress 3* (2018), <https://edbuild.org/content/stranded/full-report.pdf> [<https://perma.cc/CNT2-M3WA>] (“In thirty-nine states, consolidation may generally only happen if both districts agree to the merger. In some cases, this takes the form of voter approval, while in others, the decision is left to the school boards of each district.”).

223. See, e.g., Koby Levin, *Michigan School Districts Resist Consolidation. Will \$237M Change Minds?*, *Bridge Mich.* (July 19, 2022), <https://www.bridgemi.com/talent-education/michigan-school-districts-resist-consolidation-will-237m-change-minds> [<https://perma.cc/L3KW-FQFS>] (describing opposition to school district consolidation throughout Michigan and noting that “history has shown consolidation efforts to be unpopular with voters in many communities”); *School District Consolidation Bill Shot Down by House Panel*, *Midland Daily News* (Feb. 15, 2016), <https://www.ourmidland.com/news/article/School-district-consolidation-bill-shot-down-by-6904390.php> [<https://perma.cc/3BK9-AQZG>] (“A push by Republican leaders to consolidate some of Oklahoma’s more than 500 school districts has been derailed in the House after hundreds of students and parents crowded into a committee room urging the bill’s defeat.”).

### B. *Whites-Only Municipalities and Racial Path Dependence*

Evolutionary theory advances a concept called Path Dependence Theory. Path Dependence Theory suggests that early historical events can impact the path of subsequent conditions for a long period of time.<sup>224</sup> It specifically describes “historical sequences in which contingent events set into motion institutional patterns . . . that have deterministic properties.”<sup>225</sup> A historic event is path dependent if one can trace a particular outcome to the historical event and demonstrate that the outcome could not be explained by other factors or events.<sup>226</sup> Some path-dependent historical sequences are self-reinforcing and exhibit increasing returns.<sup>227</sup> Plainly stated, this means that a historical event leads to the formation of an “institutional pattern [that] delivers increasing benefits with its continued adoption, and . . . over time it becomes more and more difficult to transform the pattern or select previously available options, even if these alternative options would have been more ‘efficient.’”<sup>228</sup>

In Professor Roithmayr’s seminal model of locked-in racial inequality, she applies Path Dependence Theory to racial discrimination and segregation in the legal profession, post-apartheid public education financing in South Africa, and modern-day residential segregation.<sup>229</sup> She argues that racial discrimination or segregation in those domains are path-dependent events that established initial conditions that create today’s racial arrangements favoring white people in those domains. This Essay refers to Professor Roithmayr’s theory as “Racial Path Dependence.” She analogizes Racial Path Dependence to a flood that reshapes a river such that “subsequent evolution proceeds from that point forward.”<sup>230</sup> She theorizes that Racial Path Dependence impacts today’s racialized inequality because white people established racially discriminatory and subjugating

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224. See S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 *J.L. Econ. & Org.* 205, 205 (1995); James Mahoney, *Path Dependence in Historical Sociology*, 29 *Theory & Soc’y* 507, 507 (2000).

225. Mahoney, *supra* note 224, at 507.

226. *Id.* at 507–08.

227. *Id.* at 508.

228. *Id.*

229. See Roithmayr, *Reproducing Racism*, *supra* note 37, at 93–99, 116–19; Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 *Va. L. Rev.* 727, 742 (2000) (“Borrowed in part from evolutionary theory, path dependence suggests that even small historical events, particularly those that occur early in the formation of an industry, can have unexpectedly long-lasting effects on market outcome.”); Roithmayr, *Locked In Inequality*, *supra* note 37, at 41 (finding that the “market lock-in model of discrimination” illustrates that existing racial disparities stem from one group’s manipulation of institutions to gain an advantage and that these disparities “can become self-reinforcing” even without continuing intentional discrimination); Daria Roithmayr, *Locked In Segregation*, 12 *Va. J. Soc. Pol’y & L.* 197, 213 (2004) [hereinafter Roithmayr, *Locked In Segregation*] (arguing residential segregation is path dependent and can be traced back to enslavement of Africans and to the Jim Crow era).

230. Roithmayr, *Reproducing Racism*, *supra* note 37, at 126.

institutions (e.g., enslavement, Jim Crow segregation, standardized admissions tests) that enabled them to monopolize access to resources.<sup>231</sup> As a result, they gained an unfair competitive advantage akin to a monopoly.<sup>232</sup> In line with Path Dependence Theory, she argues the monopoly is self-reinforcing, exhibits increasing gains, and has “now become locked into institutional structures and processes”<sup>233</sup> because switching costs are too high. She uses the term “switching costs” to mean both the tangible and intangible costs of switching to a system that reduces racial inequality.<sup>234</sup>

A concrete example from Professor Roithmayr’s model is modern-day residential segregation. She situates racial discrimination by lending institutions, real estate boards, and homeowners’ associations as path-dependent historical events.<sup>235</sup> Racial discrimination by these entities, along with state, federal, and local government action and complicity, allowed white people to monopolize the best neighborhoods, as nonwhite people were denied loans to purchase in those neighborhoods or threatened with violence if they attempted entry.<sup>236</sup> Consequently, white people are now locked into neighborhoods that have high property values, an ample tax base through which to fund high-quality public schools, and social networks within the neighborhoods that can provide access to good jobs.<sup>237</sup> Owing to Racial Path Dependence, the advantages to white people of living in these neighborhoods are locked in because (i) nonwhite people, especially Black people, face barriers to entry that include having to pay higher costs to move in than white people and (ii) switching costs would include structural changes, such as upsetting property-value expectations, that are deemed too costly to bear.<sup>238</sup> As a result, “historical racism created a readily observed pattern out of which people move, even in the absence of significant racial discrimination, and therefore created a path dependence for the evolution of [residential] racial segregation.”<sup>239</sup>

Just as Racial Path Dependence locks in residential segregation in housing, it has the same effect on school districts, particularly when school district boundary lines are drawn around formerly whites-only municipalities. Indeed, the tether between geography and public schooling—particularly school assignment and school finance—creates “institutionally self-reinforcing processes”<sup>240</sup> that can racialize the place elements of school districts. In particular, the modern ideological premises that may

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231. *Id.* at 128–29.

232. *Id.*

233. Roithmayr, *Locked In Inequality*, *supra* note 37, at 40.

234. Roithmayr, *Reproducing Racism*, *supra* note 37, at 129.

235. Roithmayr, *Locked In Segregation*, *supra* note 229, at 216–21.

236. *Id.* at 220–21; see also *supra* section I.A.

237. Roithmayr, *Locked In Segregation*, *supra* note 229, at 226–31.

238. *Id.* at 231–36.

239. Stephen Menendian & Richard Rothstein, *Putting Integration on the Agenda*, 28 *J. Affordable Hous. & Cmty. Dev. L.* 147, 161 (2019) (book review).

240. Roithmayr, *Locked In Segregation*, *supra* note 229, at 208.

draw residents to a school district and the public policies that determine who has access to the school district are mutually constitutive with race due in large part to the history of racial exclusion within the territorial base that encompasses the district.

GPPSS again provides an instructive example. One of the ideological premises that may have initially drawn residents to the geographic space that now comprises GPPSS was a racialization process that marked those who could purchase or rent a home there as white. That ideological premise was reinforced by public policies at the federal, state, and local level that excluded nonwhite residents. The ideological premise also colored social interactions as white residents went to extremes—including violence—to maintain the geographic space as white. Being racialized as white vis-à-vis entry into the GPPSS space came with status rewards and economic benefits in the form of higher property values and higher social standing associated with saying that one resided in Grosse Pointe.

Critically, the geographic space derived much of its substantive value from the negation of those racialized as nonwhite. Put another way, the value was established due to the absence of certain nonwhite people in that geographic space and the spatialized preservation of a whites-only space. It was situated as valuable in relation to the neighboring areas that did not (or could not) exclude nonwhite people. As a result, the geography within the Detroit metropolitan area was imbued with relational patterns that carried significant consequences. The relational patterns were never affirmatively disrupted; instead, laws merely prohibited race-based denial of entry into Grosse Pointe without addressing structural barriers (e.g., finances, social interactions, or limited housing variety and stock) that make entry difficult for nonwhite people in modern times.

Creating Grosse Pointe as a whites-only municipality and maintaining school district boundary lines around that same geographic space was therefore a path-dependent event. The continued tie between geography and public schooling creates a self-reinforcing model. The same geography used to create the initial conditions of racialization and racial hierarchy facilitates increasing returns that allow white people to maintain advantages: Higher property values attached to all-white municipalities give them a more ample tax base from which to draw local funding for their schools; bounding all-white municipalities with school district boundary lines serves a recruitment function that draws more white people and others with means and status; and that recruitment in turn generates a positive reputational property interest that also draws white families and nonwhite families with means and status. The place elements of the district therefore remain racialized as white due to Racial Path Dependence.

Yet as Professor Roithmayr notes, Equal Protection doctrine fails to identify, let alone remedy, racial inequality linked to Racial Path Dependence. It fails to do so for the following reasons. First, the doctrine's requirement that discriminatory intent be established before a violation is found fails to "recognize the importance of membership in racial groups,

even though [Racial Path Dependence] distribute[s] opportunity or entitlements on the basis of membership in other socially relevant groups.”<sup>241</sup> For example, Equal Protection doctrine allows for the distribution of benefits based on being a member of a particular neighborhood.<sup>242</sup> The doctrine portends that local membership in a neighborhood is so inviolable the Constitution cannot stop the government from making distinctions in the quality of state-provided education a student receives based on the neighborhood in which they live. The doctrine does not, however, allow school districts to voluntarily consider race in restructuring neighborhood-based school assignment plans to prevent racial segregation in schools, since the Supreme Court reasoned that doing so requires the government to intentionally treat people differently based on race.<sup>243</sup>

This Supreme Court doctrine is an odd tautology. In the context of school districts that track municipal boundary lines, historical acts of racial exclusion in residential locations are “locked in,” creating path dependencies that extend to schools, even if no one expressly intends for them to do so.<sup>244</sup> The intent requirement doesn’t allow schools to voluntarily consider race in crafting school assignment plans to address the racial path dependency inherent in neighborhood-based school assignment; but it conversely requires a plaintiff trying to upend the Racial Path Dependence inherent in neighborhood-based school assignment to demonstrate that the assignment plan was adopted because of an express intent to racially discriminate.<sup>245</sup>

Second, Equal Protection doctrine falls short in curtailing Racial Path Dependence because, as of late, it eschews frameworks that would allow it to recognize racial balkanization as a cognizable injury. The term “racial balkanization” is used to mean the creation of smaller, often disparate, political units—in this case school districts—that are racially homogenous. Racial balkanization in the context of public schools is dangerous because

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241. *Id.* at 241.

242. *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991) (finding that a school-assignment plan that would rely on neighborhood-based assignment, but create racially segregated schools, did not violate the Equal Protection Clause).

243. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (finding a school assignment plan that considered race when assigning students to schools and granting transfer requests unconstitutional, reasoning that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”).

244. See *supra* notes 229–243 and accompanying text.

245. See, e.g., *Thomas Cnty. Branch of NAACP v. City of Thomasville Sch. Dist.*, 299 F. Supp. 2d 1340, 1351 (M.D. Ga. 2004), *aff’d in part, vacated in part, rev’d in part sub nom. Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325 (11th Cir. 2005) (finding racial imbalances existing in the school district were not traceable to a prior *de jure* segregated system and did not stem from intentional discrimination).



it undermines public schools' ability to educate and prepare a racially diverse citizenry to live and work together.<sup>246</sup> As noted by Professor Reva Siegel, an Equal Protection framework geared toward stopping racial balkanization would “assess[] the constitutionality of government action by asking about the kind of polity it creates . . . [and] emphasize[] the importance of cultivating social bonds that enable groups to relate and identify across difference.”<sup>247</sup> Racial Path Dependence fosters racial balkanization by using geography to assign students to schools and to fund schools—linking school assignment with residential addresses that are bound by boundary lines that historically excluded nonwhite people. The inevitable result is not only to silo students based on race, but to provide better resources and educational opportunities for those who reside in predominantly white areas, while those who live in historically nonwhite areas receive fewer resources and educational opportunities.

While moderate interpretations of the Equal Protection doctrine were arguably previously undergirded by concerns about racial balkanization,<sup>248</sup> a more conservative interpretation has taken hold that seemingly does not recognize racial balkanization as a harm worth preventing and seeks to remove any and all consideration of race from legislative decisionmaking.<sup>249</sup> Critically, racial balkanization is arguably linked to racially disparate impacts in policies such as school assignment. Nonetheless, disparate impact equal protection jurisprudence has been adulterated in ways that also make it unlikely to capture racial inequality caused by Racial Path Dependence that leads to racial balkanization.<sup>250</sup>

Further, other scholars have argued that the Equal Protection Clause should be interpreted to mean that a state's action violates Equal Protection if its meaning conflicts with the government's obligation to

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246. See Erika K. Wilson, *Racialized Religious School Segregation*, 132 *Yale L.J. Forum* 598, 629 (2022) (arguing that increased school segregation results in balkanization that leads to “students being siloed, unexposed to the diverse array of persons that inhabit America . . . [and] [t]he net result will be a decrease in social solidarity and cohesion, elevating risks of internal upheaval and violence”).

247. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *Yale L.J.* 1278, 1301 (2011).

248. See, e.g., *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring) (espousing a moderate view of reading the Equal Protection Clause for purposes of fostering racial integration in schools and noting that “[t]he enduring hope is that race should not matter; the reality is that too often it does”).

249. See, e.g., *Shelby County v. Holder*, 570 U.S. 529, 547–48 (2013) (explaining the “significant progress” made by racial minorities in access to voting).

250. Cf. Roithmayr, *Locked In Segregation*, *supra* note 229, at 242–44 (noting the use of disparate impact as an evidentiary tool to prove intentional discrimination and the ability of a defendant, under some antidiscrimination laws, to claim a business necessity rationale to justify a racially disparate impact).

treat each person with equal concern.<sup>251</sup> Such an interpretation of the doctrine would enable courts to recognize Racial Path Dependence that leads to the state—through both action and inaction—reifying boundary lines forged by racial violence, conveying a message that Black and other nonwhite students are inferior and unequal. The Equal Protection doctrine as currently situated does not. It is instead firmly committed to an arduous intent requirement incapable of capturing or curtailing the harms of Racial Path Dependence.

Most significantly, the injury caused by Racial Path Dependence in the context of school district boundary lines encompassing formerly whites-only municipalities is an uneven distribution of advantage. Yet Equal Protection doctrine does not capture the distorting effects of privilege or advantage.<sup>252</sup> Instead, modern Equal Protection doctrine situates the residential segregation codified by school district boundary lines as the race-neutral result of individual preference in residential location outside of the remedial purview of courts.<sup>253</sup> This position represents a stark shift away from courts' prior application of Equal Protection doctrine in which they acknowledged the link between historical intentional residential segregation and patterns of racial segregation in schools.<sup>254</sup> Modern courts, however, fail to engage with the ways in which choices in residential location are not unfettered. Instead, residential location choices often reflect exclusionary zoning laws that shape the housing stock available in a community; constraints related to finances; and a sense of community and

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251. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L.J.* 421, 421–22 (1960) (outlining that the Equal Protection Clause should be interpreted as saying that Black Americans should not be significantly disadvantaged by state laws); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 *Minn. L. Rev.* 1, 10 (2000) (“The state may not adopt policies that express a message of unequal worth; this is what the Equal Protection Clause prohibits.”).

252. See Wilson, *Monopolizing Whiteness*, *supra* note 17, at 2409–14.

253. See *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring) (“The Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race.”); *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) (“Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.”); NAACP, *Jacksonville Branch v. Duval Cnty. Sch.*, 273 F.3d 960, 972 (11th Cir. 2001) (finding that although a number of schools were racially segregated, school officials desegregated schools to the extent practicable and that “voluntary residential patterns have re-segregated a number of the core city’s schools”).

254. See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 202 (1973) (“The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.”); *Hart v. Cmty. Sch. Bd. of Brooklyn*, 383 F. Supp. 699, 755 (E.D.N.Y. 1974) (“We cannot ignore the fact that ‘the system of geographic school attendance, imposed upon segregated housing patterns, provides the broad base for racial isolation in Northern Schools.’” (quoting 1 U.S. Comm’n on C.R., *Racial Isolation in the Public Schools* 73 (1967))).

belonging (or lack thereof) tethered to race.<sup>255</sup> Each of these factors creates forms of Racial Path Dependence. As a result, “the choice to move to a particular municipality is not voluntary for everyone”<sup>256</sup> but is instead driven by Racial Path Dependence. Nonetheless, Equal Protection doctrine does not capture or acknowledge this reality, instead situating residential location choice at a race-neutral individual level rather than a race-conscious systemic one.

Finally, state public policies surrounding school district boundary lines also fail to recognize or mitigate the effect of Racial Path Dependence. States continue to maintain boundary lines around formerly whites-only municipalities like Grosse Pointe. States also enact policies regarding boundary line changes that are voluntary rather than mandatory, allowing districts that benefit from Racial Path Dependence to decline to participate.<sup>257</sup> State policies regarding school district boundary lines also foment racial balkanization within metropolitan areas.<sup>258</sup> They do so by encouraging residents to sort across municipal boundary lines tethered to school district boundary lines, as sociocultural norms (and Supreme Court precedent) suggest that school district boundary lines won’t be abrogated and residents won’t have to share resources or schools with those outside of these boundary lines.<sup>259</sup> As the final section discusses, new legal and policy frameworks are needed in order to capture and mitigate the impact that Racial Path Dependence has on the place elements of school districts that encompass geographic spaces that are microclimates of racial meaning.

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255. Cecilia Rouse, Jared Bernstein, Helen Knudsen & Jeffery Zhang, *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, White House (June 17, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/> [<https://perma.cc/5KEU-RD95>] (“Because exclusionary zoning rules drive up housing prices, poorer families are kept out of wealthier, high-opportunity neighborhoods.”); see also Anderson, *supra* note 108, at 10 (describing the tether between race, geography, and belonging in a community); Wilson, *Monopolizing Whiteness*, *supra* note 17, at 2444 (describing the role of the racial wealth gap in keeping Black families out of high-performing predominantly white school districts).

256. Erika K. Wilson, *The New School Segregation*, 102 *Cornell L. Rev.* 139, 193 (2016).

257. See *supra* notes 219–223 and accompanying text.

258. See Stephen Menendian, Samir Gambhir & Arthur Gailes, *The Roots of Structural Racism Project: Twenty-First Century Residential Segregation in the United States, Othering & Belonging Inst.* (June 21, 2021), <https://belonging.berkeley.edu/roots-structural-racism> [<https://perma.cc/V578-C4ZX>] (last updated June 30, 2021) (describing balkanization between residential neighborhoods that is mirrored in schools).

259. See, e.g., Dana Goldstein, *Where Civility Is a Motto, a School Integration Fight Turns Bitter*, *N.Y. Times* (Nov. 12, 2019), <https://www.nytimes.com/2019/11/12/us/howard-county-school-redistricting.html> (on file with the *Columbia Law Review*) (describing parental tensions and concerns regarding a redistricting plan).

C. *School Districts as Microclimates of Racial Meaning: Adopting New Legal and Policy Frameworks*

The microclimates of racial meaning framework, as a descriptive matter, elucidates how race, absent intervention, is baked into geography in ways that create localized geographic advantage (or disadvantage). A self-reinforcing process of Racial Path Dependence then occurs and impacts the geographic area encompassed by school district boundary lines, such that the place elements of the school district are racialized. Yet as the prior section showed, neither Equal Protection doctrine nor state public policies recognize or address racialization of a school district's place as a cognizable legal injury that can or should be remedied.

This final section makes the case for a more nuanced approach to Equal Protection doctrine and state public policies regarding school district boundary lines, particularly when the boundary lines create patterns of stark interdistrict racial segregation. The law and policy frameworks should be modified to allow for an acknowledgment that racial orderings and formation have historically been tied to geography. Instead of affording deference to local district sovereignty, particular focus should be given to the historic social conditions that constructed a locality encompassed by school district boundary lines, including any past racial violence that makes the locality a microclimate of racial meaning. The frameworks should also acknowledge that there are contemporary implications of structures that were used to create and reinforce a racial ordering, particularly when no affirmative interventions—except prohibitory fair housing laws—are put in place to address the past history. The frameworks could be reworked to achieve those goals in the following ways.

1. *Adopting a New Legal Framework.* — First, when considering whether patterns of interdistrict racial segregation violate the Fourteenth Amendment, courts should consider whether a geographic location encompassed by a school district is a microclimate of racial meaning. The plaintiff should bear the burden of making such a showing. Demonstrating that a geographic location is a microclimate of racial meaning is an art, not a science.<sup>260</sup> Nonetheless, just as the Equal Protection doctrine looks at numerous factors when assessing whether there is an intent to discriminate,<sup>261</sup> courts could also look at numerous factors in assessing whether the geographic location should be considered a microclimate of racial meaning. Such a factor-based analysis could be similar to that used under section

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260. See Ward, *Microclimates of Racial Meaning*, *supra* note 29, at 603 (“Understanding and interrupting centuries of racial violence requires careful examination of the specific places where it occurs, forms it takes, and underlying its generative frameworks.”).

261. See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (noting that “whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available” and articulating several factors a court can consider in making the determination).

2 of the Voting Rights Act, which also examines the intersection between racial subordination and geography.<sup>262</sup>

The factors a court might consider include, but are not limited to, (i) whether the geographic location has a history of being a sundown town—by either law or informal policy; (ii) whether the geographic location has a history of extreme race-related violence, such as lynchings or race riots; (iii) the racial demographics of the area over the past thirty years—changes in racial demographics could weigh against the location being considered a microclimate of racial meaning, while static demographics could weigh in favor of it being considered one; (iv) any history of institutionalized racial discrimination within the geographic area such as discriminatory policies enacted by real estate boards or homeowners' associations; (v) any history of “redlining” or “greenlining” of the geographic area based on the HOLC maps; and (vi) the reputation of the geographic area.<sup>263</sup>

The suggested factors are not dispositive but provide a basic set of criteria a court could use to decide whether the school district boundary lines encompass a geographic location that is a microclimate of racial meaning. Moreover, in assessing the factors, the court could consider the state and local government's role in facilitating or condoning any of the factors. For example, if a plaintiff showed that there was an extreme history of racial violence and the state or local government aided in perpetuating the violence or failed to act to stop the violence, the court could consider the racial violence to be a product of state action. Finally, if, like GPPSS, a district had a history of being a formerly whites-only municipality and is currently a white island district, a court could automatically presume that the geographic location encompassing the school district boundary lines is a microclimate of racial meaning.

If a plaintiff successfully established that the geographic area was a microclimate of racial meaning, the evidence could be used for purposes of establishing an interdistrict constitutional violation that warrants broaching or rearranging the school district boundary lines. Bear in mind, under *Milliken*, a court will only abrogate school district boundary lines for desegregative purposes if a plaintiff can show “that racially discriminatory acts of the state or local school districts, or of a single school district have been a *substantial* cause of interdistrict segregation.”<sup>264</sup> Demonstrating that

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262. See, e.g., S. Rep. No. 97-417, § VI.D (1982) (confirming that section 2 of the Voting Rights Act creates a results-based test and enumerating factors typically indicative of a lack of equal voting opportunities based on an area's history of racial subordination).

263. As other scholars have noted, geographic areas can obtain reputations for being predominated by one race. See, e.g., Boddie, *supra* note 26, at 449 (“Spaces become racialized when they are inhabited, occupied, or frequented principally by one race and are claimed or treated as spaces that are only for individuals from that racial group.”). Evidence of reputation could be gathered by reference to popular media, expert witnesses, and even media sites that rate amenities such as schools or housing.

264. *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (emphasis added).

a district like GPPSS was a microclimate of racial meaning could raise a rebuttable presumption that racially discriminatory acts by state and local officials within the district that is a microclimate of racial meaning was a substantial cause of current patterns of interdistrict segregation.

The district could rebut the presumption by showing that the state took intervening actions that substantially altered the environment within the geographic area such that it broke the Racial Path Dependence, and therefore that the geographic area should no longer be considered a microclimate of racial meaning. Examples of intervening actions might include, but are not limited to, redrawing school district boundary lines to include new geographic spaces or enacting inclusive zoning ordinances within the geographic area.<sup>265</sup> The evidence put forth by the district to rebut the presumption of being a microclimate of racial meaning would have to be greater than the past history of racial violence. Thus, if the past history that made a geographic area a microclimate of racial meaning included sustained acts of physical violence and a status as a sundown town, the district would have to put forth substantial evidence to show that the intervening acts broke the Racial Path Dependence. If the district were unable to do so, the court could find that the plaintiff met its burden of demonstrating an interdistrict violation. Modifying the current Equal Protection framework to include such a burden-shifting standard would do two important things. First, it would allow a plaintiff to make clear the tie between state-perpetuated racial discrimination and geography, dispelling the notion that geography is somehow race-neutral. Second, and most importantly, it would allow a plaintiff to show that current residential patterns are not the product of individual residential choice but are instead a product of state-facilitated patterns of racial segregation and exclusion. It would make it more difficult for geography to continue serving as a race-neutral mechanism for reifying racial advantage (or disadvantage). The proposed modified Equal Protection framework could be used for a federal or state constitutional claim.

2. *Adopting a New Policy Framework.* — Although revamping the Equal Protection framework around interdistrict violations could be useful, changing the ideology undergirding state public policies regarding school district boundary lines could have a more direct impact. Currently, like the courts, most state policies regarding boundary line changes are grounded

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265. Inclusive zoning ordinances might include allowing multi-family homes, removing lot size restrictions, or requiring new developments to set aside some portion of new housing and sell (or rent) them below market value. For an example of inclusive zoning policies that helped an affluent, predominantly white school system become more diverse and equitable, see Heather Schwartz, *Integrating Schools Is a Matter of Housing Policy*, in *Poverty & Race Rsch. Action Council, Finding Common Ground: Coordinating Housing and Education Policy to Promote Integration 15* (Philip Tegeler ed., 2011), <https://files.eric.ed.gov/fulltext/ED538400.pdf> [<https://perma.cc/W5ZZ-ABH7>].

in a commitment to local control or local district sovereignty.<sup>266</sup> State legislators should balance the legitimate benefits of local control, such as citizen participation, efficiency, and capitalizing on interlocal diversity,<sup>267</sup> with the need for racial equity. They can do so by using policy tools that require deliberation regarding the racialized history of the geography encompassed by school district boundary lines when deciding whether to allow or require a school district to open up its borders or participate in a boundary line change.

For starters, when deciding whether to require a consolidation, a merger, an annexation, or participation in an interdistrict transfer program, state legislators could adopt the same factors as courts. They could use those factors to make an assessment as to whether the geographic space encompassed by school district boundary lines is a microclimate of racial meaning. If it is, then a district should not be permitted to voluntarily opt out or to have a voter referendum regarding a boundary line change. More critically, in the case of districts that are encompassed by microclimates of racial meaning and are also white island districts, like GPPSS, the state could require the district to undergo periodic redistricting as a method of breaking Racial Path Dependence. While these policy prescriptions are not a panacea, they would offer an important starting point in undoing the legacy of racial violence that infects school districts, particularly formerly whites-only municipalities that encompass white island school districts in racially diverse metropolitan areas.

#### CONCLUSION

United States metropolitan areas have a sordid history of creating racialized places through racial violence, discrimination, and exclusion. The racialization of place is imbued upon school districts as well, particularly when school districts encompass formerly whites-only municipalities. Yet legal and policy frameworks surrounding school district boundary lines fail to recognize, let alone remedy, the harms caused by such racialized places. As a result, patterns of stark interdistrict racial segregation exist throughout the United States, including white island districts—pockets of predominantly white, affluent, and thriving school districts situated within racially diverse metropolitan areas, in close proximity to predominantly low-income districts populated by students of color. This Essay sets forth a legal and policy framework for identifying and remedying such patterns of interdistrict racial segregation. It offers important conceptual frameworks

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266. See *supra* Part II.

267. For a discussion about the purported benefits of local control in education and the critiques thereof, see Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 *Wash. U. L. Rev.* 959, 962–98 (2015) (contending that “both the executive branch and Congress can significantly restructure and expand their authority over education under the Spending Clause”).

for resituating the connection between race, racial inequality, and geography in the context of school districts. It also offers a path forward to disrupt the use of geography as a race-neutral mechanism for facilitating racial subordination and exclusion through school district boundary lines.



## PERSONHOOD, PROPERTY, AND PUBLIC EDUCATION: THE CASE OF *PLYLER V. DOE*

Rachel F. Moran\*

*Property law is having a moment, one that is getting education scholars' attention. Progressive scholars are retooling the concepts of ownership and entitlement to incorporate norms of equality and inclusion. Some argue that property law can even secure access to public education despite the U.S. Supreme Court's longstanding refusal to recognize a right to basic schooling. Others worry that property doctrine is inherently exclusionary. In their view, property-based concepts like residency have produced opportunity hoarding in schools that serve affluent, predominantly white neighborhoods. Many advocates therefore believe that equity will be achieved only by moving beyond property-based claims, for instance, by recognizing education as a public good or human right.*

*The Court has upheld a constitutional right of access to public schools on just one occasion. In Plyler v. Doe, the Justices found that Texas could not bar undocumented students from schools or charge them tuition. The Court did not declare education a fundamental right or alienate a suspect classification. Instead, the opinion relied on several rationales, some property-based and some not. Residency, for instance, featured prominently in the case, but so did a trope of childhood innocence. Recently, there have been calls to revisit Plyler, making this an opportune moment to evaluate how its reasoning will fare. Despite growing interest in property-based entitlements as a strategy for inclusion, Plyler's fate will likely turn on considerations that transcend property: the blamelessness of children, the cruelty of relegating them to a lifetime of illiteracy, and the implications that such deliberate indifference has for our democratic integrity.*

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## INTRODUCTION

In thinking about education and property, much of the dynamic is driven by disenfranchisement. In 1973, the U.S. Supreme Court's decision in *San Antonio Independent School District v. Rodriguez* made the right to education a constitutional orphan.<sup>1</sup> The Court refused to find that the Equal Protection Clause included protection for equal education.<sup>2</sup> Nor was education the kind of bulwark of liberty, namely the kind that supports participation in the political process, that received any special protection under the First Amendment.<sup>3</sup> Although the Court suggested that there might be a right to a basic education, the Justices have yet to endorse this principle.<sup>4</sup> In the intervening years, education has been searching for a constitutional home, and property has presented itself as a possibility. Law professor Matthew Shaw, for example, has argued that education is a protected property interest under substantive due process.<sup>5</sup> Although the odds of succeeding with such a claim have dimmed considerably since the Supreme Court rejected a substantive due process right to reproductive freedom in 2022,<sup>6</sup> the notion that education has property-like qualities persists. Often, these qualities are equated with privilege and exclusion rather than equity and inclusion.<sup>7</sup>

Even so, scholars still hope that treating education as a form of property can promote access for disadvantaged children. For instance, Professor Shaw cites *Plyler v. Doe*<sup>8</sup> as the Supreme Court opinion that comes closest to ensuring a right to education for vulnerable students.<sup>9</sup> He believes that the decision rested on unspoken recognition of a vested property interest in public education.<sup>10</sup> In *Plyler*, the Court declared that Texas violated the Equal Protection Clause when it allowed public schools to bar undocumented students or charge them tuition.<sup>11</sup> The opinion did not declare a right to a basic education but instead offered a *mélange* of

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1. 411 U.S. 1 (1973).

2. *Id.* at 28.

3. *Id.* at 35–37.

4. *Id.* at 25 & n.60; Matthew Patrick Shaw, *The Public Right to Education*, 89 U. Chi. L. Rev. 1179, 1181 (2022).

5. Shaw, *supra* note 4, at 1183–88.

6. See *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 5 (U.S. June 24, 2022) (rejecting a substantive due process right to an abortion because the right does not appear in the Constitution and is not "implicit in the concept of ordered liberty" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997))).

7. See, e.g., LaToya Baldwin Clark, *Education as Property*, 105 Va. L. Rev. 397, 398–401, 408–10 (2019) [hereinafter Baldwin Clark, *Education as Property*]; LaToya Baldwin Clark, *Stealing Education*, 68 UCLA L. Rev. 566, 575–77 (2021) [hereinafter Baldwin Clark, *Stealing Education*].

8. 457 U.S. 202 (1982).

9. Shaw, *supra* note 4, at 1220–26.

10. *Id.* at 1223–26.

11. *Plyler*, 457 U.S. at 230.

reasons for its holding. Some justifications were rooted in property-like entitlements, but others reflected a fraught discourse over immigration by invoking conceptions of the public good as well as norms of fundamental human decency.<sup>12</sup> The Court's recent opinion overturning the right to an abortion has sparked calls to challenge *Plyler* as similarly misguided judicial activism,<sup>13</sup> so it seems timely and worthwhile to consider the likely staying power of the decision's varied rationales.

First, this Essay will consider competing conceptions of property as they bear on education. To make property-like entitlements consistent with full access to education, scholars have modified traditional doctrinal principles to serve broader objectives of distributive fairness. For critics of property-based approaches, though, even elastic interpretations of the concept cannot reliably advance equal educational opportunity. As a result, some scholars have adopted alternative approaches that focus on education as a public good or a human right.

Next, this Essay will discuss how property-like concepts played a complex role in finding a right to education in *Plyler*. Undocumented families invoked an entitlement based on residency in the school district to deflect exclusion based on their immigration status. Although property-like claims figured significantly in the case, other factors were at work as well. The trope of childhood innocence allowed undocumented children to counter arguments that they should be punished for their parents' decision to enter the country illegally. The students' blamelessness became a shield against the inherited stigma that came with their parents' immigration status.

This Essay closes with a reflection on *Plyler*'s likely fate if it were to return to the Court today. Residency remains an important way to allocate educational resources. However, its power derives from policymaking rather than any constitutional guarantee. Meanwhile, Congress and the states have grown bolder in enacting restrictive legislation that denies public benefits to undocumented individuals. Only *Plyler* has stood in the way of extending these policies to elementary and secondary education. Interestingly, the decision's most enduring argument may be based not on property-like entitlements but on the innocence of children. The fear that dehumanizing border-enforcement practices threaten fundamental democratic values is likely to remain a critically important element of any defense of *Plyler*.

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12. See *infra* Part II.

13. See David Martin Davies, Texas Matters: Why Abbott Wants *Plyler v. Doe* Overturned, Tex. Pub. Radio (May 16, 2022), <https://www.tpr.org/podcast/texas-matters/2022-05-16/texas-matters-why-abbott-wants-plyler-v-doe-overturned> [<https://perma.cc/8K8H-LKPB>]; Kate McGee, Gov. Greg Abbott Says Federal Government Should Cover Cost of Educating Undocumented Students in Texas Public Schools, Tex. Trib. (May 5, 2022), <https://www.texastribune.org/2022/05/05/greg-abbott-plyler-doe-education/> [<https://perma.cc/F3LG-HXSE>].

## I. COMPETING CONCEPTIONS OF EDUCATION: PROPERTY-BASED ENTITLEMENTS AND THE ALTERNATIVES

Property is having a moment, one that is getting education scholars' attention. Though property was long associated with rights of exclusion, there are now efforts to redefine property and deploy it in the service of distributive justice.<sup>14</sup> That reformist impulse has assumed a new urgency as growing divides in wealth and income leave some individuals without the basic wherewithal to lead a decent and dignified life.<sup>15</sup> Because access to education is closely associated with an individual's life chances, it should come as no surprise that conceptions of property have been increasingly prominent in debates over schooling. At a global level, the right to education is framed as one that "straddles the division of human rights into civil and political, on the one hand, and economic, social and cultural, on the other hand."<sup>16</sup> A neoliberal framework treats students as "homo economicus, for whom education is a matter of value added by way of credentials and—if lucky—the skills that will ensure competitiveness in the global job market."<sup>17</sup> Because neoliberalism mainly treats education as an individual entitlement, that is, a private rather than a public good,<sup>18</sup> economic considerations overshadow other conceptions of a right to learn, deepening inequality in access to schooling.<sup>19</sup>

Most commentary on the privatization of education in the United States has focused on the rise of school choice through the creation of charter schools and voucher programs.<sup>20</sup> However, recent scholarship has

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14. See, e.g., Timothy M. Mulvaney & Joseph William Singer, *Essential Property*, 107 *Minn. L. Rev.* 605, 635–38 (2022). The review of these extensive developments in property law is necessarily limited and highlights innovations of particular relevance to education law.

15. *Id.* at 647–51.

16. Katarina Tomaševski, *Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable* 9 (2001), [https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski\\_Primer%203.pdf](https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf) [<https://perma.cc/S3F4-CQ37>] [hereinafter Tomaševski, *Human Rights Obligations*].

17. James Murphy, *Neoliberalism and the Privatization of Social Rights in Education*, in *Economic and Social Rights in a Neoliberal World* 81, 93 (Gillian MacNaughton & Diane F. Frey eds., 2018).

18. *Id.* at 92–93.

19. See Steven J. Klees & Nisha Thapliyal, *The Right to Education: The Work of Katarina Tomasevski*, 51 *Comp. Educ. Rev.* 497, 505 (2007); Jennifer LaFleur, *Centring Race in Contemporary Educational Privatization Policies: The Genealogy of U.S. 'Private School Choice' and Its Implications for Research*, 26 *Race Ethnicity & Educ.* 205, 212–13 (2023) (describing theories that anti-Blackness is embedded in neoliberalism); see also Johanna Crighton, *Book Review*, 37 *Compare* 121, 122–23 (2007) (reviewing Katarina Tomaševski, *Speaking Truth to Power. Human Rights Obligations in Education: The 4-A Scheme* (2006)) (describing how promises of free, compulsory education are undermined by treating education as a "traded service").

20. See Lois Weiner, *Privatizing Public Education: The Neoliberal Model*, 19 *Race Poverty & Env't*, no. 1, 2012, at 35, 35 (arguing that accountability testing under the No Child Left Behind Act was a means to "replac[e] locally controlled, state-funded school systems with a collection of privatized services governed by the market"); Jason Blakely, *How*

tried to deploy property-like concepts more broadly in evaluating education law and policy. This Part first explores efforts to reimagine property in ways that bolster its capacity to promote inclusion. These innovations usually incorporate public-regarding aspects of property that depart from an emphasis on an exclusionary right of individual enjoyment. Then, the analysis contrasts these reimagined notions of property with the views of scholars concerned about the exclusionary effects of treating education as property. The final section considers alternative frameworks that largely reject property-based conceptions of schooling. Some treat education as a public good, focusing on broad social benefits rather than individual gains. Still others treat education not as a market commodity but as a human right essential to achieving full personhood.

A. *Education as Property: Competing Accounts*

The task of considering the role of property in shaping access to education is greatly complicated by widely disparate notions of what property means. In the face of growing inequality, progressives have tried to retool the concept to make it more sensitive to concerns about distributive fairness, including access to educational opportunities. At the same time, many scholars believe that property is inextricably linked to principles of exclusion that perpetuate inequality, including opportunity hoarding in public schools. This section will evaluate these competing accounts and their widely divergent implications for education.

1. *Reconceptualizing Property to Make It More Inclusive.* — In recent years, scholars have openly questioned conceptions of property law as a bundle of individual rights.<sup>21</sup> These rights typically include “a right of exclusion, a right of use, a right of possession, and a right of alienation.”<sup>22</sup> The entitlements are associated with private market transactions, but as property law scholars Timothy M. Mulvaney and Joseph William Singer point out, this framework of rights and privileges derives from “an exercise of public power” and thus cannot be indifferent to distributive consequences that undermine basic human dignity.<sup>23</sup> Progressive property law scholars have tried to redefine the doctrine’s normative underpinnings to

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School Choice Turns Education Into a Commodity, *Atlantic* (Apr. 17, 2017), <https://www.theatlantic.com/education/archive/2017/04/is-school-choice-really-a-form-of-freedom/523089/> (on file with the *Columbia Law Review*).

21. See Katrina M. Wyman, *The New Essentialism in Property*, 9 *J. Legal Analysis* 183, 188 (2017) (“The starting point for the new essentialist project is a powerful critique of the bundle picture.”).

22. *Id.* (citing Shane Nicholas Glackin, *Back to Bundles: Deflating Property Rights, Again*, 20 *Legal Theory* 1, 3 (2014)).

23. Mulvaney & Singer, *supra* note 14, at 631.

promote just allocation of resources.<sup>24</sup> In their view, property must incorporate principles of nondiscrimination and realistic opportunities,<sup>25</sup> both of which are clearly implicated by equal access to schooling.

These recent calls for a revised understanding of property build on earlier efforts to adapt the doctrine to changing circumstances. One of the most important innovations was to move away from the idea that property had to be a “thing.”<sup>26</sup> As Professor Charles Reich recognized, many Americans’ most significant entitlements—what he termed “the new property”—turned on government largesse.<sup>27</sup> Far from being private property that guaranteed individual autonomy, the new property left people largely at the mercy of the state, which set the terms and conditions of benefits like social security, unemployment compensation, and public assistance.<sup>28</sup> In Reich’s view, public education was the most important form of government largesse because of its great value to the student.<sup>29</sup> This seminal work made it possible to conceive of opportunity creation through the schools as a form of entitlement.

Reich recognized that because the new property left individuals deeply dependent on the state, it was critical to revise property doctrine to protect these entitlements.<sup>30</sup> Progressive law scholars have answered this call by envisioning a basic safety net that reflects “an ethic of social solidarity” that ensures “resilience against our vulnerabilities.”<sup>31</sup> While this effort to ensure principles of human dignity springs from interdependency, a sense of shared fate,<sup>32</sup> property scholar Margaret Radin relies on personhood to infuse property law with norms of just distribution. In her view, “to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment.”<sup>33</sup> She draws a critical distinction between how closely “resources are bound up with the individual” and how readily they can “be traded or held for trade.”<sup>34</sup> Radin concludes that fungible property easily exchanged on the market should enjoy less protection than property closely identified with a person’s autonomy and individuality.<sup>35</sup> As Radin explains,

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24. Id. at 635–38.

25. Id. at 643–51.

26. See Wyman, *supra* note 21, at 206–09 (describing calls by property essentialists to resurrect the requirement that property be a thing).

27. Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733, 733 (1964).

28. Id. at 734, 737–38.

29. Id. at 737.

30. Id. at 787.

31. Mulvaney & Singer, *supra* note 14, at 651–53.

32. Id. at 651.

33. Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957, 957 (1982).

34. Id. at 982.

35. Id. at 981–82, 986.

[A] welfare rights theory incorporating property for personhood would suggest not only that government distribute largesse in order to make it possible for people to buy property in which to constitute themselves but would further suggest that government should rearrange property rights so that fungible property of some people does not overwhelm the opportunities of the rest to constitute themselves in property.<sup>36</sup>

Under Radin's framework, education must enjoy special protection because it creates the conditions for constituting oneself as an individual. By making education compulsory and imposing taxes to support the public schools, the state prioritizes largesse that advances opportunities to develop as a person over private use of those monies in fungible market transactions.

To achieve a fairer allocation of schooling, Professor Shaw treats education as a form of property that should enjoy protection under the Due Process Clause.<sup>37</sup> The hybridity of his proposal, reflecting links between property and personhood, is immediately apparent. He wants constitutional protection for "the public right to education," which is simultaneously an individual entitlement.<sup>38</sup> Shaw draws especially heavily on Reich's notion of the new property, arguing that states have created an entitlement by establishing public schools, making school attendance compulsory, and heavily regulating the quality of instruction.<sup>39</sup> In his view, this comprehensive government largesse gives rise to a vested property interest that allows students to challenge efforts to diminish those rights.<sup>40</sup> As a result, federal courts should apply heightened scrutiny to official actions that change "constitutions, statutes, regulations, curricula, and even 'rules or understandings' that establish the 'legitimate claim of entitlement' to public education."<sup>41</sup> By adopting a public-regarding notion of an individual entitlement, Shaw repackages property as a means to promote inclusive education.

Efforts to reconceptualize property reveal what a protean concept it can be. In the face of growing inequality, progressives have tried to redefine property to advance a just distribution of resources, including the opportunity to receive an education. All of these innovations make property a more capacious concept, expanding its relevance to schooling and equity. Even so, some critics still find that property remains an inadequate foundation for advancing educational opportunity, as the next section demonstrates.

2. *The Exclusionary Effects of Characterizing Education as Property.* — For all the hopeful accounts of a new property that can advance progressive

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36. *Id.* at 990.

37. Shaw, *supra* note 4, at 1186–87.

38. *Id.*

39. *Id.* at 1215–20.

40. *Id.* at 1189.

41. *Id.* at 1228 (footnotes omitted).



values, some scholars remain convinced that it will continue to be a force for exclusion and inequality.<sup>42</sup> Of particular interest are accounts of how property-like concepts lead to opportunity hoarding in public schools, contribute to patterns of racial subordination, and entrench stark differences based on citizenship status. Professor LaToya Baldwin Clark's work exemplifies efforts to conceptualize education as property to explain exclusionary practices like opportunity hoarding in public schools.<sup>43</sup> She has identified "stealing education" as a crime that makes sense only "if stakeholders regard education as a property right bearing the essential functions of property, including the right to exclude."<sup>44</sup> The crime of stealing education turns heavily on residency in a school district. That is, a violation occurs when a parent knowingly makes a false statement about the family's principal place of residence to enroll a child in a public school outside the neighborhood.<sup>45</sup> Baldwin Clark argues that these stealing-education statutes convert education into a traditional form of property because they treat it as transferrable, confer the right of use and enjoyment, and allow the lawful exclusion of others.<sup>46</sup> As she explains, education is transferrable because taxpayers convey the right to attend neighborhood schools to resident children and deny it to nonresident children.<sup>47</sup> Education is for exclusive enjoyment because "taxpayers, and taxpayers only, should receive the benefit of their taxes," which allows for "the exclusion of nonresidents."<sup>48</sup> Finally, laws that criminalize stealing education create a right to exclude nonresident children through official surveillance and state prosecution.<sup>49</sup>

Baldwin Clark contends that the commodification of schooling exacerbates both race and class inequality. In her view, "communities justify the unequal system that hoards opportunity by conceiving of education as property."<sup>50</sup> These justifications often rest on a "master narrative" of "Black cultural inferiority."<sup>51</sup> Although residency itself is a facially neutral basis for excluding students, Baldwin Clark believes that prosecutions for stealing education are supported by stereotypical assumptions about Black families as interlopers who diminish the quality of schooling in the district.<sup>52</sup> Moreover, she concludes that although school officials use the race-neutral language of residency to justify enforcement actions, "they

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42. See, e.g., Wyman, *supra* note 21, at 185.

43. Baldwin Clark, *Education as Property*, *supra* note 7, at 398, 401–02; Baldwin Clark, *Stealing Education*, *supra* note 7, at 575.

44. Baldwin Clark, *Education as Property*, *supra* note 7, at 402.

45. *Id.* at 405–06; Baldwin Clark, *Stealing Education*, *supra* note 7, at 589–97.

46. Baldwin Clark, *Education as Property*, *supra* note 7, at 410.

47. *Id.* at 411.

48. *Id.* at 413.

49. *Id.* at 416–20.

50. Baldwin Clark, *Stealing Education*, *supra* note 7, at 598.

51. *Id.* at 600.

52. *Id.* at 605–17.

most certainly know that school funding inextricably connects to race and class precisely because of the relationship between property and race-class residential segregation.<sup>53</sup> Judges, too, Baldwin Clark argues, must be aware that “constitutionalizing local administration of education is far from race-neutral or class-neutral given its race-class-conscious pedigree.”<sup>54</sup>

At this juncture, Baldwin Clark’s analysis of residency requirements as a form of race- and class-based subordination intersects with the work of critical race scholar Cheryl Harris. Harris argues that whiteness itself is property.<sup>55</sup> Harris, like Radin, departs from conventional notions of property by extending the concept to an intangible property interest closely linked to personhood and identity.<sup>56</sup> Harris claims that the “reputational interest in being regarded as white” is “a thing of significant value,” that is, “a form of status property.”<sup>57</sup> In fact, people have used and enjoyed their property interest in whiteness “whenever [they] took advantage of the privileges accorded white people simply by virtue of their whiteness.”<sup>58</sup> In other ways, Harris’s account of property is quite traditional: She examines exclusive rights of possession, use, and disposition; the right to transfer or alienate; the right to use and enjoyment; and the right to exclude others.<sup>59</sup> Harris contends that even if whiteness is inalienable, it can still qualify as a form of property with “perceived enhanced value” because of its centrality to personal identity.<sup>60</sup> Significantly, she finds that “[t]he right to exclude was the central principle . . . of whiteness as identity” and that legal avenues were available to enforce this right.<sup>61</sup> Although a right to exclude was evident during slavery and Jim Crow segregation, Harris asserts that purportedly race-neutral means still can be deployed to protect a property interest in whiteness.<sup>62</sup> Like Baldwin Clark, Harris treats property-like concepts as tools for perpetuating inequality that have “allowed expectations that originated in injustice to be naturalized and legitimated.”<sup>63</sup>

These discussions of education and race as forms of exclusionary property are heavily focused on the United States. In the analysis of whiteness as property, Harris alludes to the ways in which white identity rests on “aspects of citizenship that were all the more valued because they were

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53. *Id.* at 623.

54. *Id.*

55. Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707, 1709 (1993).

56. *Id.* at 1724–25.

57. *Id.* at 1734.

58. *Id.*

59. *Id.* at 1731.

60. *Id.* at 1734.

61. *Id.* at 1736.

62. *Id.* at 1766, 1778.

63. *Id.* at 1777.

denied to others.”<sup>64</sup> She does this, however, to highlight the second-class citizenship that permitted racial subordination to persist in the United States. Other scholars have gone considerably farther in characterizing citizenship as a form of inherited property.<sup>65</sup> In particular, legal scholars Ayelet Shachar and Ran Hirschl argue that birthright citizenship laws allocate political membership based on parentage and territoriality and thus qualify as a form of inherited property.<sup>66</sup> In their view, these laws “distribute[] opportunity on a global scale” because:

In a world where membership in different political communities translates into very different starting points in life, upholding the legal connection between birth and political membership clearly benefits the interests of some (heirs of membership titles in well-off polities), while providing little hope for others (those who do not share a similar ‘birthright’).<sup>67</sup>

In short, citizenship serves a gatekeeping function that permits global haves to exclude the global have-nots.<sup>68</sup> This gatekeeping produces vast disparities in, among other things, educational attainment and achievement between developing and developed nations.<sup>69</sup>

In analogizing birthright citizenship to property, Shachar and Hirschl acknowledge that “[p]roperty is notorious for escaping any simple or unidimensional definition.”<sup>70</sup> In their view, property should be understood as “a human-made and multi-faceted institution that creates and maintains certain *relations* among individuals in reference to things.”<sup>71</sup> This reconceptualization of property rejects narrow concepts of market alienability and instead focuses on property as a web of social relationships.<sup>72</sup> Shachar and Hirschl define citizenship as perhaps the ultimate exemplar of the new property: “a status-entitlement that is dispensed by the state, an entitlement that bestows a host of goods and benefits to its beholders.”<sup>73</sup> Though communally generated, the claim to birthright citizenship belongs to individuals.<sup>74</sup>

Property rules govern access to scarce resources, and birthright citizenship is a prime example of the power to exclude.<sup>75</sup> The state jealously guards its borders, restricting entry by “those arriving from low-income or

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64. Id. at 1744.

65. See Ayelet Shachar & Ran Hirschl, *Citizenship as Inherited Property*, 35 *Pol. Theory* 253, 254 (2007).

66. Id.

67. Id. at 254–55.

68. Id. at 255.

69. Id. at 257.

70. Id. at 259.

71. Id.

72. Id. at 262.

73. Id. at 261.

74. Id. at 262.

75. Id. at 260.

politically unstable countries.”<sup>76</sup> Reflecting concerns of progressive law scholars, Shachar and Hirschl believe that citizenship can perform an “opportunity-enhancing function” for those who enjoy its benefits.<sup>77</sup> Citizens have a right not to be excluded, which can include “a fair share of equal liberties, access to public goods, and non-discriminatory participation in economic and labor markets” or, more broadly, a right to the mitigation of inequalities or the provision of basic necessities for a decent existence.<sup>78</sup> At the same time, though, birthright citizenship can become the basis for opportunity hoarding as it takes on the dimensions of an entailed estate, one that provides for hereditary transfer of power and wealth.<sup>79</sup> In Shachar and Hirschl’s view, the deep inequalities engendered by citizenship as property should be redressed, although their analysis recognizes the difficulty of persuading “the reluctant citizens of wealthy polities” to forego “their ‘tax-free’ membership inheritance.”<sup>80</sup>

For this group of scholars, property is synonymous with a range of practices that entrench inequality in neighborhood schools, the nation-state, and the world. The power to subordinate lies in the emphasis on an individual right of enjoyment and the authority to exclude others from that enjoyment. This individualistic framework legitimates opportunity hoarding as a right, one that is not tempered by concerns about the greater good or distributive justice. For that reason, the prospects for property-like concepts to advance progressive values seem dim. Those doubts have prompted some reformers to embrace alternative frameworks, as described in the next section.

#### B. *Alternative Frameworks that Reject Education as Simply a Property Interest*

For some scholars, treating education as a property interest impoverishes an understanding of schooling’s central role in advancing societal well-being and human flourishing. As a result, they use alternative frameworks that transcend the imagery of the market. For those who conceive of education as a public good, schooling generates benefits that cannot be captured by looking solely to individual student gains. Ignoring collective benefits by characterizing education as solely a private good significantly undervalues it. For others, educational access cannot be reduced to dollars and cents because it is foundational to being fully human. Education therefore is a human right, a dignitary imperative that defies commodification.

1. *Education as a Public Good.* — Critics of education as property bemoan the ways in which “[n]eoliberalism has positioned itself as the

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76. *Id.* at 266.

77. *Id.* at 267.

78. *Id.* at 268.

79. *Id.* at 269–74.

80. *Id.* at 281.

arbiter of common sense in education, and substantially eroded the mutuality that defines the unique character of education as a social right.”<sup>81</sup> For them, education is a public good—one that yields broad societal benefits and not just individual advantages. Some definitions of education as a public good are still tethered to traditional conceptions of property, which emphasize the right to enjoyment and the right to exclude. According to this view, education qualifies as a public good only if it is both nonrivalrous and nonexcludable.<sup>82</sup> As economists explain, “consumption of a nonrivalrous good does not in any way affect another individual’s opportunity to consume that good,” while a nonexcludable good is something “that can’t be excluded from someone’s use.”<sup>83</sup> Because overcrowding in public schools diminishes educational quality and because schools restrict access based on criteria like residency, neighborhood schools lack the defining characteristics of a public good.

But this purely market-based definition ignores the possibility that education can be a public good because it generates collective benefits in addition to individual gains.<sup>84</sup> The magnitude of these collective benefits can be hard to measure, but there may be widespread consensus that, for example, schooling promotes not only improved employment prospects for students but also enhanced civic engagement that, in turn, produces better political outcomes.<sup>85</sup> Under this framework, opportunity hoarding leads not only to individual harm but also to social injury by depriving communities of benefits that would come with a more equitable distribution of quality education.

In some instances, the collective advantages of schooling are linked to democratic integrity. Schools can play an important role in cultivating the solidarity necessary for diverse democracies to function. According to political philosopher Will Kymlicka, national solidarity is foundational to a welfare state that provides for basic needs because “justice amongst members is egalitarian, whereas justice to strangers is humanitarian, and social justice in this sense arguably depends on bounded solidarities.”<sup>86</sup> Unfortunately, those bounded solidarities create “endemic risks for all those who are not seen as belonging to the nation, including indigenous peoples,

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81. Murphy, *supra* note 17, at 98.

82. See Matthew T. Lambert, *Privatization and the Public Good: Public Universities in the Balance* 79 (2014); Simon Marginson, *Higher Education and the Public Good*, 65 *Higher Educ. Q.* 411, 417–18 (2011); Sandy Baum & Michael S. McPherson, *Is Education a Public Good or a Private Good?*, *Chron. Higher Educ.* (Jan. 18, 2011), <https://www.chronicle.com/blogs/innovations/is-education-a-public-good-or-a-private-good> [<https://perma.cc/6FAC-ZTZF>].

83. Lambert, *supra* note 82, at 79.

84. *Id.*

85. See *id.* at 80–81. This assumption lies at the heart of the description of the foundational importance of education in *Brown v. Board of Education*, 387 U.S. 483, 493 (1954).

86. Will Kymlicka, *Solidarity in Diverse Societies: Beyond Neoliberal Multiculturalism and Welfare Chauvinism*, 3 *Compar. Migration Stud.*, no. 17, 2015, at 4.

substate national groups[,] and immigrants.”<sup>87</sup> Assumptions about the untrustworthiness and unfitness of these groups is bolstered by social stigma and racialization.<sup>88</sup> As a result, trade-offs arise between the multiculturalism necessary to legitimate liberal nationalism and the strong bonds of nationhood essential to secure stability and solidarity.<sup>89</sup>

Due to the need for bounded solidarities, nation-states face two unsatisfactory choices: neoliberal multiculturalism (that is, solidarity without inclusion) or welfare chauvinism (that is, inclusion without solidarity).<sup>90</sup> In an educational setting, these two choices are illustrated by Baldwin Clark’s account of education as property. When a community rigorously enforces its residency requirements to prevent nonresident parents from stealing education, the school district achieves solidarity without inclusion. Indeed, a sense of insular identity is expressed through the exclusionary practices.<sup>91</sup> At the same time, when Black children qualify as residents eligible to enroll in a neighborhood school, schools can track them by perceived ability in ways that produce racially identifiable classrooms.<sup>92</sup> These assignment patterns reflect inclusion without solidarity as students become entrenched in separate and unequal educational settings.

Kymlicka’s preferred state is one of inclusive solidarity, though he wonders whether such an outcome is even possible.<sup>93</sup> The prospects are hindered by forces of commodification that emphasize individualism and undermine solidarity.<sup>94</sup> Baldwin Clark’s work demonstrates how those impulses operate in prosecutions for stealing education, while Kymlicka’s account pays especially close attention to the treatment of immigrants. In his view, nation-states must “develop . . . a form of multiculturalism that enables immigrants to express their culture and identity as modes of participating and contributing to the national society.”<sup>95</sup> This “multicultural liberal nationalism” characterizes immigrants as permanent residents and future citizens rather than temporary migrants.<sup>96</sup> That characterization in turn leads to widespread recognition that “permanent residents and future citizens have a clear self-interest in investing in society, becoming members, and contributing to it.”<sup>97</sup> A sense of membership allows for norms of reciprocity: Immigrants with a long-term stake belong and are included because they reciprocate through their own contributions to the

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87. *Id.* at 5.

88. *See id.*

89. *See id.* at 6.

90. *See id.* at 8.

91. *See* Baldwin Clark, *Stealing Education*, *supra* note 7, at 628–29.

92. *Id.* at 627–28.

93. Kymlicka, *supra* note 86, at 8.

94. *Id.*

95. *Id.* at 12.

96. *Id.* at 13.

97. *Id.*

nation-building enterprise.<sup>98</sup> As Kymlicka makes clear, multicultural liberal nationalism supports the full inclusion of immigrant children in the public schools.

2. *Education as a Human Right.* — Although some scholars transcend a framework that treats education as property by highlighting schooling's broader social benefits, others understand education as an individual right but reject the inherently privatizing tendencies of property-like entitlements. According to this view, privatization can weaken claims to personhood—or, as Hannah Arendt put it, “the right to have rights”—by diminishing the public sphere and “transforming the foundations of citizenship from social and political to contractual and civil.”<sup>99</sup> As a result, those who treat education as a human right insist on nonnegotiable conditions of dignity and personhood. Human rights scholars like Katarina Tomaševski reject an approach that turns education, which should be “affirmed as each child’s birthright,” into “a long-term development goal” by avoiding “the language of human rights or public responsibilities.”<sup>100</sup> Under Tomaševski’s framework, free and compulsory education for all is a minimum condition for human flourishing, which government is obligated to provide.<sup>101</sup> Respecting this obligation is essential because the importance of the right to education reaches far beyond education itself. Many individual rights are beyond the grasp of those who have been deprived of education, especially rights associated with employment and social security. Education operates as a multiplier, enhancing the enjoyment of all individual rights and freedoms where the right to education is effectively guaranteed, while depriving people of the enjoyment of many rights and freedoms where the right to education is denied or violated.<sup>102</sup>

This conception of education as a human right resonates with efforts to recast property to include minimum principles of distributive justice that preserve human dignity. However, human rights scholars treat the conditions for personal flourishing as axiomatic and not merely constraints on the worst excesses of a market economy. Like Reich, Tomaševski understands education as an essential form of government largesse, but she rejects his concern that dependency on the state will leave individuals vulnerable to government overreach. Instead, she sees an educated citizenry as a critical safeguard against official abuse.<sup>103</sup>

For Tomaševski, property-like concepts have prevented the United States from recognizing a fundamental right to education. In contrast to her view that education is essential to human flourishing, the U.S.

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98. See *id.* at 12–13.

99. Murphy, *supra* note 17, at 98.

100. Katarina Tomasevski, *The State of the Right to Education Worldwide: Free or Fee: 2006 Global Report*, at xx (2006), [http://www.katarinatomasevski.com/images/Global\\_Report.pdf](http://www.katarinatomasevski.com/images/Global_Report.pdf) [<https://perma.cc/H7CG-BCEK>].

101. See Tomaševski, *Human Rights Obligations*, *supra* note 16, at 5.

102. *Id.* at 10.

103. *Id.* at 17.

Supreme Court has rejected the claim that a right to education is preservative of other rights, including the right to free speech and the right to vote.<sup>104</sup> Instead, the Court has adopted a hands-off approach to issues involving access to education, concluding that these matters are for taxpayers and state and local governments to decide. As Tomaševski observes:

Education is commonly financed out of general taxation, which in some countries places the mobilization of funding for education beyond the remit of domestic courts. A typical example is the United States, where economic and social rights are not recognized and, furthermore, the Supreme Court has declared taxation as well as economic and social policy to lie beyond its purview.<sup>105</sup>

In short, Tomaševski argues, neoliberal pressures for commodification—in the form of taxpayer entitlements—have crimped the United States's ability to recognize a human right to education.

As this discussion demonstrates, property and education have a complicated relationship. Progressives have tried to reconceive of property to incorporate norms of distributive fairness, which include access to educational opportunities. Other scholars are convinced that traditional notions of private property, rooted in exclusive rights of enjoyment, are deeply entrenched and designed to perpetuate inequality. As a result, property-like claims about education exist alongside alternative frameworks that reject the commodification of education altogether. Whether education is treated like a public good or a human right, it is not simply an artifact of individual property entitlements or market forces.

This complexity means that advocates of educational opportunity have a range of strategies at their disposal. At a theoretical level, these approaches appear to be at loggerheads. A property-like entitlement, even a progressive one, can elevate the importance of education as a market transaction, obscuring its status as a nonnegotiable, noncommodifiable precondition for human flourishing. Meanwhile, the emphasis on an individual right to education can eclipse calls for a collective approach that recognizes schooling's broad social benefits. For litigators, however, theoretical purity must cede to the imperative of prevailing in court. Advocates can draw on different conceptions of educational entitlement, fit them into the appropriate legal claim, and plead all of them in the alternative. As Part II shows, this is precisely what happened in *Plyler v. Doe*. Property-like entitlements worked alongside visions of the public good and fundamental human dignity to produce a surprising victory.

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104. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–37 (1973) (declining to recognize education as “a constitutionally protected prerequisite to the meaningful exercise of either right”).

105. Tomaševski, *Human Rights Obligations*, *supra* note 16, at 20.



II. THE CASE OF *PLYLER V. DOE*

Professor Shaw claims that *Plyler* exemplifies how property-like entitlements can safeguard a right to education.<sup>106</sup> In his view, the Justices struck down a Texas law allowing school districts to bar undocumented students or charge them tuition because the statute, in effect, deprived children of a vested property interest in a previously free and open system of public education.<sup>107</sup> Shaw's is far from the only plausible interpretation of *Plyler's* reasoning. Because the Justices cataloged the statute's social harms in terms of "unemployment, welfare, and crime" that would result from having "a subclass of illiterates" in the community,<sup>108</sup> some scholars would argue that the Court was cognizant of education's importance as a public good. In addition, the Court observed that public education "has a fundamental role in maintaining the fabric of our society."<sup>109</sup> For Kymlicka, that language suggests a commitment to inclusive solidarity as a hallmark of multicultural liberalism.<sup>110</sup> To complicate the picture even further, *Plyler* has been characterized as the "high water mark for constitutional personhood" in the Court's jurisprudence, suggesting that a human right was at stake.<sup>111</sup> Precisely because *Plyler* implicates notions of education as property and alternatives to that concept, it provides an intriguing case in which to evaluate the impact of these different frameworks. This Part turns to an in-depth exploration of the litigation and the role that different normative arguments played in allowing the Justices to find that Texas violated the constitutional rights of undocumented children under the Equal Protection Clause.

A. *The Plyler Litigation: A Surprising Victory and a Range of Rationales*

In *Plyler v. Doe*, the plaintiffs challenged an amendment to Texas's school funding formula for undocumented students.<sup>112</sup> Previously, the state had relied on head counts of all students (that is, average daily attendance) to calculate the amount of state support that a public school would receive. In 1975, the legislature prohibited schools from receiving those funds for undocumented students.<sup>113</sup> To avoid financial hardship in

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106. Shaw, *supra* note 4, at 1220–26.

107. *Id.*

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

109. *Id.* at 221.

110. See *supra* notes 94–98 and accompanying text.

111. AALS Education Law Section 2021 Annual Meeting Session (Co-Sponsored With the Section on Immigration Law): The Future of *Plyler v. Doe* on Its 40th Anniversary, AALS Educ. L. Section (Ass'n Am. L. Schs., D.C.), 2021, at 2, 4 (citing comments of Professor Rachel F. Moran).

112. *Plyler*, 457 U.S. at 202.

113. *Id.* at 205 & n.1.

districts serving these children, the statute allowed schools to bar undocumented pupils altogether or to charge them annual tuition of \$1,000.<sup>114</sup> Two lawsuits were filed on behalf of undocumented school-aged youth that challenged the measure as unconstitutional because it violated the Supremacy Clause and the Equal Protection Clause.<sup>115</sup> The Eastern District of Texas agreed on both grounds, and the U.S. Supreme Court ultimately affirmed based on equal protection arguments without reaching the preemption claims.<sup>116</sup> The victory was surprising because the Justices had previously declined to find a constitutionally protected right to attend the public schools when children alleged unequal treatment based on wealth and language.<sup>117</sup>

The Court's analysis sidestepped significant issues even as it struck down the Texas statute. After concluding that the undocumented students were persons within the state's jurisdiction and thus entitled to equal protection,<sup>118</sup> the majority declined to strengthen constitutional safeguards by declaring alienage a suspect class or education a fundamental right.<sup>119</sup> Instead, the Court applied a rational relation test, the most lenient standard of constitutional review. In finding the statute irrational, the majority pointed to harms inflicted on innocent children as well as significant costs to the nation of creating a subclass of illiterate people.<sup>120</sup> The Court concluded that these damaging consequences outweighed the state's interest in conserving resources and deterring the flow of undocumented migrants.<sup>121</sup> This balancing approach produced a majority opinion that rested on a number of rationales, some related to property-like entitlements and some not.

With respect to property-like entitlements, undocumented children held two statuses that worked at cross-purposes. They were residents of the school district, but they were not legally present in the United States. The children asserted that they should be able to attend the neighborhood school based on residency, but officials countered that they were ineligible because they lacked citizenship (or even permanent residence). These competing claims were complicated by the allocation of authority to define each status. While Texas was able to decide who qualified as a resident by

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114. *Id.* at 206 n.2; Michael A. Olivas, *Plyler v. Doe*, Tex. St. Hist. Ass'n (Apr. 7, 2022), <https://www.tshaonline.org/handbook/entries/plyler-v-doe> [<https://perma.cc/Y757-4ELJ>].

115. *Plyler*, 457 U.S. at 208–10.

116. *Id.* at 210 n.8, 230.

117. *Lau v. Nichols*, 414 U.S. 563, 563–66 (1974) (refusing to find an Equal Protection Clause violation due to alleged unequal treatment based on language); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973) (holding that wealth is not a suspect classification).

118. *Plyler*, 457 U.S. at 210–16.

119. *Id.* at 220–23.

120. *Id.* at 223–24.

121. *Id.* at 227–30.

drawing school district boundaries, the federal government determined eligibility for citizenship and legal immigration status.

The lawsuits challenged how these statuses affected an undocumented child's access to public education. The Court allowed children to benefit from their parents' status as residents of the school district but questioned any taint of illegality for innocent children whose parents had entered the country illegally. Thus, residency could be a transferrable privilege, but it was not clear that undocumented status should be a heritable source of stigma. The Court also considered factors other than property-like claims. By pairing individual entitlements based on residency with demands for equal protection, the litigation made it possible to address the broader social importance of education. Although the U.S. Supreme Court declined to find a right to basic education, the intertwining factors in the case permitted it to weigh the collective harms that might be inflicted on society and the body politic if undocumented children were denied schooling. The following sections explore each of these dynamics.

#### B. *The Role of Property-Like Entitlements in Plyler*

There were two key elements of *Plyler* that turned on property-like entitlements. The first drew on a conventional notion, residency, that emphasized exclusive rights of enjoyment for neighborhood children to attend the public schools. Undocumented families were able to deploy this concept successfully to defend a right of educational access. The second reflected the notion of the new property, which turned on education as a form of government largesse. Here, however, the battle was over whether federal or state officials would get to set the terms for school enrollment. This conflict revealed a largely neglected complication of the new property, the insecurities that arise when multiple government actors claim authority to confer or deny largesse.

1. *How Residency Trumped Undocumented Status.* — Property-based concepts certainly played a role in *Plyler*. Although Baldwin Clark's work identifies the exclusionary implications of a property-like interest in residency,<sup>122</sup> Shaw contends that *Plyler* illustrated the inclusionary potential of education as property.<sup>123</sup> A close examination of the case shows that both dynamics were at play. The attorneys challenging the Texas law argued that undocumented families had earned the right to send their children to public schools because they "in general contribute to the tax base of the schools in the same manner as other parents."<sup>124</sup> Parents did this either by paying property taxes directly as homeowners or indirectly as renters, and they also contributed through sales taxes.<sup>125</sup> There was some ambivalence

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122. See *supra* notes 43–49 and accompanying text.

123. See *supra* notes 106–107 and accompanying text.

124. Appellees' Brief on the Merits at 3, *Plyler*, 457 U.S. 202 (No. 80-1538), 1980 WL 339676 [hereinafter Brief for Appellees].

125. *Id.* at 37.

on this point, however. Advocates questioned any attempt to turn public education into a fee-for-service arrangement, observing that “[i]t has never been permissible to tie access to State services to tax contributions.”<sup>126</sup> Even so, undocumented families had to address the issue because Texas impermissibly premised its legislation on “an unstated foundation . . . that services can be withdrawn from those children because of their lack of tax contribution.”<sup>127</sup>

Interestingly, claims about the need to provide taxpaying families with access to quality education were echoed in an amicus brief filed by the Edgewood Independent School District.<sup>128</sup> Edgewood parents, who were predominantly Mexican American, had previously brought suit in *San Antonio Independent School District v. Rodriguez*, alleging that Texas’s system of school financing deprived their children of an equal educational opportunity in violation of the Fourteenth Amendment.<sup>129</sup> The case directly challenged the local property tax system as a denial of the fundamental right to education and a form of wealth discrimination.<sup>130</sup> The Court ultimately rejected both arguments, leaving open whether the U.S. Constitution guarantees minimum access to education.<sup>131</sup> In doing so, the Justices expressed considerable deference to state and local autonomy over both education and taxation.<sup>132</sup> At the time that *Plyler* was filed, some advocates saw it as an opportunity to revisit the right to a basic education given that some Texas school districts had effectively barred undocumented students from obtaining any schooling whatsoever.<sup>133</sup> This connection may have prompted the Edgewood school district to file an amicus brief in *Plyler*. Drawing on *Rodriguez*, the brief raised issues of tax equity, specifically, that undocumented families were entitled to enroll their children in public schools as taxpayer-consumers who had effectively paid for these services.<sup>134</sup> Texas did not deny that undocumented families

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126. *Id.* at 36.

127. *Id.* at 37.

128. See Amicus Brief of Edgewood Independent School District in Support of Appellees at 10, *Plyler*, 457 U.S. 202 (No. 80-1538), 1981 WL 389976 (“It seems fair to say that if undocumented aliens are subject to the taxing power of the State, which they are, then they should not be denied the public education which is financed by those same taxes.”).

129. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4–5 (1973).

130. *Id.* at 18.

131. *Id.* at 18, 28–29, 30–37.

132. *Id.* at 38–44.

133. See, e.g., Brief of Amicus Curiae American Jewish Committee at 9–10, *Plyler*, 457 U.S. 202 (No. 80-1538), 1981 WL 389972 (“While this Court has never held education to be a fundamental interest, neither has it ruled on a state’s total deprivation of educational opportunities to school-age children within its borders.”).

134. Amicus Brief of Edgewood Independent School District in Support of Appellees, *supra* note 128, at 10; see also Brief of American Friends Service Committee et al., at 3, *Plyler*, 457 U.S. 202 (No. 80-1538), 1981 WL 389637 (“In short, undocumented residents contribute to the wealth of the nation, pay taxes, but are not expected to receive the benefit of their labor.”).

living within the school district paid taxes, whether directly or indirectly.<sup>135</sup> Instead, the state highlighted the extra expense of educating undocumented children who often arrived with little formal education, could not speak English, and lived in poverty.<sup>136</sup> That response suggested that under a fee-for-service model, the taxes that undocumented families contributed would not cover the increased costs of educating their children.

In addition, the Texas Attorney General's Office contended that undocumented children could not invoke constitutional protections because they were not persons "within its jurisdiction" for purposes of equal protection law.<sup>137</sup> Texas conceded that the Supreme Court already had extended protections under the Fourteenth Amendment's Due Process Clause to undocumented immigrants because they were persons.<sup>138</sup> However, the Equal Protection Clause also required that those persons be within the jurisdiction. According to Texas, because undocumented immigrants had entered the United States illegally, they did not meet this added requirement.<sup>139</sup> As a result, a Texas statute could properly distinguish between undocumented individuals and those who were citizens or permanent residents.<sup>140</sup> In fact, the Texas Attorney General asserted, legally present residents recognized the distinction and were reluctant to pass "bond issues to build schools for children from Mexico."<sup>141</sup>

At its core, the state's argument made residency—that is, physical presence in the district—irrelevant when undocumented students remained citizens of Mexico. In fact, Texas pointed out, "the children may remain in their native country or return thereto with or without their parents" to get an education, a result encouraged by the statute.<sup>142</sup> During oral argument, the state attorney general even went so far as to argue that if the Court did not uphold the Texas law, children who lived in Mexico would be able to cross the border and attend public school in the United States.<sup>143</sup> In response, one of the Justices observed that any child who commuted to a Texas school from Mexico would not reside in the district so that a residency requirement alone would suffice to deal with the problem.<sup>144</sup>

An amicus brief filed by several Texas school districts in the lower Rio Grande Valley reinforced the State's arguments. Like the attorney general,

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135. See Transcript of Oral Argument at 12–13, *Plyler*, 457 U.S. 202 (No. 80-1538) [hereinafter Transcript of Oral Argument in *Plyler*].

136. Brief for the Appellants at 8–10, *Plyler*, 457 U.S. 202 (No. 80-1538), 1981 WL 389967.

137. *Id.* at 5, 14–17.

138. *Id.* at 14.

139. *Id.* at 14–15, 21–22.

140. *Id.* at 26.

141. *Id.* at 7.

142. Appellants' Reply Brief at 7, *Plyler*, 457 U.S. 202 (No. 80-1538), 1980 WL 339678.

143. Transcript of Oral Argument in *Plyler*, *supra* note 135, at 9–10.

144. *Id.* at 10.

the amici asserted that the relevant classification was “between residents, whether citizens or aliens, and non-residents, whether citizens or aliens.”<sup>145</sup> That is, undocumented children not legally present in the United States could not qualify as residents under Texas law. The districts argued that the children were unable to form the requisite domiciliary intent because they had no expectation of long-term presence while subject to deportation.<sup>146</sup> Echoing the attorney general’s claims, the districts’ brief cited taxpayer resentment at having to fund “the free education of illegal aliens at the expense of those who are legally here”<sup>147</sup> as well as the high costs of educating the undocumented children.<sup>148</sup> Most significantly, the districts insisted that any right to education these students had was one that Mexico was obligated to protect. If the children could not access that right, this was due to their parents’ voluntary choice to “trade[] away” their children’s educational opportunities to pursue economic opportunities in the United States.<sup>149</sup> Any reward for illegal entry, such as free public education, would simply condone lawlessness.<sup>150</sup>

In the end, the Supreme Court rejected Texas’s argument that undocumented students were not persons within the state’s jurisdiction. Undocumented children were certainly persons based on any common understanding of the term, and because of their physical presence in Texas, they were subject to its laws.<sup>151</sup> Moreover, the Court noted that undocumented pupils were entitled to coextensive protections under the Due Process and Equal Protection Clauses.<sup>152</sup> As the opinion explained, equal protection was essential to abolish “all caste-based and invidious class-based legislation,” an “objective [that] is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless exempted from its protections.”<sup>153</sup>

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145. Brief of Amici Curiae School Districts: Harlingen Consolidated Independent School District, Mission Independent School District, Brownsville Independent School District, McAllen Independent School District, and San Benito Independent School District, in Support of Appellants at 3, *Plyler*, 457 U.S. 202 (No. 80-1538), 1981 WL 389992.

146. See *id.* at 7–10.

147. *Id.* at 17.

148. *Id.* at 12 (“The district court in *Doe v. Plyler* found the cost of educating a needy child of Mexican citizenship, whether legally or illegally present, to be thirty to forty percent higher than the cost of educating an ‘average pupil.’” (citing *Doe v. Plyler*, 458 F. Supp. 569, 577 (E.D. Tex. 1978))).

149. *Id.* at 17–18.

150. *Id.* at 18–20.

151. *Plyler*, 457 U.S. at 210, 215.

152. *Id.* at 211.

153. *Id.* at 213. The Solicitor General of the United States also concluded in his brief that undocumented immigrants were persons within the jurisdiction for purposes of the Equal Protection Clause. Brief for the United States as Amicus Curiae in No. 80-1538 and Brief for the United States in No. 80-1934 at 9, 24–26, *Plyler*, 457 U.S. 202 (No. 80-1538), 1981 WL 390001 [hereinafter Brief for the United States].

In short, residency based on physical presence overrode the significance of the children's undocumented status. This was critical to the victory in *Plyler* because it emphasized de facto membership in local communities rather than formal legal categories under federal immigration law. As Professor Linda Bosniak explains,

[T]he law has constructed alienage as a hybrid legal status category that lies at the nexus of two legal and moral worlds. On the one hand, it lies within the world of borders, sovereignty and national community membership. . . .

Yet alienage as a legal category also lies in the world of social relationships among territorially present persons. In this world, government power to impose disabilities on people is substantially constrained. Formal commitments to norms of equal treatment and to the elimination of caste-like status have shaped American public law in important ways over the past several decades. In this world, aliens appear to be at once indistinguishable from citizens and precisely the sort of social group that requires the law's protection.<sup>154</sup>

While Baldwin Clark's work emphasizes how residency operates as a form of property to exclude and subordinate,<sup>155</sup> *Plyler* demonstrates how residency can work to deflect the implications of another property-like claim, one rooted in citizenship and legal permanent residency. The Court's framing made de facto membership in the community, through payment of taxes and an obligation to abide by the laws, critical to determining whether undocumented children deserved access to neighborhood schools. At the same time, residency continued to serve exclusionary purposes. As briefs in the case made clear, undocumented children generally resided in districts readily identifiable by ethnicity and poverty.<sup>156</sup> Because of the state's school finance system, these localities often were strapped for resources and struggled to provide a quality education.<sup>157</sup> Indeed, the Edgewood school district filed an amicus brief in part to make this very point.<sup>158</sup> As a result, *Plyler's* reliance on property-like notions of residency could not achieve Kymlicka's vision of inclusive solidarity given ongoing patterns of segregation and stratification in the Texas schools. Even so, the Justices at least rejected solidarity predicated on exclusion of undocumented children from a public education. In the end, as the Edgewood brief suggests, the Court effectively endorsed inclusion

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154. Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* 38 (2006).

155. See Baldwin Clark, *Education as Property*, supra note 7, at 398–420; Baldwin Clark, *Stealing Education*, supra note 7, at 570–79.

156. See, e.g., *Brief of Amicus Curiae School Districts: Harlingen Consolidated Independent School District et al.*, supra note 145, at 1–4.

157. *Amicus Brief of Edgewood Independent School District in Support of Appellees*, supra note 128, at 1–4.

158. *Id.*

without solidarity by protecting undocumented students' participation in a system of separate and unequal schooling for poor children of color.

2. *How Preemption and Equal Protection Law Unsettled the Meaning of Education as New Property.* — Drawing on Reich's conception of the new property, Shaw claims that *Plyler* tacitly recognized a student's property interest in a state-provided education.<sup>159</sup> That is, the Justices believed that Texas's decision to alter the terms of its largesse triggered significant due process concerns. Interestingly, *Plyler* reveals a notably distinct complication for the new property: the difficulties that can arise when there are jurisdictional disputes over who determines the scope of government largesse. In *Plyler*, the claims were twofold. Although most scholars have focused on issues surrounding authority over immigration, attorneys for the undocumented children also made a preemption argument based on federal education law. This claim asserted that the U.S. government could set some terms of access to schooling, not through the Due Process Clause but through comprehensive legislation.

According to the plaintiffs, federal education policy had consistently been designed "to assure that those most disadvantaged have a fighting chance to overcome their disabilities."<sup>160</sup> The Texas statute directly contradicted this effort because it would relegate undocumented children to "virtual serfdom."<sup>161</sup> As the plaintiffs noted, federal policy at no time excluded undocumented youth, for instance, by underfunding migrant and bilingual education programs.<sup>162</sup> Texas strongly rebuffed these contentions. According to state officials, "[I]t is highly dubious that Congress had as a purpose the education of illegal aliens when it enacted educational programs which must supplement, not supplant basic educational programs."<sup>163</sup> Federal funds were not directed at basic educational needs, which remained the responsibility of state and local governments.<sup>164</sup> Texas officials thus made clear their primacy over educational decisionmaking, decisively rejecting any federal right to education based on statutory enactments. In short, state officials, not Congress, would set the terms of largesse in providing public schooling.

The preemption issues surrounding immigration policy were considerably thornier for Texas. State officials faced an uphill battle in framing the law as an effort to police national borders because of the combined effects of the Supremacy Clause and the Equal Protection Clause. Under the Supremacy Clause, plaintiffs' counsel argued, the U.S. government had sole authority to enforce the immigration laws, and the Texas statute

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159. See Shaw, *supra* note 4, at 1186–1226.

160. Brief for Appellees, *supra* note 124, at 46.

161. *Id.* at 46, 49.

162. *Id.* at 49–51.

163. Appellants' Reply Brief, *supra* note 142, at 4–5.

164. *Id.*



impermissibly infringed on those prerogatives.<sup>165</sup> The plaintiffs' brief emphasized that "[o]nly the Federal Government has the power and right to regulate the flow of persons across a national border."<sup>166</sup> Although conceding that "not every State law that has some effect on immigration is preempted," the brief distinguished between a statute with an incidental and speculative effect on immigration and one with an express purpose to deter immigration.<sup>167</sup> If the Court upheld the law, the plaintiffs warned, many other states might try to regulate immigration, greatly undermining the federal government's authority in matters of international relations.<sup>168</sup>

Texas could not easily dispense with the risk of preemption under immigration law. During oral argument, the Texas Attorney General noted that state officials "would like to reduce the incentive for illegal immigration, particularly of families and of school aged children," but "[i]t has been said that we don't have a permissible interest in that regard."<sup>169</sup> In its briefs and during argument, the state made clear that it was forced to act because the federal government had not enforced immigration laws effectively.<sup>170</sup> According to Texas officials, the state had a unique interest because "only Texas has a long international border with Mexico, each side of which is relatively densely populated" and "only Texas must bear the burden of providing an education to children in its public schools."<sup>171</sup> Even so, Texas faced something of a catch-22: It could emphasize the need to deter illegal immigration and risk preemption, or it could downplay this objective and substantially weaken its rationale for adopting the law. Before the Supreme Court, the Reagan Administration's brief on behalf of the United States made clear that Texas need not grapple with this dilemma. According to the U.S. Solicitor General, the Texas statute was not preempted by federal law.<sup>172</sup> By then, however, Texas had already been shaping its litigation strategy based on preemption concerns. As a result, it emphasized residency in the jurisdiction rather than immigration status throughout the case. Ultimately, the Court did not reach preemption issues.<sup>173</sup>

Challenges in deploying property-like conceptions of residency and citizenship reflect the complexities of the new property when government itself is fragmented and hierarchical. As Bosniak explains, the federal courts have recognized "a division of labor" among national and state officials in the field of immigration:

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165. Brief for Appellees, *supra* note 124, at 42–45.

166. *Id.* at 42.

167. *Id.* at 44.

168. *Id.*

169. Transcript of Oral Argument in *Plyler*, *supra* note 135, at 13.

170. Brief for the Appellants, *supra* note 136, at 5–6, 8; Transcript of Oral Argument in *Plyler*, *supra* note 135, at 14–16.

171. Appellants' Reply Brief, *supra* note 142, at 3.

172. Brief for the United States, *supra* note 153, at 6–8.

173. *Plyler v. Doe*, 457 U.S. 202, 210 n.8 (1982).

Since (the argument goes) the federal government is constitutionally understood to possess the power to regulate matters of immigration and naturalization, courts must yield to its decisions regarding the treatment of noncitizens. States, on the other hand, enjoy no such constitutional power; when states discriminate against aliens, therefore, courts must apply equal protection analysis full force.<sup>174</sup>

As a result of this division of labor, Texas's critique of federal efforts to secure the nation's borders was largely ineffectual.

That point is brought home by a colloquy with the state's attorney general about the Immigration and Naturalization Service (INS) during oral argument:

MR. ARNETT: As far as whether we could reasonably expect INS to deport them, we think not. The evidence in this record is that INS gets complaints from citizens all the time that they don't follow, including addresses.

QUESTION: But this is not citizens. This is a state government.

...

QUESTION: You mean INS just paid no attention to a state complaint?

MR. ARNETT: Your Honor, INS apparently doesn't pay much -- INS is so underfunded, it is not INS's problem.<sup>175</sup>

Rather than bolster Texas's claim about the need to deter unlawful immigration, one Justice responded that the INS's failures reinforced the opposing side's argument "that these children will remain in the school district because it is just too much of an administrative burden to get them deported, so they are going to be part of the community anyway."<sup>176</sup> The students' long-term presence in turn cast doubt on the propriety of leaving them uneducated.

The Equal Protection Clause further constrained Texas's ability to classify children based on immigration status. Because states had no authority to regulate immigration, officials were subject to heightened scrutiny if they used alienage-based classifications.<sup>177</sup> Once it was clear that undocumented immigrants were persons within the jurisdiction, it was far more difficult for Texas to assert that they could not be residents for purposes of school admissions. According to the plaintiffs, the state's argument that the law classified children based on residency rather than alienage was specious. As their brief explained, state officials "argue that an undocumented person cannot become a resident and that residence requirements are permissible . . . . The argument is circular. If undocumented children are 'persons within the jurisdiction' for purposes of the Equal Protection Clause the state cannot say that they are not residents

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174. Bosniak, *supra* note 154, at 58–59.

175. Transcript of Oral Argument in *Plyler*, *supra* note 135, at 15–16.

176. *Id.* at 16.

177. *Id.* at 27–29.

because of their status.”<sup>178</sup> On the contrary, these students met traditional residency requirements by living in the school districts for a number of years.<sup>179</sup>

Attorneys for the undocumented children argued vigorously that the statute relied on an alienage classification that should trigger strict scrutiny.<sup>180</sup> The “calamit[ous]” denial of public education was one that could be visited only on the “politically powerless” who suffered “arbitrary scapegoating” and had to “suffer injustice silently.”<sup>181</sup> Texas officials countered that the rational relation test rather than strict scrutiny should apply.<sup>182</sup> The Texas Attorney General insisted that any heightened standard of review based on alienage be limited to legally present immigrants because only they should be recognized as legitimate members of the community.<sup>183</sup> As Texas explained in its brief, because the statute’s classification turned on residency, it was “entirely consistent with the congressional determination to exclude the aliens from admission.”<sup>184</sup> That is, the state’s action comported with federal law because it was simply a smaller exercise of the power to exclude: that is, the state could keep undocumented children out of the public schools when the children could be excluded from the jurisdiction altogether.

The Court ultimately agreed that “[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’”<sup>185</sup> Although the decision purported to apply a rational relation test, the majority appeared to adopt a more exacting approach sometimes called rational relation with bite.<sup>186</sup> The Justices rejected Texas’s claim “that the undocumented status of these children *vel non* establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents.”<sup>187</sup> Echoing the lower court’s findings, the Justices concluded that the statute was a “ludicrously ineffectual attempt to stem the tide of illegal immigration.”<sup>188</sup> Moreover, there was no basis for singling out undocumented children because of any special burdens they placed on the public educational system. Texas offered no persuasive evidence that the children’s presence imposed unique costs or damaged the quality of education for

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178. *Id.* at 28–29.

179. *Id.* at 29.

180. Brief for Appellees, *supra* note 124, at 27.

181. *Id.*

182. Brief for the Appellants, *supra* note 136, at 25.

183. *Id.* at 24–25.

184. *Id.* at 24.

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

186. See Dennis J. Hutchinson, More Substantive Equal Protection? A Note on *Plyler v. Doe*, 1982 Sup. Ct. Rev. 167, 193 (describing *Plyler v. Doe* as evidence of the Court’s willingness to put “real ‘bite’ in the ‘mere rationality’ standard”).

187. *Plyler*, 457 U.S. at 224.

188. *Id.* at 228 (citing *Doe v. Plyler*, 458 F. Supp. 569, 585 (E.D. Tex. 1978)).

their peers.<sup>189</sup> Nor was it appropriate to bar them because they might not remain in Texas, given that many children could leave the state at some point during their lives.<sup>190</sup> In fact, many undocumented children were likely to “remain in this country indefinitely,” and some would “become lawful residents or citizens of the United States.”<sup>191</sup> The prospect of long-term residency left the Court unwilling to exclude undocumented children because of their lack of citizenship or permanent resident status. In fact, the Court expressed considerable concern about the harm to “the innocent children who are [the law’s] victims” if they were to be relegated to a “subclass of illiterates.”<sup>192</sup>

### C. *Alternative Frameworks in Plyler*

Although property-like entitlements played a role in the *Plyler* litigation, they were far from the only principles at work. One of the most prominent elements of the opinion related to childhood innocence, which served to trump any claim that the stigma of undocumented status was a heritable disadvantage. In addition, the Court went out of its way to identify the social harms, both to public order and to democratic integrity, that might result if children were denied an education. In this way, the Justices acknowledged the collective stake in providing students with meaningful opportunities to learn.

1. *How the Innocence of Children Interrupted the Heritability of Parental Status.* — The role of childhood innocence in interrupting heritable stigma and dispossession is a significant feature of *Plyler* that has gone largely unremarked in discussions of education as property. Although commentators argue that birthright citizenship is an inherited form of property, *Plyler* makes clear that the converse need not be true. In fact, the Court used innocence to interrupt the intergenerational transfer of a stigmatized status, even as citizenship remained a tremendous source of privilege. This point emerged most clearly in analogies drawn to the treatment of illegitimate children under equal protection law. As the plaintiffs’ attorneys noted, their clients “have neither the power nor the right to determine their place of residence.”<sup>193</sup> Because “in our jurisprudence guilt is personal,”<sup>194</sup> these children, who had no choice in the matter, should not be punished for decisions that their parents made. For both undocumented and illegitimate youth, “[t]he parents have the ability to conform their conduct to societal norms but their children can affect neither their

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189. *Id.* at 229.

190. *Id.* at 229–30.

191. *Id.* at 230.

192. *Id.* at 224, 230.

193. Brief for Appellees, *supra* note 124, at 24.

194. *Id.* (citing *Healy v. James*, 408 U.S. 169, 185–86 (1972); *Robinson v. California*, 370 U.S. 660, 666–67 (1962); *Scales v. United States*, 367 U.S. 203, 224 (1961)).

parents['] conduct nor their own status.”<sup>195</sup> Because Texas law penalized undocumented students for their parents’ acts, turning illegality into an inherited form of stigma, the attorneys argued that the Court should apply heightened review.<sup>196</sup> The Texas Attorney General rejected this claim because illegitimacy statutes could not prevent the birth out of wedlock, which already had taken place. By contrast, the Texas school finance statute could shape behavior because “the children may remain in their native country or return thereto with or without their parents.”<sup>197</sup> In short, as the attorney general explained during oral argument, “[t]he parents are free to effect the conduct in question [that is, illegal presence in the United States] at this time.”<sup>198</sup>

The majority opinion cited the illegitimacy cases to conclude that undocumented children have no control over their parents’ conduct and that “[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”<sup>199</sup> The dissent took issue with the majority’s approach, noting that the Equal Protection Clause was “not an all-encompassing ‘equalizer’ designed to eradicate every distinction for which persons are not ‘responsible.’”<sup>200</sup> On the contrary, legislatures could use classifications over which individuals have no control, such as mental health.<sup>201</sup> Moreover, the dissent noted, illegitimate children suffer due to a status assigned at birth, but undocumented children are penalized for their own illegal entry into the country.<sup>202</sup>

As Bosniak points out, the *Plyler* Court displayed considerable ambivalence about undocumented immigrants.<sup>203</sup> In her view, the Justices put much of the blame for the children’s presence on their parents. Because the children’s status was acquired “involuntarily,” the Court concluded that they should not bear the consequences of their parents’ decision to enter the United States illegally.<sup>204</sup> In fact, Bosniak argues that

[h]ad the case involved denial of state benefits to undocumented adults (whose undocumented status, it is assumed, would be the result of their own, voluntary, action), and had the case not specifically involved educational rights (which the Court treats as

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195. *Id.* at 26 (citing *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)).

196. *Id.* at 24.

197. Appellants’ Reply Brief, *supra* note 142, at 7.

198. Transcript of Oral Argument in *Plyler*, *supra* note 135, at 69.

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

200. *Id.* at 245 (Burger, C.J., dissenting).

201. *Id.*

202. *Id.* at 246.

203. Bosniak, *supra* note 154, at 66.

204. *Id.*

fundamentally important in [*Plyler*]), the outcome might well have differed very little from the one urged by the dissent.<sup>205</sup>

From the standpoint of a property-based approach, the *Plyler* decision left the notion of citizenship as heritable privilege largely intact. The Court nowhere questioned the substantial advantages that come with birthright citizenship. For example, children born in this country to undocumented parents can claim citizenship and its attendant advantages.<sup>206</sup> In fact, undocumented students often come from mixed-status families in which some of their siblings are U.S. citizens.<sup>207</sup> Moreover, during oral argument, the Court expressed the view that Texas could bar Mexican children residing across the border from attending the state's elementary and secondary schools. These students would have to be satisfied with the educational opportunities afforded to them in Mexico.<sup>208</sup> At the same time, for undocumented children residing in the United States, the Justices recognized that notions of citizenship as heritable privilege can become dislocated and destabilized.<sup>209</sup> The Court accorded these students a key privilege of birthright and naturalized citizens: attendance at a public school free of charge.<sup>210</sup> In doing so, *Plyler* complicated the national identity and loyalty of these youth. By attending public schools, undocumented students went through rituals of political socialization alongside their citizen and permanent resident classmates. As one undocumented youth explained:

They say go back to your country, but I don't even know the Mexican national anthem. It's kind of embarrassing around my cousins from Mexico, but I didn't grow up there. I sure do know all of our national songs. 'My Country, 'Tis of Thee,' 'America the Beautiful.' We learned them in school. It's like every American kid knows those songs because we learn them in school. It says something about me, where I'm from. It connects us.<sup>211</sup>

As sociologist Roberto G. Gonzales has explained, high school graduation is momentous for these students. After enjoying the protections of

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205. *Id.* (citation omitted).

206. U.S. Const. amend. XIV. Recently, a member of Congress from Texas introduced a bill to redefine birthright citizenship so that it does not extend to the children of undocumented immigrants. See Birthright Citizenship Act of 2021, H.R. 140, 117th Cong. (2021).

207. See Randy Capps, Michael Fix & Jie Zong, Migration Pol'y Inst., Fact Sheet: A Profile of U.S. Children With Unauthorized Immigrant Parents 4 (2016), <https://www.migrationpolicy.org/sites/default/files/publications/ChildrenofUnauthorized-FactSheet-FINAL.pdf> [<https://perma.cc/EZZ4-HQRL>].

208. Transcript of Oral Argument in *Plyler*, *supra* note 135, at 9–11.

209. *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982) (describing how lax enforcement of immigration laws and employment restrictions created a “substantial ‘shadow population’ of illegal immigrants—numbering in the millions” and “raised the specter of a permanent underclass,” which posed “difficult problems for a Nation that prides itself on adherence to principles of equality under law”).

210. *Id.* at 221–23, 230.

211. Roberto G. Gonzales, *Lives in Limbo: Undocumented and Coming of Age in America* 76 (2015).

*Plyler* in elementary and secondary school, graduates embark on a transition to illegality that reveals the limits of their ability to fully integrate into American life.<sup>212</sup> For that reason, undocumented youth find their lives in limbo: They cannot claim the benefits of citizenship in the United States, but they have been socialized to identify as American. Although many of these young people, known as the Dreamers, have pressed for full inclusion through comprehensive immigration reform, so far their efforts have failed.<sup>213</sup> To reinforce claims of innocence and desert, the Dreamers have emphasized not only the blamelessness of their arrival but also their hard work and personal rectitude while residing in the United States.<sup>214</sup> If at an earlier time these youth had no choice about coming into the country, they have since demonstrated their bona fides by making worthy choices. This strategy arguably reflects a property-based claim of belonging: Undocumented youth have earned the right to legal status through achievements that make them de facto Americans.<sup>215</sup> Even so, the Dreamers' passage to adulthood reinstates the heritability of citizenship as an unattainable privilege, one that cannot be attained even by faultless children who have grown into deserving adults.

2. *How Equality Concerns Allowed the Court to Transcend the Conception of Public Education as a Purely Private Good.* — Because *Plyler* focused heavily on inequality, it should come as no surprise that alternative conceptions of education as a public good and as a human right influenced the Court. The Court had to tread carefully, given its unwillingness to frame education as a fundamental right. The plaintiffs' attorneys argued vigorously that the Court must recognize their clients as persons who enjoyed equal protection lest they be subjected to arbitrary and irrational treatment wholly "at odds with the most fundamental principles of this Nation."<sup>216</sup> The National Education Association and the League of United Latin American Citizens filed an amicus brief that squarely situated *Plyler* in a broader historical framework of group subordination.<sup>217</sup> According to the brief, the Fourteenth Amendment was designed to end the "perpetuation of a permanent subclass of benighted individuals within the borders of a state neglectful of their interests."<sup>218</sup> For that reason, Southern states that had permitted slavery were allowed to rejoin the Union only if they afforded Black people access to education.<sup>219</sup> The amici asserted that the

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212. *Id.* at 96.

213. Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 *U.C. Davis L. Rev.* 1905, 1920–31 (2020).

214. *Id.* at 1919–20.

215. *Id.*

216. Brief for Appellees, *supra* note 124, at 14.

217. Brief Amici Curiae of the National Education Association & the League of United Latin American Citizens, Supporting Appellees at 3, *Plyler v. Doe*, 457 U.S. 202 (1982) (No. 80-1538), 1981 WL 389989.

218. *Id.* at 7–8.

219. *Id.* at 6–7.

history of discrimination against the Mexican-origin population in Texas “closely parallels the history of discrimination against slaves and post-Civil War freedmen.”<sup>220</sup> More specifically, the brief claimed, “[T]he social and economic circumstances of undocumented aliens in Texas resemble in many ways the condition of those former slaves for whose benefit the Fourteenth Amendment was originally enacted.”<sup>221</sup> The brief concluded that the Court had to recognize an equal protection violation in order to prevent “the perpetuation of a permanently inferior caste, exposed to exploitation by the rest of society” and not all that different from enslaved people.<sup>222</sup>

The Court took these concerns quite seriously. The majority opinion expressly noted that “[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.”<sup>223</sup> Although the Court declined to find a fundamental right to minimum access to education, it did acknowledge that undocumented students were persons who required education as a precondition for being fully human.<sup>224</sup> In doing so, the Justices went beyond treating education as a property right without enshrining it as a human right.<sup>225</sup> Given the uncertain status of a right to education,<sup>226</sup> the opinion focused on the ways in which education is a public good as a way to evaluate broader societal concerns. The Justices, for instance, cited the significant social harms that the Texas statute would produce. As the majority observed, “It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a sub-class of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.”<sup>227</sup> Moreover, the Court noted, the promise of universal education based on merit rather than caste was integral to any collective understanding of the promise of equal protection.<sup>228</sup> As the opinion explained, the creation of a “permanent caste of undocumented resident aliens” would “present[] most difficult problems for a Nation that prides itself on adherence to principles of equality under

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220. *Id.* at 8.

221. *Id.* at 44.

222. *Id.* at 51–56, 61.

223. *Plyler*, 457 U.S. at 213.

224. See *id.* at 222 (describing “[t]he inestimable toll of that [educational] deprivation on the social, economic, intellectual, and psychological well-being of the individual”).

225. *Id.* at 214–15.

226. *Id.* at 222.

227. *Id.* at 230.

228. *Id.* at 221–22.



law.”<sup>229</sup> In Kymlicka’s parlance, solidarity without inclusion would do injury to a shared interest in democratic integrity.<sup>230</sup>

Equality claims often require a broader understanding of education than a traditional conception of property can provide. In the free market, inequality is tolerated as an inevitable by-product of individual differences in skills, resources, and effort.<sup>231</sup> However, when education is treated as a public good, there are ways to recognize that deep disparities can undercut shared democratic possibilities, especially when those differences coincide with identifiable traits like race or national origin.<sup>232</sup> Meanwhile, the emphasis on access to schooling as a human right suggests that educational opportunities cannot be so profoundly unequal that some children are denied a path to becoming fully functioning adults.<sup>233</sup> Although the Court was unwilling to acknowledge a right to education, the majority in *Plyler* warned against policies that would rob children of their humanity.<sup>234</sup> In doing so, the opinion suggested some limits on disparities that ultimately render a system of schooling antidemocratic.<sup>235</sup>

As this discussion of *Plyler* shows, even when property-like concepts play a role in education litigation, they can be far from decisive. This is in part due to the complexity and malleability of property itself. In *Plyler*, the Texas legislature had created an entitlement based on residency.<sup>236</sup> Undocumented families clearly met the criteria by living in a school district and paying taxes either directly or indirectly.<sup>237</sup> Except for their immigration status, these parents and their children had, by Texas’s own accounting, earned the right to attend a public school in their neighborhood. After long adhering to this paradigm and having recently defended it before the

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229. *Id.* at 219.

230. See *supra* note 86 and accompanying text.

231. See M.D.R. Evans & Jonathan Kelley, Education Legitimizes Income Inequality: Normative Beliefs in Early Post-Communist and Market-Oriented Nations, 200 *Polish Socio. Rev.* 441, 443, 448–54 (2017) (describing a widespread belief that education should be rewarded based on its contributions to economic productivity and arguing that this belief results in tolerance of income inequality).

232. See Amy Gutmann, *Democratic Education* 45–46 (paperback ed. 1987) (describing a norm of nondiscrimination as a “principled limit on democratic education,” requiring that all educable children be prepared for deliberative self-governance as adults and rejecting exclusion of “entire groups of children from schooling,” including “racial minorities, girls, and other disfavored groups of children”).

233. Sharon E. Lee, Education as a Human Right in the 21st Century, 21 *Democracy & Educ.*, no. 1, 2013, at 1, 7.

234. See *supra* note 224 and accompanying text.

235. See Rachel F. Moran, The Constitution of Opportunity: Democratic Equality, Economic Inequality, and the Right to Compete, *in* *A Federal Right to Education: Fundamental Questions for Our Democracy* 261, 269–74 (Kimberly Jenkins Robinson ed., 2019).

236. *Plyer v. Doe*, 457 U.S. 202, 206 (1982).

237. See *id.* (noting that the plaintiffs resided in the school district).

U.S. Supreme Court,<sup>238</sup> the state was hard-pressed to justify a newly created restriction on eligibility for undocumented students.

A shift in eligibility standards lies at the heart of Professor Shaw's claim that the Court saw the policy at issue in *Plyler* as a denial of substantive due process to undocumented children.<sup>239</sup> Because families had relied on the traditional residency requirements, their children acquired a vested property interest in this government largesse. As a result, Texas could not deprive them of the entitlement in an arbitrary and capricious way. This analysis is fine so far as it goes, but it does not speak to the challenges of defining the new property when there are unclear lines of authority in areas like education and immigration. Without concerns about preemption, Texas's arguments about its rationale for the law might have looked quite different. Instead of relying solely on residency, the state could have invoked another property-like entitlement based on citizenship or legal status to bolster its claim that the change to the law was justified.

Moreover, Shaw's account of *Plyler* largely overlooks the ways in which the Court moved beyond property-based rationales. For one thing, the Justices rejected the heritability of a dispossessed status based on parents' conduct. The trope of innocence was a prominent feature of the opinion that largely rejected property-like entitlements. In addition, the Justices were preoccupied with equality concerns distinct from property interests under the Due Process Clause. Far from accepting the state's largesse as the benchmark for an entitlement to education, the Justices warned that a history of discrimination could make states unduly parsimonious in providing access to education.<sup>240</sup> The fears of a caste system suggested that privileging individual claims to exclusive rights of enjoyment could perpetuate subordination of the nation's most vulnerable children.

### III. *PLYLER'S PROSPECTS: WILL IT SURVIVE RENEWED JUDICIAL ATTENTION?*

Because *Plyler* relied on a miscellany of arguments, some property-based and some not, the plaintiffs' surprising victory has become something of a jurisprudential anomaly. Its reasoning has been narrowly construed and limited to the particular facts of the case.<sup>241</sup> As a result, the decision has not offered strong protection for the rights of undocumented youth in other educational settings. For instance, states have successfully passed legislation targeting undocumented college and university students for unequal treatment, most notably by charging them out-of-state tuition

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238. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

239. See *supra* notes 4–5, 37–41 and accompanying text.

240. *Plyler*, 457 U.S. at 221–22 (noting the systemic denial of education to Black children and how “denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit”).

241. *Moran*, *supra* note 213, at 1941.

even when they are residents.<sup>242</sup> *Plyler's* anomalous status has contributed to concerns about the opinion's staying power.<sup>243</sup> Indeed, education law scholar Michael A. Olivas described *Plyler* as a "tenuous" decision that survived "with a substantial dose of luck and persistence and a powerful backstory of innocent children."<sup>244</sup> On the other hand, perhaps because *Plyler* did not declare any fundamental constitutional right, no Justice has yet signaled opposition to the decision, although Chief Justice Roberts did prepare a private memorandum critical of the case when he served in the Reagan Administration in 1983.<sup>245</sup>

Despite the Justices' silence, this is an opportune moment to revisit the decision's reasoning because of newfound fears that *Plyler's* luck finally may have run out. In May 2022, Governor Greg Abbott of Texas told a radio talk show host that the Supreme Court precedent he would most like to see overturned is *Plyler*.<sup>246</sup> According to Abbott, "I think we will resurrect that case and challenge this issue again, because the expenses are extraordinary and the times are different than when *Plyler v. Doe* was issued many decades ago."<sup>247</sup> For Abbott, the fact that *Plyler* has been binding precedent for over forty years has not cemented its hold on constitutional respectability. Because the decision failed to make pronouncements about education as a fundamental right or alienage as a suspect class, it may not seem to qualify as "a super precedent" that is "so well established that it would be unthinkable that it would ever be overruled."<sup>248</sup> For critics, *Plyler's* fragile status stems from its reliance on policy considerations, which, as Abbott notes, can shift over time.<sup>249</sup> Although one immigration law scholar, Professor Jaclyn Kelley-Widmer, has predicted that overruling *Plyler* would have "catastrophic" consequences, it seems entirely possible that the Justices could return to the issue in the coming years.<sup>250</sup> For that

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242. *Id.* at 1915–16. Interestingly, Texas was the first state to allow undocumented students to pay in-state tuition. *Id.* at 1916.

243. *Id.* at 1941; Michael A. Olivas, No Undocumented Child Left Behind: *Plyler v. Doe* and the Education of Undocumented Children 44 (2012) [hereinafter Olivas, No Undocumented Child Left Behind] (describing how scholars criticized the decision as "messy," "ad hoc," and "divorced" from other precedents).

244. Olivas, No Undocumented Child Left Behind, *supra* note 243, at 92.

245. Matt Barnum, What You Should Know About *Plyler*, the Case Protecting Undocumented Students' Education Rights, Chalkbeat (May 11, 2022), <https://www.chalkbeat.org/2022/5/11/23067472/plyler-supreme-court-abbott-undocumented-students-schools> [<https://perma.cc/RYE2-72FZ>].

246. Davies, *supra* note 13.

247. *Id.*

248. Barnum, *supra* note 245.

249. See *supra* notes 118–121 and accompanying text.

250. Davies, *supra* note 13. At least one education law scholar, Professor Derek Black, has concluded that Governor Abbott's comments are "much ado about nothing" while admitting that given the polarization on the Court, *Plyler* might be overturned. Barnum, *supra* note 245. Black predicts, however, that were a state to bar undocumented children from the public schools, the ban would immediately be challenged. *Id.* In his view, a lower court

reason, it is worth reflecting on whether the *Plyler* Court's rationales will likely survive renewed judicial attention.

This Part will begin by exploring whether the Court's recent embrace of formalism renders *Plyler*'s reasoning a nullity. The majority's reasoning adopted a pragmatic approach, but there is reason to believe that formalism could offer a new rationale rooted in the language and history of the Fourteenth Amendment to uphold the decision. But, assuming that the Court's analysis in *Plyler* remains relevant to at least some Justices, the discussion then turns to the ongoing persuasiveness of both property-like rationales and alternative frameworks. As this analysis will show, the backstory of innocence may be the most compelling, enduring feature of the case, even as it struggles—like education itself—to find a constitutional home.

#### A. *Will Formalism Override Plyler's Reasoning?*

Before exploring the justifications used in *Plyler*, it seems essential to ask whether the Court's turn to formalism will override the decision's balancing of policy interests. Justice Lewis Powell, the key swing vote in the case, favored an approach that weighed concerns about education and alienage.<sup>251</sup> To accommodate these preferences, Justice William Brennan revised the majority opinion to make clear that education was not a fundamental right and alienage was not a suspect classification. Instead, the two rationales were used to bolster one other.<sup>252</sup> Because the weighing of "too many considerations" led *Plyler* to read like a critique of Texas's social policy, constitutional law scholar Mark Tushnet has concluded that the decision had "almost no generative or doctrinal significance."<sup>253</sup> Now, with the Court's increasingly formalist bent, it seems even less likely that the Justices will be partial to the artful balancing prized by Justice Powell.

To address this concern, Professor Steven G. Calabresi and historian Lena M. Barsky have proposed an originalist defense of the *Plyler* decision.<sup>254</sup> In their view, the Due Process and Equal Protection Clauses protect all persons, including undocumented people, in contrast to the Citizenship Clause and the Privileges or Immunities Clause, which apply exclusively to citizens.<sup>255</sup> In contrast to Shaw's emphasis on due process, Calabresi and Barsky conclude that only equal protection can safeguard

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would strike down the state's law, citing *Plyler*, and the Supreme Court would decline to review the decision. *Id.*

251. Mark V. Tushnet, Justice Lewis F. Powell and the Jurisprudence of Centrism, 93 *Mich. L. Rev.* 1854, 1873–74 (1995).

252. *Id.* at 1871–73.

253. *Id.* at 1873.

254. Steven G. Calabresi & Lena M. Barsky, An Originalist Defense of *Plyler v. Doe*, 2017 *BYU L. Rev.* 225, 228.

255. *Id.* at 235–40.

an undocumented child's right to schooling under an originalist interpretation. As they explain, based on common understandings at the time of adoption, lack of access to public education did not deny life, liberty, or property.<sup>256</sup> However, Calabresi and Barsky assert, the differential treatment of undocumented children would violate equal protection based on both the text and legislative history of the Fourteenth Amendment. As for the text, which refers to persons, the statute in *Plyler* impermissibly "gave less protection—shelter or refuge under the law—to illegal alien children than it gave to other children in the state of Texas."<sup>257</sup> Although admitting that reliance on legislative history is controversial, Calabresi and Barsky use the record to conclude that the Fourteenth Amendment's protections for persons made no distinction between aliens legally and illegally present because there were no federal immigration laws at the time.<sup>258</sup> Ultimately, Calabresi and Barsky find that *Plyler* was correctly decided based on an originalist interpretation of the Constitution.

This formalist approach is revealing in at least two ways. For one thing, it makes clear that *Plyler*'s fate turns on equal protection. Consequently, the decision is not vulnerable to concerns about substantive due process rights that have no express grounding in the Constitution. Recently, the Court has shown considerable antipathy to recognizing such rights based on concerns about unwarranted judicial activism.<sup>259</sup> In addition, Calabresi and Barsky's textual exegesis and historical review make plain that originalist interpretations will adhere to traditional conceptions of property, leaving little room for progressive notions that have evolved in the meantime to influence educational jurisprudence. All of this suggests that if *Plyler* is to have staying power under a formalist framework, the most successful arguments will turn on notions of equal treatment that transcend property claims rooted in exclusive rights of enjoyment.

#### B. *Property-Like Entitlements and the Future of Plyler*

Even with a new commitment to formalism, at least some Justices are likely to revisit the arguments in *Plyler*. If they do, one important question is how influential property-like notions will be in determining the decision's fate. Here, the answer is mixed. In the intervening years since the *Plyler* decision, efforts to privatize public education have only grown in significance in the United States. The most notable example is the expansion in school choice programs, whether in the form of vouchers or charter

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256. *Id.* at 249.

257. *Id.* at 249–50.

258. *Id.* at 280, 286.

259. See Kenji Yoshino, Opinion, A Retro Reading of the Constitution Imperils Many Rights Beyond Abortion, *L.A. Times* (May 6, 2022), <https://www.latimes.com/opinion/story/2022-05-06/abortion-roe-supreme-court-draft-decision-unenumerated-rights> [<https://perma.cc/5PRC-GAXF>].

schools.<sup>260</sup> Under a law that took effect in September 2022, Arizona has taken the most drastic step in this direction, authorizing vouchers of up to \$7,000 per year for every child eligible to enroll in its public schools.<sup>261</sup> The bill passed even though voters had decisively rejected a previous version of the legislation.<sup>262</sup> Although it is not clear what proportion of Arizona's more than one million students will use vouchers to exit the public school system, a Democratic legislator has described the statute as an effort to "kill public education."<sup>263</sup> Opponents already have vowed to place the measure on an upcoming ballot so that Arizona voters once again can weigh in on its merits.<sup>264</sup>

As the Arizona program makes plain, privatization treats education as an individual entitlement, property-like in nature, rather than as a public good. That said, there are still significant uncertainties about whether that entitlement is secure. In the nearly four decades since *Plyler* was decided, the Court has yet to find a constitutional right to a minimum level of education.<sup>265</sup> Nor has it recognized Shaw's argument that there is a right to education under the Due Process Clause. As a result, public education remains an insecure benefit, a form of largesse that a state may not be obligated to provide. *Plyler* evaded the issue by reasoning that education was important enough and undocumented children vulnerable enough to find an equal protection violation. Even as courts have recognized a fundamental right to education under state constitutions, the decisions have not had to address whether the right extends to undocumented children. Instead, *Plyler* decided the matter for them.<sup>266</sup>

1. *Will Residency Protect an Undocumented Child's Right to Public Education?* — An entitlement to education based on residency remains a

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260. See Mark Berends, *The Current Landscape of School Choice in the United States*, Kappan (Aug. 23, 2021), <https://kappanonline.org/current-landscape-school-choice-united-states-vouchers-charter-schools-berends/> [<https://perma.cc/E4TH-4YGJ>].

261. Valerie Strauss, *Ignoring Voters, Arizona Approves Nation's Largest School Voucher Scheme*, Wash. Post (June 30, 2022), <https://www.washingtonpost.com/education/2022/06/30/arizona-passes-nation-biggest-voucher-program/> (on file with the *Columbia Law Review*).

262. Kathryn Joyce, *School's Out Forever: Arizona Moves to "Kill Public Education" With New Universal Voucher Law*, Salon (July 1, 2022), <https://www.salon.com/2022/07/01/schools-out-forever-arizona-moves-to-public-education-with-new-universal-voucher-law/> [<https://perma.cc/WVJ2-R48T>].

263. *Id.* Approximately 98,000 children already in private schools or home schools would be eligible to receive the vouchers. Bob Christie, *Arizona OKs Biggest US School Voucher Plan, Faces Challenge*, Associated Press (July 7, 2022), <https://apnews.com/article/education-arizona-doug-ducey-school-vouchers-7c5d7eb0498e5e7234d7eeb726027506> [<https://perma.cc/9SSQ-KT3B>]. Another 12,000 children already receive vouchers under Arizona's previous program. *Id.*

264. Christie, *supra* note 263.

265. Shaw, *supra* note 4, at 1181–82.

266. See Olivas, *No Undocumented Child Left Behind*, *supra* note 243, at 45 (asserting that "immigrant restrictionists [have chosen] not to touch the third rail of schoolchildren, at least not directly").

powerful tool in rationing access. This tool is mainly the product of state and local policymaking rather than any constitutional imperative. Although the plaintiffs in *Plyler* used residency to bolster claims to inclusion, the concept also has been deployed in exclusionary ways that resemble accounts of stealing education. One year after the victory in *Plyler*, the Court decided *Martinez v. Bynum*.<sup>267</sup> In that case, Roberto Morales was a U.S. citizen born in McAllen, Texas. His parents, however, were Mexican citizens who had returned to their home country. Roberto moved to Texas to live with his sister and attend the neighborhood school. However, she was not his legal guardian.<sup>268</sup> Under the district's residency requirement, a child had to be living with a parent or guardian to attend the public schools.<sup>269</sup>

In an opinion by Justice Powell, the Court held that the requirement was bona fide and allowed the district to exclude ineligible children to conserve resources for residents.<sup>270</sup> However, the Court noted that Roberto might qualify as a resident if he planned to live permanently in the district and was not there solely for the purpose of attending school.<sup>271</sup> Justice Brennan, who had authored the *Plyler* opinion, concurred because Roberto might have a way to establish residency.<sup>272</sup> Only Justice Thurgood Marshall dissented,<sup>273</sup> finding that the Texas statute violated equal protection. In his view, there was no adequate justification for excluding children like Roberto from a public education simply because their primary motivation was to attend school.<sup>274</sup>

During oral argument in *Plyler*, the Texas Attorney General had raised concerns about children from Mexico crossing the border to attend Texas public schools.<sup>275</sup> The Court responded by pointing out that residency requirements alone could fully address that concern,<sup>276</sup> and *Martinez* clearly reinforced this view. More recently, Professor Olivas reported that there is "growing evidence that this issue, long dormant, will rear its head, as a small number of U.S.-Mexico-border school districts have begun to police enrollments to ensure that the families are actually residing in the school boundaries, rather than sending their children . . . across bridges that span the two countries."<sup>277</sup>

Crackdowns that require proof of status as a parent or guardian to establish a child's residency can pose problems for undocumented adults.

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267. 461 U.S. 321 (1983).

268. *Id.* at 322–23.

269. *See id.* at 323.

270. *Id.* at 326–33.

271. *Id.* at 332.

272. *See id.* at 333 (Brennan, J., concurring).

273. *See id.* at 334 (Marshall, J., dissenting).

274. *See id.*

275. *See* Transcript of Oral Argument in *Plyler*, *supra* note 135, at 10.

276. *Id.*

277. Olivas, No Undocumented Child Left Behind, *supra* note 243, at 59.

In some instances, they cannot show that they are legal parents or guardians because they lack basic forms of identification like social security numbers or driver's licenses.<sup>278</sup> Here, lack of access to one form of state-created property can become a barrier to accessing another form of largesse, public education. In some cases, undocumented adults have relied on a different nation's largesse to meet credentialing requirements. In *Joel R. v. Board of Education*, an aunt used a notarized document from a Mexican court to establish that she was a child's legal guardian.<sup>279</sup> As in *Martinez*, the child had been born in the United States, but his parents resided in Mexico. The school district refused to accept the document, but a court ultimately ordered that officials recognize the guardianship and admit the child.<sup>280</sup>

All of this suggests that residency, along with the property-like entitlement it confers, will remain a significant factor in allocating access to public education. Rather than bar undocumented children altogether, school districts can simply double down on proof of residency. If this proves a workable strategy, the Court may find it unnecessary to revisit *Plyler*. Instead, even if undocumented students cannot be formally barred from the public schools, concerns about stealing education will remain powerful barriers to their admission.

2. *Will Preemption Continue to Cast a Shadow Over States' Efforts to Bar Undocumented Children From Public Schools?*—*Joel R.* is yet another reminder that government largesse implicates which officials get to decide whether a benefit will be conferred. In that case, a Mexican judge established the prerequisites that allowed entry into an Illinois public school. In *Plyler* itself, the division of labor between the federal government and the State of Texas played a significant part in determining whether undocumented children have a right to attend public school. While the federal government was responsible for conferring the benefits of citizenship, the state was authorized to distribute access to public education. Although the Court did not reach preemption issues in *Plyler*, this federalist framework remains important today. Subsequent state efforts to deny undocumented immigrants opportunities, such as pursuit of employment, have regularly run afoul of the Supremacy Clause.<sup>281</sup>

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278. See *id.* at 48–50.

279. 686 N.E.2d 650 (Ill. App. Ct. 1997).

280. See *id.* at 656–67.

281. See, e.g., *Arizona v. United States*, 567 U.S. 387, 403–07, 416 (2012) (striking down Arizona's misdemeanor offense based on undocumented immigrants' knowing application to work as employees or independent contractors because the law was preempted by comprehensive federal regulation in the area); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768–74, 776–86 (C.D. Cal. 1995) (striking down provisions that denied public benefits, health care, and elementary and secondary education to undocumented people as a violation of the federal government's authority in these areas).



Even so, the division of labor is not as clear-cut as it once was due to explicit agreements that authorize states to cooperate with federal authorities in enforcing immigration law. The Secure Communities program enabled state and local law enforcement to alert Immigration and Customs Enforcement (ICE) agents about the arrest or detention of a potentially undocumented immigrant. ICE could then obtain a detainer to deport the individual, regardless of the outcome of the state or local criminal action.<sup>282</sup> Some state and local governments have openly resisted this role by declaring themselves sanctuary jurisdictions.<sup>283</sup> Although *Plyler* tried to create safe spaces for undocumented students, cooperative enforcement arrangements have sometimes affected public schools. For instance, in *Murillo v. Musegades*, a federal district court enjoined an El Paso high school from allowing the Border Patrol to have “a regular, consistent, and prominent presence on the . . . campus.”<sup>284</sup> According to the court, agents parked in the school lot; drove along service roads, concrete sidewalks, and grassy areas; entered the football locker rooms; and surveilled students through binoculars.<sup>285</sup> Students were regularly stopped, questioned, frisked, and even detained and arrested.<sup>286</sup> The district court found that this racial profiling and targeting violated equal protection.<sup>287</sup> The facts in *Murillo* were particularly egregious, but in other instances, schools have turned over students suspected of being undocumented to the Border Patrol or agents have waited just outside of school grounds to apprehend parents suspected of being in the United States illegally.<sup>288</sup>

*Plyler* formally rejected any property-like interest in citizenship or legal permanent resident status as a justification for excluding undocumented immigrants from a state’s public schools. Enforcing immigration laws is the exclusive province of federal authorities, and states cannot use education laws to deter migrant flows. In the shadow of *Plyler*,

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282. Adam B. Cox & Thomas J. Miles, Policing Immigration, 80 U. Chi. L. Rev. 87, 92–97 (2013).

283. Catalina Amuedo-Dorantes, Thitima Puttitanun & Mary Lopez, Immigration, Sanctuary Policies, and Public Safety, 56 Int’l Migration Rev. 668, 670 (2022); Dara Lind, Why Cities Are Rebelling Against the Obama Administration’s Deportation Policies, Vox (June 6, 2014), <https://www.vox.com/2014/6/6/5782610/secure-communities-cities-counties-ice-dhs-obama-detainer-reform> [<https://perma.cc/3M94-6UUD>] (describing state and local backlash against Secure Communities and demands to opt out of the program).

284. 809 F. Supp. 487, 495, 503 (W.D. Tex. 1992).

285. See id. at 491–95.

286. See id.

287. See id. at 500.

288. See, e.g., Olivas, No Undocumented Child Left Behind, *supra* note 243, at 51–52; Trevor Hughes, Immigration Agents Accused of Targeting Parents Taking Their Kids to School, USA Today (Feb. 27, 2020), <https://www.usatoday.com/story/news/nation/2020/02/27/ice-criticized-detaining-parents-school-trump-enforcement-push/4891529002/> [<https://perma.cc/DEM4-HP83>] (reporting on use of the tactic in Colorado, Oregon, and Pennsylvania).

however, cooperative arrangements have authorized state and local agencies to participate in enforcement efforts and have sometimes eroded the status of schools as safe spaces. Even if *Plyler* protects formal access, immigration enforcement on or near public school grounds can make school attendance an illusory promise. Under these circumstances, policing the boundaries of the nation-state enforces a property-like claim that vitiates an undocumented child's constitutional right to go to school. Unfortunately, the *Plyler* decision standing alone cannot prevent these activities. However, it does provide jurisprudential cover for executive guidance declaring schools exempt from border enforcement tactics. In fact, in 2021 the Biden Administration issued guidelines on protected areas, including schools, where immigration agents must refrain from making arrests.<sup>289</sup>

The recent blurring of enforcement boundaries in part reflects the federal government's own admission of failure in enforcing existing laws and enacting comprehensive immigration reform. The Supremacy Clause still applies, even when federal authorities confess incompetence, but the politics of working with the most impacted states necessarily shift. That phenomenon is well illustrated by the controversies surrounding the Deferred Action for Childhood Arrivals (DACA) program. Under the Obama Administration, a 2012 administrative memorandum laid the foundation for DACA by putting a low priority on enforcing immigration laws for undocumented youth who had arrived in the United States while under sixteen years of age, resided continuously in the country for at least five years, successfully pursued educational opportunities or military service, were not involved in crimes or threats to national security, and were still under thirty years of age.<sup>290</sup> To justify the program, federal officials said that they had to set appropriate priorities because they could deport only a tiny fraction, about four percent, of the undocumented persons living in the United States.<sup>291</sup> Texas, of course, had decried wholly inadequate federal enforcement efforts in the *Plyler* litigation but without such an explicit admission of failure to bolster its claim.<sup>292</sup>

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289. See Charles R. Davis, Biden Administration Limits ICE Arrests at Schools, Churches, Daycares, and Other 'Protected Areas', *Bus. Insider* (Oct. 27, 2021), <https://www.businessinsider.com/biden-administration-limits-ice-raids-at-schools-churches-daycares-2021-10> [<https://perma.cc/7DXT-BXVF>].

290. See Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs. & John Morton, Dir., U.S. Immigr. & Customs Enf't, Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/85WA-DRN9>].

291. See Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enf't, to All ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [<https://perma.cc/TC58-NBL6>].

292. See *supra* notes 169–170 and accompanying text.

In 2014, the Obama Administration expanded DACA and extended the program of deferred action to the undocumented parents of citizens or permanent residents.<sup>293</sup> As was true of the original version of DACA, the new programs made clear that they granted neither substantive rights nor a pathway to citizenship.<sup>294</sup> Even so, the expansion—especially to parents—was a bridge too far for Texas and twenty-five other states. They sued, alleging that the 2014 programs violated the Administrative Procedure Act because they were not adopted pursuant to notice-and-comment rule-making, exceeded the scope of federal enforcement officials' authority, and failed to faithfully execute the laws of the United States.<sup>295</sup> Revealingly, the states relied on the federal government's abdication of its responsibility to enforce immigration laws as a basis for standing.<sup>296</sup> In doing so, the plaintiffs cited federal authorities' own admission that they could deport only a tiny fraction of the undocumented population.<sup>297</sup> The district court acknowledged that this theory of standing was "not well-established"<sup>298</sup> but concluded that, if accepted, this litigation provided "a textbook example" of federal abdication.<sup>299</sup> The Fifth Circuit acknowledged the theory but ultimately found standing on more traditional grounds.<sup>300</sup> On the merits, the lower courts concluded that the programs should have been adopted pursuant to a rulemaking procedure and that officials had exceeded their authority.<sup>301</sup> The courts did not reach the question of whether officials had taken care to faithfully execute immigration laws.<sup>302</sup> The Supreme Court affirmed the lower court holdings in a one-line opinion by an evenly divided vote.<sup>303</sup>

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293. See Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigr. & Customs Enf't & R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children and With Respect to Certain Individuals Whose Parents Are U.S. Citizens or Permanent Residents 4 (Nov. 20, 2014), <https://www.aila.org/infonet/dhs-exercising-prosecutorial-discretion> [<https://perma.cc/B6HJ-74S7>].

294. Memorandum from Jeh Charles Johnson, *supra* note 293, at 5; Memorandum from Janet Napolitano, *supra* note 290, at 3.

295. See *Texas v. United States*, 86 F. Supp. 3d 591, 614, 664–72, 677–78 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd* by an equally divided Court, 579 U.S. 547 (2016).

296. See *id.* at 636–37.

297. See *id.* at 637.

298. *Id.* at 640.

299. *Id.* at 643.

300. See *Texas v. United States*, 787 F.3d 733, 746–54 (5th Cir. 2015) (noting that the district court had relied on a theory of "abdication standing" but that the court of appeals would instead rely on evidence that Texas suffered a "concrete, particularized, and actual or imminent injury" based on the cost of issuing driver's licenses).

301. *Texas*, 86 F. Supp. 3d at 677, *aff'd*, 809 F.3d 134, 171–83, 186 (5th Cir. 2015).

302. *Texas*, 809 F.3d at 146, 149.

303. *United States v. Texas*, 579 U.S. 547, 548 (2016) (*per curiam*).

After the ruling, only the original 2012 DACA program survived intact. However, the Trump Administration rescinded the original DACA program in 2017, triggering new litigation.<sup>304</sup> Ultimately, the U.S. Supreme Court found that the rescission was arbitrary and capricious and therefore unlawful on procedural grounds.<sup>305</sup> In particular, the Court concluded that the Department of Homeland Security (DHS) should have distinguished between deferring deportation and conferring benefits—for instance, the right to obtain a driver’s license and legal employment. According to the Justices, DHS could have rescinded eligibility for benefits while refraining from pursuing deportation efforts.<sup>306</sup> In addition, DHS failed to weigh the reliance interests of DACA recipients who would experience a significant change in circumstances due to the rescission.<sup>307</sup>

Under the Biden Administration, the original DACA program has remained in effect, and Texas has continued to challenge it.<sup>308</sup> The procedural and substantive grounds are the same as those that figured in the earlier litigation. In 2021, a district court in Texas found the program unlawful; the Fifth Circuit affirmed in 2022.<sup>309</sup> While the litigation was pending, the Biden Administration pursued notice-and-comment rule-making and issued a final rule establishing the DACA program in August 2022.<sup>310</sup> As a result, the Fifth Circuit remanded the case to the district court for review of the new rule. In the meantime, a nationwide stay remains in place to prohibit new DACA applications, although existing DACA recipients can retain their status.<sup>311</sup>

As the ongoing controversy makes clear, decades of congressional inaction and frank admissions of inadequate border enforcement have complicated claims to exclusive federal authority over immigration matters. In *Plyler*, Texas portrayed itself as unable to do much about lax enforcement because the federalist system assigned authority over immigration to the national government.<sup>312</sup> At that time, comprehensive federal

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304. See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1903 (2020).

305. *Id.* at 1910–12.

306. *Id.* at 1912–13.

307. *Id.* at 1913–15.

308. Memorandum of January 20, 2021: Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 Fed. Reg. 7053, 7053–54 (Jan. 25, 2021); Press Release, Ken Paxton, Att’y Gen. of Tex., Paxton Leads Coalition to Defeat DACA After Biden Administration Attempts to Salvage the Illegal Immigration Policy (Dec. 16, 2022), <https://www.texasattorneygeneral.gov/news/releases/paxton-leads-coalition-defeat-daca-after-biden-administration-attempts-salvage-illegal-immigration> [https://perma.cc/N9FK-EANK].

309. See *Texas v. United States*, 549 F. Supp. 3d 572, 624 (S.D. Tex. 2021), *aff’d* in part and remanded, 50 F.4th 498, 508 (5th Cir. 2022).

310. *Deferred Action for Childhood Arrivals*, 87 Fed. Reg. 53,152 (Aug. 30, 2022) (to be codified at 8 C.F.R. pts. 106, 236, 274a).

311. *Texas v. United States*, 50 F.4th 498, 531–32 (5th Cir. 2022).

312. See *supra* notes 169–170 and accompanying text.

immigration reform was imminent under the Reagan Administration—in fact, many of the undocumented schoolchildren in *Plyler* used the Immigration Reform and Control Act of 1986 to become legal residents and eventually citizens of the United States.<sup>313</sup> Today, however, protracted congressional inaction has “le[ft] immigration policy squarely in the hands of the executive branch.”<sup>314</sup> As a result, state leaders have been emboldened to challenge federal authority directly. Now, they are focused on the separation of powers at the federal level, questioning agency officials’ power to confer government largesse on undocumented individuals.

So far, Ken Paxton, the attorney general of Texas, has led a coalition of states in filing eleven immigration-related lawsuits against the Biden Administration.<sup>315</sup> In fact, the steady stream of cases has prompted one news outlet to describe Texas as a “legal graveyard” for the President’s agenda.<sup>316</sup> Before that, Democratic attorneys general pursued similar strategies to block immigration policy under the Trump Administration.<sup>317</sup> Importantly, regardless of which administration is in charge, litigation is used to stymie the executive branch when it attempts to remedy congressional inaction. As former U.S. Attorney General Jeff Sessions explained, “A plaintiff only needs to win once to stop a national law from taking effect or a national policy. But the government needs to win every time to carry out policies. That makes governing all but impossible.”<sup>318</sup> The potential to obstruct a national agenda is especially significant when advocates can forum shop for sympathetic judges, many of whom are ideologically identified with the administration that appointed them.<sup>319</sup>

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313. Olivas, *No Undocumented Child Left Behind*, supra note 243, at 3, 7–8.

314. Caitlin Dickerson, *The Secret History of Family Separation: “We Need to Take Away Children.”*, Atlantic (Aug. 7, 2022), <https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/> (on file with the *Columbia Law Review*).

315. Press Release, Ken Paxton, Att’y Gen. of Tex., AG Paxton Again Sues Biden Over Border: New Immigration Rules Drastically Lower “Asylum Bar,” Forming New Incentives for Next Flood of Aliens (Apr. 28, 2022), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-again-sues-biden-over-border-new-immigration-rules-drastically-lower-asylum-bar-forming> [<https://perma.cc/XL7V-B8C4>].

316. Tierney Sneed, *Why Texas Is a Legal Graveyard for Biden Policies*, CNN (Mar. 3, 2022), <https://www.cnn.com/2022/03/03/politics/texas-biden-court-losses-paxton-bush/index.html> [<https://perma.cc/6GCF-X7HC>].

317. See Joel Rose, *Texas Takes Its Fight Over Biden’s Border Policies to Judges Appointed by Trump*, NPR (Feb. 14, 2022), <https://www.npr.org/2022/02/14/1080548542/texas-takes-its-fight-over-bidens-border-policies-to-judges-appointed-by-trump> [<https://perma.cc/UB4W-M5YU>] (describing ways in which attorneys general from both parties have used lawsuits to block executive immigration policies).

318. *Id.* (describing how litigation has been used to stymie immigration reforms under both Democratic and Republican administrations).

319. See Sneed, supra note 316 (describing conservative advocates’ preference to sue in Texas because of a large proportion of Republican-appointed judges on the federal bench).

Ongoing struggles to recalibrate the balance of power over immigration law and policy have complicated the division of labor that underlies preemption doctrine. These battles may have larger implications as well. Congress's plenary power over immigration has been one factor in treating alienage as a category that prompts heightened scrutiny under the Equal Protection Clause. Although the federal government is free to classify on this basis to manage the nation's borders, states do not enjoy similar prerogatives.<sup>320</sup> Texas disputed this allocation of authority in *Plyler*, but it did so at a time when direct assaults on federal authority were still relatively uncommon. In 1994, however, California enacted Proposition 187, a popular referendum that denied a range of government benefits to undocumented immigrants and openly flouted *Plyler*.<sup>321</sup> Although the initiative was largely overturned on preemption grounds,<sup>322</sup> it ushered in an era of state efforts to control undocumented immigration.<sup>323</sup>

Ongoing uncertainty about the scope of federal power likely reinforces the Court's wavering treatment of the relevant standard of review in alienage cases. If states have some authority to supplement federal enforcement efforts, it is not clear that heightened scrutiny should apply to these classifications. The Justices failed to explicitly endorse more than a rational relation test in *Plyler*, though the decision implicitly applied a more exacting approach. If the Court does revisit the question of undocumented students' access to the public schools, intensifying conflicts over federal and state authority to regulate immigration could weaken the power of preemption claims and dilute the scrutiny that Justices apply to alienage classifications. The authority to define the terms of government largesse in the form of public education for undocumented children would then shift to state and local officials.

As this discussion makes clear, property-like entitlements are a precarious foundation for preserving the *Plyler* decision. The role of residency reveals property's protean nature, which allows it to be deployed in the service of both inclusion and exclusion. The families in *Plyler* were able to

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320. See Stephen Lee, Monitoring Immigration Enforcement, 53 *Ariz. L. Rev.* 1089, 1133 (2011) (noting that immigration restrictions are usually understood to fall within the federal government's plenary powers and thus considered preemptive of state efforts).

321. See Phillip J. Cooper, *Plyler* at the Core: Understanding the Proposition 187 Challenge, 17 *Chicano-Latino L. Rev.* 64, 64-65 (1995).

322. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 787 (C.D. Cal. 1995).

323. See, e.g., Supporting Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Sess. § 1 (Ariz. 2010) (describing "a compelling interest in the cooperative enforcement of federal immigration laws" as a way to achieve "attrition through enforcement" by "discourag[ing] and deter[ring] the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States"); Gary Reich & Jay Barth, Immigration Restriction in the States: Contesting the Boundaries of Federalism?, 42 *Publius* 422, 429 (2012) (explaining that the initiative increased media coverage of immigration and prompted legislators in other states to act).

assert their desert based on their status as taxpaying residents of the district. Yet the challenges of establishing bona fide residency can operate as powerful barriers to access, as undocumented children are accused of stealing education. Meanwhile, the fragmented and shifting nature of governmental authority can make the new property a similarly treacherous ground for an entitlement to schooling. Whether a benefit is secure will depend on who gets to set the terms and conditions of access. When states challenge federal authority and partisan conflict leads to volatile policy pronouncements, the long-term prospects for largesse can seem dim. The changing fortunes of DACA recipients exemplify these vagaries, but because *Plyler* rested heavily on a balancing of policy considerations, its constitutional future could also be uncertain.

### C. *Beyond Property: Alternative Frameworks and the Future of Plyler*

If property-like entitlements offer limited possibilities for upholding *Plyler*, then a key question is whether alternative frameworks provide stronger grounds for preserving undocumented students' right to public education. The trope of childhood innocence remains a powerful one, but the challenge is to find a constitutional home for widely shared, fundamental norms of decency. As for education as a public good, one that is integral to democratic integrity, the greatest stumbling block is the Court's consistent refusal to recognize even basic education as a fundamental right. The failure to do so tacitly rejects both dignitary claims and distributive justice as worthy of constitutional protection.

1. *Will Childhood Innocence Protect Undocumented Children Against Inherited Stigma and the Burden of Illiteracy?* — One important lesson of *Plyler* is that even if citizenship involves some inherited privilege, undocumented status need not be a heritable dispossessed status. The Court relied heavily on childhood innocence to conclude that parents' actions should not be a basis for punishing undocumented students. This image of blamelessness came under attack when former President Donald J. Trump tweeted that undocumented youth who received protections under DACA are “no longer very young” and “are far from ‘angels.’”<sup>324</sup> Indeed, he noted, “[s]ome are very tough, hardened criminals.”<sup>325</sup> Of course, these observations did not apply to elementary and secondary students, but the Trump Administration pursued other initiatives that undercut protections for young undocumented children. When there was a surge of unaccompanied minors at the border, some were required to appear in immigration

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324. Donald J. Trump (@realDonaldTrump), Twitter (Nov. 12, 2019), <https://twitter.com/realDonaldTrump/status/1194219655717642240> [<https://perma.cc/QU5-NQXT>]; see also Quint Forgey, Trump Claims He'll Strike Deal for Dreamers With Dems if SCOTUS Overturns DACA, Politico (Nov. 12, 2019), <https://www.politico.com/news/2019/11/12/donald-trump-dreamer-deal-supreme-court-overturns-daca-069802> [<https://perma.cc/PV2L-L39Q>].

325. Trump, *supra* note 324.

court alone because they could not afford representation.<sup>326</sup> Given that some minors were infants and toddlers, they were effectively denied any way to exercise their rights in the proceedings.<sup>327</sup> Youthful innocence did not protect them against being deported. In fact, children unrepresented by counsel were substantially more likely to be subject to deportation or voluntary removal orders.<sup>328</sup> Nor was this an unusual circumstance. From 2005 to 2017, about one-third of unaccompanied minors lacked representation.<sup>329</sup> The Biden Administration recently initiated an eight-city initiative to provide government-funded counsel to minors in some immigration proceedings,<sup>330</sup> but the longstanding neglect of these youth suggests an indifference that innocence has yet to overcome.

Perhaps even more stark was the Trump Administration's effort to use family separations to promote a zero-tolerance policy for immigration at the border. In May 2018, then-Attorney General Sessions announced that every person entering the country illegally would be prosecuted. The policy extended to parents with children, which meant that families had to be separated while the prosecutions proceeded.<sup>331</sup> By the time President Trump announced a change in policy one month later, thousands of children had been taken from their parents; a substantial number have yet to be reunified.<sup>332</sup> While many problems were blamed on administrative incompetence,<sup>333</sup> it is also important to understand how claims of childhood innocence became damaged in the process. During the detentions, young children, including infants and toddlers, had their mug shots taken and were held in wire cages.<sup>334</sup> Even when officials in the field brought these

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326. See Sarah Burr, Opinion, Why Are Children Representing Themselves in Immigration Court?, Hill (Oct. 24, 2021), <https://thehill.com/opinion/judiciary/578076-why-are-children-representing-themselves-in-immigration-court/> [<https://perma.cc/363Z-Y723>].

327. Id.

328. Erica Bryant, Alyssa Snider & Becca DiBennardo, No Child Should Appear in Immigration Court Alone, Vera (Jan. 28, 2022), <https://www.vera.org/news/no-child-should-appear-in-immigration-court-alone> [<https://perma.cc/S4UM-K2UE>].

329. Id. For a valuable discussion of how unaccompanied minors are perceived as choosing to enter the country illegally and therefore are deemed presumptively guilty rather than innocent, see Nina Rabin, Second Wave DREAMers, Yale L. & Pol'y Rev. (forthcoming) (on file with the *Columbia Law Review*).

330. Hamed Aleaziz, The Biden Administration Is Providing Legal Representation for Certain Immigrant Children in Eight US Cities, BuzzFeed News (Sept. 28, 2021), <https://www.buzzfeednews.com/article/hamedaleaziz/immigrant-children-attorneys-biden> [<https://perma.cc/NH25-3JGN>].

331. Julie Hirschfeld Davis & Michael D. Shear, Border Wars: Inside Trump's Assault on Immigration 255–57, 262–65 (2019); Dickerson, *supra* note 314.

332. Davis & Shear, *supra* note 331, at 277–78; Dickerson, *supra* note 314.

333. Dickerson, *supra* note 314.

334. Id.



concerns to Attorney General Sessions's attention, the detainees' blamelessness did not dissuade him from an unshakeable belief that "[w]e need to take away children."<sup>335</sup>

Instead, to shield the policy from public scrutiny, the federal government denied access to detention facilities where minors were being held.<sup>336</sup> Eventually, when ProPublica released a leaked tape of separated children wailing for their parents, the trope of innocence reasserted itself. In public comments on the story, one person described how "[m]y heart breaks hearing these innocent children crying," while another said, "Never have I been more ashamed with America."<sup>337</sup> The outcry led Trump to discontinue the policy, demonstrating that sympathy for innocent children remains a powerful shield against government overreaching. Any effort to bar undocumented students from the public schools would be a highly visible incursion on claims of innocence, and a lawsuit to overturn *Plyler* would once again test our nation's compassion for vulnerable children.

The power of innocence may be especially important in upholding protections for undocumented children because of the prospect that personhood is waning as a constitutional value. The Court today seems more willing to defer to states when it comes to claims of personhood, even if that judicial deference renders undocumented people largely invisible and unprotected. In another case arising out of Texas, *Evenwel v. Abbott*, the plaintiffs alleged that the state violated their right to equal protection by apportioning seats in the state legislature based on total population rather than the population of eligible voting-age citizens.<sup>338</sup> The plaintiffs lived in districts with "particularly large eligible- and registered-voter populations."<sup>339</sup> As a result, the lawsuit argued, their votes were impermissibly devalued compared to those of voters in districts with large numbers of residents ineligible to vote.<sup>340</sup> To avoid this harm, the plaintiffs asserted, the Equal Protection Clause required "voter equality" based on voter-eligible population, not total population.<sup>341</sup> Texas contended that it had the flexibility to choose among baselines, including total population as well as voter-eligible population.<sup>342</sup> In an opinion by the late Justice Ruth

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335. *Id.* (internal quotation marks omitted) (quoting U.S. Attorneys' notes characterizing a phone call with Sessions, as recorded in a Department of Justice review of the family separation policy).

336. *Id.*

337. *Id.*; see also Davis & Shear, *supra* note 331, at 272–74 (describing how the release of the audio recording by ProPublica "crystallized the human dimensions of the family separation policy" and how "[i]mages of children sleeping under metallic blankets behind chain-link fences quickly captured the public imagination").

338. 136 S. Ct. 1120, 1124–26 (2016).

339. *Id.* at 1125–26.

340. *Id.*

341. *Id.* at 1126.

342. *Id.* at 1126–27.

Bader Ginsburg, the Court held that Texas could constitutionally rely on total population in drawing its state legislative districts but left open the possibility that it also could use the voting-age population, registered voters, or some other metric.<sup>343</sup>

During the litigation, the parties offered competing visions of representation. The plaintiffs argued that the relevant constituents are those eligible to vote and that electoral systems need to accord potential voters equal weight and respect.<sup>344</sup> Texas responded by emphasizing the state's autonomy to select an apportionment method of its choosing,<sup>345</sup> but amici curiae contended that political officials are obligated to consider the welfare of all who reside in their districts. As a result, fair representation requires equal access to legislators, regardless of whether an individual can or does vote. Under this view, total population is the proper basis for drawing district lines because each person has an equivalent opportunity to seek assistance from an elected official.<sup>346</sup> The Court declined to decide which theory of representation better fits our democratic process, and precedents have not been entirely consistent on this point.<sup>347</sup>

Latinx residents would have been most affected by the proposed change in *Evenwel* because of the disproportionate youthfulness of the population as well as the large proportion of noncitizens, including undocumented residents. An amicus brief filed by the Leadership Conference on Civil and Human Rights reported that 79.1% of the non-Hispanic white population in the United States qualified as eligible voting-age citizens compared to 70.2% of the Black population, 54.5% of the Asian population, and 45.2% of the Latinx population.<sup>348</sup> According to the brief, only 1.5% of the non-Hispanic white population and 4.1% of the Black population were noncitizens, while 23.7% of the Latinx population and 27.2% of the Asian population were.<sup>349</sup> Another amicus brief noted that in Texas, adult noncitizens made up less than 8% of the population,

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343. *Id.* at 1132–33.

344. Brief for Appellants at 26, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 4624625.

345. Brief for Appellees at 18, 20, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 5562189.

346. See, e.g., Brief for Amici Curiae Texas Senators in Support of the Appellees at 5–7, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 5719749; Brief of the Texas Senate Hispanic Caucus & the Texas House of Representatives Mexican American Legislative Caucus as Amici Curiae in Support of Appellees at 17–19, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 5731666.

347. See *Evenwel*, 136 S. Ct. at 1130–33.

348. Brief of the Leadership Conference on Civil & Human Rights et al. as Amici Curiae in Support of Appellees at 1, 1AAA app. C, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 5766319.

349. *Id.*

but the majority were Latinx and lived in identifiably Latinx communities.<sup>350</sup> As a result, any shift away from total population would adversely affect Latinx access to political representation.<sup>351</sup>

Later on, a memorandum prepared by the late Thomas Hofeller, a Republican Party consultant sometimes called the “Michelangelo of gerrymandering,” came to light.<sup>352</sup> An influential Republican donor had funded Hofeller’s August 2015 analysis when considering whether to finance litigation advancing the arguments in *Evenwel*.<sup>353</sup> Hofeller concluded that counting eligible voting-age citizens would be advantageous to Republicans and non-Hispanic whites in Texas because “the maps would exclude traditionally Democratic Hispanics and their children from the population count” and “would translate into fewer districts in traditionally Democratic areas, and a new opportunity for Republican mapmakers to create even stronger gerrymanders.”<sup>354</sup> Hofeller noted, however, that the approach was unworkable without a citizenship question on the United States Census.<sup>355</sup> Because *Evenwel* left open the possibility that states could use the number of eligible voting-age citizens, rather than total population, to draw state district lines, this approach could still be adopted in upcoming reapportionment processes.<sup>356</sup> In fact, Missouri voters already have approved the state’s use of eligible voting-age citizens to draw district boundaries if officials choose to do so.<sup>357</sup> The Trump Administration’s unsuccessful effort to add a citizenship question to the 2020 Census may have slowed down these efforts, but they remain a distinct possibility.<sup>358</sup>

What these recent events demonstrate is the confluence of two trends. The *Evenwel* litigation reveals the ongoing tendency to accord states more autonomy in matters affecting noncitizens, while family separations and

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350. Brief of the Texas Senate Hispanic Caucus & the Texas House of Representatives Mexican American Legislative Caucus as Amici Curiae in Support of Appellees, *supra* note 346, at 8.

351. *Id.* at 11–19.

352. Michael Wines, Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question, *N.Y. Times* (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html> (on file with the *Columbia Law Review*).

353. *Id.*

354. *Id.*

355. *Id.*

356. Yuri Rudensky, Ethan Herenstein, Peter Miller, Gabriella Limón & Annie Lo, Brennan Ctr. for Just., Representation for Some: The Discriminatory Nature of Limiting Representation to Adult Citizens 4 (2021), <https://www.brennancenter.org/our-work/research-reports/representation-some> [<https://perma.cc/AR2C-BBAZ>].

357. *Id.*

358. *Id.*; see also *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2574 (2019) (“It is hardly improper for an agency head to come into office with policy preferences and ideas . . . . And yet, viewing the evidence as a whole, we share the . . . conviction that the decision to reinstate a citizenship question cannot adequately be explained in terms of DOJ’s request . . . .”).

the treatment of unaccompanied minors suggest the declining role of personhood as a nationally protected value. Taken together, these trends relegate the claims of innocent children to the realm of politics rather than civil rights. That move can seem like a cynical one given that undocumented people are not only disenfranchised but often go unheard and unseen. Dehumanization is most easily accomplished in the shadows, away from the glare of media scrutiny and public accountability. To the extent that states continue to assert greater authority over undocumented individuals and rely on the political process to exercise that control, there is a growing danger that undocumented people's humanity will be obscured, often in ways that veil the claims of innocent children.

To avert that risk, it will be critical to give childhood innocence and norms of personhood a clear constitutional home. At present, the options seem limited in part because the Constitution does not include clear structural safeguards for inclusive solidarity, even though it is essential to the nation's democratic integrity. The most significant protection is the Fourteenth Amendment's prohibition on caste, arguably the worst transgression against solidary values. Absent a more comprehensive framework, the Court's emphasis on innocence in *Plyler* functioned as a kind of constitutional metaphor for these broader concerns. For these reasons, moving beyond metaphor will not be easy and is likely to be only partially satisfying. For instance, blamelessness might be used to bolster a due process analysis by emphasizing the right of the innocent to be free of unwarranted deprivations of an interest in education. Alternatively, dignitary claims of personhood could once again be invoked to call for recognition of a federal right to basic education. That right would become a minimum condition of human flourishing. Without some decisive change in our constitutional framework, however, widely shared norms of fundamental decency will remain unprotected and at risk.

2. *Will Equality Remain an Effective Way to Broaden the Conversation About Education of Undocumented Children?* — As *Plyler* demonstrates, equality claims can have a salutary effect in alerting courts to the broader implications of educational access. However, the current state of equality jurisprudence makes it hard to acknowledge structural inequities. As already mentioned, growing deference to state and local initiatives on immigration has weakened the rationale for heightened judicial scrutiny of alienage classifications under equal protection law. However, there are other reasons to be concerned about how impactful equality claims will be in preserving undocumented students' access to public schools. As the demographic diversity of the United States continues to increase, Americans may be suffering from "pluralism anxiety" that shapes constitutional jurisprudence in important ways.<sup>359</sup> According to legal scholar Kenji Yoshino, there are widespread fears that a proliferation of differences will diminish

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359. Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 751 (2011).

the nation's sense of shared fate in ways that imperil its democratic prospects.<sup>360</sup> For that reason, he argues, the Supreme Court has turned away from equality jurisprudence, growing increasingly reluctant to recognize new group-based classifications that trigger exacting constitutional scrutiny.<sup>361</sup> To avoid dangers of balkanization, the Court instead has emphasized universal interests in individual liberty.<sup>362</sup> Yoshino believes that advancing liberty-based claims to dignity has the wholesome effect of “stress[ing] the interests we have in common as human beings rather than the demographic differences that drive us apart.”<sup>363</sup> The hope is that the recognition of freedoms that everyone enjoys will build “a broader, more inclusive form of ‘we.’”<sup>364</sup>

This rhetoric invokes a sense of our shared humanity, but for undocumented children seeking to maintain *Plyler's* protections, there is one great stumbling block. In 1973, the Supreme Court held that there is no fundamental right to equal education under the Constitution.<sup>365</sup> In the intervening decades, the Court refrained from enshrining even a right to basic education, despite clear recognition of schooling's importance to human flourishing and a healthy democracy.<sup>366</sup> There are no signs that today's Court will find a right to education, whether equal or adequate. Indeed, recent evidence suggests a growing reluctance to find constitutional entitlements, including one to education, when they are not expressly mentioned in the Constitution.<sup>367</sup> Short of judicial recognition of a fundamental right, Congress could act to protect an entitlement to adequate schooling through comprehensive educational reform.<sup>368</sup> So far, though, Congress has shown little appetite for such an endeavor, in part due to concerns about cost and a conviction that education remains primarily a state and local matter.<sup>369</sup>

If the Court retreats from group-based protections yet declines to find a fundamental right to education, the foundations of *Plyler's* equal protection analysis will face new challenges. If property-like entitlements are insufficient to secure the decision's future, alternative frameworks will fill

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360. *Id.* at 751–52.

361. *Id.* at 755–59.

362. *Id.* at 748–49.

363. *Id.* at 793.

364. *Id.* at 776.

365. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

366. See Kimberly Jenkins Robinson, Introduction, *in* *A Federal Right to Education: Fundamental Questions for Our Democracy*, supra note 235, at 1, 10–12, 16–19 (describing how the *Rodriguez* decision shifted litigation to the state courts as well as recent efforts to revive a federal right, including under the Due Process Clause).

367. See *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 5 (U.S. June 24, 2022) (rejecting substantive due process as a basis for protecting reproductive rights).

368. Kimberly Jenkins Robinson, *A Congressional Right to Education: Promises, Pitfalls, and Politics*, *in* *A Federal Right to Education: Fundamental Questions for Our Democracy*, supra note 235, at 186, 187.

369. *Id.* at 187, 198–201.

the gap only to the extent that they can find constitutional traction. There is great irony in the divergence between the state of the law and our most prized values. Two of these values are protecting innocent children and preserving the conditions for human flourishing. Neither, however, has found a clear constitutional home when it comes to safeguarding educational access for undocumented children. For now, there do not seem to be new ways to express these normative commitments beyond analogies to illegitimacy and allusions to the dangers of a caste-like system. If *Plyler* is reconsidered, advocates must hope that these indirections will suffice or that the Court will find firmer ground in formalism or a reinterpretation of the Fourteenth Amendment. Whatever the rationale, though, only upholding *Plyler* will align the Constitution with a vision of inclusive solidarity.

### CONCLUSION

The *Plyler* case reveals the underlying complexities of treating education as a form of property. The decision clearly implicated the earned entitlements of residency, even as the opinion is remembered as a high-water mark of personhood. Claims to personhood were strengthened by characteristics of the plaintiffs themselves: innocent young children who had yet to achieve their full potential. Relegating youth to a dehumanized and degraded state of illiteracy struck at the heart of the nation's foundational democratic precepts, most notably an abhorrence of caste systems based on ascribed traits assigned at birth.

Today, concepts of property and personhood continue to influence thinking about access to public education for undocumented students. The privatization of education has elevated property-like claims to schooling based on residency. However, the federal government's ability to define the terms of government largesse in this area has been greatly weakened by congressional inaction and repeated attacks on the executive branch's authority. There have been recent incursions on the portrayal of undocumented children as innocents, but public backlash against their punitive treatment has been swift and forceful. *Plyler* remains good law not only because children have a property-like entitlement in schooling but also because the polity has a stake in preserving norms of fundamental decency.

# BENEATH THE PROPERTY TAXES FINANCING EDUCATION

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*Many states turn in sizable part to local property taxes to finance public education. Political and academic discourse on the extent to which these taxes should serve in this role largely centers on second-order issues, such as the vices and virtues of local control, the availability of mechanisms to redistribute property tax revenues across school districts, and the overall stability of those revenues. This Essay contends that such discourse would benefit from directing greater attention to the justice of the government's threshold choices about property law and policy that impact the property values against which property taxes are levied.*

*The Essay classifies these choices into three categories: structural choices relating to infrastructure and land use; financial choices relating to subsidies and exemptions; and protective choices relating to forestalling natural and human-induced adversities. This taxonomy reveals that if the government made different choices surrounding the content of property rights, those choices would produce different property values and, thus, different distributions of the property tax revenues that finance public education. The Essay distills a series of norms—circumstance-sensitivity, antidiscrimination, and interconnectedness—that can serve as a useful starting point for a justice-inspired evaluation of these omnipresent choices about property that are inevitably linked to educational opportunity and delivery.*

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## INTRODUCTION

The importance of elementary and secondary education to human flourishing, economic opportunity, and effective participation in democratic life has been acknowledged at the highest levels of American government.<sup>1</sup> Nevertheless, education has traditionally been classified as a “local good.”<sup>2</sup> While select states support this local good through a heavy reliance on state revenues for which sales and income taxes are the

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1. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”); see also *Plyler v. Doe*, 457 U.S. 202, 222 (1982) (“[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society.” (internal quotation marks omitted) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972))); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (noting the “grave significance of education both to the individual and to our society” (internal quotation marks omitted) (quoting *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 283 (W.D. Tex. 1971), rev’d, 411 U.S. 1 (1973))); *Robinson v. Cahill*, 355 A.2d 129, 132 (N.J. 1976) (describing New Jersey legislation as establishing the goal of “provid[ing] to all children . . . the educational opportunity which will prepare them to function politically, economically and socially in a democratic society” (internal quotation marks omitted) (quoting N.J. Stat. Ann. § 18A:7A-4 (West 1975))); Tyll van Geel, *The Courts and American Education Law 18* (1987) (noting that all fifty states have compulsory education laws); Palma Joy Strand & Nicholas A. Mirkay, *Racialized Tax Inequity: Wealth, Racism, and the U.S. System of Taxation*, 15 *Nw. J.L. & Soc. Pol’y* 265, 297 (2020) (“In the twentieth century, the United States became a leader among nations as a result of its investment in its most valuable resource: its people. . . . Investing in young people tells them . . . they are valued and valuable, opens the door to opportunity, and brings them into the realm of citizenship.”).

2. See Mildred Wigfall Robinson, *Financing Adequate Educational Opportunity*, 14 *J.L. & Pol.* 483, 486 (1998). Case in point, the Supreme Court declared a half century ago in *San Antonio Independent School District v. Rodriguez* that the federal Constitution does little to constrain state and local government discretion in determining the revenue sources from which to fund public education. See 411 U.S. at 58 (“The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States . . .”).



primary sources,<sup>3</sup> most turn in sizable part to local revenues that are overwhelmingly derived from property taxes.<sup>4</sup>

Political and academic discourse on the extent to which property taxes should serve in this role regularly centers on three overarching issues: the vices and virtues of local control, the availability of mechanisms to redistribute property tax revenues from more affluent school districts to less affluent ones, and the overall stability of those revenues.<sup>5</sup> This discourse is critical in helping evaluate the consequences of taxing property values to finance education vis-à-vis the consequences of the various alternative approaches to structuring taxing and spending policy in the education space. As critical as they are, though, these issues are second order in the sense that their resolution is inextricably tied to first-order choices about property law and policy that impact the property values against which property taxes are levied.<sup>6</sup> This Essay contends,

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3. Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. Rev. 1385, 1406 (2019) [hereinafter Black, *Educational Gerrymandering*] (noting that “two states finance the primary cost of public education themselves,” while “the rest place substantial school funding burdens on local communities”).

4. EdBuild, *Fractured: The Accelerating Breakdown of America’s School Districts 1* (2019), <https://edbuild.org/content/fractured/fractured-full-report.pdf> [<https://perma.cc/GB7Z-K8QY>] (“Nearly half of all education funding comes from local sources, primarily property taxes drawn from within school district borders.”); Nat’l Ctr. for Educ. Stat., *Public School Revenue Sources, The Condition of Education 2022*, <https://nces.ed.gov/programs/coe/indicator/cma/public-school-revenue> [<https://perma.cc/9LF8-28EC>] (last updated May 2022). The extent to which individual states turn to local revenue sources—and, thus, the property tax in particular—to fund public education varies. Connecticut, Illinois, Maine, Massachusetts, New Hampshire, and New York derive more than 50% of their total education revenue from the local property tax. *Id.* Colorado, Missouri, Nebraska, New Jersey, Ohio, Pennsylvania, Rhode Island, South Dakota, and Texas follow closely behind, deriving 40–50% of their total education revenue from local property taxes. *Id.* Another twenty-eight states fall within the 20–40% range. *Id.* Often prompted by judicial decisions delegitimizing extant district-based approaches, select states draw on a statewide property tax. See Therese J. McGuire, Leslie E. Papke & Andrew Reschovsky, *Local Funding of Schools: The Property Tax and Its Alternatives*, in *Handbook of Research in Education Finance and Policy* 376, 379 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015) (discussing what amount to statewide property tax schemes in California and Michigan); Laurie Reynolds, *Skybox Schools: Public Education As Private Luxury*, 82 Wash. U. L.Q. 755, 792–94 (2004) [hereinafter Reynolds, *Skybox Schools*] (explaining that the Vermont legislature turned to a statewide property tax to finance education after the state’s Supreme Court invalidated a district-based approach on equal protection grounds).

5. The education finance literature is extensive, and it would be a fool’s errand to attempt to craft a list of all the most prominent works in the field. Part I, however, surveys a selection of the key recent works specifically related to the thesis advanced here.

6. Property taxes are administered against a baseline valuation of both land and the structures thereon that is determined via a government appraisal. Joan M. Youngman, *Defining and Valuing the Base of the Property Tax*, 58 Wash. L. Rev. 713, 715–17 (1983). Such appraisals rest on a jurisdictionally defined measure of value. *Id.* at 718–20. In most states, the going statutory measure is “fair market value,” that is, an appraisal of what a property would sell for in an arm’s length transaction on the open market. J. Lyn Entrikin, *The Property Tax Netherworld*, 89 Chi.-Kent L. Rev. 289, 294 (2014). There is considerable

therefore, that such discourse would benefit from directing greater attention to the first-order question of how land that is taxed in any property tax scheme gains its value at the outset.<sup>7</sup>

Land values, this Essay asserts, are not the mere product of individual choices and initiatives; they do not simply arise via naked operation of the free market. Rather, they are influenced in important respects by myriad

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debate surrounding the fairness of the appraisal process, particularly given its highly subjective nature. Laura S. Underkuffler, *Takings and the Problem of Value: Grappling With the Truth in Land-Restriction Cases*, 11 *Vt. J. Env't L.* 465, 469 (2010) [hereinafter Underkuffler, *Takings and the Problem of Value*] (“Because of the highly subjective and location-specific nature of amenities effects—including visual amenities, recreational opportunities, wildlife enjoyment, and psychological satisfaction from land preservation efforts—the finding of a comparable piece of land for any newly restricted parcel will be difficult.” (emphasis omitted) (footnote omitted)); Edward A. Zelinsky, *The Once and Future Property Tax: A Dialogue With My Future Self*, 23 *Cardozo L. Rev.* 2199, 2203 (2001) (“The determination of the fair market value of property subject to taxation is one of the most difficult, and most controversial, aspects of the administration of the real property tax.”). Empirical evidence indicates that the burdens of failings in appraisal regimes fall disproportionately on racial minorities and the poor. See, e.g., Bernadette Atuahene & Christopher Berry, *Taxed Out: Illegal Property Tax Assessments and the Epidemic of Tax Foreclosures in Detroit*, 9 *U.C. Irvine L. Rev.* 847, 886 (2019) (deeming it likely, upon review of a large data set on assessment ratios and subsequent foreclosures, that “thousands of Detroit home owners—mostly African-Americans” lost their property in the wake of the Great Recession due to tax assessment procedures that were unjust and likely violated the Michigan Constitution); Christopher Berry, *Reassessing the Property Tax 9* (Feb. 7, 2021) (unpublished manuscript), [https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/6/2330/files/2019/04/Berry-Reassessing-the-Property-Tax-2\\_7\\_21.pdf](https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/6/2330/files/2019/04/Berry-Reassessing-the-Property-Tax-2_7_21.pdf) [<https://perma.cc/76R8-6YRM>] (highlighting empirical evidence revealing that, in and around Chicago, more expensive properties regularly are undervalued while less expensive properties regularly are overvalued).

This Essay does not focus on these important procedural questions surrounding the various approaches to appraisal. Rather, it contends that, on the appraisal process implemented in any jurisdiction, the value of a given parcel of land is driven in nontrivial part by state choices about the meaning of ownership that are reflected in the relevant jurisdiction’s background laws of property. This contention is consistent with Justice Thurgood Marshall’s brief nod in *San Antonio Independent School District v. Rodriguez* toward the role of land use regulation in creating wealth disparities across school districts. See 411 U.S. at 123–24 (Marshall, J., dissenting) (“[G]overnmentally imposed land use controls have undoubtedly encouraged and rigidified natural trends in the allocation of particular areas for residential or commercial use, and thus determined each district’s amount of taxable property wealth.”); see also Wayne Batchis, *Urban Sprawl and the Constitution: Educational Inequality as an Impetus to Low Density Living*, 42 *Urb. Law.* 95, 104 (2010) (interpreting Justice Marshall’s dissent as declaring that “[i]f a state . . . intentionally draws its internal political boundaries, and then regulates the use . . . of the land within such boundaries effectively predetermining the tax wealth . . . , a state’s ability to . . . subject . . . each district to vastly different treatment should be subject to . . . [strict] scrutiny”).

7. In this sense, the Essay does not assess property taxes as a source of education financing against the backdrop of local disparities in property wealth and the local disparities in spending that can ensue therefrom. Rather, it looks to the laws—property laws—that help create those local disparities in the first place. It therefore focuses on reforming unjust property laws rather than redistributing the revenues gained from taxing property values that are influenced by unjust property laws.

societal choices made by federal, state, and local governments that are reflected in the background laws of property. These laws, both past and present, include structural choices (such as building highways, zoning land, and drawing district boundaries), financial choices (such as allowing mortgage-interest deductions, offering homestead exemptions, and subsidizing flood insurance), and protective choices (such as shielding nonconforming uses, constructing erosion-control devices, and providing disaster relief). Such choices set the terms on which private parties can develop social and economic relationships. Making these choices unavoidably requires normative assertions about the types of relationships to allow and the types of relationships to curtail. In endorsing certain relationships, the government is conferring its power on certain persons at the expense of others; in turn, these persons' exercise of such power in the marketplace dictates property values. It follows that evaluating the justness of the government's taxing property values to fund public education in a given jurisdiction must be informed by evaluating the justness of that jurisdiction's background property laws.<sup>8</sup>

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8. Different jurisdictions adopt different laws surrounding property, and judges in these jurisdictions follow different approaches in interpreting and applying these laws. It follows that the property rules that impact a particular piece of land in one jurisdiction may well be distinct—in some cases, markedly so—from the rules that impact a particular piece of land in another jurisdiction. The evaluation called for here naturally includes an assessment of not only those background property laws adopted in the jurisdiction subject to evaluation but also those background property laws adopted elsewhere that influence values in that jurisdiction. Consider, for instance, the well-known matter of *Southern Burlington County NAACP v. Township of Mount Laurel*, in which the residents of Mount Laurel claimed that they held the authority to preclude construction of affordable housing and thereby price out families on the lower rungs of the income scale. 336 A.2d 713 (N.J. 1975). These residents were of the mind that they owned the value of “their” municipality’s property tax base; in turn, they saw themselves as the justified recipients of the services—including a high-quality public education—financed via “their” property tax revenues. On this general theme, see Lee Anne Fennell, *Homes Rule*, 112 Yale L.J. 617, 625 (2002) (reviewing William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (2001)); Gerald E. Frug, *City Services*, 73 N.Y.U. L. Rev. 23, 29–31 (1998) [hereinafter Frug, *City Services*]; Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay For” Model of Local Government*, 56 Fla. L. Rev. 373, 430–31 (2004); Richard Schragger, *Consuming Government*, 101 Mich. L. Rev. 1824, 1827–29, 1847–48 (2004) (reviewing William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (2001)). Yet it was the state that drew the lines that delineated Mount Laurel from neighboring Camden in the first place. The choice to draw those lines where the state drew them is in and of itself a distributional choice that has marked effects on values. The same can be said for the very tool that the residents of Mount Laurel sought to deploy: Adopting a zoning scheme that effectively excludes the poor from living in Mount Laurel would, of course, heavily influence property values in Mount Laurel. It also, though, would have derivative impacts on property values in Camden. As one scholar described it, “To treat Mount Laurel as an autonomous owner of ‘its’ property tax base is to ignore its necessarily parasitic relationship with neighboring jurisdictions.” Schragger, *supra*, at 1850; see also Rachel Alterman, *Land-Use Regulations and Property Values: The “Windfalls Capture” Idea Revisited*, in *The Oxford Handbook of*

Proposing such an evaluative exercise is not to suggest that undertaking it will produce a universalizable decree as to how education should be financed across the country.<sup>9</sup> It is true that if the property laws applicable in a given jurisdiction operate in concert with one another to create an unjust property system, any model for financing education (or, for that matter, any other public service) that is based on that system will lead to unjust outcomes. But this revelation alone is not reason enough to determine that public schools should be financed via an alternative revenue source, such as income taxes, sales taxes, or so-called “sin” taxes.<sup>10</sup> Reaching that conclusion would require a critical assessment of the justice of the laws that influence the values of the objects against which these non-property taxes are levied, as well as an evaluation of the second-order consequences of taxing those values. Those comparative assessments are well beyond the scope of this Essay. The goal here is a much narrower one: to deepen the discourse on the property tax option by encouraging analysts to direct more attention than they have to date on the influences

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Urban Economics and Planning 755, 761 (Nancy Brooks, Kieran Donaghy & Gerrit-Jan Knaap eds., 2012) (referring to “shifting values” across localities).

9. The Essay does, though, operate on the assumption that the local taxation of property is a constitutionally viable option to fund education. It does not, therefore, address the charge, advanced by some scholars and endorsed in select states, that state constitutions should be interpreted to require states to provide education through state revenues rather than local revenues. See, e.g., Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. Davis L. Rev. 1835, 1871 (2007) [hereinafter Reynolds, *Uniformity of Taxation*] (“[S]tate constitutional requirements of uniform taxation should apply to invalidate state reliance on the local property tax for fulfillment of a state constitutional obligation . . .”). Still, at least to the extent that such a charge is grounded in the view that disparities in property wealth make the linkage between property wealth and school revenues problematic, see, e.g., Maurice Dyson, *The Death of Robin Hood? Proposals for Overhauling Public School Finance*, 11 *Geo. J. on Poverty L. & Pol’y* 1, 17 (2004) (explaining claimants’ position that, for the 1998–1999 academic year, Highland Park Independent School District in Dallas County had an average per pupil property wealth of \$643,000, while the Boles Home Independent School District in another part of the same county had an average per pupil property wealth of less than \$6,000), there are connections between that charge and the thesis advanced here in the sense that more just property laws would make that linkage more just. In other words, a more just property system would mitigate some of the inequalities or inadequacies in educational support that litigants challenging locally funded approaches have emphasized. Reynolds, *Uniformity of Taxation*, *supra*, at 1851–52 (describing how litigation initially “sought to neutralize the fiscal disparity that came from heavy reliance on the local property tax” by reformulating funding formulae before later “accept[ing] the inequality inherent in a system that relies on local property tax funding” to focus on the “absolute gauge of inadequacy”).

10. Professor Laurie Reynolds has explained that there is “little consensus” among critics of financing education through local property taxes in terms of what revenue source should replace the property tax and noted that “overall school funding levels frequently drop when the state assumes greater responsibility for education.” See Reynolds, *Skybox Schools*, *supra* note 4, at 811.

that property laws have on the values against which property taxes are levied.<sup>11</sup>

To advance the thesis that evaluating the justness of the government's reliance on property taxes to fund public education in a given jurisdiction must be informed by evaluating the justness of the background property laws in that jurisdiction, the Essay proceeds in three Parts. Part I suggests that a discourse that concentrates exclusively on the consequences of the government's choice to tax property values for the purpose of financing education runs the risk of underappreciating the extent to which government choices impact how those values came to be in the first place. Such a course, in turn, leaves space for proliferation of the view that land values are simply the product of individual exchange in a self-regulating market when, in actuality, property also serves a communal function: The rules and standards reflected in property laws set the terms by which individuals can engage in market exchanges by predetermining which social and economic relationships are and are not legitimate in a modern democracy that respects freedom, equality, and human dignity. In fulfilling this term-setting function, the government influences property values quite extensively.

Part II depicts how government choices that determine the contours of property rights come in a variety of forms—some structural, others financial, and still others protective—and influence property values in different ways. This depiction is not meant to be all-inclusive, but rather to illustrate via a range of examples just how sizable the government's footprint is in determining the property values at which property taxes take aim.

Part III sets out a series of norms to help guide the evaluation of these various value-influencing property laws, on the view that reforms consistent with these norms will, given these laws' inevitable connection to property taxes, have derivative effects on educational opportunity and delivery. These norms—the first of which is process-oriented, the second of which is substantive, and the third of which offers a conceptual bridge between the first two—include a sensitivity to the circumstances of how property law operates in a given community rather than leaning on assumptions about “typical” communities; acknowledgment of the current effects of both prior and present-day discriminatory practices surrounding property; and attention to the ways that property laws do not exist in isolation but are instead intricately integrated with each other.

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11. It may be that, in the end, alternative models of education finance emerge in every jurisdiction that are more just than the property tax option. However, in a given jurisdiction, the type of justice-inspired evaluation advanced here may reveal that, when all is said and done, property taxes are a superior source of education financing than the alternatives. And it is the case that, when evaluating two jurisdictions under this framework, it is more appropriate to rely on property taxes in the jurisdiction with the more just property laws than it is in the other.

I. FUNDING SCHOOLS VIA PROPERTY TAXES:  
COMPETING CONCEPTIONS OF PROPERTY

It is often difficult to link specific taxes to specific expenditures at the federal and state level, such that tax scholars regularly separate analyses of the two.<sup>12</sup> When it comes to education finance, however, the link between property taxes and education spending is clearer. As a simple empirical matter, property tax revenues make up the bulk of local government budgets,<sup>13</sup> and a sizable share of those budgets is directed to education spending.<sup>14</sup> Moreover, states affirmatively draw school district boundaries to, among other purposes, determine to which specific properties and in what proportion that education spending is dedicated.<sup>15</sup>

Against this backdrop, assessing the prudence of financing education through local property taxation requires an evaluation across two orders. First-order issues center on the drivers of the land values against which property taxes are levied.<sup>16</sup> Second-order issues, meanwhile, take land values as they are and hone in on the consequences of the government's decision to tax those values in order to finance education. As the first section below recounts, scholarly discourse on education finance concentrates heavily on the latter. The second section suggests that this heavy concentration on second-order issues carries with it the prospect of underappreciating the extent to which government choices impact the

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12. See, e.g., Gary S. Becker & Casey B. Mulligan, *Deadweight Costs and the Size of Government*, 46 *J.L. & Econ.* 293, 304 (2003) (“[T]he typical economic analysis takes government spending as given when analyzing the effects of changes in the tax system and so ignores politically induced responses of tax rates, and hence of government spending, to changes in the efficiency of the tax system.”).

13. See Gerald Korngold, *Land Value Capture in the United States: Funding Infrastructure and Local Government Services* 9 (2022) (reporting that the property tax accounted for seventy-two percent of local tax revenues in 2017).

14. Richard Briffault, Laurie Reynolds, Nestor M. Davidson, Erin Adele Scharff & Rick Su, *Cases and Materials on State and Local Government Law* 730 (9th ed. 2021) (describing the property tax as the “financial mainstay of many local governments”); see also *State and Local Backgrounders: State and Local Expenditures*, Urban Inst., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures> (on file with the *Columbia Law Review*) (last visited Feb. 25, 2023) (“Elementary and secondary education is a far larger share of direct local government spending than state spending.”).

15. Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 *UCLA L. Rev.* 1416, 1444–45 (2014) (“School districts levy taxes on property that lies within their boundaries and, for the most part, use all of that money to fund their own schools.”).

16. The justice of the laws that help determine the value of *any* objects of taxation—property, income, sales, and the like—should be considered when assessing the justness (including the progressivity or regressivity) of taxing those objects to fund public services. The point that values are not objective but are instead products of the laws that underlie them, though, seems particularly important to emphasize in the context of taxing property for the purpose of funding public education for the reasons set out above. See *supra* text accompanying notes 13–15.

first-order issue of how the land at which property taxes take aim gains its value in the first place.

A. *Second-Order Inquiries: Accepting Property Values as They Are*

The literature on the most oft-discussed issues in the education finance realm—matters of local government autonomy, the redistribution of property tax revenues across jurisdictions, and the overall stability of those revenues—is decidedly vast and complex. Here, though, it is necessary to summarize this literature only to the extent necessary to explain how it largely leaves aside the first-order issue of how land values come to be.

Consider, first, the discourse surrounding *local government autonomy*.<sup>17</sup> Localists varyingly suggest that autonomy advances the values of academic excellence; democratic accountability and participation; community choice; and efficiency.<sup>18</sup> The following pages address these iterations of the autonomy claim in turn.

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17. The very notion of local government autonomy deserves qualification in this context, for the power to tax is not inherent but, rather, is delegated to municipalities by the state. See Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 Conn. L. Rev. 773, 777 (1992) [hereinafter Briffault, *The Role of Local Control*] (“Local governments exist only because they are created by their states . . .”). Some have suggested that states have hidden behind this delegated power to defend themselves against the charge that it is the state’s task—not that of local governments—to finance and deliver public education under most state constitutions. Derek W. Black, *Localism, Pretext, and the Color of School Dollars*, Minn. L. Rev. 1415, 1491 (2023) (“While states may engage local communities to assist in discharging its duty, the state does not relieve itself of constitutional responsibility simply by involving districts.”). Local control has featured prominently in state court decisions addressing equality-based challenges to education policies. See Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. Pitt. L. Rev. 231, 252–56 (1998) (documenting how many state courts, in both decisions that uphold education finance systems and decisions that invalidate them, have consistently demonstrated deference toward local control).

18. Some versions of the local autonomy argument are more directly connected to local finance than others. It seems that advocates who contend that the internalization of administrative costs at the local level generates efficiencies may see *any* financial contributions by the state as inefficient, while advocates who lean on academic excellence, democratic accountability, and community choice may not necessarily oppose state funding so long as localities have the ability to supplement that funding. Briffault, *The Role of Local Control*, supra note 17, at 798. Competing perspectives exist on the extent to which state financing in practice limits the operational discretion of local government decisionmaking even when there are no explicit strings attached to that financing. Compare James P. Pfiffner, *Inflexible Budgets, Fiscal Stress, and the Tax Revolt*, in *The Municipal Money Chase: The Politics of Local Government Finance* 37, 57 (Alberta M. Sbragia ed., 1983) (“State aid . . . often diminishes home rule and increases the centralization of control at higher levels of government, for there is a tendency for those who control financing to try also to control policy.”), with Amy Gutmann, *Democratic Education* 143 (1987) (“[T]he best evidence available . . . does not support the conventional wisdom that he who pays the piper calls the tune. The correlation between the amount of state control over local schools and state share of school financing is low . . .”).

Local autonomy contentions grounded in advancing academic excellence focus on the prospect of “alert” local governments experimenting with educational innovations that other local governments will want to replicate.<sup>19</sup> Critics contend that envisioning each local government as, to use Justice Louis Brandeis’s familiar frame, a “laboratory” to “conduct novel social and economic experiments”<sup>20</sup> ignores the disparities in property wealth across jurisdictions that can limit both their ability to conduct such experiments and their ability to emulate those experiments that are conducted by others.<sup>21</sup> Advocates on both sides, then, advance their standpoints on the assumption that property values—and the extant disparities in property values across jurisdictions—are a given.

Local autonomy contentions grounded in accountability and participation center on maximizing the prospects for democratic control. Resting on the Jeffersonian view that local governments are “little republics” in which neighbors collectively determine how to resolve local challenges,<sup>22</sup> supporters of this view suggest that (i) it is relatively easy for small governmental units to disperse information to the persons they represent; (ii) small groups of people who live close to one another are readily organizable around a given cause; and (iii) proximity to local officials allows organized groups to directly influence decisions on matters of special local importance like education.<sup>23</sup> Moreover, they contend, the ability to hold government officials accountable offers a cyclical benefit: Individuals who realize their effect on a particular issue in public life will be compelled to engage on future issues.<sup>24</sup> Critics counter, though, that,

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19. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267, 314 (1998) (explaining that experimentalism often underpins calls for bottom-up policymaking); Michael A. Rebell, *Fiscal Equity in Education: Deconstructing Myths and Facing Reality*, 21 *N.Y.U. Rev. L. & Soc. Change* 691, 708 (1995) (contending that local control “encourages diversity, innovation, and experimentation in education”).

20. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Sharon Jacobs, *On the Mend: The Ninth Circuit Gives San Francisco’s Health Care Security Ordinance the Green Light (For Now)*, 36 *J.L. Med. & Ethics* 431, 431 (2008) (asserting that Brandeis’s maxim extends in theory to local governments); Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 *Colum. L. Rev.* 215, 232 (2021) (same).

21. Peter J. Hammer, *The Fate of the Detroit Public Schools: Governance, Finance and Competition*, 13 *J.L. Soc’y* 111, 144–46 (2012) (asserting that even if a poor school district could gather information on and evaluate educational innovations in other districts, it would be unable to fund the implementation of those innovations).

22. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in 13 *The Writings of Thomas Jefferson* 394, 400 (Albert Ellery Bergh ed., 1905).

23. Briffault, *The Role of Local Control*, supra note 17, at 795–96 (summarizing the democratic control rationale).

24. Robert A. Dahl & Edward R. Tufte, *Size and Democracy* 41 (1973) (discussing how “citizen effectiveness” can generate further interest in political participation); Gerald E. Frug, *Empowering Cities in a Federal System*, 19 *Urb. Law.* 553, 559 (1987) (explaining the



given the disparities in assessed property tax bases, the only “choice” about which to influence decisions in some municipalities, “if it can be called that,” is the “extent to which they will underfund education.”<sup>25</sup> Again, then, neither position wrestles with the drivers of the differences in the underlying assessed values across jurisdictions.

Both community choice and efficiency versions of the local autonomy argument rest on Professor Charles Tiebout’s image of individual “consumers” sorting themselves among localities based on their preferences for different levels of taxation, regulation, and government-supported services.<sup>26</sup> On this view, in a market in which thousands of municipalities are in competition, people are able to move about in pursuit of the mix that best satisfies their preferences; they can, in effect, “purchase” their desired quantity and quality of government.<sup>27</sup> According to some economists, this self-sorting process is efficient in two respects. First, local governments are directly dependent on the property wealth of their communities for property revenues, and thus will seek to retain and expand that wealth in contest with other municipalities that are doing the same.<sup>28</sup> Second, self-sorting generates small, homogenous communities that require fewer administrative service-provision costs than do larger,

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“participation theory” that “elections may be the only form democracy can take” in states, such that “only in cities . . . can people have the experience of engaging in democratic activity themselves,” and asserting that “the reason for having powerful local governments is to promote this kind of activity”); Rebell, *supra* note 19, at 708 (“[T]he local school district remains the most broad-based and effective vehicle for meaningful participatory democracy in American society.”); Aaron J. Saiger, *Local Government Without Tiebout*, 41 *Urb. Law.* 93, 94 (2009) [hereinafter Saiger, *Local Government Without Tiebout*] (“Empowered local politics facilitate individual political participation, which can be distressingly attenuated with respect to more distant state and national authorities.”).

25. Black, *Educational Gerrymandering*, *supra* note 3, at 1409; see also Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 *Stan. L. Rev.* 735, 750 (2018) (contending that local control advantages more affluent communities to the detriment of less affluent ones by relieving those affluent communities of the burden of contributing to a statewide system and affording them the opportunity to out-compete neighboring communities for the best teachers); Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 *Nw. U. L. Rev.* 945, 1014 (2017) (concluding that state “lawmakers . . . [should] consider school districts’ abolition and transfer of educational powers to general governments”).

26. Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 416–20 (1956).

27. *Id.* at 420 (“The act of moving or failing to move . . . replaces the usual market test of willingness to buy a good and reveals the consumer-voter’s demand for public goods.”); see also Saiger, *Local Government Without Tiebout*, *supra* note 24, at 93 (“By purchasing or renting a home, one also purchases or rents a basket of local public goods.”).

28. William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* 39–40 (2001) (“[R]eforms should not attempt to divorce the collection of taxes from the decisions to spend and regulate. Local tax collection is an inseparable part of the efficiency of local government.”); Vincent Ostrom, Robert L. Bish & Elinor Ostrom, *Local Government in the United States* 206 (1988) (“[R]ivalry among local governments is analogous to rivalry among firms . . .”).

more heterogeneous communities.<sup>29</sup> Critics challenge the Tieboutian model in varying respects, pointing out the many ways that the consumer–provider picture of the corporate world is not neatly transferable to the local government–citizen context.<sup>30</sup>

More than the other versions of local autonomy claims, the community choice and efficiency versions recognize in some respects the influence of government choices on property values. The focus, though, is on a relatively narrow set of government tools, namely those land use measures such as minimum lot sizes and floor space requirements that homeowners might draw on to exclude newcomers in an effort to preserve home values in their by-now sorted, homogenous communities.<sup>31</sup> This concentration discounts the far broader range of extant property laws that influence property values; the property laws that preceded and precipitated those owners' purchase of their homes; and the reality that choices surrounding property laws protect the interests of some claimants only at the expense of others (such that the enactment of value-enhancing policies in one neighborhood or jurisdiction can produce value-reducing impacts in other neighborhoods or jurisdictions).<sup>32</sup>

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29. Briffault, *The Role of Local Control*, supra note 18, at 791–92 (explaining this argument). But see Zachary D. Liscow, *The Efficiency of Equity in Local Government Finance*, 92 N.Y.U. L. Rev. 1828, 1836 (2017) (highlighting efficiency virtues of centralized funding schemes).

30. The literature supporting and critiquing the Tieboutian model is incredibly voluminous. See Todd E. Pettys, *The Mobility Paradox*, 92 Geo. L.J. 481, 483–84 (2004) (noting, in reference to Tiebout's 1956 article, that "[i]t would be exceedingly difficult to find nine pages of scholarship that have exerted a greater impact on the ongoing debate about federalism and the ideal distribution of power between the state and federal governments"); see also Bruce Hamilton, Edwin Mills & David Puryear, *The Tiebout Hypothesis and Residential Income Segregation*, in *Fiscal Zoning and Land Use Controls: The Economic Issues* 101, 101 (Edwin S. Mills & Wallace E. Oates eds., 1975) (economists are "fond of pointing to the efficiency attributes" of the Tieboutian model while "[c]ivil liberties lawyers" object to the inequities it generates). Critiques that engage directly with the model's implications for education policy include Briffault, *The Role of Local Control*, supra note 17; Saiger, *Local Government Without Tiebout*, supra note 24; Schragger, supra note 8, at 1830.

31. See, e.g., Fischel, supra note 28, at 39–71.

32. See, e.g., Fennell, supra note 8, at 620, 652–54 (noting how "exclusionary choices can push costs across jurisdictional boundaries within a metropolitan region"). Moreover, individuals' abilities to sort themselves into the local governments of their choice are limited by the distribution of wealth and income. See, e.g., Frug, *City Services*, supra note 8, at 31 ("People who live in unsafe neighborhoods or send their children to inadequate schools don't do so because they have taste for them. . . . If they had a choice. . . , they would prefer better schools and less crime."); see also Fennell, supra note 8, at 627 ("[D]emographic differences in homeownership rates cannot be wholly attributed to differences in preferences."); Clayton P. Gillette, *Reconstructing Local Control of School Finance: A Cautionary Note*, 25 Pa. L. Rev. 37, 40 (1996) ("The Tiebout world . . . is obviously not the world in which we live. People are constrained in their choices of residence by financial and psychological considerations."); Justin R. Long, *Democratic Education and Local School Governance*, 50 Willamette L. Rev. 401, 415 (2014) ("For disfavored minorities and the poor, the homogeneity they share with their neighbors is merely their socioeconomic status,

The related discourse on the possibility of the government's *redistributing revenues across jurisdictions* also largely takes property values as they are. Some advocates assert that people who have spent the significant amounts necessary to buy land in affluent districts have "already paid" for the service advantages they enjoy, including school funding sufficient to avoid shared computers, antiquated textbooks, outdated infrastructure, faculty cuts, and the elimination of programs, all of which often plague less affluent districts.<sup>33</sup> Therefore, according to these advocates, residents of more affluent districts should not be charged again through redistributions to less affluent districts.<sup>34</sup> Others, though, lament that school districts with higher assessed property values have the capacity to generate greater revenues than those with lower assessed values at a fraction of the rates.<sup>35</sup> They thereby either support the use of redistributive

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not common values and common dreams of what they want from their children's schools."); Ann R. Markusen, *Class and Urban Social Expenditure: A Marxist Theory of Metropolitan Government*, in *Marxism and the Metropolis* 82–84 (William F. Tabb & Larry Sawers eds., 2d ed. 1984) ("If Tiebout's views were correct, suburban political units would exhibit a wide variety of public-service packages . . . . In fact, the most striking characteristics of suburban units are their . . . nearly identical public-service mixes, with quality of service rising quite consistently with class composition of residents . . . ."); Saiger, *Local Government Without Tiebout*, supra note 24, at 105 ("[D]ifferent budget constraints in different jurisdictions are the primary determinants of [individuals'] different choices."). The distribution of wealth and income is itself dictated in meaningful part by our property laws. See Timothy M. Mulvaney & Joseph William Singer, *Essential Property*, 107 *Minn. L. Rev.* 605, 627–38 (2022).

33. See, e.g., Denise C. Morgan, *The New School Finance Litigation: Acknowledging that Race Discrimination in Public Education Is More Than Just a Tort*, 96 *Nw. U. L. Rev.* 99, 143 (2001) (noting the common view that "citizens may withdraw their support from the public school system or reject the community's political leadership in defiance of Robin Hood plans that they feel betray the American tradition of liberal individualism"); Austin Pennington, Comment, *The Texas Education Agency and the Robin Hood Plan: Is Stealing From the Rich Really Giving More to the Poor?*, 12 *Tex. Tech Admin. L.J.* 389, 397 (2011) ("Robin Hood forces property-rich districts to lay off teachers and cut funding for advanced scholastic programming. . . . [P]roperty-rich districts are essentially being punished for having high property values within their school districts. . . ."). Widespread debate persists on the extent to which financing impacts educational quality relative to other variables, such as the makeup of the student body. See, e.g., James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *Yale L.J.* 2043, 2106–07 (2002) (comparing achievement successes attributable to funding increases to those attributable to affording poor students access to wealthier peer groups).

34. Bruce W. Hamilton, *Capitalization of Intra-jurisdictional Differences in Local Tax Prices*, 66 *Am. Econ. Rev.* 743, 744 (1976) (explaining the argument that "[i]f differential fiscal surpluses are capitalized into demand curves for property, there can be no horizontal inequity in a static world").

35. See Jennifer O'Neal Schiess, *Bellwether Educ. Partners, Prioritizing Equity in School Funding 1* (2021), [https://bellwethereducation.org/sites/default/files/Bellwether\\_PandemictoProgress\\_SchoolFunding\\_Final.pdf](https://bellwethereducation.org/sites/default/files/Bellwether_PandemictoProgress_SchoolFunding_Final.pdf) [<https://perma.cc/5DXS-3H3D>] ("Inequitable access to funding is a foundational driver of inequity in schools. Reliance on local property taxes, which account for a significant portion of school funding in most states, is a root cause of this inequity."); James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the*

mechanisms<sup>36</sup> or outrightly oppose reliance on the property tax to finance education.<sup>37</sup> Both sides, then, effectively operate on the premise that some school districts naturally have high property values and others naturally have low property values.

*Revenue stability* debates present a similar story. Some observers claim that financing education through property taxes is prudent because the rate of taxation levied upon the assessed base can be determined after the assessments take place.<sup>38</sup> Therefore, they assert, governments can

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United States, 22 How. L.J. 547, 591 n.98 (1979) (“Studies indicate that moderate income subdivisions fail to generate sufficient revenues to support the cost of providing services. The major component of this service requirement is education.”); Kirk J. Stark, Rich States, Poor States: Assessing the Design and Effect of a U.S. Fiscal Equalization Regime, 63 Tax L. Rev. 957, 968 (2010) (“Because of interjurisdictional differences in the value of taxable property, school districts commonly exhibit variation either in per pupil expenditure levels or in the tax rates imposed on local property owners.”). The wealthy and the poor do not, of course, live exclusively in communities with, respectively, high and low assessed property values. See Fischel, *supra* note 28, at 146–48. This does not change the fact, though, that educational inequities tend to correspond to socioeconomic status. Fennell, *supra* note 8, at 651. Others, from a different equity angle, assert that taxing assessed property values to fund public education discriminates against homeowners without school-aged children because these parties’ assessed values are taxed just as heavily as the property values of those persons with children who attend public schools. See Hunkar Ozyasar, Advantages & Disadvantages of Property Taxes Used to Fund Education, Sapling, <https://www.sapling.com/12053235/advantages-disadvantages-property-taxes-used-fund-education> (on file with the *Columbia Law Review*) (last visited Aug. 6, 2022) (“[T]hose who moved into the area when their kids were too old to use the public primary or secondary education system . . . are taxed just as heavily as a family who lives in a house of the same assessed value and has four kids.”). But see Briffault, *The Role of Local Control*, *supra* note 18, at 786–87 (noting the counterargument that, in a democratic society, an educated populace that is capable of evaluating different ways of life is a concern not just for the parents of school-age children but for all members of a community).

36. See, e.g., Dyson, *supra* note 9, at 17 (evaluating reform proposals to the so-called “Robin Hood” education finance scheme in Texas); Reynolds, *Skybox Schools*, *supra* note 4, at 788–97, 809–10 (discussing “systems [that] explicitly seize property tax revenues and redistribute them (or force the local school district itself to distribute them) to districts with less property wealth”); Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. Rev. 857, 893 (2006) (“The only solution [to equalize education spending] is the ‘Robin Hood’ approach of requiring the rich to share most of whatever additional dollars they choose to raise with poor school districts.”).

37. See, e.g., Long, *supra* note 32, at 464 (advocating the abandonment of local school governance); Reynolds, *Skybox Schools*, *supra* note 4, at 809–10.

38. See generally John W. Matthews, *Fiscal Rsch. Ctr.*, No. 109, *Tax Revenue Volatility and a State-Wide Education Sales Tax 1–2* (2005), [https://csf.gsu.edu/files/2014/06/tax\\_revenue\\_volatility\\_and\\_a\\_state\\_wide\\_education\\_sales\\_tax\\_brief.pdf](https://csf.gsu.edu/files/2014/06/tax_revenue_volatility_and_a_state_wide_education_sales_tax_brief.pdf) [<https://perma.cc/49AQ-N6RT>] (comparing the property tax and the sales tax in terms of stability); John V. Winters, *Fiscal Rsch. Ctr.*, No. 164, *Tax Revenue Stability of Replacing the Property Tax With a Sales Tax, 1–3* (2007), [https://csf.gsu.edu/files/2014/06/tax\\_revenue\\_stability\\_of\\_replacing\\_the\\_property\\_tax\\_with\\_a\\_sales\\_tax\\_brief.pdf](https://csf.gsu.edu/files/2014/06/tax_revenue_stability_of_replacing_the_property_tax_with_a_sales_tax_brief.pdf) [<https://perma.cc/4FDS-PVL6>] (same); J. Fred Giertz, *The Property Tax Bound*, 49 Nat’l Tax J. 695 (2006) (same); Andrew T. Hayashi, *Countercyclical Property Taxes*, 40 Va. Tax Rev. 1, 4–5 (2020) (“To keep property tax revenues stable as property values fall, local governments must raise effective property tax rates—the ratio of property taxes to actual property values.” (emphasis omitted))

confidently take aim at target revenues in light of the reality that property is less mobile than the bases of sales and income taxes: While shoppers can simply make purchases in another locality to avoid a particular local sales tax and businesses can relocate their headquarters to avoid local income taxes, homeowners cannot so easily avoid property taxes.<sup>39</sup> Critics, though, question the administrability of increasing the rate at which assessed values are taxed on short notice, particularly as a means of counteracting phenomena as significant as bank failures and housing market collapses.<sup>40</sup> Again, then, neither advocates nor critics concentrate on the drivers of the assessed values at which property taxes take aim.

B. *First-Order Inquiry: Addressing the Drivers of Property Values*

As even the foregoing, very crude summary reveals, the discourse on the consequences of the government's choice to tax property values for the purpose of financing education is of crucial importance in evaluating whether that choice is superior to alternative financing schemes. At the same time, though, an exclusive focus on these second-order issues carries the risk of underappreciating the extent to which government choices impact the first-order issue of how the land against which property taxes are levied gains its value at the outset. Such a focus, in turn, allows to fester without rebuttal the commonly held assumption that land values are a natural product of individual initiative and exchange on the open market.

This individualist view is a powerful one in the American psyche.<sup>41</sup> Property owners like to believe that their personal decisions are the

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(footnote omitted)); Andrew M. Reschovsky & Joan Youngman, *Local Property Taxes—Improving an Important Revenue Source*, N.Y. St. Bar Ass'n J., Oct. 2008, at 27, 29 (“[H]istory demonstrates that property values, and hence property tax revenues, are a much more stable source of revenue than local sales or income taxes . . .”); Daphne Kenyon, Bethany Paquin & Semida Munteanu, *Public Schools and the Property Tax: A Comparison of the Education Funding Models in Three U.S. States*, *Lincoln Inst. Land Pol’y* (Apr. 12, 2022), <https://www.lincolninst.edu/publications/articles/2022-04-public-schools-property-tax-comparison-education-models> [<https://perma.cc/2TR9-HVG7>] (“The property tax is . . . a stable tax, as evidenced by its performance relative to the sales tax and income tax each time the economy falls into a recession.”). For various reasons, property tax assessments often represent a fraction of a property's full market value. Therefore, local governments actually can increase revenues by manipulating their assessment techniques in ways that increase the size of that fraction without having to adjust the tax rate at all. See Briffault et al., *supra* note 40, at 734.

39. Darien Shanske, *How Less Can Be More: Using the Federal Income Tax to Stabilize State and Local Finance*, 31 *Va. Tax Rev.* 413, 451 (2012) (arguing that it is “relatively easy to tax property”). See generally Kenyon et al., *supra* note 38 (discussing how shoppers can easily avoid local sales taxes).

40. Howard Chernick, Andrew Reschovsky & Sandra Newman, *What's the Link Between Housing Markets and the Financial Health of Cities?*, *Housing Matters* (July 21, 2021), <https://housingmatters.urban.org/research-summary/whats-link-between-housing-markets-and-financial-health-cities> [<https://perma.cc/UR5N-3EBT>].

41. See, e.g., Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 250 (1990) (arguing that the belief that “property rights bear a special

creators of what their properties are worth.<sup>42</sup> They can, for instance, make prudent investments by anticipating the buying public's changing preferences or shifts in population centers; alternatively, they can place bad bets.<sup>43</sup> They can engage in sustainable construction; alternatively, they can degrade land via overdevelopment.<sup>44</sup> They can nurture land through strategic plantings; alternatively, they can spoil it through intensive cultivation.<sup>45</sup> These types of personal decisions about what to do and what not to do with their properties, many trust, dictate their properties' values.

Such an individualist streak has long played a prominent role in theoretic debates about the very meaning of property. Indeed, it is common fare to conceive of the institution of property as conveying interests to possess and use resources to the exclusion of others absent the interest holder's consent.<sup>46</sup> This conception of property as predominantly individualist in scope underpins regular accounts of Blackstone's description of property as conferring "absolute dominion,"<sup>47</sup> many

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relation to liberty" is a "psychological experience"); Laura S. Underkuffler, *Tahoe's Requiem: The Death of the Scalian View of Property and Justice*, 21 *Const. Comment.* 727, 731 (2004) (suggesting that "all of us, on some level, believe" in the idea of "property as protection").

42. This stance is reflected in the common, misbegotten version of the American story that Europeans discovered the vacant lands of the Americas, earned possessory rights to those lands through their or their ancestors' individual labor, and then instituted governments to protect those rights. See Joseph W. Singer, *The Right to Have Property*, *Tex. A&M L. Rev.* (forthcoming 2023) (manuscript at 4) (on file with the *Columbia Law Review*) [hereinafter Singer, *Right to Have Property*]; Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 *Ariz. L. Rev.* 237, 247–49 (1989).

43. Underkuffler, *Takings and the Problem of Value*, *supra* note 6, at 474.

44. C. Ford Runge, M. Teresa Duclos, John S. Adams, Barry Goodwin, Judith A. Martin & Rodrick D. Squires, *Government Actions Affecting Land and Property Values: An Empirical Review of Takings and Givings* 5 (1996).

45. Richard Gray, *Follow the Food: Why Soil Is Disappearing From Farms*, BBC, <https://www.bbc.com/future/ bespoke/ follow-the-food/ why-soil-is-disappearing-from-farms/> [https://perma.cc/HZ9R-DMJK] (last visited Jan. 31, 2023).

46. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 *Cornell L. Rev.* 745, 747 (2009) ("The core image of property rights, in the minds of most people, is that the owner has a right to exclude others and owes no further obligation to them.").

47. See, e.g., Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 *Yale L.J.* 601, 601–02, 604–05 (1998) (asserting that many property scholars quote Blackstone's "absolute dominion" phrase without noting the qualifying language that he thereafter attached to it); James Y. Stern, *The Essential Structure of Property Law*, 115 *Mich. L. Rev.* 1167, 1178 n.46 (2017) ("When Blackstone described property as dominion claimed over external things 'in total exclusion of the right of any other individual in the universe,' . . . he may also have had in mind not simply [a] caricatured view of property . . . but the way one property right rules out contradictory ones." (quoting 2 William Blackstone, *Commentaries* \*2)).

varieties of Lockean libertarianism,<sup>48</sup> multiple forms of utilitarianism and its modern cognates in the law-and-economics field,<sup>49</sup> and even some understandings of natural law.<sup>50</sup> Each of these approaches, of course, has its own rich history and nuance. They are tied together, though, in their support of the general notion that individual actors drive property values through their personal decisions about whether to buy, sell, trade, or keep their interests in the self-regulating sphere of the marketplace.<sup>51</sup> On this view, the government is neither responsible for nor heavily involved in the outcomes generated in this private sphere.<sup>52</sup>

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48. See, e.g., C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* 263–77 (1962) (describing as “possessive individualism” the classical liberal understanding of property often attributed to Locke).

49. Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347, 359 (1967) (situating the impetus for establishing individual property rights in individual ordering).

50. See David L. Breau, Note, *A New Take on Public Use: Were Kelo and Lingle Nonjusticiable?*, 55 *Duke L.J.* 835, 862–63 (2006) (“According to the conventional wisdom, the United States in the first century following the Revolutionary War was a ‘quintessentially Lockean’ society exemplified by economic individualism and vested natural rights in which the law’s primary purpose was to ensure that private property owners retained virtually uncontrolled dominion over [their] property.”).

51. Joseph William Singer, *Legal Realism Now*, 76 *Cal. L. Rev.* 465, 534 (1988) (reviewing Laura Kalman, *Legal Realism at Yale: 1927–1960* (1986)) (“[T]he classical view [is] that the market is a self-regulating system made up of individual, free transactions fundamentally separate from the public sphere of state power.”).

52. This individualistic account of property continues to undergird various areas of constitutional doctrine. See, e.g., *Deshaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989) (asserting that the purpose of the Constitution is “to protect the people from the State, not to ensure that the State protect[s] them from each other”); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (describing the Constitution as “a charter of negative rather than positive liberties” and contending that “[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them”). Consider, for example, takings law. Courts have interpreted the Takings Clause to protect against those government choices affecting property that are unfair and unjust absent compensating property owners for any resulting diminution in property values. See, e.g., Timothy M. Mulvaney, *Non-Enforcement Takings*, 59 *B.C. L. Rev.* 145, 195 (2018). In this way, takings law concedes that government choices made in the face of competing claims to resources can negatively impact property values. Underkuffler, *Takings and the Problem of Value*, supra note 6, at 466. This body of law, however, rarely considers that, in many cases, the owner claiming that their property has been taken by a government choice owns property that is valuable only because of other government choices (or, in some cases, even the very government choice they are challenging). Abraham Bell & Gideon Parchomovsky, *Givings*, 111 *Yale L.J.* 547, 566–67 (2001); see also Jeffrey A. Michael & Raymond B. Palmquist, *Environmental Land Use Restriction and Property Values*, 11 *Vt. J. Env’t L.* 437, 438 (2010) (“It is widely assumed that legal restrictions can adversely affect the value of real property. . . . However, contrary to this general assumption, restrictions may also positively affect land values, and the positive effects of restrictions may offset, at least in part, their negative effects.”). It follows that, where the government has in various ways *augmented* the market values of property, compensation awards based on those market values can unjustly enrich those property owners. See Runge et al., supra note 44, at 13; Schragger, supra note 8, at 1852 (“[T]he suburbanite often behaves as if property value increases that are a product of the state-given

The legal realists, though, adeptly highlighted that property law does not merely confer entitlements on individuals and let the chips fall where they may in the private market; it also serves a communal function.<sup>53</sup>

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power to incorporate and zone are ‘earned’ and not ‘taken,’ but contrary state attempts to distribute localized property taxes to poorer neighbors are ‘taken’ but not ‘earned.’”). Such awards afford the owners compensation for not only their equity in their properties but also the windfall to those properties established through public expense. Edward Thompson Jr., *The Government Giveth*, *Env’t F.*, Mar./Apr. 1994, at 22, 24.

Admittedly, there are select instances in which takings law might be considered to recapture some such windfalls. Bell & Parchomovsky, *supra*, at 596–601. For one example, some jurisdictions limit the amount of compensation owed where condemning part of a parcel for a public project renders the remainder of that parcel more suitable for economically beneficial uses. See *United States v. Fort Smith River Dev. Corp.*, 349 F.2d 522, 525 (8th Cir. 1965) (interpreting federal legislation to require consideration of whether condemning land to enhance a river channel rendered the remainder more valuable by improving its suitability for more intensive industrial uses). Those limits, however, have no impact on those who own property that, given its proximity to the public project, benefits from that project but who are not themselves subject to any affirmative condemnation action. For another example, regulatory takings law at times references the “average reciprocity of advantage” conferred by state choices surrounding property. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 140 (1978) (Rehnquist, J., dissenting) (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Even in those instances, though, the value-enhancing nature of a given state choice is often highlighted only to declare that claimants have not suffered a loss rather than to recognize that they have experienced a gain. Underkuffler, *Takings and the Problem of Value*, *supra* note 6, at 471 (arguing that environmental restrictions on land imposed by the government usually do not seriously reduce the land’s value). Outside the takings context, a number of mechanisms could be construed as crude measures aimed at offsetting such windfalls. See Korngold, *supra* note 13, at 9, 12–14 (discussing exactions, impact fees, tax-increment financing, special assessments, incentive zoning, and transferable development rights); Martim O. Smolka, *Lincoln Inst. Land Pol’y, Implementing Value Capture in Latin America: Policies and Tools for Urban Development 2* (2013), [https://www.lincolninstitute.edu/sites/default/files/pubfiles/implementing-value-capture-in-latin-america-full\\_1.pdf](https://www.lincolninstitute.edu/sites/default/files/pubfiles/implementing-value-capture-in-latin-america-full_1.pdf) [<https://perma.cc/83JZ-WWDM>] (“Conventional fiscal policies . . . largely neglect how the costs of providing urban infrastructure and services are socialized, and how their benefits are privatized. The notion of value capture is to mobilize for the benefit of the community at large . . . the land value increments . . . generated by actions other than the landowner’s . . .”); Alterman, *supra* note 8, at 766–72 (surveying a range of “betterment capture” tools employed in various international settings); Jeffrey Chapman, *Value Capture Taxation as an Infrastructure Funding Technique*, 22 *Pub. Works Mgmt. & Pol’y* 31, 33–34 (2017) (discussing various techniques to leverage property value increases for the purposes of financing infrastructure improvements). Much of the modern value capture literature draws inspiration from the 1978 book, *Windfalls for Wipeouts: Land Value Recapture and Compensation*. Windfalls for Wipeouts: Land Value Recapture and Compensation (Donald G. Hagman & Dean J. Mischynski eds., 1978).

53. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 *Cornell L.Q.* 8, 28–29 (1927) (“[E]xperience has shown all civilized peoples the indispensable need for communal control to prevent the abuse of private enterprise.”); Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 *Yale L.J.* 779, 793 (1918) (describing how property rights govern interactions between people); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *Yale L.J.* 710, 718 (1917) (describing property rights as governing relationships between people); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial*



Property is a norm-based system that takes into account how the allocation and exercise of property rights affects how people engage with and live alongside one another in a crowded and interconnected world.<sup>54</sup> In this systemic sense, property laws determine which types of social and market relationships are fair game within a democracy that respects all persons as free and equal and which ones are, instead, beyond the pale.<sup>55</sup>

Recognizing that property laws determine which types of social and market relationships are acceptable requires acknowledging that the government *cannot avoid making these determinations*. Consider, for instance, a situation in which one party claims the right to mine subsurface resources and another party claims the right to use the surface free from the instability such mining would cause. The government is obligated to resolve this conflict: In choosing to allocate to one party their claimed right, the government necessarily must deny the claimed right of the other party.<sup>56</sup> In so doing, it determines the nature of the relationship between those parties by setting the terms on which they can thereafter transact.<sup>57</sup> To make these kinds of unavoidable determinations, the government must make evaluative assertions about the kind of society in which we live and to which we aspire.<sup>58</sup> It cannot simply be a behind-the-scenes “watchman”

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Reasoning, 23 Yale L.J. 16, 55 (1913) (describing a property right as “one’s affirmative claim against another”).

54. See, e.g., Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* 105 (1990) (describing how different property theories affect perspectives on social ordering); Joseph William Singer, *Entitlement: The Paradoxes of Property* 98 (2000) [hereinafter Singer, *Entitlement*] (noting that property rights govern people’s daily interactions); C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. Pa. L. Rev. 741, 742–43 (1986) (noting that property governs relationships between people).

55. See Baker, *supra* note 54, at 743 (“The standards used to determine the content and extent of decisionmaking authority . . . are what I mean by ‘property rules.’ Property rules determine the relevance of various factors, including the behavior and status of people, to the evaluation of a person’s claim to possess some specific decisionmaking authority.”).

56. See Singer, *Right to Have Property*, *supra* note 42 (manuscript at 7) (explaining that property rights “are not ours alone; they originate, and are based on, laws that made it both possible—and impossible—to become an owner”).

57. Robert Hale, *Freedom Through Law: Public Control of Private Governing Power* 10 (1952) (“[A] little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none . . . .” (internal quotation marks omitted) (quoting *Coppage v. Kansas*, 236 U.S. 1, 17 (1915))); see also Singer, *Entitlement*, *supra* note 54, at 59 (“Before two parties can enter into a contract, we must define what they own. Otherwise, we cannot determine who is buying and who is selling.”).

58. Property is, in this way, paradoxical: Many Americans hold a deep belief that property *should* be very strongly protected, but there is *no way that it can be*. See Jennifer Nedelsky, *Should Property Be Constitutionalized? A Relational and Comparative Approach*, in *Property on the Threshold of the 21st Century* 417, 427 (G.E. van Maanen & A.J. van der Walt eds., 1996) (“[P]roperty implicates the very core issues of politics: distributive justice and the allocation of power.”); Eduardo M. Peñalver, *Property Metaphors and Kelo v. New*

for property rights.<sup>59</sup> To the contrary, it is omnipresent in *determining the contours* of the property rights and privileges that are the subject of market exchange. It thus is not possible for property values to exist separate and apart from the influence of these governmental choices;<sup>60</sup> as Henry George so profoundly explained, property values are not attributable merely to individual improvements but, in considerable respects, to efforts by the community at large.<sup>61</sup>

It follows from the foregoing that affording greater attention to the first-order issues surrounding the creation of property values can offer a healthy supplement to the ongoing discourse that currently hones in on the second-order consequences—for local government autonomy, revenue stability, revenue redistribution, and beyond—of taxing those values for the purpose of financing education. While it will take a wide range of future efforts to respond effectively to this call, the remainder of this Essay takes two very preliminary steps in this direction. The next Part, Part II, offers a basic taxonomy of the government choices that determine the contours of property rights in an effort to illustrate how these choices influence property values in a variety of ways. Following Part II's

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*London*: Two Views of the Castle, 74 *Fordham L. Rev.* 2971, 2974 (2006) (“When owners prove unwilling or unable to sort out disagreements about . . . spillover effects on their own, the state [has] to make decisions about which spillover effects owners must tolerate and which spillover-creating actions they may not take . . .”); Laura S. Underkuffler, *The Politics of Property and Need*, 20 *Cornell J.L. & Pub. Pol’y* 363, 370 (2010) (“No societally recognized and enforced property right, which is ‘normatively neutral,’ actually exists.”). But see Eric R. Claeys, *Kelo*, *The Castle*, and *Natural Property Rights*, in *Private Property, Community Development, and Eminent Domain* 35, 47 (Robin Paul Malloy ed., 2016) (“In all but the most extreme cases . . . the natural law refrains from picking and choosing among owners or land uses.”).

59. See Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 *Notre Dame L. Rev.* 1033, 1042 (1996).

60. See Korngold, *supra* note 13, at 16 (“[O]wners are not responsible for much of the appreciation in the value of their land.”); see also Underkuffler, *Takings and the Problem of Value*, *supra* note 6, at 474 (“The creation of economic value in land is the product of a complex mosaic of both private and public factors.”).

61. In an 1879 treatise, George explained that communities are significant contributors to land values, such that, in his view, landowners should be entitled to any value increases that they individually created (through, e.g., construction of a building) but not to any value increases attributable to community action. Henry George, *Progress and Poverty* (1879); see also Eric T. Freyfogle, *The Land We Share: Private Property and the Common Good* 126–30 (2003) (explaining that, to George, land values arise “from the city itself” and that, short of rejecting the very idea of owning nature, “[w]hat would work . . . and what would fairly protect the public’s interest, [would be] for the public to claim all income attributable to land itself”). George’s influence is evident throughout municipal finance, with no clearer example than the tax-increment financing schemes that have proliferated to fund improvements in various geographical regions on the promise of the future tax benefits resulting from those improvements. See, e.g., Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 *U. Chi. L. Rev.* 65, 65–66 (2010). For a survey of the critiques of George’s work, see Robert V. Andelson, *Critics of Henry George: An Appraisal of Their Strictures on Progress and Poverty* (1979).

revelations on the breadth and depth of these value-influencing choices, Part III sets out several components of a general framework to assess the justness of such choices.

## II. BENEATH PROPERTY TAXES: A BACKGROUND INFRASTRUCTURE OF PROPERTY LAWS

Property laws, as set out in the prior Part, reflect government choices to allocate interests in land and other resources in the face of competing individual claims. These laws set the terms of private exchange and therefore influence property values in considerable respects. As this Part illuminates, the government choices that constitute the laws of property come in a variety of forms and influence property values in a variety of ways. These influences are in some situations direct, while in others, they are derivative; they appear suddenly in some cases, while in others, they reveal themselves over time; and they can, depending on the circumstances, lead to either increases or decreases in property values in various magnitudes.

Drawing on a range of illustrative examples, this Part classifies the government's choices affecting land values into three overarching categories: *structural choices* relating to infrastructure and land use, *financial choices* relating to subsidies and exemptions, and *protective choices* relating to forestalling natural- and human-induced adversities. That there is some overlap among these categories is readily conceded, and, indeed, some readers may share different perspectives as to the category into which a specific illustrative government choice might be best placed. The point in articulating these categories and offering illustrations therein, though, is not to offer a comprehensive account of those government choices that influence property values but, instead, to present an accessible framework within which readers can grasp the sheer ubiquity of these choices.

### A. *Structural Choices*

One can begin considering the range of structural choices that impact property values with a look at transportation infrastructure. While canals, rails, and roads were often privately financed in the early days of our nation, the government regularly allocated the lands through which those networks traversed to private parties via land grants or other government-supported initiatives.<sup>62</sup> Today, a sizable percentage of our transportation

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62. See John Bell Rae, *Federal Land Grants in Aid of Canals*, 4 J. Econ. Hist. 167–77 (1944). Reflecting the dark underbelly of landholdings across much of America, the government had secured much of the land that it allocated to private parties for transportation projects via conquest against Indigenous populations that had occupied and lived on the land for centuries. See generally Robert J. Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny* (2006) (describing

infrastructure is financed directly through government entities.<sup>63</sup> The location and design of this infrastructure has a marked effect on property values.

Consider, for instance, how lands throughout the Appalachians faced increased demand when they were touched by roadway expansion in the early 1800s, giving them new connections to the bustling ports of the Eastern seaboard.<sup>64</sup> These connections, in turn, triggered land value increases in and around those Eastern ports.<sup>65</sup> Anxious to reap these same types of fruits, cities in what was then the “Northwest,” such as Cincinnati, Cleveland, and Columbus, supported the construction of a canal network that linked the Great Lakes to the Ohio–Mississippi River systems.<sup>66</sup> In each of these instances, the government coordinated with private businesses to make transportation accessible at a relatively low cost and thereby increase the possibility of these businesses securing higher profits.<sup>67</sup> The government-created cost savings were soon capitalized into land prices in and around the regions served by this new infrastructure.<sup>68</sup>

Rail networks did the same in the decades before the Civil War. New rail lines reinforced the water networks already in place, and cities that built them held a monopoly-like grip on trade.<sup>69</sup> Land in cities like New York increased in value; further, demand from city residents for goods produced outside the city rose, leading to property value enhancements for those forest and agricultural lands connected to the city by rail.<sup>70</sup> The dredging of the Panama Canal in the early 1900s, which reduced the cost of shipping western grain to the East Coast, had a similarly positive effect on the value of farmlands along water routes in California, Montana,

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how U.S. policy makers utilized the law to “subjugate Native Americans and seize their land”).

63. See James McBride & Anshu Siripurapu, *The State of U.S. Infrastructure*, Council on Foreign Rels., <https://www.cfr.org/background/state-us-infrastructure> [<https://perma.cc/7VN7-9JSH>] (last updated Nov. 8, 2021).

64. See Fed. Highway Admin., DOT, *America’s Highways: 1776–1976*, 16–27 (1977) (describing the Gallatin Plan and other early 19th century federal plans for transportation).

65. Runge et al., *supra* note 44, at 16.

66. Julius Rubin, *An Innovating Public Improvement: The Erie Canal*, in *Canals and American Economic Development* 15–66 (Carter Goodrich ed., 1961).

67. A sizable amount of the property value within many school districts is held not by individual residents but by businesses. See Dyson, *supra* note 9, at 5 (suggesting that, because businesses are often established in particular areas in light of state-financed infrastructure that facilitates the development of those areas, public school students statewide should reap the benefits of those value-enhancing infrastructure choices).

68. Runge et al., *supra* note 44, at 16–17.

69. H.D. Lloyd, *The Story of a Great Monopoly*, *Atlantic* (Mar. 1881), <https://www.theatlantic.com/magazine/archive/1881/03/the-story-of-a-great-monopoly/306019/> [<https://perma.cc/694A-66KV>] (“The monopoly of the pipelines which the railroads gave it made the Standard the master of the exits of oil from the producing districts.”).

70. Albert Fishlow, *American Railroads and the Transformation of the Antebellum Economy* 93–95 (1965).

Oregon, Washington, and the Dakotas.<sup>71</sup> The development of the interstate highway system several decades later prompted similar cost savings, including reduced commutes that led to property value enhancements along its routes.<sup>72</sup>

These examples are only among the most dramatic; the capitalization of cost savings generated by government investment in transportation infrastructure is a ubiquitous story in all corners of America. Such capitalization is not, though, the full story. Just as government investment decisions in the design, siting, and construction of transportation infrastructure can augment property values in the ways described, they can also generate negative impacts on property values. First of all, lands that were not in the pathway of new canals, rail lines, and roads often saw their property values drop.<sup>73</sup> In effect, value in these lands was redistributed to lands that were in the newly created transportation corridors.<sup>74</sup> Further, though, consumer preferences in land can change over time. For instance, where adjacency to rail lines may once have been considered an amenity, it may today be considered a disamenity—and thereby lead to reductions in property values—due to the noise and air pollution associated with rail traffic.<sup>75</sup> The same story attaches to the provision of various other forms of infrastructure, including those related to water, sanitation, solid waste disposal, recycling, electricity, natural gas, and the like.<sup>76</sup> While the precise

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71. Runge et al., *supra* note 44, at 17.

72. See, e.g., Herbert Mohring, *Land Values and the Measurement of Highway Benefits*, 69 *J. Pol. Econ.* 236, 244–49 (1961) (documenting land value increases associated with decreases in commuting time to downtown Seattle resulting from new highway construction). For a particularly recent iteration, consider how proximity to new light rail stations augments property values. See generally Keith Bartholomew & Reid Ewing, *Hedonic Price Effects of Pedestrian- and Transit-Oriented Development*, 26 *J. Plan. Lit.* 18 (2011) (analyzing forty studies assessing this influence). On the general idea that increases or decreases in traffic can make a parcel more or less desirable, see Christopher Serkin, *A Case for Zoning*, 96 *Notre Dame L. Rev.* 750, 773 (2020) (citing Alois Stutzer & Bruno Frey, *Stress That Doesn't Pay: The Commuting Paradox*, 110 *Scandinavian J. Econ.* 339, 339 (2008)).

73. Runge et al., *supra* note 44, at 18.

74. *Id.* at 20 (“[P]ublic policy on transportation may be said to represent a spatial redistribution of capital appreciation, giving to some landowners while taking from others.”). As discussed *infra* in notes 143 and accompanying text, other lands were so directly in the pathway of new transportation corridors that the people living on these lands—who were overwhelmingly low-income and Black—were displaced. See Raymond Mohl, *Planned Destruction: The Interstates and Central City Housing* 229 (2000) (“It was quite obvious that neighborhoods and communities would be destroyed [by the creation of the federal highway system], but this was thought to be an acceptable cost of creating new transportation routes and facilitating urban economic development.”).

75. Larry C.L. Poon, *Railway Externalities and Residential Property Prices*, 54 *Land Econ.* 218, 223–25 (1978).

76. See, e.g., Richard C. Ready, *Do Landfills Always Depress Nearby Property Values?*, 32 *J. Real Estate Res.* 321, 325, 336 (2010) (concluding, upon a “meta-analysis of all available landfill property value impact estimates,” that “20-26% of low-volume landfills do not negatively impact nearby property values” but “essentially all high-volume [landfills] do negatively affect nearby property values”).

effects of government investment in transportation and other infrastructure are difficult to pinpoint, the government's provision of such infrastructure can undeniably augment land values in areas that such infrastructure serves well and contribute to land-value declines in areas that it does not.<sup>77</sup>

Land use regulation's role in determining property values mirrors that of publicly financed infrastructure in many respects. Consider, for example, the most traditional of these regulations: zoning. Zoning schemes can, all else being equal, undoubtedly create a development effect that impairs property values by limiting the intensity of allowable uses of an owner's property.<sup>78</sup> At the same time, though, zoning schemes limit the intensity of allowable uses on that owner's neighbors' properties.<sup>79</sup> In this respect, zoning can create reciprocal amenity effects that make a region a desirable place in which to live and invest, thereby boosting property values.<sup>80</sup> Moreover, zoning can generate positive scarcity effects: By limiting the amount of development that can occur in an area, the value of the opportunity to develop those undeveloped properties that remain developable—and, of course, the value of already developed properties—can increase.<sup>81</sup> All of these effects, too, may have derivative

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77. OECD, *Financing Transportation Infrastructure Through Land Value Capture: Concepts, Tools, and Case Studies*, OECD Reg'l Dev. Papers (2022), <https://doi.org/10.1787/8015065d-en> [<https://perma.cc/T7P2-YN5Z>] (discussing strategies for recouping costs of new transportation infrastructure).

78. Noelwah R. Netusil, *The Effect of Environmental Zoning*, 81 *Land Econ.* 227, 228 (2005) (explaining the uncertain effects of environmental zoning on property values).

79. John D. Echeverria, *Regulating Versus Paying Land Owners to Protect the Environment*, 26 *J. Land Res. & Env't L.* 1, 32 (2005).

80. William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 *Env't L.* 105, 112–14 (2006).

81. See Michael & Palmquist, *supra* note 52, at 438 (“However, contrary to this general assumption, restrictions may also positively affect land values, and the positive effects of restrictions may offset, at least in part, their negative effects.”); Serkin, *supra* note 72, at 776 (explaining how zoning can restrict the supply of housing and create a “mini cartel of existing housing stock”). For example, a regulation that reduces the number of residential units that a developer can construct on a given parcel from twelve to ten may, in fact, benefit that developer because it reduces the total number of opportunities to develop in that area. This restriction in supply could mean that the total value of constructing ten units under this new regime could exceed the total value of constructing twelve units under the prior regime. See George R. Parsons, *The Effect of Coastal Land Use Restrictions on Housing Prices: A Repeat Sale Analysis*, 22 *J. Env't Econ. & Mgmt.* 25, 34–35 (1992) (reporting that an empirical study revealed that land use restrictions within 1,000 feet of the Chesapeake Bay generated a 50% increase in the value of homes with bay frontage and a 14–27% increase in the value of homes in the restricted zone); see also Runge et al., *supra* note 44, at 13 (explaining how urban growth boundaries “result in windfalls to some landowners and losses to others”). The scarcity effects of zoning can result from invidious efforts to exclude. See, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *Harv. L. Rev.* 1841, 1861 (1994). A similar phenomenon has reared its head in the context of school district boundaries, as some communities have successfully sought to “secede” from their school districts to create smaller, more privileged enclaves. See Erika Wilson, *The New School Segregation*, 102 *Cornell L. Rev.* 139, 165–74 (2016) (describing

impacts on property values in nearby communities that are not subject to the zoning regime.<sup>82</sup>

Other land use regulations produce similar effects on value. Consider, for instance, minimum lot sizes and setback requirements;<sup>83</sup> historic preservation ordinances;<sup>84</sup> air and water quality, wetlands, riparian corridor, endangered species, and other environmental regulations;<sup>85</sup> and imperatives surrounding the extraction and depletion of oil, gas, timber, and other natural resources.<sup>86</sup>

Overlain on the line-drawing that much of land use regulation necessarily entails are other governmental decisions to draw boundaries for school districts, business improvement districts, special assessment districts, and the like. Contrary to popular perception, these boundary lines are not incontrovertible but rather are what Professor Aaron Saiger refers to as “contingent[] features of the legal and political landscape.”<sup>87</sup> The government’s affirmative choices about how and where to draw these lines have a hand in predetermining the property tax capacity of those

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the contemporary school district secession movement); EdBuild, *supra* note 4, at 1 (reporting in 2019 that the “wave of secessions is accelerating”). On local tools of secession more broadly, see Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 *Stan. L. Rev.* 1115, 1130 (1996) (“Local boundaries frequently determine the scope of local services.”); Gerald E. Frug, *Is Secession from the City of Los Angeles a Good Idea?*, 49 *UCLA L. Rev.* 1783, 1792 (2002) (explaining how the state delegation of zoning and taxing power to localities gives those localities the power to exclude less affluent populations and to assure that only the affluent benefit from the public services offered in those localities).

82. Michael & Palmquist, *supra* note 52, at 438; Parsons, *supra* note 81, at 25 (reporting that land use restrictions within 1,000 miles of the Chesapeake Bay generated a 4–11% increase in the value of homes as far as three miles outside the critical areas).

83. Bethany R. Berger, *The Illusion of Fiscal Illusion in Regulatory Takings*, 66 *Am. U. L. Rev.* 1, 22 (2016) (“Increasing minimum lot sizes generally leads to higher-income property owners.”).

84. One study revealed that properties in a neighborhood that Chicago deemed historic increased in value by 30–38%, while properties in those areas adjacent to the designated neighborhood increased in value by 29%. Peter V. Schaeffer & Cecily Ahern Millerick, *The Impact of Historic District Designation on Property Values: An Empirical Study*, 5 *Econ. Dev. Q.* 301, 311 (1991).

85. Jaeger, *supra* note 80, at 124–25 (detailing various ways land use regulations can reduce property values).

86. See, e.g., Jerett Yan, *Standing as a Limitation on Judicial Review of Agency Action*, 39 *Ecology L.Q.* 593, 600–01 (2012) (referring to a case in which, “[b]ased on the declarations of two forestry experts, [a] court found that the reduction in economic value [due to regulations that restricted timber harvesting] was sufficiently specific, concrete, and particularized to satisfy the injury-in-fact analysis”).

87. Aaron J. Saiger, *The School District Boundary Problem*, 42 *Urb. Law.* 495, 507 (2010). Professor Richard Briffault calls the popular perception a “pregovernmental” view of boundaries. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *Colum. L. Rev.* 346, 387 (1990). See also Schragger, *supra* note 8, at 1856 (“[O]ur current structure of fragmented local government is not the end-product of some idealized market process, but rather the historically contingent result of the deployment of legal and political power.”).

neighborhoods inside and outside the lines.<sup>88</sup> In drawing boundary lines, the government allocates economic power.<sup>89</sup>

The government also impacts property values when resolving on which state-owned lands (or private lands that it will condemn) to site essential services. Transportation hubs, parks, wildlife and nature refuges, schools, hospitals, and protected wetlands, for instance, often enhance property values in their vicinity.<sup>90</sup> Meanwhile, airports, prisons, landfills, hazardous waste depositories, and nuclear power plants are generally correlated with lower property values in nearby neighborhoods.<sup>91</sup>

The foregoing is nowhere near a comprehensive documentation of the many ways in which the government's structural choices surrounding property influence property values. It is sufficient, though, to counter the subliminal assumption underpinning much of education finance discourse that property values result predominantly from private market exchange. This counter is further buttressed by considering the ways in which the government's *financial* choices surrounding property impact property values, a matter to which the next section turns.

## B. *Financial Choices*

The government's finance-related choices impact property values in myriad ways. Consider, for example, agricultural lands.<sup>92</sup> The federal

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88. Consider, for instance, two property owners, A and B, who have the same income and wealth. A is the wealthiest landowner in a poor school district, while B is the poorest landowner in the neighboring and far more affluent school district. A will bear a higher tax share than B, get lesser services than B, or both, simply because of where the state drew the school district line. These disparities will, in turn, be reflected in A's and B's property values. See Schragger, *supra* note 8, at 1848–50 (“The perception that taxes and services are ‘owned’ by the residents . . . relies on a naturalized view of local boundaries . . . . But . . . the regional geography of fragmented local governments is a product of legal rules. . . . [T]he drawing of the jurisdictional lines is itself a distributional choice.”); Stark, *supra* note 35, at 963 (citing James M. Buchanan, *Federalism and Fiscal Equity*, 40 *Am. Econ. Rev.* 583, 591 (1950)) (“In effect, the decision to draw jurisdictional lines around groups of people results in different fiscal treatment for otherwise similarly situated individuals.”).

89. Long, *supra* note 32, at 402 (explaining that school district boundary lines are “about power”); see also Robert Hale, *supra* note 57, at 1–12 (casting property law as the state's bestowing coercive powers upon private parties).

90. Runge et al., *supra* note 44, at 20–21; see also Bell & Parchomovsky, *supra* note 52, at 575 (explaining how building a new park in neighborhood A might increase the property values in that neighborhood while property values in neighboring B remain that same, such that “the decision to bestow the benefit upon the residents of neighborhood A is a lost opportunity to the residents of . . . B”); Serkin, *supra* note 72, at 773 (citing Elena G. Irwin, *The Effects of Open Space on Residential Property Values*, 78 *Land Econ.* 465, 478 (2002)) (explaining that people pay a premium to live near conserved land such that decisions to zone land conservation or to purchase or otherwise acquire conservation easements affect value).

91. Runge et al., *supra* note 44, at 20–22; Saiger, *Local Government Without Tiebout*, *supra* note 24, at 112.

92. See, e.g., Runge et al., *supra* note 44, at 7 (“In addition to direct federal crop subsidies of various forms, government grazing permits, government-subsidized



government pays farmers across the country tens of millions of dollars per day to urge them not to plant crops on portions of their lands.<sup>93</sup> The goal of these subsidies is to prevent the supply of wheat, corn, and other crops from depressing prices of these commodities to a point that would threaten the country's ability to offer "the world's most abundant and affordable food supply."<sup>94</sup> These payments and the higher commodity prices they generate keep farms in business by maintaining farm incomes and, unsurprisingly, are capitalized into land prices.<sup>95</sup> Myriad other agricultural subsidies—including, for instance, subsidies for conservation improvements, such as soil drainage and erosion control—also increase the value of agricultural lands.<sup>96</sup>

Various other finance-related choices impact land values in similar ways. The income tax deduction for home mortgage interest allows individuals to buy houses that are far more expensive than the homes they could buy in the absence of such a write-off,<sup>97</sup> and homestead exemptions can create an analogous effect.<sup>98</sup> Subsidies for flood insurance make feasible the acquisition and development of properties that private companies would not insure on their own due to their flood vulnerability.<sup>99</sup> Subsidized grazing permits increase the value of the ranch lands to which

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transportation, conservation infrastructure, and credit have all underwritten farm assets and land values.”).

93. Farm Subsidy Information, Env't Working Grp., <https://farm.ewg.org/region.php> [<https://perma.cc/WE3C-BGTR>] (last visited Jan. 31, 2023) (noting the various types of agricultural subsidies provided by the U.S. government).

94. Thompson, *supra* note 52, at 22–23.

95. See, e.g., J. Stephen Clark, K.K. Klein & Shelley J. Thompson, Are Subsidies Capitalized Into Land Values? Some Time Series Evidence From Saskatchewan, 41 *Can. J. Ag. Econ.* 155, 167 (1993) (concluding from a study of farm subsidies across a forty-year period that farm income alone is insufficient to explain long term increases in farm values).

96. See, e.g., Raymond B. Palmquist & Leon E. Danielson, A Hedonic Study of the Effects of Erosion Control and Drainage on Farmland Values, 71 *Am. J. Ag. Econ.* 55, 58–61 (1989) (noting that “the[] data imply that land value would rise . . . if drainage were undertaken” and that studies estimate that a “one-unit reduction in potential erosivity . . . results in an increase in farmland value”); see also Linda Qiu, Farmland Values Hit Record Highs, Pricing Out Farmers, *N.Y. Times* (Nov. 13, 2022), <https://www.nytimes.com/2022/11/13/us/politics/farmland-values-prices.html> (on file with the *Columbia Law Review*) (noting that agricultural subsidies have soared in recent years and explaining that “[t]hose payments, or even the very promise of additional assistance, increase farmland values as they create a safety net and signal that agricultural land is a safe bet”).

97. See, e.g., Thompson, *supra* note 52, at 23 (noting that the income tax deduction “enables people to buy houses almost [twice] as expensive as they could without the write-off”).

98. See, e.g., Berger, *supra* note 83, at 18 (“More than half of states have homestead exemptions reducing the taxes on properties occupied as the owner’s primary residence.”). Of course, property tax rates can themselves affect property values.

99. See Daniel D. Barnhizer, Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts, 27 *Harv. Env't L. Rev.* 295, 296–97 (2003) (explaining that government policies subsidize the cost of living in floodplains and that those policies maintain “development against rising sea levels, climate change, extreme weather phenomena, and erosion”).

they are assigned.<sup>100</sup> And, of course, various choices specifically related to property tax schemes can themselves affect property values. For example, adopting high property taxes in a given jurisdiction may in some circumstances decrease the values of homes because, with the cost of ownership being so high, the ownership market shrinks;<sup>101</sup> capping the amount by which localities can increase their property taxes to fund schools can generate the same type of effects;<sup>102</sup> and extending property tax abatements to attract specific corporations allows those corporations to maintain property at below-market levels.<sup>103</sup>

As was the case with the structural choices referenced in the prior section, these illustrations merely scratch the surface in terms of the extent to which the government's finance-related choices surrounding property set the terms on which market actors engage in real estate transactions that appraisers lean on in valuing land. As the next section explains, the government's *protective* choices surrounding property complement the value-impacting nature of these structural and financial choices.

### C. *Protective Choices*

The government makes a wide range of choices regarding whether and how to protect property that have a sizable influence on property values. Consider, for illustrative purpose, the parcels at issue in the Supreme Court's rather notorious decision in *Lucas v. South Carolina Coastal Council*.<sup>104</sup>

The headline facts of the *Lucas* litigation are well known. In 1986, after reaping significant returns through his development company's sale of more than 1,000 residential units in a subdivision on a narrow barrier

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100. See, e.g., N.K. Roberts, Economic Foundations for Grazing Use Fees on Public Lands, 45 J. Farm Econ. 721, 726–27 (1963) (reporting empirical evidence indicating that grazing permits on public lands significantly increases the sales price of ranch lands); L. Allen Torell & John P. Doll, Public Land Policy and the Value of Grazing Permits, 16 W.J. Agric. Econ. 174, 178–83 (1991) (same).

101. See IMF, Tax Policy, Leverage and Macroeconomic Stability 7 (2016) (“Housing taxes can also reduce speculative demand for housing, which can be a source of short-term price instability and responsible for long-term price swings . . .”).

102. See Winnie Hu, Cuomo Plans to Push for a Cap on Property Taxes, Wash. Post (Dec. 12, 2010), <https://www.nytimes.com/2010/12/13/nyregion/13cap.html> (on file with the *Columbia Law Review*) (explaining that then-Governor Andrew Cuomo intended that the cap on property tax would give “relief from skyrocketing property taxes that are driving [New Yorkers] from their homes and out of the state”); see also Ctr. on Budget & Pol’y Priorities, Policy Basics: Property Tax Caps 1 (2008), <https://www.cbpp.org/sites/default/files/atoms/files/policybasics-taxcaps.pdf> [<https://perma.cc/MA6P-JWN3>].

103. See Robert W. Wassmer, Property Tax Abatement as a Means of Promoting State and Local Economic Activity, in *Erosion of the Property Tax Base: Trends, Causes, and Consequences* 251–52 (Nancy Y. Augustine, Michael E. Bell, David Brunori & Joan M. Youngman eds., 2009) (contending that property tax abatements in these circumstances deprive the local jurisdiction of property tax revenues that they otherwise would reap from economic growth).

104. 505 U.S. 1003, 1007 (1992).

island in South Carolina, David Lucas acquired from the company two such lots for himself.<sup>105</sup> This barrier island—the Isle of Palms—is especially dynamic due to sand-shifting patterns attributable to a nearby inlet.<sup>106</sup> At various points in the four decades before the suit, accretion resulted in these two lots resting hundreds of feet landward of the ocean’s mean high-water line; at other points in this period, though, erosion placed them completely underwater.<sup>107</sup> While the state’s coastal region had been extensively regulated for some time, these lots were considered developable when Lucas acquired them.<sup>108</sup>

Shortly after Lucas’s acquisition, the state legislature passed the 1988 South Carolina Beachfront Management Act.<sup>109</sup> Relying on new scientific evidence revealing the impacts of erosion resulting from development of the state’s coastline, this statute served in many respects as a last ditch measure to preserve a beach and dune system that protects the public from harm.<sup>110</sup> The Act established a coastal setback line based on historic high-water episodes of the previous four decades and prohibited new development or reconstruction of existing development on any lots—including the two recently acquired by Lucas—seaward of that line.<sup>111</sup> Lucas filed suit seeking compensation for an alleged \$3 million diminution in his properties’ value that he attributed to what he deemed an unconstitutional regulatory taking.<sup>112</sup>

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105. See Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, in *Property Stories* 299, 304 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009).

106. Jan Goldman-Carter, *Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of Lucas v. South Carolina Coastal Council*, 28 *Land & Water L. Rev.* 425, 431 (1993) (“Lucas’ lots came within the erosion baseline, primarily because they were located adjacent to tidal inlets which had not been secured with groins, rip-rap, or other structural erosion control measures.”); James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 *Md. L. Rev.* 1279, 1335 (1998) (noting that David Lucas’s “lots were about 300 feet from the beach, but because they were near an inlet, the shore had advanced and retreated several times in the preceding few decades”).

107. Been, *supra* note 105, at 311.

108. Apparently, similarly situated lots in all other East Coast states were not developable at the time Lucas acquired his lots. See Carol M. Rose, *The Story of Lucas: Environmental Land Use Regulation Between Developers and the Deep Blue Sea*, in *Environmental Law Stories* 237, 258 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

109. *Lucas*, 505 U.S. at 1008–09.

110. *Id.* at 1007–08; see also Richard J. Lazarus, *Lucas Unspun*, 16 *Se. Env’t L.J.* 13, 29 (2007) (“The Beachfront Management Act sought to put an end to the human folly of placing people, lives, livelihoods, and homes in those places most exposed to the destructive forces of nature.”).

111. *Lucas*, 505 U.S. at 1007.

112. Lucas advocated for a new rule by which the sheer weight of the economic impact resulting from a development restriction of this nature categorically triggers takings liability regardless of whether it mirrors a common law prohibition or otherwise serves an important public interest, such as health and safety or environmental protection. *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 898 (S.C. 1991), *rev’d*, 505 U.S. 1003 (1992) (“Lucas maintains

This claim prompts one to consider whether and to what extent governmental choices surrounding South Carolina property law contributed to the fact that Lucas's properties—two vacant lots on a narrow barrier island that protects the mainland against storm-driven wave activity—were worth so much money to begin with. It turns out that only the grace of a slew of the government's property-related choices made it feasible for Lucas to engage in personally lucrative construction on this vulnerable sand spit.

Some of those choices were structural. For instance, the government constructed a bridge to access the island and roads to traverse it,<sup>113</sup> installed sewer, water, and electrical systems to service houses and businesses built thereon,<sup>114</sup> and determined setback and other zoning requirements relating to construction on oceanfront parcels.<sup>115</sup> Others were financial. For example, Lucas benefited from the mortgage interest deduction and from flood insurance that the government underwrote.<sup>116</sup> Many other choices, though, were protective in nature. For instance, the government implemented a range of measures to prevent homes and businesses on the Isle of Palms from being swept away by the sea, including supporting beach replenishment, dune plantings, and the installation of both granite and fiberglass walls along the waterfront to blunt the impact of wave activity.<sup>117</sup> In this case, while the trial court's holding that the state's development restrictions were unconstitutional absent compensation was pending on appeal, those measures failed in spectacular and lethal fashion when Hurricane Hugo roared ashore.<sup>118</sup> The storm, boasting sustained winds of 135 miles per hour, inundated nearly every property on the island with mud and sewage and reduced more than 20% of the homes to

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that if a regulation operates to deprive a landowner of 'all economically viable use' of his property, it has worked a 'taking' for which compensation is due, regardless of any other consideration.").

113. Thompson, *supra* note 52, at 22.

114. *Id.*

115. See Calvert G. Chipchase, *Lucas Takings: Why Investment-Backed Expectations Are Irrelevant When Applying the Categorical Rule*, 24 U. Haw. L. Rev. 147, 172 n.181 (2001); Timothy M. Mulvaney, *Property-As-Society*, 2018 Wis. L. Rev. 911, 915–16.

116. See Thompson, *supra* note 52, at 22.

117. Barnhizer, *supra* note 99, at 325 (“[P]hysical projects which include beach armoring . . . and sand replenishment programs, promote direct givings by reducing risks from floods within their design capacities and promote fiat givings by creating the implication that if the government funded such projects once, it likely will do so again.” (footnote omitted)). The government's structural, financial, and protective choices often, of course, work in concert. For example, after making the structural choice to implement the noted shore protection measures in an effort to assure that coastal properties would not erode as swiftly as they otherwise would, the state made the financial choice to underwrite flood insurance to soften the losses when those shore protection measures inevitably failed. Thompson, *supra* note 52, at 22.

118. Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. Colo. L. Rev. 331, 347 (2004).

rubble.<sup>119</sup> In the hurricane's wake, the federal government provided more than \$300 million in disaster relief funds to provide housing assistance for the displaced, remove debris, and repair or replace infrastructure,<sup>120</sup> and state and local government entities chipped in additional millions.<sup>121</sup> Further, the state amended the Beachfront Management Act to allow property owners to rebuild many of the homes that had been damaged or destroyed.<sup>122</sup>

For the purposes advanced here, it is not material to evaluate whether or the extent to which Lucas's undeveloped properties held "intrinsic" value.<sup>123</sup> Rather, the point is simply that governmental choices to protect property had a nontrivial impact in establishing the conditions under which the market ultimately determined these properties' considerable value.<sup>124</sup> And while the properties at issue in *Lucas* offer a particularly vivid backdrop against which to advance this charge, protective choices affecting property values abound throughout property law. Decisions to live in hazardous locales are routinely shaped by local land use decisions and greatly influenced by state and federal incentive programs. For example, choices to construct levees rather than adopt nonstructural responses to flood risks impact property values;<sup>125</sup> choices on whether to require sellers to disclose hazard zone designations impact property values;<sup>126</sup> choices on whether to apply land use restrictions to existing

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119. Been, *supra* note 105, at 313.

120. Emergency Preparedness: Are We Ready for a 21st Century Hugo?: Hearing Before the Subcomm. on Oversight & Mgmt. Efficiency of the H. Comm. on Homeland Sec., 113th Cong. 9 (2014) (statement of Robert J. Fenton, Jr., Acting Deputy Assoc. Adm'r, Off. of Response & Recovery, FEMA).

121. U.S. Gov't Accountability Off., GAO/RCED-91-150, Disaster Assistance: Supplemental Information on Hurricane Hugo in South Carolina 5 (1991); see also Barnhizer, *supra* note 99, at 296–97.

122. Been, *supra* note 105, at 313–14.

123. See Barnhizer, *supra* note 99, at 366 (noting the challenge of "separating value attributable to [government] givings from value attributable to private investment or action of the private markets").

124. One analyst concluded that "taxpayer-financed improvements contributed to the value of Lucas's property and in all likelihood spelled the difference between its being attractive for development and a financially worthless strip of shifting sand." Thompson, *supra* note 52, at 22; see also Barnhizer, *supra* note 99, at 296–98 ("[M]uch of the value of coastal properties . . . is the direct result of past government programs to mitigate or reallocate the risk of flood losses on coastal properties by attempting to guard coastal landowners against the risks and costs of floods."); *id.* at 299 ("[A]ny government action within coastal floodplains can magnify the value of coastal properties by reducing or reallocating flood risks, increasing the perceived permanence of coastal properties, [or] improving access to coastal properties . . .").

125. Daniel A. Farber, Jim Chen, Robert R.M. Verchick, & Lisa Grow Sun, *Disaster Law and Policy* 26–27 (2d ed. 2010).

126. See, e.g., Cal. Civ. Code § 1103 (2018) (delineating that sellers of real property located in particular hazard zones "shall disclose to any prospective buyer the fact that the property is located within" said zone).

development in hazard-prone areas impact property values;<sup>127</sup> and choices on whether to suppress wildland fires to defend nearby private homes and businesses in the near term or prescribe burns in an effort to manage these fires for the future impact property values.<sup>128</sup> The list of hazard-related choices influencing property values goes on.

Protective choices come in many other forms outside the natural hazards context, too. Take, for instance, land use rules that protect nonconforming uses or allow for variances, special exceptions, or rezoning in the face of topographical or other hardships.<sup>129</sup> Consider, too, licensing programs for real estate agents, contractors, and inspectors.<sup>130</sup> The examples offered in this section merely reflect the tip of the iceberg when it comes to the government's protective choices surrounding property laws that influence property values.

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Property is, in the words of one set of scholars, more a "register of value" than a "creator of value."<sup>131</sup> Property values rest on choices that the government has made in the face of competing claims and, pace Jeremy Bentham, individuals' expectations—and their expectations about *other individuals' expectations*—regarding what choices the government will make in the future.<sup>132</sup> The government's choices surrounding property rules—to, for instance, construct roads and bridges that facilitate certain land uses (structural choices), subsidize certain land uses (financial choices), and protect certain investments in those land uses (protective choices)—are capitalized into the value of land. It follows that different choices surrounding the content of property rights, past and present, would produce different property values and, thus, different distributions of the property tax revenues that finance public education across a large swath of the country.<sup>133</sup>

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127. See Farber et al., *supra* note 125, at 36.

128. *Id.* at 41.

129. See, e.g., Patrick J. Rohan, A Primer on Conveyancing: Title Insurance, Deeds, Binders, Brokers and Beyond, N.Y. St. Bar Ass'n J., Oct. 2000, at 49, 52 ("[T]he residual value of the property for a conforming use may only be a fraction of its former value as a non-conforming use.").

130. See, e.g., Richard H. Seamon, Causation and the Discretionary Function Exception to the Federal Tort Claims Act, 30 U.C. Davis L. Rev. 691, 762 (1997).

131. Runge et al., *supra* note 44, at 1.

132. See, e.g., William Cronon, Nature's Metropolis: Chicago and the Great West 23–96 (1991) (explaining that, as word of possible railroad extensions into the American West spread in the late 1800s, the price of land soared and fell based on predictions as to where exactly those rail lines would run).

133. Economists have developed models designed to represent the economic forces at play in various land markets in an effort to illustrate how individuals will behave. These models, though, operate against a backdrop of property laws. Michael & Palmquist, *supra* note 52, at 440. People would behave differently if different laws were in place; therefore, with different laws in place, property values would be different. *Id.*

### III. JUSTIFYING PROPERTY TAXES AS A SOURCE OF SCHOOL FUNDING: NORMS FOR PROPERTY LAW REFORMS

The prior Part illustrates the ubiquitous nature of the governmental choices that influence property values. It also, though, sheds light on the *inevitability* of the government making these types of choices in the face of competing private claims to property. Consider, for a basic example, the three possible categories of resolutions of a dispute between neighbors regarding the natural flow of surface water. For one, the government could construct a diversionary device that alters the flow of water from one party's property and damages or destroys the other party's property. For another, the government could authorize the parties to construct that same type of diversionary device by either formally permitting it or choosing not to prohibit it. For a third, the government could prohibit constructing diversionary devices. In each case, the government cannot relieve itself from having to decide whether these neighbors' property interests include the freedom to protect their lands from natural surface water flows or the freedom to be secure against the harms of surface water diversions.<sup>134</sup> Conceiving of property values as the product of individual initiative and exchange fails to appreciate that the government's choice to recognize and protect one of these claims necessarily will reject the competing claim. Choices of this nature are in actuality normative assertions about the starting points for the development of market relationships. They are conclusions about the integrity of our social and economic system, in that they determine which interests can be valued in which circumstances and who, in those circumstances, holds what measure of bargaining power.<sup>135</sup> In the words of one prominent property theorist, "There is, in truth, no morally neutral place for [property law] to hide."<sup>136</sup>

It follows that the justice of relying on local property taxes to finance education should be informed by evaluating the justice of the vast series

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134. See Isaac Saidel-Goley & Joseph William Singer, Things Invisible to See: State Action & Private Property, 5 Tex. A&M L. Rev. 439, 487–88 (2018) ("Either an owner has the right to eject a homeless person from his property or the homeless person has a right to enter . . . to save his life. The state cannot fail to act in cases like this; it must allocate the entitlement to someone and deny it to others . . ."). But see *Woods v. Mass. Dep't of Env't Prot.*, No. BACV200700099A, 2011 WL 7788022, at \*6 (Mass. Super. Ct. Jan. 7, 2011) (holding that the State's not enforcing conditions to permits issued to the claimants' neighbors that allow them to build revetments, which allegedly led to destructive erosion on the claimants' property, is best viewed as a dispute between two private parties rather than one that the State necessarily must resolve).

135. See C.B. Macpherson, The Meaning of Property, *in* Property: Mainstream and Critical Positions 1, 11–12 (C.B. Macpherson ed., 1978) (asserting that property "is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right," such that "if it is not so justified, it does not for long remain an enforceable claim").

136. See Eric T. Freyfogle, Property and Liberty, 34 Harv. Env't L. Rev. 75, 84 (2010); see also Laura S. Underkuffler-Freund, Takings and the Nature of Property, 9 Canadian J.L. & Juris. 161, 201 (1996) (arguing that "[n]o model of property avoids value choice[s]").

of governmental choices that impact the property values against which those taxes are levied.<sup>137</sup> Contemplating such an evaluation raises a number of challenging inquiries. For instance, what makes an assessed property value just? Which specific property-related policies and laws have stood in the way of securing just values? How far geographically might we look for those policies and laws, and how might we counteract their externalizing impacts? How far temporally might we look for those policies and laws, and how might we counteract the effects of choices made in prior lawmaking eras that linger in the present? This Part begins to sketch a framework for developing property reforms that respond to inquiries of this sort. The framework rests on three norms that seem crucial to endorse if society is to chart a course on education finance that leans in any sizable respect on the assessed values at which property taxes take aim. Addressed in turn below, the first of these norms, circumstance sensitivity, leans toward process-based considerations; the second, antidiscrimination, is principally substantive in nature; while the third, legal integration, offers a conceptual bridge between the first two.<sup>138</sup> Each norm is illuminated through the lens of the types of government choices surrounding property—structural, financial, and protective—explored above.

#### A. *Circumstance Sensitivity*

In evaluating governmental choices surrounding property, we must pay attention to how things are rather than how we imagine them to be. Perhaps the point is most clearly articulated in the context of rent control: It seems foolhardy for a governmental entity to choose a level at which to control rents by hypothetical reference to a “typical” tenant in the “typical” situation without accounting for the cost of living in the places where working people actually need to live to perform the work they do.<sup>139</sup> Yet examples of circumstance insensitivity abound across governmental choices that influence land values.

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137. Even in a hypothetical world in which all property values across all school districts are equal, though, the justice of the distribution of educational opportunities requires a just administration. See, e.g., Tara García Mathewson, *New Data: Even Within the Same District Some Wealthy Schools Get Millions More Than Poor Ones*, Hechinger Rep. (Oct. 31, 2020), <https://hechingerreport.org/new-data-even-within-the-same-district-some-wealthy-schools-get-millions-more-than-poor-ones/> [<https://perma.cc/Y3V6-QA3J>] (discussing empirical evidence on intra-districting spending indicating that “53 districts across the United States . . . spent a statistically significant amount less state and local money on high-poverty schools than on lower-poverty schools”); see also Ross Wiener & Eli Pristoop, *How States Shortchange the Districts that Need the Most Help*, in *Educ. Tr., Funding Gaps* 5, 6 (2006) (reporting on studies that estimate the extent to which low-income students need more resources than their peers to reach certain basic educational thresholds).

138. See Mulvaney & Singer, *supra* note 32, at 638–53 (advancing these and other norms for property law reforms in the context of the disparities between wealth and income, on one hand, and essential resources on the other).

139. *Id.* at 609–10.



In the context of *structural choices*, for instance, consider decisionmaking around the government's eminent power to acquire property for public uses upon the payment of just compensation. The exercise of this power can lift depressed areas out of poverty by, for example, providing more adequate and affordable housing for the benefit of many people, including the displaced; however, this same power can perpetrate economic segregation by situating land for upmarket development without concern for those forced to move on.<sup>140</sup> The Supreme Court's conclusion in *Kelo v. City of New London* that condemning nonblighted residential properties to create jobs and amplify the local tax base promotes a "public use" as required by the federal Constitution's Fifth Amendment<sup>141</sup> does not attend to this nuance any more than do the statutory restrictions on condemnation enacted by allegedly outraged state legislatures in *Kelo's* wake.<sup>142</sup> Evaluating the justness of a given locality's exercises of eminent domain demands inquiring into the identities of the people who those efforts are displacing—including, in Professor A.J. van der Walt's terms, "the degree of [their] desperation"<sup>143</sup>—and those of the people who are filling their shoes.<sup>144</sup>

Circumstance sensitivity in the context of *financial choices* respecting property is exemplified in Professor Dorothy Brown's proposal to provide income tax deductions for home mortgage interest only in neighborhoods

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140. See Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 *Calif. L. Rev. Cir.* 349, 371–72 (2014). In this light, cases such as *Kelo* have been contrasted with the likes of *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), which involved the state's exercise of eminent domain not for economic redevelopment but rather to correct what the state viewed as an insalubrious distribution of land holdings. For a recent decision echoing this distinction, see *Mount Laurel Twp. v. Mipro Homes, L.L.C.*, 878 A.2d 38, 49 (N.J. Super. Ct. App. Div. 2005), *aff'd*, 910 A.2d 617, 620 (N.J. 2006) (upholding the condemnation of property for open space from an owner who planned to build large residential houses thereon because, among other reasons, "development of single-family homes that [would] be affordable only to upper-income families would not serve a comparable public interest").

141. 545 U.S. 469, 483–87 (2005).

142. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 *Minn. L. Rev.* 2100, 2114–48 (2009) (surveying the state legislative measures regarding eminent domain post-*Kelo*).

143. A.J. van der Walt, *Housing Rights in the Intersection Between Expropriation and Eviction Law*, in *The Idea of Home in Law: Displacement and Dispossession* 55, 89 (Lorna Fox O'Mahony & James A. Sweeney eds., 2011).

144. Compare John A. Lovett, "Somewhat at Sea": Public Use and Third-Party Transfer Limits in Two US States, in *Rethinking Expropriation Law I: Public Interest in Expropriation* 93, 118–19 (Björn Hoops, Ernst Marais, Hanri Mostert, Jacques Sluysmans & Leon Verstappen eds., 2015) (discussing a case involving the condemnation of a vacant lot owned by an individual who had been absent for more than five years and owed \$37,000 in taxes and penalties; a lot the municipality subsequently transferred to the nonprofit home-building organization Habitat for Humanity (citing *New Orleans Redev. Auth. v. Burgess*, 16 *So.3d* 569, 571–74 (La. Ct. App. 2009))), with van der Walt, *supra* note 143, at 70–74 (discussing an English case involving London's eviction of caravans of Romani Gypsies and Irish Travelers to make way for the 2012 Summer Olympics (citing *Smith & Ors v. Sec. of State for Trade & Indus.* [2007] *EWHC* (Admin) 1013 (Eng.))).

identified as possessing relatively low levels of household wealth due to past discriminatory or otherwise unjust governmental choices.<sup>145</sup> Other proposed alterations to this deduction seek to make similar headway. For instance, William Inden has lamented the idea that homeowners are privy to the deduction whether they build in a revitalizing urban neighborhood or in the middle of an endangered species habitat and, thus, calls for a policy that adjusts the amount of the deduction based on the development's environmental impact.<sup>146</sup>

In terms of the government's *protective choices*, consider the efforts by numerous state legislatures to enact various measures that increase the likelihood that claimants will be awarded compensation for purported regulatory interference with their property rights.<sup>147</sup> Some of these statutes create a remedy of compensation—separate and apart from constitutional takings remedies—when a regulation allegedly diminishes land value beyond a defined threshold<sup>148</sup> or produces an “inordinate burden” on an individual claimant.<sup>149</sup> For example, Mississippi law requires compensation in the face of regulations—say, watering limits—that reduce the market value of a claimant's agricultural lands by more than 40% of their preregulation value.<sup>150</sup> A law of this nature does not account for the reality that compensating a given landowner in such a case would (a) allow them to avoid the costs associated with the challenged regulation (complying with the water restrictions absent compensation) while (b) permitting them to continue to enjoy the positive impact on their property from the

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145. Emily Badger, Can the Racial Wealth Gap Be Closed Without Speaking of Race?, N.Y. Times: The Upshot (May 10, 2019), <https://www.nytimes.com/2019/05/10/upshot/racial-wealth-gap-2020-candidates.html> (on file with the *Columbia Law Review*).

146. William L. Inden, Comment, Compensation Legislation: Private Property Rights vs. Public Benefits, 5 Dick. J. Env't L. & Pol'y 119, 144 (1996).

147. Davidson & Mulvaney, *supra* note 20, at 237–41.

148. See La. Stat. Ann. § 3:3610 (2019) (requiring compensation for prospective state and local regulations that reduce the market value of agricultural or forest lands by more than 20% of their preregulation value); Miss. Code Ann. §§ 49-33-7, -9 (2023) (requiring compensation for prospective state and local regulations that reduce the market value of agricultural or forest lands by more than 40% of their preregulation value); Or. Rev. Stat. § 195.305 (West 2019) (requiring compensation for prospective state and local regulations that reduce market value in certain circumstances).

149. See Fla. Stat. Ann. § 70.001 (West 2022) (requiring compensation for prospective state and local regulations that “inordinately burden” any property). An “inordinate burden” is defined as government action that:

[D]irectly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.

Id. § 70.001(3)(e)(1).

150. Miss. Code Ann. §§ 49-33-1 to -17.

continued compliance of all other landowners in the region.<sup>151</sup> Attending to circumstances would foster appreciation for the distinction between the positive and negative economic effects of a broadly applicable regulation and the decidedly positive economic effects of an exemption to a regulation with which others must continue to comply.<sup>152</sup>

Adopting a circumstance-sensitive norm in evaluating governmental choices surrounding the meaning of property interests offers the promise of accounting for factual differences in ways that protect against treating as the same those situations and settings that, for historical reasons or otherwise, are different.

### B. *Antidiscrimination*

While attending to factual circumstances is critical, we need additional norms to tell us whether those circumstances are acceptable as a matter of social justice. Facts alone cannot, say, define whether a given practice treats people as free, equal, or dignified beings. We need to give normative content to an understanding of these kinds of democratic principles that is consistent with the kind of society we want to advance. One means of doing so is through antidiscrimination laws and policies, which not only must outlaw property relations that deny impartial access to the market—and to the services, including education, that are financed on the basis of market-generated values—but also must undo the continuing effects of past discrimination.<sup>153</sup>

In terms of *structural choices*, the government has deployed transportation infrastructure in especially discriminatory ways. For example, highway construction in urban areas can create physical barriers that perpetuate neighborhood segregation initially brought about by racially restrictive covenants and other racially segregative policies of the past.<sup>154</sup> The city of Rochester has shown, though, that change is possible: It recently dismantled a massive highway loop that had cut through a

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151. The scenario outlined above assumes that either the other landowners who suffered a value diminution exceeding 40% chose not to file a claim, or the other landowners, though they may have suffered a land value diminution, did not experience a diminution exceeding 40%. See Miss. Code Ann. § 49-33-13.

152. Jaeger, *supra* note 80, at 107.

153. See Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 *How. L.J.* 849, 878–79 (2013) (discussing political obstacles to addressing the effects of past discrimination); Erika Wilson, *White Cities, White Schools*, 123 *Colum. L. Rev.* 1221, 1268 (2023) [hereinafter Wilson, *White Cities*] (explaining that “current residential patterns are not [exclusively] the product of individual residential choice but are instead a product of state-facilitated patterns of racial segregation and exclusion”).

154. Adam Paul Susaneck, *Opinion, Mr. Biden, Tear Down This Highway*, *N.Y. Times* (Sept. 8, 2022), <https://www.nytimes.com/interactive/2022/09/08/opinion/urban-highways-segregation.html> (on file with the *Columbia Law Review*).

predominantly Black neighborhood and walled off parts of that neighborhood from the downtown center.<sup>155</sup>

As meticulously documented by scholar Richard Rothstein, many *financial choices* surrounding property laws made in the first half of the twentieth century contributed in substantial respects to the racial segregation of residential neighborhoods that, in many parts of the country, continues to this day.<sup>156</sup> For example, the government gave developers federal loans on the condition that those developers would sell only to whites, preventing diverse, working-class suburban neighborhoods from proliferating;<sup>157</sup> maintained tax-exempt status for churches, educational institutions, and hospitals despite their promotion of racially restrictive covenants;<sup>158</sup> and exploited the racial boundaries it created by providing sizable tax breaks for single-family home ownership while dedicating little funding to transportation projects that could carry African Americans to job opportunities that would diminish “the inequality on which segregation feeds.”<sup>159</sup>

That same era saw *protective choices* made on discriminatory grounds. For instance, state real estate commissions offered licenses to brokers who deemed it their obligation to facilitate and maintain segregated neighborhoods.<sup>160</sup> The state then endorsed the segregative practices of those brokers. For example, the federal Home Owners’ Loan Corporation issued the notorious redlined maps based on maps used by local brokers, whom the National Association of Real Estate Boards had threatened to discipline if they disrupted racially segregated neighborhood patterns.<sup>161</sup>

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155. *Id.*

156. Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 11 (2017) (“Racial segregation in housing was not merely a project of southerners in the former slaveholding Confederacy. It was a nationwide project of the federal government in the twentieth century, designed and implemented by its most liberal leaders.”).

157. See *id.* at 87 (“The FHA had its biggest impact on segregation, not in its discriminatory evaluations of individual mortgage applicants, but in its financing of entire subdivisions, in many cases entire suburbs, as racially exclusive white enclaves.”); see also David M.P. Freund, *Colored Property: State Policy and White Racial Politics in Suburban America* 112–14 (2007) (describing redlining); Thompson Ford, *supra* note 81, at 1848 (“Federally subsidized mortgages often *required* that property owners incorporate restrictive covenants into their deeds.”). The federal government attempted to justify these measures of this nature, explains Erika Wilson, “on the grounds that nonwhite, particularly Black, occupancy in an area diminished the value of the property.” Wilson, *White Cities*, *supra* note 153, at 1233–35.

158. Rothstein, *supra* note 156, at 118.

159. *Id.* at 235.

160. Wilson, *supra* note 153 (manuscript at 3–6) (explaining the role that real estate brokers played in segregating neighborhoods in and around Detroit).

161. Keeanga-Yamahtta Taylor, *How Real Estate Segregated America*, *Dissent Mag.* (2018), <https://www.dissentmagazine.org/article/how-real-estate-segregated-america-fair-housing-act-race> [https://perma.cc/YA9K-PTAN].

The government continues to reinforce these segregative structural, financial, and protective choices of the past by, for instance, disproportionately channeling low-income African Americans who receive housing aid into the segregated neighborhoods that it previously created.<sup>162</sup> But even in the many instances in which the government has changed its mind—be it on the likes of highway construction, lending, or broker licensing—the effects of its initial choices often endure. For instance, a recent empirical study indicates that 75% of neighborhoods “redlined” as credit risks on government maps in the 1930s simply because of their ethnographic and racial makeup continue to face economic struggles.<sup>163</sup> As one advocate described this state of affairs, “It’s as if some of these places have been trapped in the past, locking neighborhoods into concentrated poverty.”<sup>164</sup> It is not an infringement on property rights to adopt laws that can, over time, rectify these types of historical injustices.<sup>165</sup> Quite the reverse: Doing so would *respect* the institution of property by ensuring that property rights are not unjustly denied to some segments of the population because of discrimination. An antidiscrimination norm

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162. Rothstein, *supra* note 156, at 198–99.

163. Bruce D. Baker, Matthew DiCarlo & Preston C. Green III, Albert Shanker Inst., *Segregation and School Funding: How Housing Discrimination Produces Unequal Opportunity* 4 (2022), <https://www.shankerinstitute.org/sites/default/files/2022-05/SEGreportfinal.pdf> [<https://perma.cc/DYS7-32M5>] (discussing the persistence of “segregation even after explicitly racist housing discrimination was outlawed”); Strand & Mirkay, *supra* note 1, at 271–73 (“Maps of many metropolitan areas tell a powerful story. Redlined areas to which Black people and other people of color were historically restricted are often today areas of concentrated racial or ethnic poverty.”); Tracy Jan, *Redlining Was Banned 50 Years Ago. It’s Still Hurting Minorities Today.*, *Wash. Post* (Mar. 28, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/> (on file with the *Columbia Law Review*). The evidence in *Parents Involved in Community Schools v. Seattle School District No. 1* indicating that neighborhood segregation slightly decreased when residential addresses were decoupled from school district assignments potentially offers a rough parallel. 551 U.S. 701 (2007). This evidence could be understood as a counterpoint to the assumption that segregation exists and that we must draw boundary lines in response to it. The boundary lines, on this view, contributed to the segregation in the first place. See, e.g., Erika K. Wilson, *Monopolizing Whiteness*, 134 *Harv. L. Rev.* 2382, 2399 (2021) (contending that drawing local school district boundaries has facilitated the racial monopolization of high-quality schools).

164. Jan, *supra* note 163; see also Baker et al., *supra* note 163, at 7 (highlighting need to intentionally counter the “self-reinforcing” nature of the impact of segregation on school funding, where “the districts that need the most resources tend to receive the fewest” and the “depress[ed] economic outcomes” of these districts’ students perpetuate “the geographic isolation and concentrated poverty that generates lower revenue and higher costs”).

165. The uphill nature of this climb is steep—as Professor Daria Roithmayr explains, for instance, the advantages to whites living in neighborhoods once segregated by explicitly racially discriminatory laws and policies are “locked in” as a result of racial path dependencies, such that the “switching costs” to advance structural changes in terms of upsetting the current residents’ property-based expectations are considerable. Daria Roithmayr, *Locked In Segregation*, 12 *Va. L. Soc. Pol’y & L.* 197, 232–36 (2004).

can prompt an assessment across the full spectrum of governmental choices that influence property values with the aim of ferreting out invidious disparate impacts.

C. *Interdependence*

A third norm—one that in many respects serves as a conceptual bridge that connects the other two—involves recognition of the reality that property laws dovetail. Injustices cannot be alleviated if we tackle these laws in isolation. We must, instead, look to the *full range of laws* to understand not only how benefits and burdens are distributed as a result of a specific government choice but also the reciprocal nature of benefits and burdens within and across interconnected governmental choices. As the California Supreme Court put it, reciprocity of advantage lies

not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.<sup>166</sup>

The assortment of examples available here is incredibly far reaching; indeed, few property laws stand firmly on their own two feet. For a very basic illustration of a situation in which the existence of legal integrations has gone underappreciated, though, consider that states and localities determine the extent of development in fire-prone areas (a *structural choice*) while, in those same areas, federal agencies hold decisionmaking power over fire insurance subsidies (a *financial choice*) and wildfire suppression to protect homes and businesses (a *protective choice*).<sup>167</sup> We cannot simply confine our attention to one type of property choice in assessing the justice of taxing property values to support public education and other services. The justice of the extant allocation of property interests depends on the interconnectedness of these choices.

Ascertaining the particular distributional effect of a particular governmental choice on property values is an immense challenge, given that had one choice not been made, others may have generated different outcomes and altered current opportunities and restrictions in ways that are impossible to know.<sup>168</sup> That this endeavor is challenging, though, is not license to ignore the reality that an incredible breadth of interconnected governmental choices surrounding property are influencing property values. Assessing the justice of any policy that involves taxing such values should involve assessing the justice of these underlying choices in ways that offer a window into their collective impacts.

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166. See *San Remo Hotel L.P. v. City of San Francisco*, 41 P.3d 87, 108–10 (Cal. 2002).

167. Farber et al., *supra* note 125, at 43–44.

168. See Jaeger, *supra* note 80, at 122–26; Schragger, *supra* note 8, at 1830.

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The government chose to construct a bridge that allowed transit to and from the barrier island off Charleston, South Carolina, on which David Lucas and his business partners reaped their fortunes, just as it chose to design highway interchanges in ways that cut off certain neighborhoods from the commercial center of Rochester, New York. The property values against which property taxes are levied on that South Carolinian island and in those Rochester neighborhoods are not determined merely by individual effort and exchange. Rather, they are influenced in substantial part by the government's choices on where and how to build roads.

Decisions regarding transportation infrastructure reflect just one of a vast series of structural, financial, and protective choices that, in concert, constitute the law of property. These choices have marked effects on the values that are taxed in any property tax scheme. To evaluate the justice of a locality's decision to rely on property taxes to fund public education requires evaluating the justice of the property laws in that locality and in those that affect it.

#### CONCLUSION

That governmental choices reflected in our property laws impact property values is in some situations incontrovertibly obvious. Few would deny, for instance, that land that is rezoned to allow greater development capacity usually commands a higher asking price on the market than otherwise similarly situated properties that are not so rezoned, or that land benefitting from a crop subsidy usually commands a higher asking price than otherwise similarly situated properties that are not the beneficiary of such a subsidy. A lack of focus on the full extent to which the government influences property values, though, allows to persist in many circles the assumption that owners, through individual initiative and exchange, earn the weight of the profit potential of the land to which they hold title. Such an assumption is on especially sharp display in the discourse surrounding the question of whether the government should rely in sizable measure on property taxation to fund public education. Centered as it is on local autonomy, revenue stability, and revenue distribution mechanisms, this education finance discourse routinely takes the constitutive elements of its threshold variable—property values—for granted.

This Essay has sought to highlight the ubiquity with which governmental choices about property law impact the property values against which the property taxes that finance education are levied.<sup>169</sup> Such choices go well beyond zoning schemes and crop subsidies; indeed, the

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169. Joseph William Singer, *No Freedom Without Regulation: The Hidden Lesson of the Subprime Crisis* 26–57, 177 (2015) (“Freedom requires regulation, and free markets work only because they are structured by law.”).

breadth and depth of the government's influence on property values through its adoption of property laws and policies—what this Essay terms its structural, financial, and protective choices relating to property—are simply immense. In making choices in favor of one property rule or policy over the alternatives in various contexts, the government is not engaged in a neutral exercise. Rather, the choices it makes are normative assertions about the starting points for the development of the market relationships to which appraisers turn in estimating property values. To evaluate the justness of taxing those values to finance education in a given jurisdiction, therefore, we need to evaluate the justness of the underlying property laws in that jurisdiction.

The Essay has suggested that, to start, such an evaluation should include (i) an examination of a jurisdiction's property laws' sensitivity to the circumstances of how those laws operate in a given community, rather than leaning on assumptions about "typical" communities; (ii) acknowledgment of the current effects of both prior and present-day discriminatory practices surrounding property; and (iii) attention to the ways that property laws do not exist in isolation but instead are intricately integrated. Leaning on these norms to evaluate extant property laws and their alternatives is, of course, a decidedly complex exercise in reflection and prediction. Avoiding such an evaluation, though, requires accepting the status quo of property law—and the property values that the status quo dictates—which is in and of itself staking a claim about justice.<sup>170</sup>

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170. See Hanoch Dagan, *The Craft of Property*, 91 *Cal. L. Rev.* 1517, 1519–20 (2003) (characterizing decisionmaking about maintaining or reforming property institutions as a normative process informed by human values).



# DECOUPLING PROPERTY AND EDUCATION

Nicole Stelle Garnett\*

*Over the past several years, the landscape of K–12 education policy has shifted dramatically, thanks in part to increasing prevalence of parental-choice policies, including intra- and inter-district public school choice, charter schools, and private-school choice policies like vouchers and (most recently) universal education savings accounts. These policies decouple property and education by delinking students’ educational options from their residential addresses. The wisdom and efficacy of parental choice as education policy is hotly debated, including among contributors to this Symposium. This Essay takes a step back from these education-policy debates and examines the underappreciated fact that decoupling property and education also advances at least economic development goals. First, they decrease incentives for center-city residents to move from urban neighborhoods to suburban ones in order to secure space for their children in higher-performing suburban public schools. Second, they reduce the likelihood that urban Catholic and other faith-based schools will close, thereby stabilizing important neighborhood community institutions. Third, they lessen legal and economic barriers to mobility between municipalities within metropolitan regions, including exclusionary zoning, thereby addressing the persistent challenge of intra-metropolitan economic inequality.*

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## INTRODUCTION

Until relatively recently, property and education were inextricably linked because students' publicly funded education options were limited to the district public school assigned to them by virtue of their residential address. Parents—or at least parents with the financial means to do so—“chose” their children's schools by either moving or paying tuition at a private school. Over the last several decades, however, this has changed. A majority of states have now enacted (to varying degrees) policies embracing educational choice for parents by funding a variety of educational options both within and outside of the traditional public school system, including charter schools, private-school-choice programs, and open enrollment for district public schools. Debates about the wisdom and efficacy of these parental-choice policies are intense and far ranging, including among the contributors to this Symposium, as are debates about the appropriate scope of school-choice policies. Some argue that public education expenditures should be concentrated on traditional (district) public schools;<sup>1</sup> others would limit parents' choices to district and charter schools;<sup>2</sup> and still others support private-school-choice programs that enable parents to use public funds to send their children to private and faith-

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1. See, e.g., Erika K. Wilson, *Charters, Markets, and Universalism*, 26 *Geo. J. on Poverty L. & Pol'y* 291, 306–10 (2019) [hereinafter Wilson, *Charters, Markets, and Universalism*] (“Despite charter schools' potential to take advantage of . . . universalist solutions, they often fall short . . . because race within the context of a market for public education creates sub-optimal market conditions and leads to a collective action problem.”); Zachary Jason, *The Battle Over Charter Schools*, *Harv. Ed. Mag.*, Summer 2017, at 22, 26 <https://www.gse.harvard.edu/sites/default/files/edmag/pdfs/2017-SUM-22.pdf> [<https://perma.cc/P66B-ZYKA>] (“The top criticism of charters is that they rob funding from district schools.”); *End Federal Funding for Corporate Charter Schools*, *Nat'l Educ. Ass'n* (Apr. 7, 2022), <https://www.nea.org/resource-library/end-federal-funding-corporate-charter-schools> [<https://perma.cc/QV8N-Z9T9>] (criticizing charter schools for undermining “local public schools and communities” and “taking taxpayer money with no oversight or any overall increase in student learning and growth”); Kimberly Hefling, *NAACP President Tackles Charter School Question*, *Politico* (July 12, 2018), <https://www.politico.com/story/2018/07/12/naacp-president-charter-schools-derrick-johnson-676432> [<https://perma.cc/C5P8-H22E>] (discussing the NAACP's 2016 resolution “that called for a moratorium on the expansion of charter schools until there was more accountability and transparency in their operations”).

2. See, e.g., Nicole Stelle Garnett, *Are Charters Enough Choice? School Choice and the Future of Catholic Schools*, 87 *Notre Dame L. Rev.* 1891, 1904–07 (2012) [hereinafter

based schools (in addition to choices among district and charter schools).<sup>3</sup> Wherever one falls in these debates, there is no question that the American educational landscape has shifted dramatically in the past several decades, thanks in large part to the expansion of policies expanding the publicly funded educational options available to students.<sup>4</sup>

My maximalist views on parental choice as education policy are well established,<sup>5</sup> and it is not the purpose of this Essay to rehash them here. Rather, the purpose of this Essay is to discuss the underappreciated fact that parental choice advances both economic development and education policy goals. This is because parental-choice policies decouple property and education by unlinking students' educational options from their residential addresses. By decoupling property and education, parental-choice policies serve at least three economic development functions: First, they reduce incentives for center-city residents to move from urban neighborhoods to suburban ones in order to secure space for their children in higher-performing suburban public schools.<sup>6</sup> Second, they reduce the likelihood that urban Catholic schools will close by leveling the competitive playing field between low-cost urban private schools, which must charge tuition, and district- and charter-school options, which are tuition free. This leveling is important because, as my previous work with Professor Margaret Brinig demonstrates, Catholic schools—which are rapidly disappearing from urban neighborhoods—are important, stabilizing community institutions in urban neighborhoods.<sup>7</sup> Third, these policies

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Garnett, Enough Choice?] (reviewing scholarship and highlighting that “private-school choice is intensely controversial” while “charter schools enjoy broad, bi-partisan political support”); Andrea Gabor, Opinion, These Ways to Cool the Charter-School Wars Probably Won't, Bloomberg (May 21, 2022), <https://www.bloomberg.com/opinion/articles/2022-05-21/charter-schools-and-public-schools-should-welcome-new-biden-guidelines> (on file with the *Columbia Law Review*) (noting that advocates argue that the public-school system is “essential for democracy” while privatization may “undermine public schools”); Mona Vakilifathi, How Democrats Can Compromise on Charter Schools to Benefit All Students, Brookings Inst.: Brown Ctr. Chalkboard (Aug. 27, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/08/27/how-democrats-can-compromise-on-charter-schools-to-benefit-all-students/> [<https://perma.cc/45GS-LN89>].

3. See, e.g., Alina Adams, Opinion, Adams: Public Funds for Religious Schools? It's Been Happening in NYC for Years, *The74* (July 11, 2022), <https://www.the74million.org/article/adams-public-funds-for-religious-schools-its-been-happening-in-nyc-for-years/> [<https://perma.cc/5QPU-AEDX>] (reporting on New York City's allocation of public funds to religious schools and faith-based day care centers).

4. See Garnett, Enough Choice?, *supra* note 2, at 1904–07.

5. See, e.g., Garnett, Enough Choice?, *supra* note 2, at 1894.

6. See *infra* note 124 and accompanying text.

7. See Margaret F. Brinig & Nicole Stelle Garnett, Lost Classroom, Lost Community: Catholic Schools' Importance in Urban America 9–75 (2014) [hereinafter Brinig & Garnett, Lost Classroom, Lost Community]; *infra* section II.B.

help reduce legal and economic barriers to mobility between municipalities within metropolitan regions, thereby addressing the persistent challenge of intrametropolitan economic inequality.<sup>8</sup>

It is important to note that, while all parental-choice policies decouple property and education to some extent, these economic development effects are likely to be greatest for universal parental-choice policies that maximally delink residential address and educational options by permitting parents to use public funds to send their children to the district, charter, or private school of their choice. In July 2022, Arizona became the first state to embrace universal parental choice—that is, to give parents the option of using some of the public funds allocated for their children’s education at district, private, and charter schools—when it enacted legislation that expanded access to the Arizona’s Empowerment Scholarship Account (ESA) program to all K–12 students.<sup>9</sup> Beginning in September 2022, every child became eligible to receive approximately \$7,000 in public funds to spend on a wide array of educational expenses, including private-school tuition, “microschooling,”<sup>10</sup> online courses, tutoring, textbooks, educational therapies, and curricular materials for homeschooling.<sup>11</sup> Even before this legislation, Arizona offered students the option of enrolling in any public district school in the state (if space was available) or one of over 500 charter schools.<sup>12</sup> Arizona also has three programs granting tax credits for donations to organizations funding private-school scholarships.<sup>13</sup>

A few days after the ESA expansion took effect in Arizona, West Virginia became the second state with universal parental choice when the state supreme court rejected a state constitutional challenge to a similar ESA program, which was enacted in 2021 but was on hold due to litigation.<sup>14</sup> In 2023, Arkansas, Florida, Iowa, and Utah followed suit, enacting

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8. See *infra* section II.C.

9. Empowerment Scholarship Account (ESA) Program, Ariz. Dep’t of Educ., <https://www.azed.gov/esa> [<https://perma.cc/Y373-3LCF>] (last updated Feb. 27, 2023).

10. Andrew Bauld, What Is a Microschool? U.S. News & World Rep. (Apr. 7, 2022), <https://www.usnews.com/education/k12/articles/what-is-a-microschool> (on file with the *Columbia Law Review*) (describing a microschool as a “modern-day one-room schoolhouse” featuring “personalized, student-centered learning and multiple age groups in the same classroom”).

11. Ariz. Dep’t of Education, *supra* note 9.

12. Nicole Stelle Garnett, A Radical Step in the Right Direction, *City J.* (Oct. 2, 2022), <https://www.city-journal.org/arizona-embraces-universal-school-choice> [<https://perma.cc/K84S-26C3>].

13. School Choice in Arizona, EdChoice, <https://www.edchoice.org/school-choice/state/arizona/> [<https://perma.cc/629X-WCLV>] (last visited Jan. 7, 2023).

14. Andrew Handel & Rose Laoutaris, Victory for West Virginia Families: Historic Education Opportunity Program Declared Constitutional, *Am. Legis. Exch. Council* (Oct. 10, 2022), <https://alec.org/article/victory-for-west-virginia-families-historic-education-opportunity-program-declared-constitutional/> [<https://perma.cc/8NNT-VWLF>].

universal education savings account programs,<sup>15</sup> and Oklahoma adopted a universal refundable tuition tax credit.<sup>16</sup> Like Arizona, Arkansas, Florida, Iowa, and Utah also have unrestricted open-enrollment policies for district public schools and charter schools.<sup>17</sup> West Virginia also authorizes both open-enrollment policies and charter schools, but the state currently caps the number of charter schools at ten and allows districts to set their own open-enrollment policies.<sup>18</sup>

Although the recent embrace by six states of universal parental choice reflects, in many ways, a seismic shift in education policy, momentum for parental choice has been building for decades. Thirty states, the District

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15. Stephen Gruber-Miller & Katie Akin, *Jubilant Kim Reynolds Signs Iowa's Seismic 'School Choice' Bill Into Law. What It Means*, *Des Moines Register* (Jan. 24, 2023), <https://www.desmoinesregister.com/story/news/politics/2023/01/24/iowa-governor-kim-reynolds-signs-school-choice-scholarships-education-bill-into-law/69833074007/> [https://perma.cc/FP9X-3YH9] (last updated Jan. 25, 2023); Andrew Handel, *Utah Parents and Students Celebrate Passage of Universal Education Savings Accounts*, *Am. Legis. Exch. Council* (Jan. 30, 2023), <https://alec.org/article/utah-parents-and-students-celebrate-passage-of-universal-education-savings-accounts/> [https://perma.cc/AV87-8ZDC]; Jeremiah Poff, *Florida Legislature Sends Universal School Choice Bill to DeSantis's Desk*, *Wash. Exam'r* (Mar. 23, 2023), <https://www.washingtonexaminer.com/restoring-america/community-family/florida-legislature-sends-universal-school-choice-bill-to-desantiss-desk> [https://perma.cc/DN6A-KQ89]; Brett Rains, *Arkansas Gov. Sarah Huckabee Sanders Signs Education Bill Into Law*, *40-29 News* (Mar. 8, 2023), <https://www.4029tv.com/article/arkansas-sarah-huckabee-sanders-education-bill/43250254> [https://perma.cc/6P89-3VAP] (last updated Mar. 9, 2023).

16. Ben Felder, *Governor Signs Private- And Home-School Tax Credit Bill, One of His Top Priorities*, *Oklahoman* (May 25, 2023), <https://www.oklahoman.com/story/news/politics/government/2023/05/25/oklahoma-private-school-tax-credits-governor-kevin-stitt-signs-bill/70257151007/> [https://perma.cc/Y32Z-58HB]

17. *Arkansas School Choice Roadmap*, *Nat'l Sch. Choice Wk.*, <https://schoolchoiceweek.com/guide-school-choice-arkansas/> [https://perma.cc/2SUG-RFGX] (last updated Apr. 6, 2023); *Florida School Choice Roadmap*, *Nat'l Sch. Choice Wk.*, <https://schoolchoiceweek.com/guide-school-choice-florida/> [https://perma.cc/L7SG-JXA8] (last updated Jan. 19, 2023); *Iowa School Choice Roadmap*, *Nat'l Sch. Choice Wk.*, <https://schoolchoiceweek.com/guide-school-choice-iowa/> [https://perma.cc/R9EP-MP6P] (last updated Jan. 24, 2023); *Utah School Choice Roadmap*, *Nat'l Sch. Choice Wk.*, <https://schoolchoiceweek.com/guide-school-choice-utah/> [https://perma.cc/92Z5-PXSJ] (last updated Jan. 28, 2023).

18. *West Virginia School Choice Roadmap*, *Nat'l Sch. Choice Wk.*, <https://schoolchoiceweek.com/guide-school-choice-west-virginia/> [https://perma.cc/A8RC-74TQ] (last updated Jan. 19, 2023); see also Liz McCormick, *All 5 W.Va. Public Charter Schools on Track to Open in Fall 2022*, *W. Va. Pub. Broad.* (Apr. 22, 2022), <https://www.wvpublic.org/section/education/2022-04-22/all-5-w-va-public-charter-schools-on-track-to-open-in-fall-2022> [https://perma.cc/46WZ-Y63E]; Timothy Sandefur, *Goldwater Stands Up for West Virginia Families*, *Goldwater Inst.* (Sept. 6, 2022), <https://www.goldwaterinstitute.org/goldwater-stands-up-for-west-virginia-families/> [https://perma.cc/YTN2-M5T3].

of Columbia, and Puerto Rico have one or more private-school-choice programs,<sup>19</sup> which collectively enabled 700,000 children to attend a private school during the 2021–2022 school year.<sup>20</sup> Moreover, while 2023 may yet eclipse it, 2021 was the most successful year in private-school-choice history: That year, more than two dozen states enacted, improved, or expanded choice programs, and several states—including Indiana, Ohio, and Wisconsin—opened participation in school voucher programs to a large proportion of K–12 students.<sup>21</sup> And several recently elected governors have made universal private school choice a legislative priority.<sup>22</sup> Public-school-choice policies are even more widespread. Currently, forty-five states authorize charter schools, which now educate over seven percent of all public-school students.<sup>23</sup> From 2019 to 2020, nearly 3.5 million students attended one of 7,700 charter schools in the United States.<sup>24</sup> Finally, many states and school districts offer parents the option of enrolling their children in a district public school other than the one assigned to them by virtue of their residence, sometimes as a matter of right.<sup>25</sup>

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19. School Choice in America, Am. Fed'n for Child., <https://www.federationforchildren.org/school-choice-in-america/> [<https://perma.cc/9LU6-9T56>] (last visited Apr. 9, 2023) [hereinafter Am. Fed'n for Child., School Choice].

20. Our Impact Across America, Am. Fed'n for Child., <https://www.federationforchildren.org/about-us/school-choice-victories/> [<https://perma.cc/H5K4-PJCF>] [hereinafter Am. Fed'n for Child., Our Impact Across America] (last visited Jan. 7, 2023).

21. *Id.*; Am. Fed'n for Child., School Choice, *supra* note 19.

22. See, e.g., Press Release, Off. of Governor Brad Little, Gov. Little Rolls Out 'Idaho First' Plan to Support Schools, Provide Property Tax Relief, Fight Fentanyl in 2023 State of the State and Budget Address (Jan. 9, 2023), <https://gov.idaho.gov/pressrelease/gov-little-rolls-out-idaho-first-plan-to-support-schools-provide-property-tax-relief-fight-fentanyl-in-2023-state-of-the-state-and-budget-address/> [<https://perma.cc/3QWQ-YSRJ>]; Talk Bus. & Pol. Staff, Arkansas Gov.-Elect Sanders Lays Out Education, Criminal Justice Road Map, KUAR (Jan. 9, 2023), <https://www.ualrpublicradio.org/local-regional-news/2023-01-09/arkansas-gov-elect-sanders-lays-out-education-criminal-justice-road-map> [<https://perma.cc/MAB4-JLCW>]; Supporting Every Student's Success at School, Off. of the Governor of Iowa Kim Reynolds, <https://governor.iowa.gov/vision-iowa/school-choice> [<https://perma.cc/T9E6-M73E>] (last visited Feb. 2, 2023).

23. Jamison White, 1. How Many Charter Schools and Students Are There?, Nat'l All. for Pub. Charter Schs. (Dec. 6, 2022), <https://data.publiccharters.org/digest/charter-school-data-digest/how-many-charter-schools-and-students-are-there/> [<https://perma.cc/M8GJ-CWT8>].

24. Charter School Data Dashboard, Nat'l All. for Pub. Charter Schs., <https://data.publiccharters.org/> [<https://perma.cc/5E2C-2AC3>] [hereinafter Charter School Data Dashboard] (last visited Jan. 7, 2023).

25. See *infra* note 49 and accompanying text. This Essay, refers to traditional public schools as “district schools” or “district public schools” in order to distinguish them from charter schools, which all charter school laws also designate as “public schools.” Elsewhere, I have argued that charter schools in many states should be considered private schools for federal constitutional purposes, but this question is beyond the scope of this Essay. Nicole Stelle Garnett, Manhattan Inst., Religious Charter Schools: Legally Permissible? Constitutionally Required? 8–10 (2020), <https://media4.manhattan-institute.org/>

This Essay is organized as follows: Part I describes the current landscape of parental-choice policies that decouple property and education. These policies, which are embraced to varying degrees in different states, include: (1) in a number of states, open-enrollment policies that give parents the option of sending their children to district public schools other than the one geographically assigned to them, including—in some cases—any school with available space in any school district in the state; (2) in forty-five states, charter schools, which are privately operated but publicly funded and called “public schools” in all state laws; (3) in thirty states, private-school-choice mechanisms that enable students to use public funds to attend a private school (or home school). Part II then discusses benefits of decoupling property and education for both central cities and the overall economic health of American metropolitan areas. These include: (1) reducing a major incentive that parents of school-age children have for living in suburbs rather than central cities—namely, the relative academic performance of district public schooling options;<sup>26</sup> (2) helping to stem the tide of urban Catholic school closures, thereby preserving important stabilizing community institutions in urban neighborhoods; and (3) addressing economic inequity within metropolitan areas by reducing suburbs’ incentives to erect barriers to intrametropolitan mobility, including exclusionary zoning policies.

The Essay concludes with some tentative observations about the implications of decoupling property and education for future developments in education law. In particular, these developments further undermine the factual predicates behind so-called “school funding equity litigation,” which seeks to leverage state constitutional provisions guaranteeing a right to education to secure more funding for district public schools in high-poverty communities.<sup>27</sup> As a number of commentators have noted, judicial decisions invalidating public education funding systems on state-constitutional grounds are predicated on somewhat-outdated assumptions about an increasingly tenuous connection between local property taxes and public school resources.<sup>28</sup> By decoupling property and education, parental-choice policies further increase the tensions between the prevailing theory of these funding equity cases and the on-the-ground reality of education finance in many states.

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sites/default/files/religious-charter-schools-legally-permissible-NSG.pdf [https://perma.cc/BV3C-MX7P] [hereinafter Garnett, Religious Charter Schools].

26. See *infra* section II.A.

27. See Katharine Bohrs, COVID-19 Brings School Funding Inequities and Litigation Front and Center, Harv. C.R.-C.L. L. Rev. Amicus Blog (Nov. 5, 2020), <https://harvardcrcl.org/covid-19-brings-school-funding-inequities-and-litigation-front-and-center/> [https://perma.cc/X45M-WY2B] (“An equity argument can be brought under either the state’s equal protection clause or its education clause, and alleges that the state is failing to provide funding in an equitable way across or within districts.”); *infra* note 199 and accompanying text.

28. See *infra* note 215 and accompanying text.

This is an opportune time to consider the economic development benefits of decoupling property and education. Many cities continue to struggle to recover economically from the COVID-19 pandemic, which appears to have permanently and dramatically restructured the nature of work for many Americans.<sup>29</sup> The availability of remote work has reduced a major incentive for professionals to live in urban neighborhoods—proximity to their offices—thereby increasing the risk of financial crisis for center cities.<sup>30</sup> At the same time, serious crime appears to be on the rise in urban centers,<sup>31</sup> increasing the need for stabilizing urban community institutions like Catholic schools and more residential mobility options for low-income and minority residents in metropolitan areas who are all too often priced out of suburban communities by exclusionary zoning policies motivated, in part, by a desire to preserve elite school district status.<sup>32</sup>

### I. DECOUPLING PROPERTY AND EDUCATION: THE CURRENT POLICY LANDSCAPE

Until relatively recently, education and property were inextricably linked because public school assignments were almost universally determined by residential address.<sup>33</sup> In a world of mandatory, geographically based, “zoned” school assignments, property and education are “coupled” because school assignments are determined by residential address. In these circumstances, most parents choose their children’s schools by *moving* to secure seats for their children in academically strong schools and school districts.<sup>34</sup> A small minority do so by paying tuition at a private school.

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29. See, e.g., Roland Li, *Downtown S.F. Still Has North America’s Weakest Pandemic Recovery*, S.F. Chron. (Jan. 18, 2023), <https://www.sfchronicle.com/sf/article/downtown-s-f-still-has-north-america-s-weakest-17726176.php> [<https://perma.cc/HC59-SJC9>] (last updated Jan. 20, 2023); Jimmy Vielkind, *New York Panel Unveils New Vision to Revive Manhattan*, Wall St. J. (Dec. 14, 2022), <https://www.wsj.com/articles/new-york-panel-unveils-new-vision-to-revive-manhattan-11671025421> (on file with the *Columbia Law Review*).

30. See *infra* notes 104–108 and accompanying text.

31. Alexandra Thompson & Susannah N. Tapp, Bureau of Just. Stat., DOJ, NCJ 305101, *Criminal Victimization*, 2021, at 8 (2022), <https://bjs.ojp.gov/content/pub/pdf/cv21.pdf> [<https://perma.cc/57R7-NEKA>] (“From 2020 to 2021, the rate of violent victimization in urban areas rose from 19.0 to 24.5 victimizations per 1,000 persons . . .”).

32. See Vanessa Brown Calder, U.S. Cong., Joint Econ. Comm., SCP Rep. No. 6-19, *Zoned Out: How School and Residential Zoning Limit Educational Opportunity* 7–8 (Nov. 12, 2019), [https://www.jec.senate.gov/public/\\_cache/files/f4880936-8db9-4b77-a632-86e1728f33f0/jec-report-zoned-out.pdf](https://www.jec.senate.gov/public/_cache/files/f4880936-8db9-4b77-a632-86e1728f33f0/jec-report-zoned-out.pdf) [<https://perma.cc/6MNT-5GDY>] (detailing Portland zoning policies that segregate housing by income and “likely drive[] inter-district segregation”).

33. *Id.* at 2.

34. See generally LaToya Baldwin Clark, *Education as Property*, 105 Va. L. Rev. 397 (2019) (discussing various implications of assigning educational opportunities by address, including the prosecution of parents who lie about their addresses to enroll children in good public schools).



Property and education remain “coupled” for many parents in the United States. In 2019, approximately 91% of students in grades one to twelve attended a public school, and 9% attended a private school.<sup>35</sup> The vast majority of students—73%—attended an assigned public school, and 17% attended a chosen public school.<sup>36</sup> In that same year, 42% of parents with children enrolled in grades one to twelve reported that they had the option of sending their children to a school other than the one geographically assigned to them.<sup>37</sup> Increasingly, education policies decouple property and education by empowering parents to send their children to schools of their choice.

This Part describes a variety of decoupling mechanisms. Intra- and interdistrict open-enrollment policies allow parents the option of sending their children to a district public school other than the one geographically assigned to them.<sup>38</sup> Charter schools, which operate outside of the traditional public-school system altogether, must select students by lottery if oversubscribed and typically cannot consider factors such as residential address.<sup>39</sup> Private-school-choice policies, including vouchers, education savings accounts, and tax-credit scholarship programs, give parents financial resources to enroll their children in nonpublic schools. This Part provides a brief sketch of the complex landscape of these parental-choice policies in the United States, all of which decouple property and education by delinking residential address from school assignment.

#### A. *Public-School Choice*

The decoupling of property and education began in an unexpected place and time—suburban Detroit, Michigan, in 1971. That year, a federal district court ruled that the Detroit Public Schools had unconstitutionally discriminated against Black students and that Michigan had violated the Equal Protection Clause by failing to supervise the district to prevent this

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35. Fast Facts: Public School Choice Programs, Nat’l Ctr. for Educ. Stat., <https://nces.ed.gov/fastfacts/display.asp?id=6> [<https://perma.cc/Q8M6-G2BU>] [hereinafter *Fast Facts*] (last visited Jan. 7, 2023); see also *infra* notes 70–73 and accompanying text.

36. *Fast Facts*, *supra* note 35.

37. *Id.* This kind of residential sorting increases as parents’ educational attainment rises. Jack Buckley & Mark Schneider, *School Choice, Parental Information, and Tiebout Sorting: Evidence From Washington, DC*, in *The Tiebout Model at Fifty: Essays in Public Economics in Honor of Wallace Oates* 101, 104 (William A. Fischel ed., 2006) [hereinafter *Buckley & Schneider, School Choice, Parental Information, and Tiebout Sorting*].

38. See *infra* notes 51–54 and accompanying text. It is worth noting that many parents with open-enrollment options do not exercise them, suggesting that they are either pleased with their children’s assigned school (and, in many cases, moved to secure the assignment) or unaware of or unable to access their options. In 2019, for example, 19% of parents who reported that public-school choice was available to them also reported that they moved to their current neighborhood for the assigned public school. *Fast Facts*, *supra* note 35.

39. Adam Gerstenfeld, *What Is a Charter School Lottery?*, Nat’l All. for Pub. Charter Schs. (Feb. 7, 2019), <https://www.publiccharters.org/latest-news/2019/02/07/what-charter-school-lottery> [<https://perma.cc/29WH-GWBN>].

discrimination.<sup>40</sup> To remedy this discrimination, the district court ordered the effective consolidation of (and busing of students between) Detroit and fifty-three surrounding suburban districts.<sup>41</sup> In *Milliken v. Bradley*, the U.S. Supreme Court held that the district court lacked the power to include the suburban districts in the busing remedy because there was no evidence that the suburban school districts had engaged in intentional race discrimination.<sup>42</sup> “Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief,” Chief Justice Warren E. Burger wrote for the majority, “but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country.”<sup>43</sup>

*Milliken* prompted school districts and states to experiment with strategies to achieve integration by means other than busing, including magnet schools and public-school-choice programs that let students choose to attend a district public school other than the one geographically assigned to them.<sup>44</sup> The Supreme Court approved these “compensatory” strategies in 1977,<sup>45</sup> and, since then, magnet schools and public-school choice have proliferated. According to the National Center for Education Statistics, in 2000, there were 1,469 magnet schools in the United States, enrolling 1.2 million students.<sup>46</sup> That number increased to 3,285 schools enrolling 2.6

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40. See *Bradley v. Milliken*, 338 F. Supp. 582, 587–90 (E.D. Mich. 1971), *aff’d*, 484 F.2d 215 (6th Cir. 1973), *rev’d*, 418 U.S. 717 (1974) (explaining that the School-Board-created selective optional attendance zones violated the Fourteenth Amendment by “building upon housing segregation” and “perpetuating racial segregation of students”).

41. See *Bradley v. Milliken*, 345 F. Supp. 914, 916–19 (E.D. Mich. 1972), *aff’d* in part and vacated in part, 484 F.2d 215 (6th Cir. 1973), *rev’d*, 418 U.S. 717 (1974) (“A *de jure* segregation violation having been found, the minimum remedy is maximum actual desegregation . . . .”); see also *Bradley v. Milliken*, 484 F.2d 215, 250–51 (6th Cir. 1973), *rev’d*, 418 U.S. 717 (1974) (affirming an interdistrict desegregation plan as a remedy).

42. See *Milliken v. Bradley*, 418 U.S. 717, 745–47 (1974).

43. *Id.* at 741.

44. Kevin Brown, *Race, Law and Education in the Post-Desegregation Era* 16–17 (2005); see also *id.* at 210–12 (explaining that the *Milliken* decision’s limitations on desegregation plans dramatically limited desegregation and contributed to “white flight” to suburban school districts); Charles T. Clotfelter, *After Brown: The Rise and Retreat of School Desegregation* 45 (2004) (arguing that after *Milliken*, “racial disparities between districts tended to widen”); Gary Orfield & Susan E. Eaton, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* 143 (1996) (discussing the difficulty of how to integrate schools and courts’ attempts to find a solution in *Milliken*); James E. Ryan, *Five Miles Away, A World Apart: One City, Two Schools, and the Story of Educational Opportunity in Modern America* 91–108 (2010) (discussing *Milliken* and its consequences).

45. See *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 290 (1977) (“That the programs are also ‘compensatory’ in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system.”).

46. Table 216.20. Number and Enrollment of Public Elementary and Secondary Schools, by School Level, Type, and Charter, Magnet, and Virtual Status: Selected Years, 1990–91 Through 2016–17, Nat’l Ctr. for Educ. Stat., [https://nces.ed.gov/programs/digest/d18/tables/dt18\\_216.20.asp?referer=schoolchoice](https://nces.ed.gov/programs/digest/d18/tables/dt18_216.20.asp?referer=schoolchoice) [<https://perma.cc/>

million students in 2014.<sup>47</sup> Today, there are 4,340 magnet schools educating over 3.5 million students.<sup>48</sup>

While attendance at a traditional, geographically assigned public school remains the norm in many (if not most) communities (especially in suburbs),<sup>49</sup> the number of students attending “chosen” public schools continues to steadily rise.<sup>50</sup> According to the Education Commission of the States, twenty-four states mandate that school districts adopt open-enrollment policies giving parents the right to enroll their children in a school in a school district other than the one where they reside (subject to available space), and twenty-eight states make interdistrict open enrollment voluntary for districts.<sup>51</sup> Additionally, nineteen states and the District of Columbia require intradistrict open enrollment, giving parents the right to enroll their child in any school within the district in which they reside (again subject to available space), and eleven states make intradistrict open enrollment voluntary.<sup>52</sup> The availability of public-school-choice options, including magnet schools, is greatest in urban districts.<sup>53</sup>

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9T9F-7ZKD] [hereinafter Education Statistics] (last visited Jan. 7, 2023); see also Martin F. Lueken & Michael Q. McShane, *Manhattan Inst., School Districts Without Borders: Public School Students, Families and Teachers Shut In by Education Boundaries* 6 (2022), <https://media4.manhattan-institute.org/sites/default/files/k-12-without-borders.pdf> [<https://perma.cc/G9S9-4SLZ>].

47. Education Statistics, *supra* note 46; see also Lueken & McShane, *supra* note 46, at 6.

48. What Are Magnet Schools, *Magnet Schs. Am.*, <https://magnet.edu/about/what-are-magnet-schools> [<https://perma.cc/Y8U8-54UY>] (last visited Jan. 7, 2023). Although magnet schools enroll roughly the same number of students as charter schools (3.5 million), there are significantly more charter schools (7,800) than magnet schools (4,340). *Id.*; see also Charter School Data Dashboard, *supra* note 24.

49. In 2016, 69% of K–12 students in the United States attended an assigned public school, down from 74% in 1999. School Choice in the United States: 2019, Nat’l Ctr. for Educ. Stat., [https://nces.ed.gov/programs/schoolchoice/ind\\_01.asp](https://nces.ed.gov/programs/schoolchoice/ind_01.asp) [<https://perma.cc/GG3Q-6XCX>] [hereinafter Nat’l Ctr. for Educ. Stat., *School Choice 2019*] (last visited Jan. 7, 2023).

50. See Amanda Waldron & Alison Burke, *Can You Choose Where Your Child Goes to School? How U.S. School Districts Stack Up*, Brookings Inst. (Mar. 1, 2016), <https://www.brookings.edu/blog/brookings-now/2016/03/01/can-you-choose-where-your-child-goes-to-school-how-u-s-school-districts-stack-up/> [<https://perma.cc/W8BM-6JS7>] (finding that the percentage of the nation’s largest school districts that allow parents to choose what school their child attends increased from 25% to 55% between 2000 and 2015); see also Nat’l Ctr. for Educ. Stat., *School Choice 2019*, *supra* note 49.

51. Ben Erwin, Bryan Kelley & Gerardo Silva-Padron, *50-State Comparison: Open Enrollment Policies*, Educ. Comm’n of the States (Mar. 8, 2022), <https://www.ecs.org/50-state-comparison-open-enrollment-policies/> [<https://perma.cc/SLK7-CRBR>].

52. *Id.*

53. Grace Chen, *What Is A Magnet School?*, *Pub. Sch. Rev.* (Feb. 10, 2023), <https://www.publicschoolreview.com/blog/what-is-a-magnet-school> [<https://perma.cc/FNA9-VMBG>] [hereinafter Chen, *What Is a Magnet School?*]; Matthew Chingos & Kristin Blagg, *Whether School Choice Policies Actually Increase Choice Depends on Where You Live*, *Urban Inst.* (Apr. 6, 2017), <https://www.urban.org/urban-wire/>

In 2019, more than 40% of public-school parents reported that one of these public-school choice programs provided them the option of sending their children to a school other than the one geographically assigned to them.<sup>54</sup>

### B. *Charter Schools*

Magnet schools not only opened the door for public-school choice but also arguably paved the way for charter schools.<sup>55</sup> The term “charter school” is often attributed to the late Albert Shanker, the long-time president of the American Federation of Teachers, the nation’s second-largest teachers’ union. In a 1988 speech, Shanker advocated for a “fundamentally different model of schooling” that would “enable any school or any group of teachers . . . within a school to develop a proposal for how they could better educate youngsters and then give them a ‘charter’ to implement that proposal.”<sup>56</sup> In 1991, Minnesota enacted the first charter school law, but the legislation fundamentally altered Shanker’s proposal.<sup>57</sup> The Minnesota legislation envisioned charter schools free from school districts’ control or supervision, operated by private entrepreneurs, and staffed with nonunionized teachers.<sup>58</sup>

At their inception, charter schools were viewed as a relatively modest reform that offered a more moderate alternative to “voucher” policy proposals that would give parents public funds to enroll their children at private and religious schools.<sup>59</sup> Within debates about educational finance,

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whether-school-choice-policies-actually-increase-choice-depends-where-you-live [https://perma.cc/8KPX-YK24].

54. Fast Facts, *supra* note 35.

55. See Chester E. Finn, Jr., Bruno V. Manno & Gregg Vanourek, *Charter Schools in Action: Renewing Public Education* 17 (2000) (“[C]harter schools have cousins in the K–12 family. Their DNA looks much the same under the education microscope as that of lab schools, magnet schools, site-managed schools, and special focus schools . . .”).

56. Albert Shanker, *Restructuring Our Schools*, 65 *Peabody J. Educ.*, no. 3, 1988, at 88, 97–98. Ray Budde, an education professor at the University of Massachusetts, apparently suggested the concept—and used the term—over a decade earlier. Susan Saulny, *Ray Budde, 82, First to Propose Charter Schools, Dies*, *N.Y. Times* (June 21, 2005), [http://www.nytimes.com/2005/06/21/us/ray-budde-82-first-to-propose-charter-schools-dies.html?\\_r=0](http://www.nytimes.com/2005/06/21/us/ray-budde-82-first-to-propose-charter-schools-dies.html?_r=0) (on file with the *Columbia Law Review*).

57. 1991 Minn. Laws 943; see also *Charter Schools*, Minn. Legis. Reference Libr., <https://www.lrl.mn.gov/guides/guides?issue=charter> [https://perma.cc/HP7P-HTHV] (last updated Aug. 2022) (documenting the development of the law and its legislative history).

58. These changes led Shanker to reject the charter schools as “gimmicks” and “quick fixes that won’t fix anything.” Diane Ravitch, *The Death and Life of the Great American School System: How Testing and Choice Are Undermining Education* 122–24 (2010); Paul E. Peterson, *No, Al Shanker Did Not Invent the Charter School*, *Educ. Next*, <http://educationnext.org/no-al-shanker-did-not-invent-the-charter-school/> [https://perma.cc/68KK-N49J] (last updated July 21, 2010).

59. Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 *Vand. L. Rev.* 1, 13 (2017) [hereinafter Garnett, *Sector Agnosticism*]; see

many reformers historically advocated for charter schools as an alternative to private-school-choice programs. For example, Professor Michael Heise has demonstrated that the likelihood that a state enacted or expanded a charter program increased along with the “threat” of publicly funded private-school choice.<sup>60</sup> Heise hypothesized that opponents believed that the appetite for private-school choice would decrease as the range of public-school choice options increased.<sup>61</sup> Heise labeled this reality as “ironic.”<sup>62</sup> School-voucher proponents often intentionally established private voucher programs to fuel demand for publicly funded vouchers, but their efforts backfired and instead fueled political support for charters, which in turn decreased demand for private-school choice.<sup>63</sup> Heise’s observation that charter schools suppress demand for private-school choice has arguably not stood the test of time. In fact, charter schools’ growth—and their acculturation of parents to choice—may be one factor fueling the growing demand for private-school choice.

As they have evolved, however, charter schools have become conceptually and operationally quite distinct from their more modest progenitors. Importantly, unlike magnet schools, they are not operated by the school districts—or by the government at all. Although nominally designated as “public schools,” charter schools are privately operated. Technically, charter schools are created by an agreement—the “charter”—between a charter operator (usually a nonprofit, but in some cases, a for-profit entity) and a charter authorizer (which, depending upon the state, can include a range of governmental, educational, and nonprofit private entities).<sup>64</sup> Charter schools resemble public schools in that they are tuition-free, secular, and open to all who wish to attend; although oversubscribed charter schools generally must admit applicants by lottery, some are permitted to prioritize neighborhood students or test applicants for admission.<sup>65</sup>

Charter schools also share many attributes with private schools. Importantly, they are privately operated—increasingly, by “charter management organizations” that operate multiple schools within and

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also Jack Buckley & Mark Schneider, *Charter Schools: Hope or Hype?* 115–70 (2007) (describing the “spread of vouchers” as “hotly contested”).

60. Michael Heise, *Law and Policy Entrepreneurs: Empirical Evidence on the Expansion of School Choice Policy*, 87 *Notre Dame L. Rev.* 1917, 1923 (2012).

61. *Id.* at 1922–26.

62. *Id.* at 1931.

63. *Id.* at 1929–32.

64. *Charter School Authorizers by State*, Nat’l Ass’n of Charter Sch. Authorizers, <https://www.qualitycharters.org/state-policy/multiple-authorizers/list-of-charter-school-authorizers-by-state/> [<https://perma.cc/M8TD-SAA9>] (last visited Jan. 7, 2023).

65. Nicole Stelle Garnett, *Disparate Impact, School Closures, and Parental Choice*, 2014 *U. Chi. Legal F.* 289, 338; Valerie Strauss, *How Charter Schools Choose Desirable Students*, *Wash. Post* (Feb. 16, 2013), <https://www.washingtonpost.com/news/answer-sheet/wp/2013/02/16/how-charter-schools-choose-desirable-students/> (on file with the *Columbia Law Review*).

across jurisdictions.<sup>66</sup> They have wide-ranging autonomy over staffing, curriculum, budget, and internal organization. Charter schools are also exempt from many regulations governing district public schools (although the extent of this autonomy varies by jurisdiction).<sup>67</sup> And, like private schools, they are schools of choice—that is, parents select them for their children, and public funding “follows the child” to the school, as it does with students participating in private-school-choice programs. These distinctions have led some commentators, including myself, to argue that charter schools should be treated as private schools, at least for federal constitutional purposes.<sup>68</sup> The federal courts of appeals are currently divided over this question.<sup>69</sup>

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66. “Technically, ‘charter management organizations’ are nonprofit entities that manage two or more charter schools, and ‘educational management organizations’ are for-profit entities that do the same. Some states prohibit for-profit entities from operating charter schools.” Garnett, *Sector Agnosticism*, supra note 59, at 13 n.44 (quoting Nat’l All. for Pub. Charter Schs., CMO and EMO Public Charter Schools: A Growing Phenomenon in the Charter School Sector 1, [http://www.publiccharters.org/wp-content/uploads/2014/01/NAPCS-CMO-EMO-DASHBOARD-DETAILS\\_20111103T102812.pdf](http://www.publiccharters.org/wp-content/uploads/2014/01/NAPCS-CMO-EMO-DASHBOARD-DETAILS_20111103T102812.pdf) [<https://perma.cc/U47T-B7XQ>] (last visited Jan. 7, 2023)).

67. Garnett, *Sector Agnosticism*, supra note 59, at 13–14.

68. See, e.g., Garnett, *Religious Charter Schools*, supra note 25, at 8–10 (discussing the “state action doctrine” and its application to charter schools); Garnett, *Sector Agnosticism*, supra note 59, at 52–58 (reviewing case law on the question of when charter schools should be treated as state actors); Preston C. Green III, Bruce D. Baker & Joseph O. Oluwole, *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 *Emory L.J.* 303, 305–15 (2013) (confronting the difficulty of properly categorizing charter schools as state actors); Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 *Cardozo L. Rev.* 1163, 1189–1210 (2013); Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools From Becoming Charter Schools?*, 32 *J.L. & Religion* 227, 245–62 (2017). But see Preston C. Green III, Erica Frankenberg, Steven L. Nelson & Julie Rowland, *Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?*, 18 *Wash. & Lee J.C.R. & Soc. Just.* 253, 271–75 (2012) (examining the implications of treating charter schools as private schools for the constitutional protections of students, particularly students of color); Justin M. Goldstein, Note, *Exploring “Unchartered” Territory: An Analysis of Charter Schools and the Applicability of the U.S. Constitution*, 7 *S. Cal. Interdisc. L.J.* 133, 134–35 (1998) (suggesting that charter schools are unlikely to be subject to constitutional limitations under Supreme Court precedent); Maren Hultden, Note, *Charting a Course to State Action: Charter Schools and Section 1983*, 111 *Colum. L. Rev.* 1244, 1248 (2011) (arguing that charter schools should be treated as state actors in Section 1983 suits brought by students but not employees); Catherine LoTempio, Comment, *It’s Time to Try Something New: Why Old Precedent Does Not Suit Charter Schools in the Search for State Actor Status*, 47 *Wake Forest L. Rev.* 435, 458–61 (2012) (proposing that courts classify charter schools as state actors in cases in which they have acted as education providers rather than employers); Jason Lance Wren, Note, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment’s State Action Doctrine to These Innovative Schools*, 19 *Rev. Litig.* 135, 159–66 (2000).

69. Compare *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 808 (9th Cir. 2010) (holding that an Arizona charter school was not a state actor for employment purposes), with *Peltier v. Charter Day Sch.*, 37 F.4th 104, 106 (4th Cir. 2022) (holding that a North Carolina charter school was a state actor for purposes of dress code), petition for cert. filed no. 22-238.

Today, forty-five states, Washington, D.C., Puerto Rico, and Guam have enacted laws authorizing charter schools, and charter school enrollment has more than doubled in the past twenty years to nearly 3.5 million students.<sup>70</sup> In the 2019–2020 school year, there were 7,700 charter schools operating in the United States, which collectively enrolled 7.2% of all public-school students.<sup>71</sup> A majority of charter schools are located in urban school districts, and in some of these districts, the percentage share of charter-school enrollment often far surpasses the national average.<sup>72</sup> In the 2017–2018 school year, charter schools enrolled more than 40% of public-school students in seven school districts, more than 30% in twenty-one school districts, more than 20% in sixty-four school districts, and at least 10% in 214 school districts.<sup>73</sup> For many reasons, including the fact that most of them are located in urban areas, charter schools enroll a disproportionate share of low-income and minority students.<sup>74</sup>

### C. *Private-School Choice*

Private-school-choice programs, which give children public resources to enable them to attend private schools, serve far fewer students than charter schools. In the current school year, 702,000 children—less than 1% of all K–12 students and approximately 15% of private-school students—participate in a private-school-choice program.<sup>75</sup> These programs

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70. Magnet Schs. of Am., *supra* note 48.

71. Jamison White & Matt Hieronimus, *How Many Charter Schools and Students Are There?*, Nat'l All. for Pub. Charter Schs. (May 20, 2022), <https://data.publiccharters.org/digest/charter-school-data-digest/how-many-charter-schools-and-students-are-there/> [<https://perma.cc/MEZ2-K23W>].

72. Yueting “Cynthia” Xu, 3. *Where Are Charter Schools Located?*, Nat'l All. for Pub. Charter Schs. (Dec. 6, 2022), <https://data.publiccharters.org/digest/charter-school-data-digest/where-are-charter-schools-located/> [<https://perma.cc/2EGB-725G>] (reporting that 58.2% of charter schools are located in urban areas and that those schools enroll 57.4% of charter students nationwide).

73. Kevin Hesla, Jamison White & Adam Gerstenfeld, *A Growing Movement: America's Largest Charter Public School Communities 2* (13th ed. 2019), [https://www.publiccharters.org/sites/default/files/documents/2019-03/rdl\\_napcs\\_enrollment\\_share\\_report%2003112019.pdf](https://www.publiccharters.org/sites/default/files/documents/2019-03/rdl_napcs_enrollment_share_report%2003112019.pdf) [<https://perma.cc/S5ZJ-7NSL>].

74. Yueting “Cynthia” Xu, 2. *Who Attends Charter Schools?*, Nat'l All. for Pub. Charter Schs. (Dec. 6, 2022), <https://data.publiccharters.org/digest/charter-school-data-digest/who-attends-charter-schools/> [<https://perma.cc/9UEX-SDHA>] (“In the past 16 years . . . charter schools have consistently had a higher portion of students of color compared to district schools.”); see also Charter School Data Dashboard, *supra* note 24 (noting the higher proportion of students of color in charter schools); *infra* notes 146–149 and accompanying text.

75. Stephen P. Broughman, Brian Kincel, Jennifer Willinger & Jennifer Peterson, Nat'l Ctr. for Educ. Stat., *Characteristics of Private Schools in the United States: Results From the 2019–20 Private School Universe Survey 2* (2021), <https://nces.ed.gov/pubs2021/2021061.pdf> [<https://perma.cc/V2XZ-EM3A>]; Am. Fed'n for Child., *Our Impact Across America*, *supra* note 20; Press Release, U.S. Census Bureau, *Census Bureau Reports Nearly 77 Million Students Enrolled in U.S. Schools* (Dec. 3, 2019), <https://>

fall into roughly three programmatic buckets: voucher programs, scholarship-tax-credit programs, and education savings account programs (ESAs).<sup>76</sup> Voucher programs give eligible students publicly funded scholarships to attend private schools. These scholarships follow eligible children to the school of their choice upon enrollment. Scholarship-tax-credit programs provide a tax credit against state tax liability for donations to private nonprofit organizations that fund private-school scholarships.<sup>77</sup> These organizations, which have different names in different states, are commonly referred to as SGOs (“scholarship granting organizations”).<sup>78</sup> ESAs give students funds that parents can use for a wide variety of educational expenses, including private-school tuition, homeschooling, microschooning, tutoring, and educational therapies.<sup>79</sup> Missouri has hybrid ESA/SGO programs that grant tax credits for donations to private organizations that then give qualified students education savings accounts. A handful of states also give parents tax deductions or tax credits for their own children’s tuition.<sup>80</sup>

Thirty states, Puerto Rico, and Washington, D.C. currently have at least one private-school-choice program.<sup>81</sup> Sixteen states have voucher programs,<sup>82</sup> twenty-one states have scholarship-tax-credit programs,<sup>83</sup> and eleven states have ESA programs.<sup>84</sup> And there are sixty-four private-school-

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[www.census.gov/newsroom/press-releases/2019/school-enrollment.html](http://www.census.gov/newsroom/press-releases/2019/school-enrollment.html) [<https://perma.cc/Q4HW-NFG4>].

76. Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 *Fordham Urb. L.J.* 703, 705–06 (2015).

77. Jon Huske Davies, *School Choices in the Sunflower State: The Kansas Tax Credit Scholarship for Low-Income Students Program*, 28 *Kan. J.L. & Pub. Pol’y* 197, 209 (2019).

78. *Id.*

79. *Az. Dep’t of Educ.*, *supra* note 11.

80. *Am. Fed’n for Child.*, 2021 *School Choice Guidebook* 4–5 (2021), <https://www.federationforchildren.org/wp-content/uploads/2021/10/Final-Guidebook-2021-Opt.pdf> [<https://perma.cc/QXL5-XQUE>] [hereinafter *School Choice Guidebook*]. In December 2022, the Kentucky Supreme Court invalidated the state’s ESA program on state-constitutional grounds. Peter Greene, *In Kentucky, The Court Rejects Tax Credit Scholarship Voucher Program*, *Forbes* (Dec. 18, 2022), <https://www.forbes.com/sites/petergreene/2022/12/18/in-kentucky-the-court-rejects-tax-credit-scholarship-voucher-program/?sh=3e8af06c1e6a> (on file with the *Columbia Law Review*).

81. *School Choice Guidebook*, *supra* note 80, at 5. The *School Choice Guidebook* places the count at thirty-one, but that count included the now-invalidated Kentucky program.

82. *School Vouchers*, edChoice, <https://www.edchoice.org/school-choice/types-of-school-choice/what-are-school-vouchers-2/> [<https://perma.cc/H3VQ-NHKU>] (last visited Apr. 10, 2023).

83. *Tax Credit Scholarships*, edChoice, <https://www.edchoice.org/school-choice/types-of-school-choice/tax-credit-scholarship/> [<https://perma.cc/SS3C-GP78>] (last visited Apr. 10, 2023).

84. *Education Savings Accounts*, edChoice, <https://www.edchoice.org/school-choice/types-of-school-choice/education-savings-account/> [<https://perma.cc/Q6FD-SFPK>] (last visited Apr. 10, 2023).



choice programs in the United States—twenty-six voucher programs, twenty-six scholarship-tax-credit programs, and twelve ESAs—in addition to two programs that provide refundable tax credits for private-school tuition.<sup>85</sup>

With the exception of recently enacted universal programs, almost all private-school-choice programs restrict student eligibility in some way. For example, sixteen private-school-choice programs (in fourteen states) exclusively serve students with disabilities, or in some cases, children with specific learning needs such as autism or dyslexia.<sup>86</sup> Of the remaining programs, most are means tested, with income limits ranging from 185% to 400% of the federal poverty level.<sup>87</sup> Some means-tested programs have multiple levels of funding depending on family income. For example, Indiana's voucher program has four levels of funding.<sup>88</sup> Eight of the thirty-five means-tested programs are also “failing schools” programs that restrict eligibility to students transferring from a failing public school or zoned to attend a failing school or a failing school district.<sup>89</sup> Other programs combine one or more of these eligibility limitations with others; for example, limiting eligibility to low-income students who are (1) transferring from a public school, (2) beginning kindergarten or high school, (3) siblings of current participants, (4) in the foster-care system, (5) children of active-duty military personnel, or (6) victims of bullying.<sup>90</sup> A number of programs cap the number of participants, either limiting the total number of participants to some specific number of students or pegging enrollment limits to some percentage of total public-school enrollment.<sup>91</sup>

## II. PARENTAL CHOICE AS A POSTPANDEMIC ECONOMIC DEVELOPMENT STRATEGY

Debates about the costs and benefits of parental choice are typically centered (for obvious reasons) on questions of education policy. But parental-choice policies also can serve economic development functions

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85. School Choice Guidebook, *supra* note 80, at 5; see also Nicole Stelle Garnett, *Unlocking the Potential of Private-School Choice: Avoiding and Overcoming Obstacles to Successful Implementation*, Manhattan Inst. (Mar. 16, 2023), <https://www.manhattan-institute.org/unlocking-the-potential-of-private-school-choice> [<https://perma.cc/3DDJ-LXNZ>].

86. School Choice Guidebook, *supra* note 80, at 94.

87. *Id.* at 93–95.

88. *Id.* at 32; Indiana Choice Scholarship Program, edChoice, [https://www.edchoice.org/school-choice/programs/indiana-choice-scholarship-program/#student\\_eligibility](https://www.edchoice.org/school-choice/programs/indiana-choice-scholarship-program/#student_eligibility) [<https://perma.cc/J98Q-KUA4>] (last visited Jan. 7, 2023).

89. School Choice Guidebook, *supra* note 80, at 93.

90. See generally *id.* (documenting eligibility requirements for respective state programs). Before its expansion in 2022, students could qualify for Arizona's ESA program in nine different ways. *Id.* at 18.

91. *Id.*

for at least three reasons discussed in this Part. First, decoupling property and education addresses a major “push factor” that leads many parents with the financial means to do so to exit urban neighborhoods for suburban ones—namely, the perceived need to secure space for their children in suburban public schools. It cannot, however, address the fact that the pandemic has made it easier (or at least more professionally acceptable) for professionals to work from home, thereby blunting a major “pull factor” for urban life, namely the convenience of living in close proximity to work. Second, decoupling property and education may help prevent the further closure of urban Catholic schools, which my previous research has demonstrated help stabilize disadvantaged urban communities.<sup>92</sup> Third, decoupling property and education can help address economic inequalities within metropolitan areas by reducing barriers to mobility within metropolitan regions that prevent lower-income residents of center cities and inner-ring suburbs from moving to more affluent suburban communities.<sup>93</sup> The magnitude of the effects of parental-choice policies on each of these factors above likely turns on the extent of the parental-choice policies themselves. The greater the extent of “decoupling” between property and education—that is, the closer that the parental-choice policies get to universal eligibility—the more extensive the beneficial effects on these three economic development goals.

A. *Urban Residential Stability, Collective Efficacy, and High-Quality Schools*

The years leading up to the COVID-19 pandemic were hopeful ones for American cities. Many center cities’ fortunes improved during the last few decades: Importantly, concentrated poverty declined dramatically, and population losses began to reverse. In fact, beginning in the 1990s, the population growth of many downtowns—the most “urban” areas—outpaced overall population growth in many cities. Some cities experienced

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92. See, e.g., Brinig & Garnett, *Lost Classroom, Lost Community*, *supra* note 7, at 9–75. While my research focuses explicitly and solely on Catholic schools, parental-choice policies may also spur the development of new schooling models that serve a similar stabilizing function in urban neighborhoods.

93. The importance of intrametropolitan mobility to the life prospects of lower-income, less-educated individuals is also well documented, but beyond the scope of this Essay. See, e.g., Edward Glaeser & David Cutler, *Survival of the City: The Future of Urban Life in an Age of Isolation* 299–302 (2021); see also Raj Chetty, John N. Friedman, Nathaniel Hendren, Maggie R. Jones & Sonya R. Porter, *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility* 5–6 (Nat’l Bureau of Econ. Rsch., Working Paper No. 25147, 2018), <https://www.nber.org/papers/w25147> [<https://perma.cc/Y5W5-FLF5>]. The Opportunity Atlas developed by Harvard economist Raj Chetty and his colleagues maps children’s adult outcomes across a variety of factors (including income, education, and incarceration rates) based on the neighborhood where they grew up. Low-income children who grow up in low-income communities have worse outcomes than those who grow up in more affluent ones. These dynamics continue to be studied and documented by the Opportunity Atlas. The Opportunity Atlas, <https://www.opportunityatlas.org/> (last visited Apr. 10, 2023).

overall population losses but still saw their *downtown* populations grow.<sup>94</sup> Even poor neighborhoods began to regenerate, sometimes enough to raise gentrification concerns.<sup>95</sup>

Then came the COVID-19 pandemic. Almost overnight, pandemic mitigation strategies stifled the urban vitality that many commentators (including myself) have long viewed as critical to healthy urban neighborhoods.<sup>96</sup> Social distancing turned neighbors into strangers and commercial districts into ghost towns; office buildings once teeming with economic activity emptied as employees transitioned to remote work or were laid off. Many residents with the financial means to do so decamped to less dense environs in order to reduce the risk of transmission.<sup>97</sup> As Edward Glaeser, one of the foremost scholars of urban economics, has observed, “[t]here are demons that come with density, the most terrible of which is contagious disease.”<sup>98</sup>

A recent Brookings Institute report provides a snapshot of the effects of this reality on major U.S. cities.<sup>99</sup> From 2020 to 2021, among the eighty-eight cities with populations exceeding 250,000, seventy-seven showed either slower growth, greater population declines, or a shift from growth to decline compared to the previous year.<sup>100</sup> Fifty-one registered population losses, including fourteen that had not lost population since 2010.<sup>101</sup> Those cities that experienced population gains were low density and concentrated in the South and Southwest.<sup>102</sup> It is too soon to tell whether and

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94. Rebecca R. Sohmer & Robert E. Lang, *Downtown Rebound*, in *1 Redefining Urban and Suburban America* 63, 65 (Bruce Katz & Robert E. Lang eds., 2003).

95. See, e.g., J. Peter Byrne, *Two Cheers for Gentrification*, 46 *How. L.J.* 405, 405–407 (2003) (identifying causes of gentrification); John A. Powell & Marguerite Spencer, *Giving Them the Old “One-Two”*: Gentrification and K.O. of Impoverished Urban Dwellers of Color, 46 *How. L.J.* 433, 434–35 (2003) (responding to Byrne, *supra*, and highlighting the harms of gentrification).

96. See, e.g., Nicole Stelle Garnett, *Ordering the City: Land Use, Policing, and the Restoration of Urban America* 189–211 (2010) (advocating for land use reforms that would encourage mixed-use neighborhoods and encourage urban vitality); Jane Jacobs, *Death and Life of Great American Cities* 198–233 (1961) (arguing that mixed-use neighborhoods are critical to urban neighborhood health).

97. Glaeser & Cutler, *supra* note 93, at 207–09 (describing the pandemic’s effects on urban vitality).

98. Tim Sablink, *Fed. Rsrv. Bank of Richmond, Has the Pandemic Changed Cities Forever?: COVID-19 Transformed How We Work and Socialize, Which Could Put the Future of Cities on a New Path*, *Econ Focus*, First Quarter, 2021, at 4, [https://www.richmondfed.org/publications/research/econ\\_focus/2021/q1/feature1](https://www.richmondfed.org/publications/research/econ_focus/2021/q1/feature1) [<https://perma.cc/M8XJ-G99U>] (internal quotation marks omitted) (quoting Edward Glaeser).

99. William H. Frey, *Big Cities Saw Historic Population Losses While Suburban Growth Declined During the Pandemic*, *Brookings Inst.* (July 11, 2022), <https://www.brookings.edu/research/big-cities-saw-historic-population-losses-while-suburban-growth-declined-during-the-pandemic/> [<https://perma.cc/T7L5-X2UQ>].

100. *Id.*

101. *Id.*

102. *Id.*

when cities will fully rebound from the devastation wreaked by the pandemic, but there are early signs that the road to recovery will not be an easy one. In the New York City metropolitan area, for example, office occupancy rates are currently under 50%, and only 9% of Manhattan office employees report working in the office five days a week.<sup>103</sup>

The pandemic appears to have radically transformed the nature of work, thereby eliminating a major “pull factor” for city life: proximity to the office. Before the pandemic, remote work—while possible in many cases—was relatively uncommon.<sup>104</sup> The pattern of work established during the Industrial Revolution—leaving home to go to work—persisted; both skilled and unskilled employees continued commuting to workplaces daily, even when technology enabled more remote work.<sup>105</sup> That has changed for millions of Americans, perhaps permanently. A Pew Research Center survey conducted in January 2022 found that nearly 60% of workers who stated that their jobs can be done mainly from home continue to work remotely all or most of the time.<sup>106</sup> Only 23% of the same group reported frequently working from home before the pandemic.<sup>107</sup> And, tellingly, the number of individuals working from home by choice (rather than because their workplace was closed or unavailable) increased from 36% to 61% between October 2020 and January 2022.<sup>108</sup>

As offices reopen, many employers continue to offer workers, especially highly skilled ones, the option of working remotely for at least part of the week.<sup>109</sup> Unsurprisingly, the commercial real estate market has responded: Sales and rentals of office space continue to lag behind retail

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103. Vielkind, *supra* note 29.

104. See Glaeser & Cutler, *supra* note 93, at 223 (“The pre-COVID share of Americans working from home is not entirely known . . . . One 2018 census figure is that . . . 95 percent of Americans left their home on the majority of weekdays.”).

105. *Id.* at 223 (arguing that the development of technology made our economy vastly more “connection intensive” and “turned the past forty years into a centripetal, urbanizing era”).

106. See Kim Parker, Juliana Menasce Horowitz & Rachel Minkin, Pew Rsch. Ctr., COVID-19 Pandemic Continues to Reshape Work in America 4 (2022), [https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2022/02/PSDT\\_2.16.22\\_covid\\_work\\_report\\_clean.pdf](https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2022/02/PSDT_2.16.22_covid_work_report_clean.pdf) [<https://perma.cc/YKD8-8F8Y>].

107. *Id.*

108. *Id.*

109. *Id.* 8–9; see also Ben Popken, Full Return to Office Is “Dead,” Experts Say—And Remote Is Only Growing, NBC News (Jan. 7, 2022), <https://www.nbcnews.com/business/economy/full-return-work-dead-experts-say-remote-only-growing-rcna11323> [<https://perma.cc/8MHB-R5RQ>]; Taylor Telford, Corporate America Is Coming Around to Remote Work. But More Big Changes Lie Ahead., Wash. Post (Jan. 15, 2022), <https://www.washingtonpost.com/business/2022/01/15/remote-work-omicron/> (on file with the *Columbia Law Review*). Not all jobs can be done remotely, of course. The same Pew survey found that approximately 60% of American workers cannot work remotely. Parker et al., *supra* note 106, at 5. Jobs that cannot be done remotely tend to be concentrated among lower skilled, less educated workers. “In May 2020, 36 out of the 49 million who were working remotely came from the cluster of jobs that the Bureau of Labor Statistics calls

and industrial properties.<sup>110</sup> Especially if the shift to remote work is—as appears to be the case—here to stay, retaining middle-class professional families with children is important for cities' long term economic prospects. After all, those with the luxury of working remotely now have one fewer reason to live in cities: the convenience of living in closer proximity to their offices no longer matters.<sup>111</sup>

Although the exact reasons for the prepandemic urban ascendance are the subject of debate, Edward Glaeser and Joshua Gottlieb compellingly argue that cities rebounded because elites increasingly developed an affinity for urban life, especially the social interactions and consumer amenities enabled by dense, mixed-land-use urban environments.<sup>112</sup> The reasons for the shift in lifestyle preferences included rising incomes and educational attainment and, importantly, a dramatic decline in central-city crime rates. Crime and disorder are two major disutilities of urban life; they prevent city dwellers from enjoying urban amenities and decrease opportunities for the informal social interactions that city life fosters. Beginning in the 1990s, as crime rates plummeted and urban officials began to focus on improving the quality of life in public places, city dwellers (and would-be city dwellers) found it easier to enjoy the advantages of urban life.<sup>113</sup>

This explanation supports what urban studies commentator Joel Kotkin has derisively referred to as “the cool city strategy.”<sup>114</sup> At least before the pandemic, many cities' urban development strategies turned on competing for what Professor Richard Florida famously described as “the creative class,” made up of individuals drawn to urban neighborhoods that “have become the prime location for the creative lifestyle and the new amenities that go with it.”<sup>115</sup> To do so, as a 2003 *New York Times* article observed, even “boring” cities began “a hunt for ways to put sex in the city”

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management, professional, and related occupations[;] . . . only 1.5 million out of 22 million employed service workers” reported working remotely. Glaeser & Cutler, *supra* note 93, at 228. Among employed adults, two-thirds of those with advanced degrees and 54% of those with college degrees were working remotely, compared to 15% of those without a college degree. *Id.* at 229. In November 2020, about one in two workers with an advanced degree were telecommuting, compared to fewer than one in ten of those without a college degree. *Id.*

110. Yijia Wen, Li Fang & Qing Li, *Commercial Real Estate Market at a Crossroads: The Impact of COVID-19 and the Implications to Future Cities*, 14 *Sustainability*, no. 19, art. 12851, 2020, at 12–13, <https://www.mdpi.com/2071-1050/14/19/12851/pdf> [<https://perma.cc/E33F-MDTX>].

111. See Glaeser & Cutler, *supra* note 93, at 208–09.

112. See *id.* at 234–36.

113. See Edward L. Glaeser & Joshua D. Gottlieb, *Urban Resurgence and the Consumer City*, 43 *Urban Stud.* 1275, 1286, 1297 (2006).

114. See Joel Kotkin, *Uncool Cities*, *Prospect Mag.* (Oct. 22, 2005), <http://www.prospectmagazine.co.uk/2005/10/uncoolcities> [<https://perma.cc/34BH-V3D3>] (describing efforts by cities to appeal to young professional demographics).

115. Richard Florida, *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community, and Everyday Life* 67–89, 287 (2002).

to attract residents who could “risk moving to neighborhoods with subpar school systems, fixer-upper housing stock or a little street crime.”<sup>116</sup>

Even before COVID, the cool city strategy had limits, including the fact that most young professionals, even hip ones, do not remain unattached and childless forever. When their life circumstances change, they face the same pressures and demands that all parents face—including, importantly, the need for good schools for their children. As Kotkin observed, “[i]t turns out that many of the most prized members of the ‘creative class’ are not 25-year-old hip cools, but fortysomething adults who, particularly if they have children, end up gravitating to the suburbs.”<sup>117</sup> Each year, fewer and fewer families choose to build their lives in city neighborhoods. Before COVID-19, at least, although many central cities were gaining more wealthy residents than they had in decades prior, almost all of them continued to lose families in general and middle-class families in particular. For example, a 2006 Brookings Institution study of twelve large metropolitan areas found that only 23% of central-city neighborhoods had middle-income profiles (that is, incomes between 80–100% of the median metropolitan income), compared to 45% in 1970.<sup>118</sup>

There are many reasons why middle-class families shun cities, including concerns about crime,<sup>119</sup> which appears to be on the rise post-COVID

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116. John Leland, *On a Hunt for Ways to Put Sex in the City*, N.Y. Times (Dec. 11, 2003), <https://www.nytimes.com/2003/12/11/garden/on-a-hunt-for-ways-to-put-sex-in-the-city.html> (on file with the *Columbia Law Review*).

117. Kotkin, *supra* note 114.

118. Jason C. Booza, Jackie Cutsinger & George Galster, Brookings Inst., *Where Did They Go?: The Decline in Middle-Income Neighborhoods in Metropolitan America 4* (2006), [https://www.brookings.edu/wp-content/uploads/2016/06/20060622\\_middleclass.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/20060622_middleclass.pdf) [<https://perma.cc/CBE3-UTMV>].

119. Julie Berry Cullen & Steven D. Levitt, *Crime, Urban Flight, and the Consequences for Cities*, 81 *Rev. Econ. & Stat.* 159, 159–69 (1999) (finding a strong correlation between rising crime rates and suburbanization, especially among highly educated residents with children); see also, e.g., Robert J. Sampson & John D. Wooldredge, *Evidence that High Crime Rates Encourage Migration Away From Central Cities*, 70 *Socio. & Soc. Rsch.* 310, 310–14 (1986) (similar).

after decades of decline,<sup>120</sup> a topic beyond the scope of this Essay. But access to academically strong schools is undoubtedly a major factor.<sup>121</sup> For obvious reasons, most parents prioritize the quality of their children's schools. And for many American families, "school choice" continues to mean residential choice. The 2019 Parent and Family Involvement in Education Survey of the National Household Education Surveys Program found, for example, that 20% of respondents with K–12-age children indicated that they moved to their current residence specifically so that their child would attend a public school there.<sup>122</sup> Of parents with a child attending their residentially assigned school, 80% indicated that the school was their first choice.<sup>123</sup>

As a result, an important—perhaps the most important—reason that cities find it so hard to attract and retain middle-class families is that most middle-class parents believe that suburban public schools will do a better job at educating their kids than urban ones.<sup>124</sup> Charles Tiebout was right: Local governments compete for "consumer-voters."<sup>125</sup> And, without question, the quality of public schools drives the competition for families with

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120. E.g., Jeffrey H. Anderson, *Criminal Neglect: Newly Released Numbers From the National Crime Victimization Survey Confirm that Violent Crime in Urban Areas Is Rising Dramatically*, *City J.* (Oct. 4, 2022), <https://www.city-journal.org/violent-crime-in-cities-on-the-rise> [https://perma.cc/R7WK-Q93V]. From 2020 to 2021, the rate of violent victimization in urban areas increased from 19 to 24.5 victimizations per 1,000 persons, but there was no statistically significant change in suburban and rural areas. See Thompson & Tapp, *supra* note 31, at 8. Crime declined dramatically between 1993 and 2021. *Id.* But see, e.g., Grace Hauck, *Data From Big Cities Suggests Most Violent Crime Fell Last Year. It's Not the Full Picture, Experts Say*, *USA Today* (Jan. 26, 2023), <https://www.usatoday.com/story/news/nation/2023/01/26/crime-rate-homicides-shootings-declined-2022/11075070002/> [https://perma.cc/3QZA-TLM9] ("The trends in 2022 are largely the inverse of what happened in the U.S. amid the height of the COVID-19 pandemic in 2020 and 2021, when violent crime rose . . . According to the report, homicides fell about 4% in 2022 . . ."); Jamiles Lartey, Weihua Li & Liset Cruz, *Ahead of Midterms, Most Americans Say Crime Is Up. What Does the Data Say?*, *Marshall Project* (Nov. 5, 2022), <https://www.themarshallproject.org/2022/11/05/ahead-of-midterms-most-americans-say-crime-is-up-what-does-the-data-say> [https://perma.cc/8E4H-WQCC] ("[V]iolent and property crimes have both been on a steady decline since the early 1990s. Murders did increase . . . in 2020, and have remained elevated, but murder is the least common form of violent crime. Overall, violent crime has remained roughly static since 2010, following decades of decline.").

121. See, e.g., Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 *U. Chi. L. Rev.* 201, 210–14 (2010) [hereinafter Garnett, *Affordable Private Education*].

122. Ke Wang, Amy Rathbun & Lauren Musu, *Nat'l Ctr. for Educ. Stat., NCES 2019-106, School Choice in the United States: 2019*, at 79 tbl.8.1 (2019), <https://nces.ed.gov/pubs2019/2019106.pdf> [https://perma.cc/59JB-RF75].

123. *Id.*

124. Garnett, *Affordable Private Education*, *supra* note 121, at 212.

125. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 423–24 (1956).

children,<sup>126</sup> especially as parents' income and educational attainment rise.<sup>127</sup> For this reason, as discussed in more detail below, parental-choice policies—especially maximalist “universal” choice policies that fully decouple property and education—are an important tool for recruiting and maintaining middle-class and professional families to center cities: These policies eliminate the need to move to secure seats in high-quality public schools.

1. *Why Middle-Class Families Matter.* — Whatever the cause, no one disputes that the disappearance of stable middle-class urban enclaves has not been good for cities. Cities ignore this reality at their own peril. Attracting and retaining middle-class residents promises to increase the stability of urban neighborhoods for a number of related reasons, especially because overall resident wealth is one of the most important indicators of urban success.<sup>128</sup> Another predictor of urban stability is “collective efficacy,” a term sociologists and social psychologists use to describe the “ability of neighborhoods to realize the common values of residents and maintain

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126. See, e.g., Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 6 *J. Pol. Econ.* 957, 968 (1969) (concluding that “people do appear willing to pay more to live in a community which provides a high-quality program of public services,” such as education); see also William A. Fischel, *Why Voters Veto Vouchers: Public Schools and Community-Specific Social Capital*, 7 *Econ. Governance* 109, 117–18 (2006) [hereinafter Fischel, *Why Voters Veto Vouchers*] (similar).

127. The academic struggles of urban school districts were well documented before the pandemic. See, e.g., Glaeser & Cutler, *supra* note 93, at 299–309; Christopher B. Swanson, *Educ. Rsch. Ctr., Cities in Crisis 2009: Closing the Graduation Gap: Educational and Economic Conditions in America's Largest Cities* 13 (2009), <https://epe.brightspotcdn.com/11/c9/ce165102486a982aedd2e8446fa/cities-in-crisis-2009.pdf> [<https://perma.cc/K6MW-Y54T>] (recording statistics on the “graduation crisis” as of 2009); Buckley & Schneider, *School Choice, Parental Information, and Tiebout Sorting*, *supra* note 37, at 104. The most recent result on the National Assessment of Educational Progress, or the “Nation’s Report Card,” however, suggests that things got much worse in the last three years: Math and reading scores declined precipitously in many urban districts; for some, far more so than the overall sobering national results. See, e.g., Editorial, *The School Lockdown Catastrophe*, *Wall St. J.* (Oct. 24, 2022), [https://www.wsj.com/articles/the-school-lockdown-catastrophe-naep-test-results-national-assessment-of-educational-progress-11666643369?mod=article\\_inline](https://www.wsj.com/articles/the-school-lockdown-catastrophe-naep-test-results-national-assessment-of-educational-progress-11666643369?mod=article_inline) (on file with the *Columbia Law Review*) (recording educational declines in urban districts including Detroit, Milwaukee, Baltimore, Philadelphia and Cleveland). And, whether these results are attributable to extended school closures or not—in my view, there is no question that they are—extended school closures generated frustration among parents, many of whom turned to other educational options during the pandemic, including private schools, charter schools, and homeschooling. As a result, many urban districts have not recovered from COVID-related enrollment declines. Collin Binkley, *Cities Face Crisis With Smaller Schools as Enrollment Shrinks in Wake of Pandemic*, *PBS Newshour* (Aug. 1, 2022), <https://www.pbs.org/newshour/education/cities-face-crisis-with-smaller-schools-as-enrollment-shrinks-in-wake-of-pandemic> [<https://perma.cc/MBL9-UQR9>].

128. See Glaeser & Cutler, *supra* note 93, at xvi (“There are three common measures of urban success[:] . . . earnings, population growth, and housing prices.”).



effective social controls.”<sup>129</sup> Numerous studies demonstrate that neighborhoods with low collective efficacy levels exhibit more signs of social distress—for example, they are more dangerous and disorderly, and residents are more fearful of being victimized—than those with higher levels.<sup>130</sup> Unsurprisingly, residents who do not know their neighbors—or, worse, are afraid of them—will not enlist their help in addressing community problems.<sup>131</sup>

Collective efficacy increases along with residential tenure and homeownership, suggesting that the most successful, safest city neighborhoods will ultimately be the kinds of places where people choose to live their lives long term—to live, work, and raise families. For example, in a major study of 343 Chicago neighborhoods, Professors Robert Sampson, Stephen Raudenbush, and Felton Earls found that residential stability, measured by average residential tenure and homeownership levels, was one of three major factors explaining neighborhood variation in collective efficacy.<sup>132</sup> They also found that collective efficacy, in turn, mediated the negative effects of the other two factors—economic disadvantage and immigration—enough to reduce violent victimization in a community.<sup>133</sup> These findings are consistent with other social science research linking residential tenure and homeownership, especially of single-family homes, with high collective efficacy levels.<sup>134</sup> This connection between homeownership and residential tenure is, of course, easily explained. Homeowners have not only economic incentives to organize in order to address neighborhood

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129. Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 *Science* 918, 918 (1997). Although collective efficacy is sometimes defined as a form of social capital, it might be better understood as a measure of how successfully members of a community can harness social capital. Tracey L. Meares, *Praying for Community Policing*, 90 *Calif. L. Rev.* 1593, 1604 (2002).

130. See, e.g., Chris L. Gibson, Jihong Zhao, Nicholas P. Lovrich & Michael J. Gaffney, *Social Integration, Individual Perceptions of Collective Efficacy, and Fear of Crime in Three Cities*, 19 *Just. Q.* 537, 540–42 (2002) (collecting literature).

131. See, e.g., Matthew R. Lee & Terri L. Earnest, *Perceived Community Cohesion and Perceived Risk of Victimization: A Cross-National Analysis*, 20 *Just. Q.* 131, 138 (2003) (noting that the “subjective side” of community cohesion is relevant because “individuals must actually perceive their communities to be cohesive”); Pamela Wilcox, Neil Quisenberry, Debra T. Cabrera & Shayne Jones, *Busy Places and Broken Windows? Toward Defining the Role of Physical Structure and Process in Community Crime Models*, 45 *Socio. Q.* 185, 188–89 (2004) (highlighting the harms to resident-based social control as a result of “attracting outsiders, limiting familiarity of faces, . . . and providing ‘holes’ in the resident-based fabric for which no resident will take responsibility”).

132. Sampson et al., *supra* note 129, at 921.

133. *Id.* at 923. This is particularly important because crime and the fear of crime tend to undermine residential stability. See Cullen & Levitt, *supra* note 119, at 159–69; Sampson & Wooldredge, *supra* note 119, at 310–14.

134. See, e.g., Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 *Am. J. Socio.* 603, 610 (1999).

problems but also social incentives: Social integration into a neighborhood naturally increases over time, providing opportunities to build trust relationships.<sup>135</sup>

City officials should also consider the historical connection between middle-class families' departure from urban neighborhoods and center cities' economic struggles, both of which can be traced in part to mass suburbanization in the postwar decades.<sup>136</sup> There is no question that postwar suburbanization left metropolitan areas more racially and economically segregated.<sup>137</sup> Middle-class and working-class white residents moved to the suburbs, at least in part because of a desire to avoid school integration efforts.<sup>138</sup> As they left, urban communities became more racially isolated, and urban public schools resegregated.<sup>139</sup> Racially isolated urban neighborhoods, in turn, struggled with poverty, crime, and unemployment, and racially isolated schools struggle with declining academic achievement.<sup>140</sup> Although race was, of course, not the only factor leading

135. Gibson et al., *supra* note 130, at 552.

136. Garnett, *Affordable Private Education*, *supra* note 121, at 210. Historians date the origins of the urban crisis differently. Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago, 1940–1960*, at xii–xiii (1983) (examining Chicago during World War II and the postwar period to assess the forces that contributed to the city's rigid residential segregation); Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* 4–6, 140–41 (1996) (examining Detroit as a case study of the urban crisis in America and tracing its origins to the 1940s and two related problems: economic inequality and its disproportionate burden on African Americans).

137. E.g., William Julius Wilson, *When Work Disappears* 25–41 (1996); Richard Arnott, *Economic Theory and the Spatial Mismatch Hypothesis*, 35 *Urb. Stud.* 1171, 1171–72 (1998); John Kain, *Housing Segregation, Negro Employment, and Metropolitan Decentralization*, 82 *Q.J. Econ.* 175, 197 (1968).

138. See, e.g., Charles T. Clotfelter, *After Brown: The Rise and Retreat of School Desegregation* 81–86 (2004) (using school enrollment data to measure the rate of white families leaving desegregated districts); Kevin M. Kruse, *White Flight: Atlanta and the Making of Modern Conservatism* 167–69 (2007) (reporting that the desegregation of schools in Atlanta, Georgia, inflamed local white residents who feared that the transition would jeopardize their homeownership); John T. McGreevy, *Parish Boundaries: The Catholic Encounter With Race in the Twentieth-Century Urban North* 83–84, 104–07 (1996) (describing some white Catholic communities' resistance to residential integration in urban neighborhoods during the mid-twentieth century).

139. See, e.g., Brown, *supra* note 44, at 9–25; LaToya Baldwin Clark, *Barbed Wire Fences: The Structural Violence of Education Law*, 89 *U. Chi. L. Rev.* 499, 510–22 (2022) [hereinafter Baldwin Clark, *Barbed Wire Fences*] (“[R]edlining to restrict the availability of home loans in Black areas, developing public housing that created monoracial urban spaces, passing zoning laws that slowed growth in some regions to only single-family homes that were financially out of reach for most Black families, and enforcing racially restrictive covenants . . . created the segregation that we see today.”).

140. Baldwin Clark, *Barbed Wire Fences*, *supra* note 139, at 510–22 (“[W]hen the state withdraws support for the wellbeing of its citizens . . . [it] begets social suffering[,] . . . creates vulnerability[,] . . . [and] traps people in spaces of violence, poverty, and subordination where pain and suffering concentrate. Mobility opportunities are low in these spaces, and ‘escape is difficult, if not impossible.’” (footnote omitted) (quoting Douglas S. Massey, *Getting Away With Murder: Segregation and Violent Crime in Urban America*, 143 *U. Pa. L. Rev.* 1203, 1216 (1995))); see also Michelle Wilde Anderson, *Cities Inside Out: Race,*

to postwar suburbanization, it was a major one.<sup>141</sup> The pull to suburbs, however, now extends to all racial groups. Indeed, in recent years, minorities also have suburbanized. The 2020 Census found that the bulk of suburban population gains between 2010 and 2020 were attributable to an influx of *minority* suburban residents. A majority of each ethnic group in major metropolitan areas now reside in suburbs: 76% of the white population, 77% of the Asian population, 61% of the Latino population, and 54% of the Black population.<sup>142</sup>

2. *Parental Choice and the Recruitment and Retention of Families.* — Public education reforms, including inter- and intradistrict public-school choice, undoubtedly help cities attract and retain families by giving children educational options other than the public school geographically assigned to them. For example, more than half of urban school districts operate magnet schools, compared to less than 10% of suburban school districts.<sup>143</sup> Urban school districts are also more likely to have open-enrollment policies offering families the option of sending their children to any school in the district, subject to space limitations.<sup>144</sup> Charter schools are also overwhelmingly (in most states, at least) an urban phenomenon: Nearly 58% are currently located in urban areas.<sup>145</sup> But, at least before

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Poverty, and Exclusion at the Urban Fringe, 55 *UCLA L. Rev.* 1095, 1118–24 (2008) (examining such effects in rural and unincorporated rural areas).

141. A plausible case can be made that postwar suburbanizers were the last strands of a well-frayed urban fabric. See Robert Bruegmann, *Sprawl: A Compact History* 24–50 (2005) (describing the process of residential and retail decentralization from urban to suburban areas in American and European cities in late-nineteenth and early-twentieth centuries); Gerald Gamm, *Urban Exodus: Why the Jews Left Boston and the Catholics Stayed* 24–29 (1999) (“The white-ethnic exodus since World War II, though more visible because of its association with racial change, was only the late stage of an exodus that was already under way in the 1920s.”). Our cities began decanting before the turn of the twentieth century, and middle-class “flight” from urban centers was well underway by the 1920s. See generally Kenneth Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 73–133 (1985) (describing the late-nineteenth-century growth of wealthy suburban communities outside of Boston, Chicago, Philadelphia, and New York that was enabled by rail systems). As Gerald Gamm argues in his fascinating study of Boston’s Dorchester neighborhood, a majority of Protestant and Jewish families exited urban neighborhoods well before the Second World War. Gamm, *supra*, at 11–17, 27–29. The white urban enclaves that remained intact well into the 1960s tended to be Catholic, where religious rules fostered an allegiance to geographic parishes and, importantly, schools, which rooted residents to their neighborhoods. *Id.* at 237–47. Postwar suburbanization, Gamm argues, occurred when Catholics’ attachments to their neighborhoods and parishes finally gave way. See *id.* at 11–24 (describing a pattern of Catholic families remaining rooted to their religious and neighborhood institutions and resisting suburbanization longer than other communities).

142. William H. Frey, *Today’s Suburbs Are Symbolic of America’s Rising Diversity*, Brookings Inst. (June 15, 2022), <https://www.brookings.edu/research/todays-suburbs-are-symbolic-of-americas-rising-diversity-a-2020-census-portrait/> [https://perma.cc/3MFD-EEDS].

143. Chen, *What Is a Magnet School?*, *supra* note 53.

144. See *supra* notes 48–52 and accompanying text.

145. Charter School Data Dashboard, *supra* note 24; see also Erica Frankenberg, Genevieve Siegel-Hawley & Jia Wang, *The C.R. Project, Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards* 57 (2010),

COVID-19, middle-class families had not widely embraced charter schools as an option for their kids. For a variety of reasons, including many charter schools' explicit mission of serving disadvantaged students, charter schools disproportionately educate lower-income minority students,<sup>146</sup> leading some civil rights leaders to raise concerns about racial isolation within them.<sup>147</sup> Currently, according to the National Alliance for Public Charter Schools, nearly 60% of charter-school students qualify for the federal free and reduced lunch program, and nearly 65% are racial minorities.<sup>148</sup> This may change over time: Some networks of charter schools—for example, the Great Hearts schools (which focus on classical education) and BASIS schools (which focus on STEM)—do attract many middle-class families, but not necessarily in urban communities.<sup>149</sup>

Without discounting the importance of public education reforms, however, it is also important to recognize that, for many parents, deciding to live in a major city also entails a decision to send their children to private schools. The evidence is difficult to contest. The overall proportion of American schoolchildren attending a private school has held relatively

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<https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf> [<https://perma.cc/8KYF-M9XK>] (“[A]nalyzes of charter school enrollments have noted how the concentration of charter schools in urban areas skews the charter school enrollment towards having higher percentages of poor and minority students.”). Whether charter schools are more racially isolated than district public schools in similar neighborhoods is a contested question. See, e.g., Brian P. Gill, *Charter Schools and Segregation: What the Research Says*, Educ. Next, <https://www.educationnext.org/charter-schools-segregation-what-research-says/> [<https://perma.cc/H477-BYWJ>] (last updated Nov. 19, 2018) (reviewing literature); Thomas Monarrez, Brian Kisida & Matthew M. Chingos, *Do Charter Schools Increase Segregation?*, Educ. Next, <https://www.educationnext.org/do-charter-schools-increase-segregation-first-national-analysis-reveals-modest-impact/> [<https://perma.cc/TJ7U-U7EG>] (last updated July 24, 2019) (finding compelling evidence that over the last twenty years charter schools have led to slightly higher rates of segregation but noting that impact may be related to the purpose of some charter schools to serve specific populations of students).

146. See Wilson, *Charters, Markets, and Universalism*, *supra* note 1, at 293–95 (2019) (“The growth of the charter school movement is particularly prevalent in predominately poor and minority neighborhoods.”).

147. Charter schools appear to be more effective at educating disadvantaged children than students from middle-class families. Grace Chen, *More Truths Revealed About Charter Schools: Which Students Do They Serve Best?*, *Pub. Sch. Rev.* (June 25, 2012), <https://www.publicschoolreview.com/blog/more-truths-revealed-about-charter-schools-which-students-do-they-serve-best> [<https://perma.cc/7A7U-YKWT>] (citing one study showing that “charter schools were more effective with lower-income and lower-achieving students, but less effective with high-income, high-achieving students”).

148. Charter School Data Dashboard, *supra* note 24.

149. Richard Whitmire, *More Middle Class Families Choose Charters*, Educ. Next, <https://www.educationnext.org/middle-class-families-choose-charters/> [<https://perma.cc/9P58-HXXL>] (last updated Apr. 7, 2015). One of the contributors to this Symposium, Professor Erika Wilson, has raised concerns that white middle-class families have begun to exit district schools for predominantly white charter schools. See Erika K. Wilson, *The New White Flight*, 14 *Duke J. Const. L. & Pol’y* 233, 256–59 (2019).

steady—around 10%—for decades, as has that of private-school students disproportionately residing in urban areas. Across all income categories, the percentage of K–12 students enrolled in private schools is higher in cities than suburbs, and the proportion of private-school enrollment increases along with income.<sup>150</sup> In 2008, 31% of students living in the Seattle School District were enrolled in private schools; in San Francisco, this number was approximately 25%, and in Chicago, Denver, and New York, it was approaching 20%.<sup>151</sup>

There are multiple reasons why urban families choose private schools over charter and district ones, including competition for scarce space. Space in sought-after public schools can be scarce, including because some types of public schools—namely, magnet schools—can set admissions requirements (and often do). Sometimes these requirements are based on standardized tests or student GPAs. Some magnet schools exclude students for past disciplinary issues: For example, they do not admit students who have previously been suspended. Still others require interviews or parent meetings to ensure that the student is a good fit for the school. Some have lotteries, but others consider applications on a rolling basis, giving motivated parents a leg up on securing spots for their children.<sup>152</sup> Competition for entry into the academically strongest magnet schools is frequently fierce, as recent debates about whether test-based admissions ought to be scrapped in order to achieve racial diversity highlight.<sup>153</sup>

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150. Richard J. Murnane, Sean F. Reardon, Preeya P. Mbekeani & Anne Lamb, *Who Goes to Private School?*, Educ. Next, <https://www.educationnext.org/who-goes-private-school-long-term-enrollment-trends-family-income/> [<https://perma.cc/HA84-H9NP>] (last updated July 17, 2018).

151. See, e.g., Gerald E. Frug & David J. Barron, *City Bound: How States Stifle Urban Innovation* 129 (2008) (providing statistics of private school enrollment in several major cities); Ingrid Gould Ellen, Amy Ellen Schwartz & Leanna Stiefel, *Can Economically Integrated Neighborhoods Improve Children’s Educational Outcomes?*, in *1 Urban and Regional Policy and Its Effects* 181, 200 (Margery Austin Turner, Howard Wial & Harold Wolman eds., 2008) (noting that, in 2000, 18.4% of elementary and secondary students in New York City were enrolled in private schools and that the probability of private-school attendance increases as income levels rise).

152. Lueken & McShane, *supra* note 46, at 6.

153. See Troy Closson, *In a Reversal, New York City Tightens Admissions to Some Top Schools*, N.Y. Times (Sept. 29, 2022), <https://www.nytimes.com/2022/09/29/nyregion/nyc-schools-admissions.html> (on file with the *Columbia Law Review*) (“The question of whether to base admissions on student performance prompted intense debate . . . Asian American families [argued] that the lotteries excluded their children . . . . But Black and Latino students are significantly underrepresented at selective schools, and some parents . . . hoped the previous admissions changes would become permanent to boost racial integration . . . .”); Campbell Robertson & Stephanie Saul, *Judge Strikes Down Elite Virginia High School’s Admissions Rules*, N.Y. Times (Feb. 25, 2022), <https://www.nytimes.com/2022/02/25/us/thomas-jefferson-school-admissions.html> (on file with the *Columbia Law Review*) (reporting that a federal judge struck down new admissions policies at a Virginia school that eliminated standardized testing requirements because the new rules left Asian American students “disproportionately deprived of a level playing field”

Parents seeking to take advantage of other public-school-choice options also frequently confront scarcity issues. As mentioned previously, both intra- and interdistrict choice is expanding: Thousands of students are taking advantage of open-enrollment opportunities in states where they are available. To give one example, more than 3,800 out-of-district students attend schools in Arizona's Scottsdale Unified School District, and more than 5,500 students enroll in a school other than their neighborhood school.<sup>154</sup> But, even in states with open-enrollment policies like Arizona, students must apply to transfer from their assigned schools, and schools and school districts are typically permitted (or required) to allocate seats to students who are residentially assigned to the school. And, since space tends to be a premium in the strongest schools, inter- and intradistrict choice is often illusory for many parents.<sup>155</sup> Many states also allow or require schools and school districts to restrict the number of out-of-district transfer students.<sup>156</sup> For example, some states place conditions on interdistrict transfers, in particular, limiting transfers to students attending failing schools or school districts (as is the case in many private-school-choice programs). Even when space is available, transportation is rarely provided for students transferring between schools and districts, creating a major logistical hurdle to interdistrict transfers.<sup>157</sup> For all these reasons, a more radical version of interdistrict choice is likely needed to sufficiently decouple property and education to incentivize parents with school-age children to remain in urban communities.

Scarcity of space is also an issue for parents seeking to enroll their children in charter schools.<sup>158</sup> In recent years, after long enjoying strong

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(internal quotation marks omitted) (quoting *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21cv296, 2022 WL 579809, at \*6 (E.D. Va. Feb. 25, 2022)).

154. Lueken & McShane, *supra* note 46, at 6; see also Mike McShane, Solving the School Choice Transportation Puzzle, *Forbes* (Mar. 11, 2020), <https://www.forbes.com/sites/mikemcshane/2020/03/11/solving-the-school-choice-transportation-puzzle/?sh=4644861a5119> (on file with the *Columbia Law Review*).

155. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *Yale L.J.* 2043, 2064–65 (2002) (describing the different varieties of school choice plans).

156. Lueken & McShane, *supra* note 46, at 6–7.

157. Michael Q. McShane & Michael Shaw, edChoice, *Transporting School Choice Students: A Primer on States' Transportation Policies Related to Private, Charter, and Open Enrollment Students* 5–7 (2020), <https://files.eric.ed.gov/fulltext/ED605559.pdf> [<https://perma.cc/L96R-5K6W>].

158. See, e.g., *Top 5 Facilities Struggles for Charter Schools*, Nat'l All. for Pub. Charter Schs. (Dec. 13, 2017), <https://www.publiccharters.org/latest-news/2017/12/13/top-5-facilities-struggles-charter-schools#:~:text=Not%20surprisingly%2C%20nearly%20half%20of,anticipated%20enrollment%20in%20five%20years.> [<https://perma.cc/B7XS-3RPA>] (“Nearly half of charter schools [responding to a national research survey] . . . were in school buildings that did not have space for their anticipated enrollment in five years.”); Christy Wolfe, *Opinion: Charter Schools Can't Grow If They Can't Afford Buildings for Their Students. Some Ways the Federal Government Can Help*, *The74* (Mar. 26, 2018), <https://www.the74million.org/article/opinion-charter-schools-cant-grow-if-they-cant-afford-buildings-for-their-students-some-ways-the-federal-government-can-help/> [<https://perma.cc/E88T-CHV7>] (“[S]chool facilities are one of the biggest obstacles to expanding

support among education reformers on both the left and the right, charter schools have become intensely controversial.<sup>159</sup> One result of the growing opposition to charter schools is that operators now face major hurdles when seeking authorization to open a new school.<sup>160</sup> This is especially the case when they seek authorization from school districts, which account for 90% of the country's authorizers. For example, districts authorized 222 fewer charter schools in 2016 than 2013.<sup>161</sup> During those four years, nearly two-thirds of school districts that already had charter schools did not authorize a single new charter.<sup>162</sup> In states with nondistrict authorizers, most charter school authorization activity has shifted to state education agencies and—where state law makes them an option—-independent charter boards. This slowdown in authorizations causes many charter schools to have long waitlists, especially in urban areas.<sup>163</sup>

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charter school options.”); see also Thomas Sowell, *Charter Schools and Their Enemies* 51–67 (2020) (“[P]ower to deny classroom space to charter schools [is] in the hands of local school district officials, who can protect their existing traditional public schools from competition by limiting charter schools’ capacity to expand and admit the many students on their waiting lists.”).

159. See, Gabor, *supra* note 2 (“[R]ancor between charter and public-school proponents is so toxic that a potentially mutually beneficial Biden proposal for granting funding to charter schools . . . seems almost impossible to achieve.”); Erin Aubry Kaplan, *Opinion, School Choice Is the Enemy of Justice*, *N.Y. Times* (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/opinion/charter-schools-desegregation-los-angeles.html> (on file with the *Columbia Law Review*) (arguing that charter schools are often “intensely segregated” despite their “promise[] to equalize education”); Robert Maranto, *Opinion, The Biden Administration Has Quietly Declared War on Charter Schools*, *N.Y. Post* (Mar. 28, 2022), <https://nypost.com/2022/03/28/the-biden-administration-declares-war-on-charter-schools/> [<https://perma.cc/H25E-KGHV>] (arguing that the “decades-long honeymoon period” between Democratic officials and charter schools has ended and that “the US Department of Education has declared war on charter schools”).

160. See Nat’l Ass’n of Charter Sch. Authorizers, *Reinvigorating the Pipeline: Insights Into Proposed and Approved Charter Schools* 3, 12 (2019), [https://www.qualitycharters.org/wp-content/uploads/2019/03/Reinvigorating-the-Pipeline\\_March\\_2019\\_FINAL\\_Web-1.pdf](https://www.qualitycharters.org/wp-content/uploads/2019/03/Reinvigorating-the-Pipeline_March_2019_FINAL_Web-1.pdf) [<https://perma.cc/7B8Y-LY4F>] (noting “anecdotal claims that authorizers are becoming more hesitant to take risks on qualified applications from unproven applicants”); Matt Barnum, *Who Applies and Who’s Denied? Four Things We Learned From a New Report on America’s Charter Schools*, *Chalkbeat* (Mar. 14, 2019), <https://www.chalkbeat.org/2019/3/14/21121040/who-applies-and-who-s-denied-four-things-we-learned-from-a-new-report-on-america-s-charter-schools> [<https://perma.cc/9VYN-XRXF>] (reviewing the NACSA report’s conclusions).

161. Greg Richmond, *Opinion, Richmond: Why School Districts Are Walking Away From Authorizing New Charter Schools—And Why That’s Both a Good and a Bad Thing*, *The74* (Aug. 13, 2018), <https://www.the74million.org/article/richmond-why-school-districts-are-walking-away-from-authorizing-new-charter-schools-and-why-thats-both-a-bad-and-a-good-thing/> [<https://perma.cc/M9TN-PQ3C>].

162. *Id.*

163. Susan Pendergrass & Nora Kern, *Nat’l All. for Pub. Charter Schs., Waiting for Their Chance: A Closer Look at Wait Lists in Urban Public Charter Schools* 3 (2015), [https://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2015/05/waitlist\\_web.pdf](https://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2015/05/waitlist_web.pdf) [<https://perma.cc/Y7GS-7W7K>].

Unfortunately, space in moderately priced private schools is also declining, and with it the share of middle-income families choosing to send their children to private schools. While private-school enrollment has remained relatively steady (around 10%), the number of middle-income families enrolling their children in private schools has dramatically declined in recent decades.<sup>164</sup>

One reason for the shift in private-school attendance is the disappearance of Catholic schools, which have long been the most affordable private-school option, from the American educational landscape. While Catholic schools, which tended to resume in-person instruction earlier than their public counterparts, enjoyed modest enrollment gains during the 2021–2022 school year (following decades of decline),<sup>165</sup> Catholic schools' closures continued apace. In the early 1960s, there were more than 5.2 million students enrolled in almost 13,000 K–12 Catholic schools. In the 2021–2022 school year, just under 1.7 million students attended 5,398 Catholic schools.<sup>166</sup> Between 2010 and 2020, 1,400 Catholic schools closed or consolidated, 261 opened (a 14.3% decline), and the number of students declined by 439,581 (a 21.3% decline).<sup>167</sup>

Undoubtedly, a reason why many center cities are gaining wealthy residents but losing middle-class ones is that the wealthy can afford educational options that those of modest means cannot. The Education Data Initiative reports that, during the 2020–2021 school year, the average private school tuition in the United States was \$12,350 (\$8,700 at elementary schools and \$14,500 at high schools).<sup>168</sup> The average tuition at a Catholic school was \$6,080 (\$4,800 at elementary schools and \$11,200 at high schools).<sup>169</sup> In contrast, the average tuition at nonsectarian private schools was \$25,100 (\$20,900 at elementary schools and \$28,900 at high

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164. Murnane et al., *supra* note 150.

165. Editorial, Catholic Schools' Good Covid Year: Staying Open During the Pandemic Paid Off in Growing Enrollment, *Wall St. J.* (Feb. 17, 2022), <https://www.wsj.com/articles/catholic-schools-good-covid-year-enrollment-increase-national-catholic-educational-association-11645139852> (on file with the *Columbia Law Review*).

166. Catholic School Data: 2021-22 Highlights, Nat'l Cath. Educ. Ass'n, [https://ncea.org/NCEA/Who\\_We\\_Are/About\\_Catholic\\_Schools/Catholic\\_School\\_Data/2021\\_2022\\_Highlights/NCEA/Who\\_We\\_Are/About\\_Catholic\\_Schools/Catholic\\_School\\_Data/Highlights.aspx?hkey=e0456a55-420d-475d-8480-c07f7f090431](https://ncea.org/NCEA/Who_We_Are/About_Catholic_Schools/Catholic_School_Data/2021_2022_Highlights/NCEA/Who_We_Are/About_Catholic_Schools/Catholic_School_Data/Highlights.aspx?hkey=e0456a55-420d-475d-8480-c07f7f090431) [<https://perma.cc/D7HE-GWKU>] [hereinafter Catholic School Data: 2021-22 Highlights] (last visited Jan. 7, 2023).

167. *Id.*

168. Melanie Hanson, Average Cost of Private School, Educ. Data Initiative, <https://educationdata.org/average-cost-of-private-school/> [<https://perma.cc/9UU8-X687>] (last updated Dec. 27, 2021).

169. *Id.*



schools).<sup>170</sup> Non-Catholic faith-based schools charge far less than their secular counterparts but still significantly more than Catholic schools.<sup>171</sup> Those figures undoubtedly tip the balance in favor of suburban life for many families who are concerned about the educational options available to their children.

Universal parental-choice policies, which pair public-school-choice options with charter schools and private-school choice, reduce the sticker shock facing families who would choose to remain in urban neighborhoods if private schools were a realistic option. They also likely have the side benefit of stabilizing enrollments in and the finances of lower-cost faith-based schools, the majority of which—for historical reasons discussed elsewhere—are Catholic,<sup>172</sup> thereby decreasing the likelihood that they close. Of course, Catholic and other faith-based schools are more attractive to some families than others.<sup>173</sup> I am certainly not suggesting otherwise. Still, embracing policies that completely decouple property and education by providing financial resources that make private schools more affordable for middle-income families will likely affect the residential choices of some families, at least at the margins. These policies will likely also stabilize the number of affordable private school options by preventing some Catholic schools from closing.<sup>174</sup>

It is also worth noting that, in all likelihood, the primary beneficiaries of policies that help prevent the further disappearance of Catholic schools

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170. *Id.* There are also tremendous regional variations in private-school tuition: Prices range from an average of \$23,980 in Connecticut to \$3,550 in Wisconsin. *Id.*

171. The average tuition at a non-Catholic religious school is \$10,200 (\$9,200 for elementary schools and \$18,900 for high school). *Id.*

172. Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods and Education Reform*, 85 *Notre Dame L. Rev.* 887, 900 (2012) [hereinafter Brinig & Garnett, *Catholic Schools*] (explaining the influence of parish donations and the role of religious sisters as teachers that traditionally kept tuition costs low at Catholic schools).

173. Nationwide, just over 20% of students enrolled in Catholic schools are non-Catholic. *Catholic School Data: 2021-22 Highlights*, *supra* note 166.

174. A 2006 RAND Corporation study of Michigan found that “private schools will lose one student for every three students gained in the charter schools.” Eugenia F. Toma, Ron Zimmer & John T. Jones, *Beyond Achievement: Enrollment Consequences of Charter Schools in Michigan*, in *Improving School Accountability: Check-Ups or Choice* 241, 250 (*Advances in Applied Microecon.* vol. 14, 2006). In contrast, a study in Arizona—a state with a third more students enrolled in charter schools that, at the time of the study, also operated two tuition-tax-credit programs and two voucher programs—found that charter-school competition had not negatively affected Catholic school enrollment. See Matthew Ladner, *The Impact of Charter Schools on Catholic Schools: A Comparison of Programs in Arizona and Michigan*, 11 *J. Cath. Educ.* 102, 104 (2007) (“Arizona’s experience provides a counterexample to Michigan in that the Catholic school system has done well despite the proliferation of charter schools. Arizona therefore provides a roadmap as how to expand both public and private choice systems without losing Catholic schools in the process.”). The author concluded that the private-school-choice programs in Arizona increased Catholic schools’ competitiveness. See *id.* at 110–11 (positing that Arizona’s tax credit program for private school scholarships helped bolster the state’s Catholic school enrollment).

from urban neighborhoods will be families who lack the financial means to move to suburbs to secure space in high-performing public schools. Decades of social science research has demonstrated a “Catholic school effect” on student performance.<sup>175</sup> Beginning with the groundbreaking research of Professors James Coleman and Andrew Greeley, numerous scholars have found that Catholic school students—especially poor, minority students—tend to outperform their public-school counterparts.<sup>176</sup> Greeley found, for example, that minority students’ achievement in Catholic schools not only surpassed that of those in public schools but, moreover, that the differences were the greatest for the poorest, most disadvantaged, students.<sup>177</sup> More recently, Professor Derek Neal confirmed Greeley’s “Catholic school effect” in research demonstrating that Catholic school attendance increased the likelihood that a minority student would graduate from high school from 62% to 88% and more than doubled the likelihood that a similar student would graduate from college.<sup>178</sup> Catholic schools, in other words, have a sustained record of helping close the achievement gap.<sup>179</sup> And, most recently, the first postpandemic National Assessment of Educational Progress (NAEP) results found that—in stark contrast to public- and charter-school students—Catholic school students

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175. Andrew M. Greeley, *Catholic High Schools and Minority Students* 107–08 (1982) (“Motivation for success seems to be much more adequately rewarded with learning achievement in Catholic secondary schools than in public secondary schools.”).

176. *Id.* at 108 (“The effect of Catholic schools seems to be especially powerful on the multiply disadvantaged—minority students whose parents did not attend college, who themselves have not qualified for academic programs.”); see also James S. Coleman, Thomas Hoffer & Sally Kilgore, *High School Achievement: Public, Catholic, and Private Schools Compared* 144 (1982) (“The first and most striking result is the greater homogeneity of achievement of students with different parental education levels in Catholic schools than in public schools.”).

177. Greeley, *supra* note 175, at 108.

178. See Derek Neal, *The Effects of Catholic Secondary Schooling on Educational Achievement*, 15 *J. Lab. Econ.* 98, 100 (1997).

179. To be sure, scholars debate the reasons for Catholic schools’ success. Skeptics point to selection bias; that is, the possibility that Catholic schools attract better students with more highly motivated parents than public schools. But there is ample evidence that the achievement differential between public and Catholic schools is not attributable to selection bias. See, e.g., Charles M. Payne, *So Much Reform, So Little Change: The Persistence of Failure in Public Schools* 117 (2008). A better explanation, in my view, is suggested by the work of improvement science researcher Anthony Bryk and his colleagues, who have argued that Catholic schools succeed because they are intentional communities with high levels of trust and social capital and high expectations for achievement for all community members, regardless of race or class. See Anthony S. Bryk, Valerie E. Lee & Peter B. Holland, *Catholic Schools and the Common Good* 297–304 (1993). Sociologist James Coleman also suggested that social capital helped to explain Catholic schools’ success. See James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 *Am. J. Socio.* S95, S1115 (1988) (“The low dropout rates of the Catholic schools, the absence of low dropout rates in the other private schools, and the independent effect of frequency of religious attendance all provide evidence of the importance of social capital outside the school . . . for this outcome of education.”).

experienced virtually no learning losses during the pandemic, in part because more than 92% of Catholic schools resumed in-person instruction in the fall of 2020, compared to 43% of traditional public schools and 34% of charter schools.<sup>180</sup> Catholic schools led the nation for Hispanic achievement on four tests of educational progress (fourth- and eighth-grade reading and math), Black students on three of the four tests, and low-income students overall in eighth-grade reading.<sup>181</sup>

### B. *Catholic Schools, Urban Neighborhoods, and Social Capital*

Policies that forestall Catholic school closures will likely benefit urban neighborhoods for another reason: Catholic schools appear to be stabilizing community institutions, and policies that make them more financially accessible to parents will likely have the side benefit of decreasing the likelihood that they will close. My prior work with Professor Brinig measured the effects of Catholic schools as community institutions separately from their benefits as educational institutions. This work proceeded in multiple stages, culminating in our 2014 book, *Lost Classroom, Lost Community: Catholic Schools' Importance in Urban America*.<sup>182</sup> In this research, we measured the effects of Catholic schools and charter schools on both social capital and serious crime, initially in Chicago and then in Philadelphia and the greater Los Angeles area.

In our initial study, we relied upon data collected by the Project on Human Development in Chicago Neighborhoods to measure the effects of Catholic school closures on perceived disorder and perceived social cohesion in Chicago neighborhoods.<sup>183</sup> We were able to access systematic and

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180. Kathleen Porter-Magee, Opinion, Amid the Pandemic, Progress in Catholic Schools, *Wall St. J.* (Oct. 27, 2022), <https://www.wsj.com/articles/amid-the-pandemic-progress-in-catholic-schools-partnership-naep-report-card-math-reading-public-charter-black-hispanic-11666902117> (on file with the *Columbia Law Review*).

181. Catholic school students scored the highest on all four NAEP tests. *Id.* Notably, Catholic school students scored seventeen points higher in fourth-grade math (or 1.5 grade levels) than the national public-school average and 20 points higher (two grade levels) in eighth-grade math. *Id.* Between 2019 and 2022, the scores of Black students enrolled in Catholic schools increased by ten points (about a year of learning) while falling by five points and eight points for Black public- and charter-school students, respectively. *Id.* Similarly, on the eighth-grade reading test, Hispanic students in Catholic schools gained seven points, while Hispanic students in public schools lost one point and Hispanic students in charter schools lost two points. *Id.*

182. Brinig & Garnett, *Lost Classroom, Lost Community*, *supra* note 7.

183. Brinig & Garnett, *Catholic Schools*, *supra* note 172, at 890, 902; see also Brinig & Garnett, *Lost Classroom, Lost Community*, *supra* note 7, at 57–76. This data was collected to test James Q. Wilson and George Kelling's controversial "broken windows hypothesis," which posits a causal link between disorder and more-serious crime. See James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, *Atl. Monthly*, March 1982, at 29–38, <https://cdn.theatlantic.com/media/archives/1982/03/249-3/132638105.pdf> [<https://perma.cc/25Q3-SZ9M>] (theorizing that minor instances of social and physical disorder in urban spaces can contribute to lawlessness and may encourage more serious crimes).

very detailed observations made of every block in approximately eighty Chicago neighborhoods and surveys of approximately 6,000 Chicago residents. Using this data set, we estimated the effects of Catholic school closures on neighborhood social cohesion, disorder, and “collective efficacy.” Specifically, we found that a Catholic school closure explained nearly half the variance in social disorder between similar neighborhoods, nearly 70% of the variance in social cohesion and nearly 30% of the variance in collective efficacy.<sup>184</sup>

In our second study, we obtained police-beat-level data from the Chicago Police Department on the incidence of six major crimes (aggravated assault, aggravated battery, murder, burglary, robbery, and aggravated sexual assault) from 1999 to 2005.<sup>185</sup> We then analyzed the effects of Catholic-school closures between 1990 and 1996 on the rate of serious crime in police beats between 1999 and 2005. While crime decreased across the city of Chicago during this period, our analysis suggested that Catholic school closures affected the *slope of the decline*. That is, crime decreased more slowly between 1999 and 2005 in police beats where Catholic schools closed between 1990 and 1996. On average, our analysis suggested that crime declined by approximately 25% in beats with Catholic schools and 17% in beats that experienced a Catholic school closure.<sup>186</sup>

In a third study, we again relied on police-beat-level data to compare the effects of *open* Catholic schools and *open* charter schools on serious crime in Chicago neighborhoods. We found that an open Catholic school appeared to suppress crime in a police beat. In fact, our regression analysis suggested that crime in police beats with open Catholic schools was, on average, at least 33% lower than police beats without them.<sup>187</sup> In contrast, we found that charter schools appeared to have no statistically significant effect on overall crime rates, although they were later found to be correlated with a statistically significant increase in aggravated assault and aggravated battery.<sup>188</sup> In contrast to the previous two studies, however, we

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184. Brinig & Garnett, Catholic Schools, *supra* note 172, at 926; see also Brinig and Garnett, Lost Classroom, Lost Community, *supra* note 7, at 57–76.

185. Margaret F. Brinig & Nicole Stelle Garnett, Catholic Schools and Broken Windows, 9 J. Empirical Legal Stud. 347, 350 (2012).

186. *Id.* at 362; see also Brinig & Garnett, Lost Classroom, Lost Community, *supra* note 7, at 90–99. We replicated these two studies in Philadelphia, Pennsylvania, and Los Angeles County, California. As they had in Chicago, Catholic school closures in Philadelphia negatively and significantly affected the amount of social capital in a neighborhood as well as explaining a large amount of the variations in crime rates. Interestingly, however, we were not able to replicate these effects in Los Angeles County. See Brinig & Garnett, Lost Classroom, Lost Community, *supra* note 7, at 99–112.

187. Margaret F. Brinig & Nicole Stelle Garnett, Catholic Schools, Charter Schools, and Urban Neighborhoods, 79 Chi. L. Rev. 31, 47 (2012) [hereinafter Brinig & Garnett, Charter Schools].

188. *Id.* at 47.

were unfortunately unable to demonstrate causation.<sup>189</sup> We took care to clarify that we were not making causal claims about the effects of open charter schools on neighborhood crime.<sup>190</sup>

Although we admittedly do not know *why* Catholic schools were good for urban neighborhoods in Chicago and Philadelphia during the period that we studied, we suspect that these effects are explained by Catholic schools' generating social capital, which in turns helps residents organize and address neighborhood problems.<sup>191</sup> But, at the very least, our research suggests that one of the most effective ways to maintain social capital in an urban community with an open Catholic school is to keep the school open. While we took care to emphasize that education policies should advance primarily educational goals—not community-development goals—we also noted that one side benefit of private-school-choice policies is that they likely will stem the tide of school closures, thus helping to stabilize urban communities by preserving important neighborhood institutions.<sup>192</sup> It is important to point out that this research focuses only on Catholic schools, and to a lesser extent, charter schools, not other kinds of schools—or indeed, social institutions—that may have a stabilizing effect on urban neighborhoods.

Maintaining the stabilizing influence of Catholic schools on urban neighborhoods is an important side-effect of decoupling property and education. From 2015 to 2016, approximately 36% of private-school students attended a Catholic school, and 40% attended other religious private schools.<sup>193</sup> Catholic schools are the most affordable private educational option in the United States and therefore most financially accessible to those taking advantage of private-school-choice resources.<sup>194</sup> They also are, for historical and demographic reasons, more likely to be located in urban neighborhoods. But none of this is to say that other kinds of private schools, including other kinds of religious schools, do not have stabilizing effects on urban neighborhoods. Depending on the funds made available, a positive side effect of decoupling property and education may be to spur the development of a diversity of new private schools (faith-based and otherwise) and foster other educational options, such as microschooling, that may exert a stabilizing effect on urban neighborhoods.

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189. Specifically, in our studies of the effects of Catholic school closures on crime, disorder, social cohesion, and collective efficacy, we employed instrumental variables related to the management of Catholic parishes that were exogenous to demographic factors predicting school closures. See Brinig & Garnett, *Charter Schools*, supra note 187, at 41–42.

190. See *id.* at 41–42, 48.

191. See Brinig & Garnett, *Lost Classroom, Lost Community*, supra note 7, at 112–37.

192. See *id.* at 137–56.

193. Nat'l Ctr. for Educ. Stat., *School Choice 2019*, supra note 49.

194. Hanson, supra note 168.

*C. Parental Choice and Intrametropolitan Mobility*

This Part has, thus far, discussed two benefits of policies that decouple property and education for center cities: First, they decrease the likelihood that families with the financial means to do so will exit cities for suburbs to secure space for their children in higher-performing public schools; second, they can help stabilize and prevent further closures of urban Catholic schools. But the economic development benefits of parental-choice policies extend beyond center city boundaries. Decoupling property and education will also help address economic inequalities within metropolitan areas as a whole by reducing barriers to mobility within metropolitan regions that prevent lower-income residents of center cities and inner-ring suburbs from moving to more-affluent suburban communities.<sup>195</sup>

As Professor Erika Wilson's contribution to this Symposium explains, American metropolitan areas are characterized by arguably excessive local government fragmentation.<sup>196</sup> A patchwork of municipal and school district boundaries enable local governments to exclude lower-income and minority residents from wealthier, white suburbs.<sup>197</sup> Wilson documents the unfortunate fact that many of these boundaries have racist origins.<sup>198</sup> Wilson argues that federal courts should take into account the racialized history of municipal and district boundaries in constitutional litigation seeking inter-school-district desegregation orders and boundary adjustments.<sup>199</sup> As she acknowledges, however, under current doctrine, courts are not likely to be amenable to interfering with local government boundaries in these ways.<sup>200</sup> Thus, the need to overcome incentives for the exclusionary policies will likely persist.

It is well-documented that concerns about maintaining school district quality are a major contributor to exclusionary zoning policies that limit lower-income residents' opportunities to move to suburban communities with good public schools. It is well established that school district quality is capitalized into home values, leading residents of suburban communities to support exclusionary zoning policies that limit affordable housing development.<sup>201</sup> Exclusionary zoning policies, in turn, drive up suburban

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195. The importance of intrametropolitan mobility to the life prospects of lower-income, less-educated individuals is also well documented, but beyond the scope of this Essay. See, e.g., Glaeser & Cutler, *supra* note 93, at 299–302; see also Chetty et al., *supra* note 93; text accompanying note 93.

196. Erika K. Wilson, *White Cities, White Schools*, 123 *Colum. L. Rev.* 1221, 1229 (2023) (“Metropolitan fragmentation provided a conduit to create municipalities that used legal methods and extralegal violence to exclude Black and some other nonwhite residents.”).

197. *Id.* at 1254–55.

198. See *id.* at 1233–34.

199. See *id.* at 1267.

200. *Id.* at 1256–57.

201. See Phuong Nguyen-Hoang & John Yinger, *The Capitalization of School Quality Into House Values: A Review*, 20 *J. Hous. Econ.* 30, 30–48 (2011) (reviewing fifty school capitalization studies conducted between 1999 and 2010 and concluding that “these studies

housing prices. This dynamic limits lower-income residents' access to suburbs and their many amenities, including academically strong public schools,<sup>202</sup> and increases economic segregation within metropolitan areas.<sup>203</sup> Economist Jonathan Rothwell has summed up the net effects of this phenomenon as follows: "Limiting the development of inexpensive housing in affluent neighborhoods and jurisdictions fuels economic and racial

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provide remarkably similar results, namely that house values rise by 1–4% for a one-standard-deviation increase in student test scores"); see also William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 *Urb. Stud.* 317, 327 (2004) (noting that "the value of owner-occupied homes is greatly affected by the things that local governments do[;] . . . [such as] [i]mprovements in schools . . . [that] raise the value of owner-occupied homes"); Nicole Stelle Garnett, *Unbundling Homeownership: Regional Reforms From the Inside Out*, 119 *Yale L.J.* 1904, 1932 (2010) (reviewing Lee Anne Fennell, *The Unbounded Home: Property Values Beyond Property Lines* (2009)) (arguing that there may be reasons other than home value capitalization for families to desire high-quality neighborhood schools). See generally Lee Anne Fennell, *The Unbounded Home: Property Values Beyond Property Lines* (2009) (discussing the ways in which the value of a home is determined by community resources, such as schools); William A. Fischel, *The Homevoter Hypothesis: How Homevoters Influence Local Government Taxation, School Finance and Land-Use Policies* 154–55 (2001) (concluding that "homebuyers do notice differences in test scores, or some quality closely related to test scores, and are willing to pay a premium for them").

202. Gregory K. Ingram & Daphne A. Kenyon, Introduction to Education, Land, and Location, *in* *Education, Land, and Location* 1, 2–3 (Gregory K. Ingram & Daphne A. Kenyon eds., 2014).

203. See, e.g., Sheryll Cashin, *The Failures of Integration: How Race and Class Are Undermining the American Dream* 182–83 (2004) (highlighting that the strategic use of local zoning powers contributes to economic inequality in metropolitan areas); Edward L. Glaeser & Joseph Gyourko, *Rethinking Federal Housing Policy: How to Make Housing Plentiful and Affordable* 86–87 (2008) (studying the negative impact of land-use restrictions on affordability); Myron Orfield, *Metropolitics: A Regional Agenda for Community and Stability* 6–7 (1997) ("As the central cities and inner suburbs become more socioeconomically challenged and diverse, these districts [developed through exclusionary zoning practices] become wealthier and less diverse."); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 *Stan. L. Rev.* 1115, 1136–37 (2000) ("The combination of local control over land use within local borders and local fiscal autonomy, thus, sustains a hierarchy of wealth and reinforces the differences in tax burdens and local service quality among localities in most metropolitan areas."); Richard Briffault, *Localism and Regionalism*, 48 *Buff. L. Rev.* 1, 25–26 (2000) ("With property wealth and service needs unevenly distributed throughout the region and greater property wealth per household generally concentrated in areas of lower need, there are profound interlocal taxing and spending inequalities."); Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 *U.C. Davis L. Rev.* 63, 79–80 (2013) (arguing that distribution of resources through sorting, even if acceptable in the normal market context, "is objectionable when applied to education, public safety, [and] local environmental quality"); Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 *Mich. L. Rev.* 277, 287 (2007) ("Because exclusionary zoning protects past exiters [of cities] from future ones, it raises serious transitional-fairness questions. It also has racial ramifications . . ." (footnote omitted)); Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 *Harv. L. Rev.*, 1662, 1685–89 (1979) ("[Z]oning barriers can prevent low and middle income families who live in the central city or small tax base suburbs from moving into the wealthy suburban communities, where they could enjoy a low tax, high spending fiscal package and an attractive living environment.").

segregation and contributes to significant differences in school performance across the metropolitan landscape.”<sup>204</sup>

A full review of the voluminous literature on the persistence of economic inequalities among the municipalities within U.S. metropolitan areas and these inequalities’ connection to both exclusionary zoning policies and school-district quality is beyond the scope of this Essay. It suffices here to observe that these inequalities are linked, in part, to policies that connect educational opportunities with residential address. This link places a premium on living within school districts with high-performing public schools (driving up housing prices in these districts). It also incentivizes residents privileged to live in these communities to erect barriers to entry by lower-income families, including exclusionary zoning laws that block or dramatically limit the affordable housing supply. Policies that decouple property and education change this calculus, thereby muting these exclusionary incentives. Indeed, one (unattractive) reason why suburban residents have historically opposed parental-choice policies has been concern that they will lead to the influx of lower-income children into their schools.<sup>205</sup>

Although the effects of parental-choice policies on intrametropolitan inequality have not yet been systematically studied, there are a number of studies on individual choice programs.<sup>206</sup> For example, studies of interdistrict choice programs have found that that housing values increase in

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204. Jonathan Rothwell, Brookings Inst., *Housing Costs, Zoning, and Access to High-Scoring Schools* 1–2 (2012), [https://www.brookings.edu/wp-content/uploads/2016/06/0419\\_school\\_inequality\\_rothwell.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/0419_school_inequality_rothwell.pdf) [<https://perma.cc/LD22-EUKJ>].

205. See Ryan & Heise, *supra* note 155, at 2063–73 (“Suburbanites, meanwhile, at best tolerated the influx of transfer students.”); see also Fischel, *Why Voters Veto Vouchers*, *supra* note 126, at 117–18 (“An inarticulate desire to maintain the network of intracommunity links that public schools provide may account for voters’ resistance to statewide voucher programs even in places . . . where vouchers would seem to be most attractive.”).

206. There is related literature on the effects of school finance litigation, which partially decouples school funding from residential address, on housing prices and residential mobility. These studies suggest that equalizing funding across districts increases housing values in lower-income school districts. See Eric J. Brunner, *School Quality, School Choice, and Residential Mobility*, in *Education, Land, and Location*, *supra* note 202, at 62, 70–71 (2014) (collecting and reviewing studies); see also, e.g., Eric J. Brunner, James Murdoch & Mark Thayer, *School Finance Reforms and Housing Values: Evidence From the Los Angeles Metropolitan Area*, 2 *Pub. Fin. & Mgmt.* 535, 557 (2002) (finding that school finance reform resulted in a “convergence in housing values,” but that the convergence was achieved mainly by “leveling-down” school district quality in previously high-spending districts); Thomas S. Dee, *The Capitalization of Education Finance Reforms*, 43 *J.L. & Econ.* 185, 212 (2000) (finding that after school finance reform, “in the poorest school districts (that is, those that received the most new aid), median housing values and residential rents rose by at least 8 percent”); Dennis Epple & María Marta Ferreyra, *School Finance Reform: Assessing General Equilibrium Effects*, 92 *J. Pub. Econ.* 1326, 1345–48 (2008) (finding that, following reforms to the use of property taxes to fund education, changes in both the tax rate and school quality were capitalized to the value of homes). These studies have found only limited effects on residential mobility within metropolitan areas, however. See Brunner, *supra*, at 69–72 (summarizing research).



districts that send more students to neighboring districts and decrease in districts that receive more students.<sup>207</sup> In other words, choice increases property values in academically weaker districts, a finding consistent with my argument, above, that the availability of parental choice will stabilize urban communities by giving residents options other than moving to high performing suburban school districts.<sup>208</sup> These studies also suggest that interdistrict choice reduces income segregation across metropolitan areas. For example, one study of the effects of introducing interdistrict choice in twelve states between 1989 and 1999 found that decoupling education from housing location reduced housing value disparities and residential income segregation across school districts.<sup>209</sup>

Given the relatively limited scope of private-school-choice options to date, there have been fewer opportunities to study the real-world effects of universal choice policies such as now exist in Arizona, Arkansas, Florida, Iowa, Utah, and West Virginia on housing prices and intrametropolitan mobility. Economists, however, have sought to predict the effects of universal school choice (including private-school funding) on these variables using theoretical models. These models predict that introducing even modest private-school-choice options would significantly affect both housing price disparities and economic stratification in metropolitan areas. As María Marta Ferreyra, the author of one of these studies, observed, introducing a voucher into a previously residentially zoned school system will lead to reduced disparities in income and housing value across school districts as “some voucher users migrate toward neighborhoods with relatively low tax-inclusive housing prices and send their children to private schools, thus weakening the residential stratification of the current public school system.”<sup>210</sup>

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207. See Eric Brunner, Jon Sonstelie & Mark Thayer, *Capitalization and the Voucher: An Analysis of Precinct Returns From California’s Proposition 174*, 50 *J. Urb. Econ.* 517, 519–21 (2001) (presenting a partial equilibrium model of the relationship between housing values and school quality); Eric J. Brunner, Sung-Woo Cho & Randall Reback, *Mobility, Housing Markets, and Schools: Estimating the Effects of Inter-District Choice Programs*, 96 *J. Pub. Econ.* 604, 609, 612 (2012) [hereinafter Brunner et al., *Mobility, Housing Markets, and Schools*] (“Expanded inter-district choice opportunities increase housing values in initially “low-quality” districts (districts with net outflows) and decreases housing values initially “high-quality” districts (district with net inflows).”); Randall Reback, *House Prices and the Provision of Local Public Services: Capitalization Under School Choice Programs*, 57 *J. Urb. Econ.* 275, 297–300 (2005) (“Both incoming and outgoing transfer rates have large, statistically significant effects on the future growth rate of a school district’s residential property values.”); Michael L. Walden, *Magnet Schools and the Differential Impact of School Quality on Residential Property Values*, 5 *J. Real Estate Rsch.* 221, 228–29 (1990) (“[S]chool quality does matter in the housing market. When houses are assigned to schools, houses assigned to better quality schools have that quality capitalized into their value.”).

208. See *supra* note 195 and accompanying text.

209. Brunner et al., *Mobility, Housing Markets, and Schools*, *supra* note 207, at 609.

210. María Marta Ferreyra, *Estimating the Effects of Private School Vouchers in Multidistrict Economies*, 97 *Am. Econ. Rev.* 789, 791 (2009); see also Eric J. Brunner, Jennifer Imazeki & Stephen L. Ross, *Universal Vouchers and Racial and Economic*

## CONCLUSION

Decoupling property and education will likely affect not only where American children attend school but also where American families live. Parental-choice policies therefore serve an economic development function. In center cities, these policies reduce the need for families with children to move to the suburbs for high-performing public schools and help prevent the further disappearance of Catholic schools, which exercise a stabilizing effect on urban neighborhoods. Decoupling property and education also can help address the troubling and persistent pattern of economic stratification and segregation within U.S. metropolitan areas by reducing barriers to intrametropolitan mobility, including exclusionary zoning.

Decoupling property and education will also affect education law. My previous work addressed one way in which parental-choice policies are already fueling legal changes: the blurring of the public–private distinction that plays an important role in both state and federal constitutional law.<sup>211</sup> Assuming these parental-choice policies continue to expand, lawmakers and courts also will face the question of how decoupling property and education affects other education law issues, including the future of school finance litigation. Over half of state supreme courts have relied on state constitutional education guarantees or equal protection clauses to require equalization of school funding across districts.<sup>212</sup> Although litigants have more recently begun to shift their demands away from funding equity toward requests for nonmonetary remedies,<sup>213</sup> the most recent judicial

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Segregation, 92 *Rev. Econ. Stat.* 912, 916 (2010) (“The home ownership variable captures the fact that vouchers may affect property values. In a system where households must live in a particular neighborhood in order to attend a particular school, it is well established that school quality will be capitalized into housing values . . .”); Thomas J. Nechyba, *Introducing School Choice Into Multidistrict Public School Systems*, in *The Economics of School Choice* 145, 146 (Caroline Hoxby ed., 2003) (“By bringing choice into low-income school districts, private school vouchers sever the link between school quality and residential location, thus increasing the value of living in poor public school districts and lowering the value of living in wealthy districts.”).

211. Garnett, *Sector Agnosticism*, *supra* note 59.

212. *SchoolFunding.Info: A Project of the Center for Educational Equity at Teachers College*, <https://www.schoolfunding.info/litigation-map/> [<https://perma.cc/QM2N-SPVC>] (last visited Jan. 8, 2023) (tracking thirty-two states that have a legally recognizable right to “equity” or “adequacy” in school funding, under the state’s constitution); see also Rachel F. Moran, *School Finance Reform and Professor Stephen D. Sugarman’s Lasting Legacy*, 109 *Calif. L. Rev.* 355, 360–65 (2021) (describing the litigation in different states to equal school funding across districts); Educ. L. Ctr., *From Courthouse to Statehouse—and Back Again*, Executive Summary 3 (2021), [https://edlawcenter.org/assets/files/pdfs/School%20Funding/ELC\\_Rpt\\_Exec\\_Summary\\_Courthouse\\_.pdf](https://edlawcenter.org/assets/files/pdfs/School%20Funding/ELC_Rpt_Exec_Summary_Courthouse_.pdf) [<https://perma.cc/5Y77-XHE3>] (profiling significant school funding victories in Massachusetts, Kansas, Washington, and New Jersey).

213. These remedies include court-mandated socioeconomic integration as well as a range of remedies dependent on certain state statutes mandating, for example, more assistance for children with disabilities, more instructional minutes overall, and more due

decisions continue to focus on the need for increased funding of traditional public schools.<sup>214</sup> As some commentators have observed, the underlying theory of most funding inequity claims—that disparities in property wealth lead to the underfunding of high-poverty school districts—is, in many cases, outdated and oversimplified because property tax revenues today make up only a small fraction of the educational funds available to high-poverty districts.<sup>215</sup>

Policies that decouple property and education by enabling residents to enroll their children across school-district boundaries and educational sectors further weaken the state constitutional arguments for equalization of funding by further minimizing the connection between local property taxes and education funding. This reality suggests that more state courts will eventually have to address the extent to which their education finance precedents have been rendered anachronistic. Additionally, although charter school advocates' efforts to leverage state education guarantees to obtain more funding on equality grounds have fallen short, litigation advancing this claim is currently pending in a number of states.<sup>216</sup> And efforts to demand private-school choice as a remedy for inequities in educational opportunities have also been unsuccessful,<sup>217</sup> as have—by and large—efforts to argue that charter-school and private-school-choice policies run afoul of these same guarantees.<sup>218</sup> As the policies that decouple property

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process protections for teachers. William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 *Colum. L. Rev.* 1897, 1899 (2017); Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 *Kan. J.L. & Pub. Pol'y* 346, 352 (2018).

214. See *Educ. L. Ctr.*, *supra* note 212, at 2.

215. Naaz Modan, *School Funding Lawsuits Gain Prominence as States Eye Tax Cuts*, *K-12 Dive* (Jan. 28, 2022), <https://www.k12dive.com/news/school-funding-lawsuits-gain-prominence-as-states-eye-tax-cuts/617948/> [<https://perma.cc/V7QS-YWYD>] (“The idea that our entire funding formula is based around property taxes is sort of an outdated and oversimplified explanation of what’s going on.”).

216. See Phillip Geheb & Spenser Owens, *Charter School Funding Gap*, 46 *Fordham Urb. L.J.* 72, 127 (2019) (describing charter school lawsuits in Maryland, North Carolina, New Jersey, and, most recently, Texas); R. Craig Wood, *Charter School Constitutional Funding Challenges: North Carolina and Texas May Serve as Harbingers for the Future*, 44 *J. Educ. Fin.* 341, 346–47 (similar).

217. Michael Heise, *Education Rights and Wrongs: Publicly Funded Vouchers, State Constitutions, and Education Death Spirals*, 42 *Fordham Urb. L.J.* 745 (2015); Mead, *supra* note 76, at 743.

218. Garnett, *Sector Agnosticism*, *supra* note 59, at 57–65; Preston C. Green, III, Bruce D. Baker & Joseph O. Oluwole, *The Legal Status of Charter Schools in State Statutory Law*, 10 *U. Mass. L. Rev.* 240, 240–76 (2015); Aaron Jay Saiger, *School Choice and States’ Duty to Support “Public” Schools*, 48 *B.C. L. Rev.* 909, 924–44 (2007); see also, e.g., *Magee v. Boyd*, 175 *So. 3d* 79, 111 (Ala. 2015) (rejecting state-education-clause challenge to private-school-choice program); *Meredith v. Pence*, 984 *N.E.2d* 1213, 1224–25 (Ind. 2013) (same); *Hart v. State*, 774 *S.E.2d* 281, 302–03 (N.C. 2015) (same); *Simmons-Harris v. Goff*, 711 *N.E.2d* 203, 207 (Ohio 1999) (same); *Jackson v. Benson*, 578 *N.W.2d* 602, 627–28 (Wis. 1998) (same), cert. denied, 525 *U.S.* 997 (1998). These lawsuits addressed private-school-choice programs, but there is a similar line of cases related to charter schools. See, e.g., *Wilson v. State Bd. of*

and education expand, courts will undoubtedly confront more of these claims.

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Educ., 89 Cal. Rptr. 2d 745, 751 (Cal. Ct. App. 1999) (rejecting state-education-clause challenge to charter school law); Boulder Valley Sch. Dist. RE-2 v. Colo. State Bd. of Educ., 217 P.3d 918, 930 (Colo. App. 2009) (same); Council of Orgs. & Others for Educ. About Parochial, Inc. v. Engler, 566 N.W.2d 208, 211 (Mich. 1997) (same); Ohio Cong. of Parents & Tchrs. v. State Bd. of Educ., 857 N.E.2d 1148, 1166 (Ohio 2006) (same); Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ., 17 P.3d 1125, 1131 (Utah 2001) (same); cf. Bush v. Holmes, 919 So. 2d 392 (Fla. 2006) (holding that "failing schools" voucher law violated Florida constitution); Gwinnett Cnty. Sch. Dist. v. Cox, 710 S.E. 2d 773, 775 (Ga. 2011) (same for Georgia constitution); League of Women Voters v. State, 355 P.3d 1131, 401–05 (Wash. 2015) (same for Washington constitution).

# WEAPONIZING PEACE

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*American racial justice opponents regularly wield a desire for peace, stability, and harmony as a weapon to hinder movement toward racial equality. This Essay examines the weaponization of peace historically and in legal cases about property, education, protest, and public utilities. Such peace claims were often made in bad faith and with little or no evidence, and the discord they claimed to address was actually the result of hostility to racial equality. For a time, the Supreme Court rejected dominant peace claims for precisely these reasons. This Essay further documents the weaponization of peace in current attempts to restrict Black Lives Matter protests, denigrate calls for police defunding, outlaw critical race theory, and dismantle affirmative action. By linking these historical and contemporary arguments, this Essay finds that dominant logics of peace mask the injustice, frustration, and despair felt by subordinated groups. The Essay urges closer scrutiny of appeals to peace that primarily function to stifle the pursuit of racial justice and to maintain status quo inequality.*

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## INTRODUCTION

American racial justice opponents regularly wield a purported desire for peace, stability, and harmony as a weapon to hinder movement toward racial equality. In this weaponized form, peace maintains structural inequalities, as when then-Senator John C. Calhoun defended slavery as “indispensable to the peace” of both white and Black people.<sup>1</sup> It also limits redress measures, as when President Andrew Johnson called for the end of Reconstruction in a “time o[f] peace.”<sup>2</sup> Finally, organizations like the White Citizens’ Councils have regularly used peace as pretext for measures against racial equality.<sup>3</sup>

This Essay examines the weaponization of peace historically—from slavery to segregation—and in legal cases about property, education, protest, and public utilities.<sup>4</sup> It also draws links between past instances of weaponized peace and current ones, as found in attempts to restrict Black

1. 13 Reg. Deb. 2186 (1837) (statement of Sen. Calhoun). Similarly, in defending racial segregation in 1964, then-Alabama Governor George Wallace maintained that “[w]hite and colored have lived together in the South for generations in peace and equanimity.” Letter from George C. Wallace, Governor, Ala., to Miss Martin (Apr. 14, 1964), in Gilder Lehrman Collection, No. GLC00295, Gilder Lehrman Inst. Am. Hist., [https://www.gilderlehrman.org/sites/default/files/inline-pdfs/T-00295\\_redacted.pdf](https://www.gilderlehrman.org/sites/default/files/inline-pdfs/T-00295_redacted.pdf) [<https://perma.cc/E5GJ-VHTK>].

2. Andrew Johnson, An Important Veto Message From President Johnson, N.Y. Times, Feb. 20, 1866, at A1, <https://www.nytimes.com/1866/02/20/archives/washington-news-an-important-veto-message-from-president-johnson-he.html> (on file with the *Columbia Law Review*).

3. Starting in the 1950s, these councils launched an all-out war on integration ostensibly to maintain “peace, good order and domestic tranquility.” Euan Hague, *The Citizens’ Council*, <http://www.citizenscouncils.com> [<https://perma.cc/9RK7-3FWQ>] (last visited Feb. 5, 2023) (internal quotation marks omitted) (quoting the *Citizens’ Council* (Jackson, Miss.), Oct. 1955, at 1).

4. Although illustrative, these are far from the only legal contexts in which weaponized claims about peace have arisen. In the family law context, Professor Jill Hasday notes that defenders of the common law doctrine of coverture claimed that it was “‘essential to family peace,’” and if women were given freedom to make their own decisions, wives would “destroy their marital harmony, arouse the fierce (and potentially violent) opposition of their husbands, and undermine their own welfare.” Jill Elaine Hasday, *Protecting Them From Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. Rev. 1464, 1500 (2009) (quoting Joseph R. Long, *A Treatise on the Law of Domestic Relations* 119 (1905)). In the criminal law context, Professor Jamelia Morgan examines disorderly conduct laws, which are a combination of common law offenses aimed at protecting the public order, peace, and tranquility, and argues that the criminalization of disorderly conduct reflects and reinforces deeply rooted discriminatory understandings about what behavior (and which persons) violate community norms. See Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 Cal. L. Rev. 1637, 1657 (2021).

Lives Matter protests, denigrate calls for police defunding, outlaw critical race theory, and dismantle affirmative action. By linking these historical and contemporary arguments, this Essay finds that dominant logics of peace mask the injustice, frustration, and despair felt by subordinated groups. The Essay urges closer scrutiny of appeals to peace that primarily function to stifle the pursuit of racial justice and to maintain status quo inequality.<sup>5</sup>

This Essay's analysis of weaponized peace focuses on those who consider racial justice a threat to peace, providing a companion to *Racial Justice and Peace*,<sup>6</sup> which centers Black activists for whom racial justice was a means to peace. Together, these works demonstrate how despite the widespread discussion of peace in American political discourse, those working for and against racial justice do not share common understandings of peace. While emancipatory understandings of peace entail justice as a precondition for peace, weaponized appeals to peace stifle the pursuit of justice to preserve an unjust status quo. American society must therefore learn to differentiate between these appeals to peace.

Although it focuses on American society, this Essay's analysis also adds to the international conversation around "transitional justice"<sup>7</sup> by providing a powerful example of how certain forms of peace are actually

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5. While this Essay focuses on the weaponization of peace against racial justice efforts, there are broader weaponizations of peace against people and communities of color. See, e.g., Jim Freeman, Daniel Kim & Zoe Rawson, Black, Brown, and Over-Policed in L.A. Schools 28 (2013), [https://www.njjn.org/uploads/digital-library/CA\\_Strategy-Center\\_Black-Brown-and-Over-Policed-in-LA-Schools.PDF](https://www.njjn.org/uploads/digital-library/CA_Strategy-Center_Black-Brown-and-Over-Policed-in-LA-Schools.PDF) [<https://perma.cc/R9WM-R4A3>] (finding that Black students were 29 times more likely than white students to be ticketed by the Los Angeles School Police Department for "disturbing the peace").

6. Yuvraj Joshi, *Racial Justice and Peace*, 110 Geo. L.J. 1325 (2022) [hereinafter Joshi, *Racial Justice and Peace*].

7. Transitional justice concerns how societies move from violence and oppression toward peace and justice. Although successful transitions require both peace and justice, these values can appear in tension when societies face choices between short-term peace and the pursuit of long-term justice, what is internationally known as the "peace versus justice dilemma." This Essay is one in a series of papers examining American racial justice issues from an international transitional justice perspective. See Yuvraj Joshi, *Affirmative Action as Transitional Justice*, 2020 Wis. L. Rev. 1 (comparing affirmative action in South Africa and the United States to show how integrating affirmative action and transitional justice can advance our understanding of both practices); Yuvraj Joshi, *Racial Equality Compromises*, 111 Calif. L. Rev. 529 (2023) [hereinafter Joshi, *Racial Equality Compromises*] (using transitional justice theory to demonstrate that American racial equality decisions are compromises); Joshi, *Racial Justice and Peace*, supra note 6 (examining American racial equality decisions as versions of the peace versus justice dilemma discussed in transitional justice); Yuvraj Joshi, *Racial Time*, 90 U. Chi. L. Rev. (forthcoming 2023) (on file with the *Columbia Law Review*) (discussing the role of time-based arguments in American racial justice struggles); Yuvraj Joshi, *Racial Transitional Justice in the United States*, in *Race and National Security* (Matiangai Sirleaf ed., forthcoming 2023), <https://ssrn.com/abstract=4088738> [<https://perma.cc/5QY4-NR3L>] (proposing that the centuries-long oppression of Black Americans necessitates a systematic response through transitional justice); Yuvraj Joshi, *Racial Transition*, 98 Wash. U. L. Rev. 1181 (2021) [hereinafter Joshi, *Racial Transition*] (theorizing different approaches to America's racial transition and

disadvantageous for democracy.<sup>8</sup> One of the central discussions in transitional justice is how to “reconcile legitimate claims for justice with equally legitimate claims for stability and social peace.”<sup>9</sup> The American experience teaches that not all claims to peace are equally legitimate and not all forms of peace are democratically advantageous.

This Essay proceeds in three parts. Part I provides a historical primer on weaponized appeals to peace, illustrating how dominant ideas about peace and related notions of tranquility, stability, order, unity, and harmony were routinely invoked to defend slavery and segregation and resist Reconstruction and civil rights. Often, this “peace” meant protecting white people’s property and their proprietary interest in whiteness, what Professor Cheryl Harris terms “whiteness as property.”<sup>10</sup> Racial justice was considered a threat to peace because it might lead to property destruction and devaluation<sup>11</sup> and because it might disrupt settled expectations based on white racial privilege.<sup>12</sup> This historical overview suggests that the language of peace, like that of compromise,<sup>13</sup> can provide a veneer of virtue to those hindering the pursuit of racial justice.

Part II demonstrates how *legal* arguments routinely weaponized peace to circumvent racial justice and how the Supreme Court treated these arguments. For much of its history, the Supreme Court prioritized quietude over justice: Cases like *Plessy v. Ferguson*, for example, maintained racial

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evaluating these approaches in light of transitional justice values). Relatedly, peacebuilding concerns how societies resolve injustice and pursue societal transformation in peaceful ways. On the relationship between transitional justice and peacebuilding, see generally Chandra Lekha Sriram, *Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice*, 21 *Glob. Soc’y* 579 (2007).

8. Professor K. Sabeel Rahman describes a multiracial democracy as one in which Black and Brown people have “full equal standing” as “members of the polity.” K. Sabeel Rahman, *Democracy Reform Symposium*, 109 *Calif. L. Rev.* 979, 981 (2021). Often, weaponized forms of peace excluded and undermined considerations of the standing of Black people. See *infra* Part I (discussing weaponized peace claims in social history); *infra* Part II (discussing the same in legal history).

9. See Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 *Hum. Rts. Q.* 321, 323 (2009) (discussing questions raised by transitional justice in Argentina after the end of the military dictatorship).

10. See Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707, 1713 (1993) (explaining how American law “protect[s] settled expectations based on white privilege”).

11. Whereas enslavers considered abolition “subversive of the rights of property and the order and tranquility of society,” Thomas R. Dew, *An Essay on Slavery* 6 (Richmond, J.W. Randolph 1849), segregationists warned that integration would destroy property values and thus “disrupt cordial relations previously existing between the races,” *Brief for Defendant in Error, Buchanan v. Warley*, 245 U.S. 60 (1917) (No. 15-33), reprinted in 18 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 87, 106 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter 18 *Landmark Briefs*].

12. Organizations like White Citizens’ Councils warned about integration’s threat to “generations” of white southerners’ peace. See *infra* text accompanying note 46.

13. See generally Joshi, *Racial Equality Compromises*, *supra* note 7 (reflecting that the virtuous label of “compromise” obscures how concessions made to white supremacists damage the pursuit of racial equality).



apartheid for “the preservation of the public peace and good order.”<sup>14</sup> But in the early- to mid-twentieth century, the Court rejected the weaponization of peace in cases like *Buchanan v. Warley*,<sup>15</sup> *Cooper v. Aaron*,<sup>16</sup> *Watson v. City of Memphis*,<sup>17</sup> and *Cox v. Louisiana*.<sup>18</sup> Crucially, it did so because dominant peace arguments were often made in bad faith and with little or no evidence; the discord they claimed to address was actually the result of hostility to racial equality; and “public peace” was not more important than constitutional rights. As the Court rejected weaponized peace claims, racial justice opponents modified their arguments. By the 1970s, a more conservative Court accepted resistance to racial integration under the pretext of peace in cases like *Palmer v. Thompson*.<sup>19</sup>

Part III documents the weaponization of peace in our present moment. Racial justice protestors’ basic rights to speech and assembly are often curtailed by opponents who attempt to delegitimize protestors by characterizing them as violent. Following the 2020 racial justice uprisings, several states introduced legislation expanding penalties for unlawful assembly or civil unrest.<sup>20</sup> Given that the 2020 protests were overwhelmingly peaceful, these laws seem aimed not at preventing violence but at preventing racial justice uprisings from disrupting an oppressive status quo.<sup>21</sup> Moreover, despite protests highlighting flagrant and unchecked police brutality, police departments nationwide have received increased funding and support from those who see policing as a precondition for peace.<sup>22</sup> Meanwhile, bans on critical race theory and other so-called “divisive concepts” from public schools and workplaces accuse these ideas of causing

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14. 163 U.S. 537, 550 (1896).

15. 245 U.S. 60 (1917) (striking down a residential segregation ordinance); see also *infra* section II.A.

16. 358 U.S. 1 (1958) (requiring school integration); see also *infra* section II.B.

17. 373 U.S. 526 (1963) (requiring park integration); see also *infra* section II.C.

18. 379 U.S. 536 (1965) (overturning the conviction of a civil rights protestor); see also *infra* section II.D.

19. 403 U.S. 217 (1971) (allowing pool closures); see also *infra* section II.E.

20. Meg O’Connor, Republican Lawmakers Are Using the Capitol Riot to Fuel Anti-BLM Backlash, *Appeal* (Jan. 19, 2021), <https://theappeal.org/capitol-insurrection-anti-black-lives-matter-legislation/> [<https://perma.cc/6389-NRF2>] (documenting legislation expanding penalties for unlawful assembly or civil unrest).

21. Erica Chenoweth & Jeremy Pressman, This Summer’s Black Lives Matter Protesters Were Overwhelmingly Peaceful, Our Research Finds, *Wash. Post* (Oct. 16, 2020), <https://www.washingtonpost.com/politics/2020/10/16/this-summer-black-lives-matter-protesters-were-overwhelming-peaceful-our-research-finds/> (on file with the *Columbia Law Review*) (finding that racial justice protests in the wake of George Floyd’s murder were overwhelmingly peaceful).

22. Grace Manthey, Frank Esposito & Amanda Hernandez, Despite ‘Defunding’ Claims, Police Funding Has Increased in Many US Cities, *ABC News* (Oct. 16, 2022), <https://abcnews.go.com/US/defunding-claims-police-funding-increased-us-cities/story?id=91511971> [<https://perma.cc/9A7V-765L>].

disharmony and appeal to civic peace.<sup>23</sup> One federal bill is literally called the PEACE Act.<sup>24</sup> Similarly, legal challenges to affirmative action depict race-sensitive inclusion as a threat to racial harmony.<sup>25</sup>

As weaponized peace discourse has been normalized in American society, it has eclipsed the more emancipatory understandings of peace that racial justice advocates have put forward.<sup>26</sup> Accordingly, judges and other actors may accept dominant group claims about peace without interrogating their factual and normative predicates and without considering the peace claims of subordinated groups. Working against this tendency, this Essay's conclusion outlines some considerations that should guide judges and other actors in assessing what claims to peace are legitimate and what kinds of peace are worth having.

### I. HOW PEACE BECOMES WEAPONIZED

*The white people also desire peace and harmony. This is all we want.*

— Senator James O. Eastland, defending segregation in 1955<sup>27</sup>

*If peace means accepting second-class citizenship, I don't want it.*

*If peace means keeping my mouth shut in the midst of injustice and evil, I don't want it.*

*If peace means being complacently adjusted to a deadening status quo, I don't want peace.*

*If peace means a willingness to be exploited economically, dominated politically, humiliated and segregated, I don't want peace.*

— Dr. Martin Luther King, Jr., delivering a sermon in 1956<sup>28</sup>

23. Sarah Schwartz, Map: Where Critical Race Theory Is Under Attack, *Educ. Week* (June 11, 2021), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [https://perma.cc/78BM-FBSK]. For another comprehensive documentation of such laws, see CRT Forward, UCLA Sch. L. Critical Race Stud. Program, <https://crtforward.law.ucla.edu> [https://perma.cc/32XT-RFU2] (last visited Feb. 23, 2023).

24. Jennifer Schuessler, Bans on Critical Race Theory Threaten Free Speech, *Advocacy Group Says*, *N.Y. Times* (Nov. 8, 2021), <https://www.nytimes.com/2021/11/08/arts/critical-race-theory-bans.html> (on file with the *Columbia Law Review*); see also Press Release, Sen. Marco Rubio, Rubio, Cramer, Braun Introduce Legislation to Prohibit Federal Funding of Critical Race Theory in American History and Civics Education (Aug. 9, 2021), <https://www.rubio.senate.gov/public/index.cfm/2021/8/rubio-cramer-braun-introduce-legislation-to-prohibit-federal-funding-of-critical-race-theory-in-american-history-and-civics-education> [https://perma.cc/W4JH-VMV4].

25. See *infra* notes 244–251 and accompanying text.

26. See Joshi, *Racial Justice and Peace*, *supra* note 6, at 1340–47.

27. Senator James O. Eastland, Address at the Mississippi Association of Citizens' Council Statewide Meeting (Dec. 8, 1955), *in* *Ark. Faith*, Dec. 1955, at 9 [hereinafter *Eastland, Address to Miss. Citizens' Council*].

28. Martin Luther King, Jr., *When Peace Becomes Obnoxious*, Sermon Delivered at Dexter Avenue Baptist Church (Mar. 18, 1956), *in* 6 *The Papers of Martin Luther King, Jr.*:

For centuries, white supremacists in the United States have made racialized appeals to peace by depicting an oppressive status quo as peaceful and the pursuit of racial justice as unpeaceful. In the early 1800s, American defenders of slavery appealed to a fictional peaceful coexistence of white enslavers and the Black enslaved. Following Nat Turner's slave rebellion in 1831, Thomas R. Dew, president of the College of William and Mary, said that slavery was necessary to "change the wandering character of the savage, and make it his interest to cultivate peace instead of war."<sup>29</sup> He further rebuked abolitionist arguments made in the Virginia legislature as "wild and intemperate" and "subversive of the rights of property and the order and tranquility of society."<sup>30</sup> In his famous 1837 speech defending slavery as a "positive good," John C. Calhoun called it "indispensable to the peace and happiness of both [groups]."<sup>31</sup> He predicted that abolition would require "drenching the country in blood, and extirpating one or the other of the races" and would "destroy us as a people."<sup>32</sup>

Following the Civil War, Reconstruction opponents positioned Black people's equality as both extraneous and a threat to peace. In his 1907 book, *The Crucial Race Question*, for example, clergyman and author William Montgomery Brown urged that "[c]olored men should not claim and exercise the rights of citizenship in this White man's country" in the interests of "peace and good will among men."<sup>33</sup> "So long as the Negro maintained [a] subservient attitude and accepted the 'place' assigned him, a sort of racial peace existed," Dr. King later observed of this era.<sup>34</sup> "But it was an uneasy peace in which the Negro was forced patiently to submit to insult, injustice and exploitation."<sup>35</sup>

During Jim Crow, segregationists claimed that a separation of the races was necessary to maintain tranquility and harmony.<sup>36</sup> They depicted the South as a just and peaceful society being decimated by "outside agitators" like the Supreme Court and the NAACP.<sup>37</sup> Ironically, they made these

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Advocate of the Social Gospel, September 1948–March 1963, at 257, 259 (Clayborn Carson, Susan Carson, Susan Englander, Troy Jackson & Gerald L. Smith eds., 2007) (cleaned up).

29. Dew, *supra* note 11, at 24.

30. *Id.* at 6.

31. 13 Reg. Deb. 2186 (1837) (statement of Sen. Calhoun).

32. *Id.*

33. William Montgomery Brown, *The Crucial Race Question; Or, Where and How Shall the Color Line Be Drawn* 140 (1907).

34. Martin Luther King, Jr., *Nonviolence and Racial Justice*, 74 *Christian Century* 165, 165 (1957).

35. *Id.*

36. Professor Anders Walker observes that some segregationists counseled racial segregation as a "moderate" means to improve race relations and prevent racial conflict (in contrast to lynching, rape, and other forms of violence to assert white supremacy). Anders Walker, *Diversity's Strange Career: Recovering the Racial Pluralism of Lewis F. Powell, Jr.*, 50 *Santa Clara L. Rev.* 647, 653 (2010).

37. 102 Cong. Rec. 4461 (1956) (statement of Sen. Thurmond).

appeals to peace while themselves launching an all-out war on integration.<sup>38</sup> Ultimately, segregationists sought an oppressive “negative peace,” characterized by “the absence of direct violence” and gained through racial exclusion, as opposed to a “positive peace,” characterized by “the absence of both direct and indirect violence, including various forms of ‘structural violence’ such as poverty, hunger, and other forms of social injustice.”<sup>39</sup>

In May 1954, *Brown v. Board of Education* declared racial segregation in public education unconstitutional.<sup>40</sup> Segregationists in the *Brown* litigation argued that “the public peace, harmony and the general welfare” of their communities necessitated the teaching of Black and white students in separate classrooms.<sup>41</sup> Integrationists rejected such appeals to peace as illegitimate because “the fact that racial segregation accords with custom and usage or is considered needful for the preservation of public peace and good order” does not render it constitutionally legitimate.<sup>42</sup> Integrationists argued that segregation “does not promote the ‘comfort’ of its citizenry, and is totally irrelevant to the ‘preservation of the public peace and good order.’”<sup>43</sup>

Despite the *Brown* decision, uncompromising segregationists continued weaponizing peace to resist integration.<sup>44</sup> For example, Mississippi Senator James O. Eastland argued that segregation was part of states’ “police powers [to] promote peaceful and harmonious race relations.”<sup>45</sup> In November 1954, Louisiana passed an amendment allowing the use of police powers to maintain segregated schools in the interests of “public health, morals, better education, peace, and good order.”<sup>46</sup> Segregationist

38. On “massive resistance” to *Brown* and school integration, see Elizabeth Gillespie McRae, *Mothers of Massive Resistance: White Women and the Politics of White Supremacy* 1–20 (2018) (discussing the role of white women in maintaining Jim Crow).

39. See Dustin N. Sharp, *Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice*, 35 *Fordham Int’l L.J.* 780, 784 n.10 (2012) (citing Johan Galtung, *Violence, Peace, and Peace Research*, 6 *J. Peace Rsch.* 167 (1969)) (drawing this distinction); see also Wendy Lambourne, *Transitional Justice and Peacebuilding After Mass Violence*, 3 *Int’l J. Transitional Just.* 28, 34 (2009) (similar).

40. *Brown v. Bd. of Educ.* (*Brown I*), 347 U.S. 483 (1954).

41. Brief of John Ben Shepperd, Attorney General of Texas, *Amicus Curiae* at 3, *Brown v. Bd. of Educ.* (*Brown II*), 349 U.S. 294 (1955) (Nos. 54-1, 54-2, 54-3 & 54-5), 1954 WL 72726.

42. Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 40, *Brown I*, 347 U.S. 483, 1953 WL 78288.

43. Brief of American Veterans Committee, Inc. (AVC), *Amicus Curiae* at 14, *Brown I*, 347 U.S. 483, 1952 WL 82042.

44. See Joshi, *Racial Equality Compromises*, *supra* note 7.

45. Eastland, *Address to Miss. Citizens’ Council*, *supra* note 27.

46. Neil R. McMillen, *The Citizens’ Council: Organized Resistance to the Second Reconstruction, 1954–64*, at 60 (1994). Similarly, in July 1956, North Carolina enacted the “Pearsall Plan,” which excused students from attending a court-ordered integrated public school to “help preserve the public peace.” Report of the North Carolina Advisory Committee on Education 11 (1956), [https://archive.org/details/reportofnorthcar00nort\\_0/page/8/mode/2up?q=peace](https://archive.org/details/reportofnorthcar00nort_0/page/8/mode/2up?q=peace) (on file with the *Columbia Law*

legislators responded to *Brown* by signing the “Southern Manifesto” of 1956, which alleged that the Supreme Court decision had created an “explosive and dangerous condition” by “destroying the amicable relations between the white and Negro races.”<sup>47</sup>

These allegations were echoed in 1963, when white people in Selma ran a full-page advertisement in the local *Times-Journal* that declared:

The white and Negro races have lived together in Selma and Dallas County for many generations in a state of peace and tranquility; and Selma will continue to be the home of both races long after agitators have done their evil work of poisoning the minds of some of our Negro citizens.<sup>48</sup>

Such depictions of “peace and tranquility” assumed Black people’s contentment with Jim Crow. As the Student Nonviolent Coordinating Committee, a civil rights organization formed in the wake of student-led sit-ins across the South,<sup>49</sup> responded: “Perhaps the whites, who did not fear police brutality, reprisal and lynchings with no legal recourse, lived in peace; the Negroes have not.”<sup>50</sup> Observing this discourse, one commentator opined: “The white people still believe, more passionately than ever, in racial harmony. The Negroes believe that, beyond all doubt, the price for racial harmony is one they inevitably have to pay.”<sup>51</sup>

Around this time, White Citizens’ Councils, a network of white supremacist organizations throughout the South, declared their mission as “the maintenance of peace, good order and domestic tranquility.”<sup>52</sup> According to the NAACP’s Roy Wilkins, the Councils sought to suppress violence in order to “turn[] the attention of the North away from the South and toward its own racial problems” and to “provid[e] ‘evidence’ that the Northern way of life which does not include state-imposed racial segregation produces racial clashes, whereas the Southern segregated system produces racial harmony.”<sup>53</sup> Indeed, *The Councilor* newsletter ran stories of unrest in Northern cities to show “startling contrast [with] the peaceful *segregated cities* of the South.”<sup>54</sup> According to the Councils, “the

*Review*); Samuel Momodu, The Pearsall Plan (1956–1966), *BlackPast* (Aug. 31, 2016), <https://www.blackpast.org/african-american-history/pearsall-plan-1956-1966/> [<https://perma.cc/QTJ5-UVME>].

47. 102 Cong. Rec. 4460 (1956).

48. A Declaration of Basic Rights and Principles, *Selma Times-J.*, Sept. 22, 1963, at 5.

49. SNCC, *History.com* (Aug. 24, 2021), <https://www.history.com/topics/black-history/sncc> [<https://perma.cc/9FLB-LZVF>].

50. Memorandum of the Student Nonviolent Coordinating Committee Office, Atlanta, on “A Declaration of Basic Rights and Principles” (on file with the *Columbia Law Review*).

51. John R. Fry, The Voter-Registration Drive in Selma, Alabama, *Presbyterian Life*, Jan. 15, 1964, at 12, 17.

52. Hague, *supra* note 3.

53. Letter from Roy Wilkins, Exec. Sec’y, NAACP, to J. Edgar Hoover, Dir., FBI (June 20, 1956) (on file with the *Columbia Law Review*).

54. Washington D.C.—A Haven for Integrationist Hoodlums, *Councilor* (Ass’n of Citizens’ Councils of La., Inc., Homer, La.), Feb. 1958, at 4, 5 (emphasis added).

maintenance of peace, good order and domestic tranquility” in the South required segregation, disenfranchisement, and white supremacy. Outlining these goals candidly in a fundraising appeal, the Selma chapter of the Councils promised to preserve “Racial Harmony” by “prevent[ing] sit-ins, mob marches and wholesale Negro voter registration efforts” from happening.<sup>55</sup>

Ultimately, these white supremacists cast the pursuit of racial justice as inherently unpeaceful. They especially blamed the NAACP and the Supreme Court for “creat[ing] strife and turmoil where no strife and turmoil existed before” and “caus[ing] hatred and hostility where before there was good will and harmony.”<sup>56</sup> Arkansas Attorney General Bruce Bennett claimed that any “turmoil and conflict between the races can be simply reduced to the amount of activity carried on by local branches of the NAACP.”<sup>57</sup> His “Southern Plan for Peace” called for “peaceful harmony between the white and Negro races” by suppressing the NAACP and other civil rights organizations.<sup>58</sup> He filed registration and tax suits against the NAACP, arguing that minimizing their activities would bring “peace and tranquility to the people of Arkansas again.”<sup>59</sup> Similarly, a Ku Klux Klan leader blamed racial conflict not on the KKK’s own racial terrorism but on the Supreme Court, which he said created “a situation loaded with dynamite . . . that can lead to bloodshed.”<sup>60</sup> Those making appeals for peace conveniently ignored that their notions of “peaceful harmony” required the subordination of Black people and that current strife and turmoil were the products of their own violent resistance to *Brown*.

From this historical overview, we can see why “peace” would be a popular tool in the white supremacist arsenal. Since peace is a legitimate social value, delaying or denying racial justice to maintain peace might seem more palatable than doing so out of open racial animus or protectionism. By invoking peace, Americans defending white supremacy could obscure the violence of the status quo, shield racist motives or

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55. Dallas County Citizens’ Council Advertisement, *Selma Times-J.*, June 9, 1963, at 3. Others, however, saw through this peaceful façade: The Catholic Interracial Council, for example, declared the White Citizens’ Councils a threat to “peace and security” and “our democratic way of life,” calling it “a racist organization which has launched ‘a campaign of hatred, violence and intimidation in the South.’” Press Release, Cath. Interracial Council, South’s White Citizens Councils Called a National Menace by CIC (Jan. 17, 1957) (on file with the *Columbia Law Review*).

56. 102 Cong. Rec. 6823 (1956) (statement of Rep. Williams (quoting Rep. Davis)).

57. Tony Freyer, *The Little Rock Crisis: A Constitutional Interpretation* 129 (1984) (quoting Ark. Att’y Gen. Bruce Bennett).

58. Yasuhiro Katagiri, *Black Freedom, White Resistance, and Red Menace: Civil Rights and Anticommunism in the Jim Crow South* 127–28 (2014) (quoting Ark. Att’y Gen. Bruce Bennett). Accordingly, Arkansas Act 115 forbade public employment of NAACP members. Act 115, 1959 Ark. Acts 327, 329.

59. Freyer, *supra* note 57, at 129.

60. N.K. Perlow, *KKK Leader Warns: ‘We Mean Business’*, *Nat’l Police Gazette*, Aug. 1956, at 5, 32.

designs from others, protect their self-image as peaceful rather than prejudiced or self-interested, and pass the blame onto justice-seeking groups for disrupting the peace.

Ultimately, those making these appeals were concerned only with the threat to peace posed by *changes* to the status quo, not with the threat to peace resulting from a *continuation* of the status quo. Yet, the continuation of an unequal status quo could threaten both short- and long-term peace.<sup>61</sup> Because the law has been a primary site for the weaponization of peace, this Essay now examines legal cases in which racial justice opponents have cited tranquility, stability, and harmony as reasons to limit racial justice.

## II. WEAPONIZED PEACE IN LEGAL CASES

This Part analyzes how the Supreme Court rejected weaponized peace claims as a basis for discriminatory treatment in several different contexts, including property rights, public education, public parks, and public demonstrations, as well as how it uncritically accepted such claims as a basis for the complete denial of the use of public pools.

### A. *Property*: *Buchanan v. Warley*

On May 11, 1914, Louisville, Kentucky, passed an ordinance that prohibited Black people from moving to a block with majority white residents.<sup>62</sup> The text of the ordinance mandated segregation “to prevent conflict and ill-feeling between the white and colored races” and “to preserve the public peace and promote the general welfare.”<sup>63</sup>

When Charles Buchanan, a white man, attempted to sell his house on a predominantly white block to William Warley, a Black man, Warley was prohibited from living there and did not complete the sale.<sup>64</sup> Buchanan sued Warley and alleged that the Louisville ordinance violated the Due Process Clause of the Fourteenth Amendment.<sup>65</sup>

Louisville attorneys defended the ordinance by arguing that it protected racial peace.<sup>66</sup> They argued that integration “ceases to be a constitutional right the moment it threatens the peace and good order of

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61. See Joshi, *Racial Justice and Peace*, *supra* note 6, at 1340–47. Relatedly, these appeals prioritize a negative peace based on the suppression of social conflict over a positive peace grounded in the pursuit of social justice, and they prioritize the experiences of dominant racial groups.

62. *Buchanan v. Warley*, 245 U.S. 60, 70 (1917).

63. *Id.* For examples of similar ordinances, see T.B. Benson, *Segregation Ordinances*, 1 Va. L. Reg. 330, 330 (1915) (“The purpose [of segregation ordinances] as usually expressed is to preserve the peace, prevent conflict and ill-feeling between the two races, and thereby promote the welfare of the city.”).

64. *Buchanan*, 245 U.S. at 70.

65. *Id.*

66. Brief for Defendant in Error, *supra* note 11, at 106.

society.”<sup>67</sup> They claimed that a Black person moving into a white block, simply to “gratify his inordinate . . . aspirations . . . of social equality with white people,” would destroy property values and thus “disrupt the cordial relations previously existing between the two races.”<sup>68</sup> City attorneys also characterized upholding segregation laws as simply the “duty of the white people to preserve the integrity of their own race and the peace of their own communities.”<sup>69</sup> Their brief concluded that the present law was needed to “safeguard . . . the community from lawlessness and breaches of the peace, which are the inevitable result of too intimate contact between the white and negro races.”<sup>70</sup>

Buchanan repudiated this weaponization of peace, arguing that the ordinance was not enacted in good faith or for the purposes declared.<sup>71</sup> Instead, it was drawn “with a view to placing the negro citizens of Louisville in as inferior a position as possible with respect to their right of residence and directly violating the spirit of the Fourteenth Amendment without transgressing the letter.”<sup>72</sup> Buchanan argued that nothing about Black people’s conduct made such an ordinance necessary.<sup>73</sup> Indeed, Black people had been allowed to live in the same home as their enslavers, but not as equal citizens across the street from white neighbors.<sup>74</sup> Rather, it was white people’s response to the possibility of racial equality that disrupted the peace.<sup>75</sup> Prejudice of race and color were the sole reason for the ordinance.<sup>76</sup> The law could not deny the rights of Black people in the name of peace simply to avoid aggravating lawless attacks by white neighbors.<sup>77</sup>

A series of amicus briefs supporting integration similarly disputed the ordinance’s reliance on peace. For example, the Baltimore branch of the NAACP criticized the ordinance’s stated purpose because, according to them, there had never been significant outbreaks of unrest in areas where

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67. *Id.*

68. *Id.*

69. *Id.* at 114.

70. *Id.* at 118. This argument aligned in a way with how property rights have been justified based on their ability to prevent breaches of the peace. As Professor Stewart Sterk observes: “At least since Aristotle, legal thinkers have justified property as a mechanism for avoiding quarrels and settling conflicts. Even the most libertarian of theorists acknowledge that the state must play a critical role in preventing feuds and controlling violence.” Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 *Wash. U. L.Q.* 417, 431 (2005).

71. Brief for the Plaintiff-in-Error, *Buchanan*, 245 U.S. 60, reprinted in 18 *Landmark Briefs*, supra note 11, at 3, 37.

72. *Id.* at 38.

73. Brief for the Plaintiff in Error on Rehearing, *Buchanan*, 245 U.S. 60, reprinted in 18 *Landmark Briefs*, supra note 11, at 491, 514–15.

74. *Id.* at 512.

75. *Id.*

76. *Id.*

77. *Id.* at 538.



white and Black people lived together.<sup>78</sup> Furthermore, the ordinance was incoherent because it permitted preexisting residential integration to persist but restricted further integration ostensibly to preserve community peace.<sup>79</sup> The brief argued, however, that any alleged “menace” to peace was equally likely in both situations.<sup>80</sup>

Wells H. Blodgett and Frederick W. Lehmann, affiliates of the American Bar Association, noted that although the stated purpose of the ordinance was the preservation of public peace, there were reports that prior to its enactment, white people had used violence to drive away Black people moving to the neighborhood.<sup>81</sup> Thus, they argued, the ordinance was enacted not so much to repress lawless violence perpetrated by whites but to accomplish, through law, the goal of that violence, thereby sanctioning the racism that motivated it.<sup>82</sup> The brief conceded that laws might be implemented to protect public peace but insisted that they must comply with the Constitution.<sup>83</sup>

The Supreme Court agreed with this sentiment. In 1917, the Court in *Buchanan v. Warley* struck down Louisville’s residential segregation ordinance.<sup>84</sup> “It is urged that this proposed segregation will promote the public peace by preventing race conflicts,” the Court said.<sup>85</sup> “Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution.”<sup>86</sup> While acknowledging a “serious and difficult problem arising from a feeling of race hostility which the law is powerless to control,” the Court refused to resolve this problem by depriving citizens of their constitutional rights.<sup>87</sup>

Ultimately, *Buchanan*’s reach was limited. Cities across the South flouted the ruling through further weaponizations of peace.<sup>88</sup> Birmingham, Alabama, did so on the grounds that “threats to peace were so imminent and severe if African Americans and whites lived in the same

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78. Brief of Baltimore Branch of NAACP as Amicus Curiae, *Buchanan*, 245 U.S. 60, reprinted in 18 Landmark Briefs, supra note 11, at 217, 233.

79. *Id.* at 236–37.

80. *Id.*

81. Brief of Wells H. Blodgett and Frederick W. Lehmann as Amici Curiae, *Buchanan*, 245 U.S. 60, reprinted in 18 Landmark Briefs, supra note 11, at 255, 259–60.

82. *Id.*

83. *Id.* at 297–98.

84. *Buchanan*, 245 U.S. at 82.

85. *Id.* at 81.

86. *Id.*

87. *Id.* at 80–81.

88. See Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 46–48 (2017) (noting that “[m]any border and southern cities ignored the *Buchanan* decision” and adopted exclusionary housing practices that continued “until at least 1987”).

neighborhoods.”<sup>89</sup> Similarly, Atlanta, Georgia, asserted that “race zoning [was] essential in the interest of the public peace, order and security and will promote the welfare and prosperity of both the white and colored race.”<sup>90</sup> Moreover, *Buchanan* was grounded in the right to own property rather than racial equality.<sup>91</sup> Accordingly, it did not overturn *Plessy*’s “separate but equal” decision, and the Jim Crow apartheid system continued in its wake.

Forty years later, similar issues would resurface in the education context in what became known as the Little Rock Crisis of 1957. This crisis yielded the landmark 1958 decision in *Cooper v. Aaron*, which rejected the Little Rock School Board’s proposal to postpone integration in order to maintain “public peace.”<sup>92</sup>

### B. *Education: Cooper v. Aaron*

In 1954, *Brown v. Board of Education* declared racial segregation in public education unconstitutional.<sup>93</sup> As the Little Rock School Board announced a phased integration plan to implement *Brown*, local segregationist groups, such as the Capital Citizens’ Council and the Mothers’ League of Central High School, stoked fears that integration would lead to violence.<sup>94</sup> They successfully directed their rabble-rousing at the Governor of Arkansas, Orval Faubus, who refused to permit the planned integration of Little Rock Central High School.<sup>95</sup>

Faubus purportedly sought to maintain a negative peace, which he claimed was under attack by integrationists. On September 2, 1957, Faubus

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89. *Id.* at 47. The Birmingham council president added that “this matter goes beyond the written law, in the interest of . . . racial happiness.” *Id.* (internal quotation marks omitted) (quoting the Birmingham city commission president). Birmingham’s racial zoning ordinance continued until 1950. *Id.*

90. *Id.* at 46. Robert Whitten, Atlanta’s city planner, wrote in 1922 that “[e]stablishing colored residence districts has removed one of the most potent causes of race conflict” and that this was “a sufficient justification for race zoning.” *Id.* (alteration in original) (internal quotation marks omitted) (quoting Robert Whitten). Atlanta continued to use its racial zoning map “for decades” after *Buchanan*. *Id.*

91. For a critique of *Buchanan* along these lines, see James W. Fox Jr., *Black Progressivism and the Progressive Court*, 130 *Yale L.J. Forum* 398, 415–16 (2021).

92. 358 U.S. 1, 16 (1958).

93. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

94. Karen Anderson, *Little Rock: Race and Resistance at Central High School* 57 (2010); Graeme Cope, “A Thorn in the Side”? The Mothers’ League of Central High School and the Little Rock Desegregation Crisis of 1957, 57 *Ark. Hist. Q.* 160, 162, 177 (1998). See generally McRae, *supra* note 38, at 185–216 (describing the role of white women in maintaining segregation in general and in efforts to entrench segregation in Little Rock in particular).

95. See Johanna Miller Lewis, *History of the Alternative Desegregation Plan and the Black Community’s Perspective and Reaction*, 30 *U. Ark. Little Rock L. Rev.* 363, 373–74 (2008) (discussing how segregationists pressured Faubus to stop integration).

declared a state of emergency due to an alleged “imminent danger of tumult, riot and breach of the peace” if the integration of Central High School proceeded.<sup>96</sup> On September 4, the day the school was to be integrated, he dispatched troops from the Arkansas National Guard to prevent nine Black children from entering the school building.<sup>97</sup> These Black children—known as the Little Rock Nine—faced terrifying abuse at the hands of white mobs emboldened by Faubus’s actions.<sup>98</sup>

President Dwight D. Eisenhower responded to the Faubus blockade by sending federal troops to Arkansas to maintain order and protect Black students entering Central High School.<sup>99</sup> As Eisenhower intervened in Little Rock, segregationist politicians across the country leveraged claims about peace to resist integration. Mississippi Senator John Stennis wrote to Eisenhower that integration would destroy “generations of peaceful and harmonious cooperation among the people of the two races.”<sup>100</sup> Illinois Representative Noah Mason cautioned that “[l]aws that violate or go contrary to the customs of a community never bring about social peace and harmony.”<sup>101</sup> Georgia Comptroller General Zack Cravey charged that Eisenhower could “return this nation to the normalcy of peace and harmony” but had instead chosen “catastrophe.”<sup>102</sup> Despite these complaints, Eisenhower urged compliance with federal court orders so that “the City of Little Rock will return to its normal habits of peace and order.”<sup>103</sup>

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96. Courts, 2 Race Rels. L. Rep. 931, 937 (1957) (reprinting Gov. Faubus’s proclamation).

97. “The Guard was not called out to prevent integration,” Faubus claimed, “but to keep the peace and order of the community.” Crisis Timeline: Little Rock Central High School National Historic Site, Nat’l Park Serv., <https://www.nps.gov/chsc/learn/historyculture/timeline.htm> [<https://perma.cc/R6W9-5698>] (last updated Jan. 24, 2022). Prior to the arrival of Black students, Major General Edwin Walker, head of Little Rock’s military district, assured Central High’s student body that “no one will interfere with coming, going, or your peaceful pursuit of your studies.” Id.

98. The Little Rock Nine included Minnijean Brown, Elizabeth Eckford, Ernest Green, Thelma Mothershed, Melba Patillo, Gloria Ray, Terrence Roberts, Jefferson Thomas, and Carlotta Walls. See generally Judith Bloom Fradin & Dennis Brindell Fradin, *The Power of One: Daisy Bates and the Little Rock Nine* 66–68 (2004) (telling the story of civil rights activist Daisy Bates and the Little Rock Nine). For Bates’s own recollection of the integration of Central High School, see generally Daisy Bates, *The Long Shadow of Little Rock: A Memoir* (1962).

99. President Dwight D. Eisenhower, Radio and Television Address to the American People on the Situation in Little Rock, 1957 Pub. Papers 689, 690 (Sept. 24, 1957).

100. Telegram from Senator John Stennis to President Dwight D. Eisenhower (Oct. 1, 1957) (on file with the *Columbia Law Review*).

101. Noah M. Mason, “Civil Rights” Against the Constitution, Hum. Events, July 13, 1957.

102. Telegram from Zack D. Cravey, Ga. Comptroller Gen., to President Dwight D. Eisenhower (Sept. 5, 1957) (on file with the *Columbia Law Review*).

103. Eisenhower, *supra* note 99, at 694.

Although the Little Rock Nine were able to enter the school by the end of September 1957, the Little Rock School Board later petitioned the courts to delay integration for two-and-a-half years.<sup>104</sup> Making a series of negative peace claims, the Board complained that *Brown* “pronounced a rule of law which is well in advance of the mores of the people of this region[,] and violent opposition to its principle has erupted.”<sup>105</sup> Delaying integration would reduce the “present highly emotional atmosphere, which has proven conducive to violence,” and enable people to “find a better understanding of the nature of the problems confronting them and, consequently, the direction in which the solutions lie.”<sup>106</sup> Indeed, the Board argued that transferring Black students to another school would protect *their* justice- and peace-related interests because their “high school education will not be interrupted” and “they will be spared the predictable mental torment and physical danger.”<sup>107</sup>

Representing the Black students at Central High School, the NAACP urged the Supreme Court to reject the Board’s proposal “to revert to segregated education as terms for peace with the lawless elements.”<sup>108</sup> Delaying integration would “teach[] children that courts of law will bow to violence,” which would amount to a “complete breakdown of education” worse than any temporary disturbance of schooling.<sup>109</sup> The NAACP also noted that further delay would encourage segregationists’ continued attempts to block the execution of federal orders, which would “subvert our entire constitutional framework.”<sup>110</sup> By contrast, enforcing integration would “restate in unmistakable terms both the urgency of proceeding with desegregation and the supremacy of all constitutional rights over bigots—big and small.”<sup>111</sup>

The United States government also urged the Court to reject an exclusionary negative peace. Solicitor General J. Lee Rankin filed an amicus brief arguing that “mere popular hostility” does not justify “depriving

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104. See Brief for the Petitioners, *Cooper v. Aaron*, 358 U.S. 1 (1958) (No. 58-1), reprinted in 54 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 553, 558, 566 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter 54 Landmark Briefs].

105. *Id.* at 584. The Board reasoned that “its task is not one of preserving the peace” or “quell[ing] defiance” to integration. *Id.*

106. Response to Application for Vacation of Order of Court of Appeals for Eighth Circuit Staying Issuance of Its Mandate, for Stay of Order of District Court of Eastern District of Arkansas and for Such Other Orders as Petitioners May Be Entitled to, *Cooper*, 358 U.S. 1, reprinted in 54 Landmark Briefs, *supra* note 104, at 547, 551.

107. Brief for the Petitioners, *supra* note 104, at 570.

108. Brief for Respondents, *Cooper*, 358 U.S. 1, reprinted in 54 Landmark Briefs, *supra* note 104, at 595, 606–07.

109. *Id.* at 602.

110. *Id.*

111. *Id.* at 603.

Negro children of their constitutional right.”<sup>112</sup> Like the pro-integration briefs in *Buchanan*, this brief highlighted that Black children had not caused unrest; rather, because they were Black, their mere presence had led others to engage in protest.<sup>113</sup> The United States also echoed concerns that appeasing segregationists in Little Rock “would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means.”<sup>114</sup> This possibility was especially troubling given how just a small number of active agitators had derailed the constitutional rights of the Little Rock Nine.<sup>115</sup>

Ultimately, *Cooper v. Aaron* rejected the preservation of public peace as a reason to deny a constitutional right to equality.<sup>116</sup> The Court clarified that *Brown II* permits a district court to consider “relevant factors” that might justify delaying complete integration but stated that this analysis “of course[] excludes hostility to racial desegregation.”<sup>117</sup> It added that the district court’s findings of unrest at Central High School during the 1957–1958 school year were “directly traceable” to the impermissible actions that Arkansas legislators and executive officials had taken to resist *Brown*’s implementation.<sup>118</sup> Invoking its decision in *Buchanan v. Warley*,<sup>119</sup> the Court concluded that although public peace and order are important, “law and order are not here to be preserved by depriving the Negro children of their constitutional rights.”<sup>120</sup>

Despite the *Cooper* litigation, Arkansas state officials continued to resist integration by weaponizing peace. On August 26, 1958, the Arkansas General Assembly passed a law allowing the governor to close any school when “necessary in order to maintain the peace” against violence caused by integration.<sup>121</sup> On September 18, Governor Faubus delivered a speech warning that “once total, or near total integration is effected, the peace, the quiet, the harmony, the pride in our schools, and even the good relations that existed heretofore between the races here, will be gone

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112. Brief for the United States as Amicus Curiae, *Cooper*, 358 U.S. 1, reprinted in 54 Landmark Briefs, supra note 104, at 611, 624.

113. Id. at 627.

114. Id. at 628.

115. Id. at 629.

116. The Supreme Court issued a per curiam opinion on September 12, 1958, with a full opinion issued on September 29. *Cooper*, 358 U.S. at 4–5 & n.\* (describing the sequence of events and reprinting the per curiam opinion in full).

117. Id. at 7.

118. Id. at 15.

119. 245 U.S. 60 (1917).

120. *Cooper*, 358 U.S. at 16. “The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature.” Id.

121. Courts, 3 Race Rels. L. Rep. 869, 869 (1958) (reprinting Faubus’s school closing proclamation); see also Legislatures, 3 Race Rels. L. Rep. 1037, 1037–38 (1958) (reprinting both Faubus’s proclamation calling the special session and the text of his address to the Arkansas General Assembly).

forever.”<sup>122</sup> Nine days later, the people of Little Rock voted 19,470 to 7,561 in favor of closing public schools rather than desegregating.<sup>123</sup> Additionally, the Arkansas Pupil Placement Act of 1959 allowed school boards to consider transferring pupils based in part on “the possibility of breaches of the peace.”<sup>124</sup>

### C. *Parks: Watson v. City of Memphis*

Like *Buchanan*, *Cooper* did not stop cities from weaponizing peace to delay integration. When Black residents of Memphis sued for immediate desegregation of public parks and other recreational facilities, the city resisted by asserting its “good faith” in complying with the law and the necessity of “gradual” desegregation “to prevent interracial disturbances, violence, riots, and community confusion and turmoil.”<sup>125</sup> The Sixth Circuit endorsed the city’s “unquestioned good faith” as well as its approach to maintaining “the present friendly and peaceful relations between all of the white and colored citizens of Memphis.”<sup>126</sup>

Black Memphians, however, challenged the city on both accounts. The facts did not support the city’s claim of good-faith compliance, their brief before the Supreme Court argued, because Memphis had opened several new segregated parks and facilities since the Court’s ruling declaring segregated parks unconstitutional.<sup>127</sup> The city’s appeal to peace similarly lacked evidence. While the city’s witnesses “expressed the fear that confusion, turmoil, violence and bloodshed would ensue if desegregation proceeded rapidly . . . , these oft-repeated convictions were supported by almost no facts.”<sup>128</sup> On the contrary, the Chairman of the Park Commission described Memphis as “singularly blessed by the absence of turmoil,” identifying no violence in any of the integrated facilities.<sup>129</sup>

Furthermore, even a real violent threat would not alone justify delaying integration.<sup>130</sup> Citing *Cooper* and *Buchanan*, the brief argued that if integration could proceed amid the Little Rock Crisis, then it could certainly proceed in Memphis.<sup>131</sup> At oral arguments, NAACP counsel

122. Excerpts From the Speech of Governor Orval E. Faubus, Governor, Ark., Speech on School Integration, September 18, 1958, Univ. of Ark. Libraries, <https://libraries.uark.edu/specialcollections/research/lessonplans/FaubusSpeechLessonPlan.pdf> [<https://perma.cc/7GA4-J78R>] (last visited Feb. 4, 2023).

123. Crisis Timeline: Little Rock Central High School National Historic Site, *supra* note 97.

124. Act 461, § 4, 1959 Ark. Acts 1827, 1829.

125. *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963).

126. *Watson v. City of Memphis*, 303 F.2d 863, 868, 870 (6th Cir. 1962), *rev'd*, 373 U.S. 526.

127. Brief for Petitioners at 20, *Watson*, 373 U.S. 526 (No. 424), 1963 WL 105592.

128. *Id.* at 13.

129. *Id.* at 5.

130. *Id.* at 14.

131. *Id.* 14–15.

Constance Baker Motley added that “instead of shortening any period of disquiet and confusion, [gradualism] would certainly lengthen the period of racial unrest and disturbance.”<sup>132</sup> On this view, the elimination of racial inequities through integration and other measures would secure a more durable peace.

The Court in *Watson v. City of Memphis* declared that Memphis could not further delay desegregating its public parks and other recreational facilities.<sup>133</sup> Echoing *Cooper* from five years earlier, the Court’s unanimous decision rejected the claim that slowing the pace of integration was necessary to prevent “turmoil” by noting that “constitutional rights may not be denied simply because of hostility to their assertion or exercise.”<sup>134</sup> Furthermore, it found the asserted “fears of violence and tumult” and “inability to preserve the peace” to be merely “personal speculations or vague disquietudes of city officials.”<sup>135</sup> These officials had referred “only to a number of anonymous letters and phone calls” and “gave no concrete indication of any inability of authorities to maintain the peace.”<sup>136</sup>

While these positions aligned with those expressed in *Cooper* and *Buchanan*, *Watson* arguably went further toward recognizing the value of positive peace: It concluded that “goodwill between the races . . . can best be preserved and extended by the observance and protection, not the denial, of the basic constitutional rights here asserted.”<sup>137</sup>

While *Cooper v. Aaron* and *Watson v. City of Memphis* protected integration from weaponized public peace, the Court soon considered whether racial justice protests could be curtailed in the name of public peace in *Cox v. Louisiana*. Here, too, the Court was met with similar appeals from segregationists relating to peace and order but ultimately rejected them in favor of preserving constitutional rights.

#### D. *Protests: Cox v. Louisiana*

On December 15, 1961, Reverend B. Elton Cox led a peaceful civil rights demonstration and initiated a sit-in at lunch counters in Baton Rouge, Louisiana.<sup>138</sup> Cox was ordered to stop by the local sheriff, who deemed the sit-in a disturbance of the peace.<sup>139</sup> Cox was arrested and charged with four offenses under Louisiana law—(1) criminal conspiracy,

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132. Oral Argument at 19:42, *Watson*, 373 U.S. 526 (No. 424), <https://www.oyez.org/cases/1962/424> (on file with the *Columbia Law Review*).

133. *Watson*, 373 U.S. at 528, 539.

134. *Id.* at 535.

135. *Id.* at 536.

136. *Id.*

137. *Id.* at 537. The Court added that “[t]he best guarantee of civil peace is adherence to, and respect for, the law.” *Id.*

138. *Cox v. Louisiana*, 379 U.S. 536, 538–39 (1965).

139. *Id.* at 543.

(2) disturbing the peace, (3) obstructing public passages, and (4) picketing before a courthouse—and convicted of the latter three charges.<sup>140</sup>

At trial, the judge's decision hinged on a weaponized interpretation of public peace, stating: "It must be recognized to be inherently dangerous and a breach of the peace to bring 1,500 people, colored people, down in the predominantly white [areas] . . . and to urge those 1,500 people to descend upon our lunch counters and sit there until they are served."<sup>141</sup> Cox appealed, and the case reached the Supreme Court.

Defending the conviction, Louisiana argued that peaceful demonstrations are not protected by the First and Fourteenth Amendments irrespective of the place of the demonstration.<sup>142</sup> It also argued that because the Louisiana laws involved "are designed to maintain good order in society" and their concern for peace and good order "applies indiscriminately regardless of the membership of the group picketing or demonstrating," the fact that they were applied to punish Cox for an anti-racism demonstration did not pose a constitutional problem.<sup>143</sup>

In contrast, Cox argued that a robust right to peaceful demonstration must be protected.<sup>144</sup> Indeed, "[t]he more powerless, the more oppressed a minority is, the more important to all society is the right of peaceable assembly."<sup>145</sup> His brief explained that "[p]eaceable action in the streets calling attention to the evils of discrimination has been the lifeblood of protest against racial injustice in recent years . . . . Often it is the only means by which that 'free trade in ideas,' the essence of free speech, may be obtained."<sup>146</sup>

The brief also repudiated the false characterization of Cox's peaceful protest as a riotous one. It explained that although lower courts had suggested that a riot was "inevitable," averted only by timely action by the authorities, the evidence, including Cox's speech encouraging peaceful protest, proved no riot was at hand.<sup>147</sup> The brief thus posited that the protest's stance against racism, rather than its lack of peacefulness, was the true cause of Cox's arrest. With this understanding, it argued that "to permit a demonstration until it advocates ideas with which the authorities or the general public disagrees is a discriminatory application of the law which contributes both an interference with freedom of speech and a denial of equal protection of the laws."<sup>148</sup>

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140. *Id.* at 538.

141. *Id.* at 549–50 (internal quotation marks omitted) (quoting the trial court judge).

142. Consolidated Brief for Appellee at 4–9, *Cox*, 379 U.S. 536 (No. 24), 1964 WL 81197.

143. *Id.* at 8, 13.

144. Consolidated Brief for Appellant at 9–10, *Cox*, 379 U.S. 536 (No. 24), 1964 WL 81196.

145. *Id.* at 10.

146. *Id.* at 10–11.

147. *Id.* at 27.

148. *Id.* at 29.



Eventually, in 1965, the Supreme Court overturned Cox's conviction, rejecting Louisiana's argument that the conviction should be sustained because state witnesses believed that violence was about to erupt.<sup>149</sup> The Court noted that there was no evidence of "fighting words" or any form of violence in the demonstrations and that any fear of violence was based on the reaction of white citizens looking from across the street.<sup>150</sup> Further, it found that because a plain reading of the statute would allow convictions for any peaceful expression of unpopular views, convictions under the statute would infringe on constitutional protections for freedom of speech and expression.<sup>151</sup>

Despite the favorable ruling, however, the Justices referred to civil rights protestors as "mobs" and reinforced the idea that minority groups had no right to "patrol and picket in the streets whenever they choose."<sup>152</sup> This hedging led legal scholar Harry Kalven to write that the Court "bristled with cautions and with a lack of sympathy for such forms of protest."<sup>153</sup> The lack of sympathy was a harbinger of the Supreme Court's return to uncritically accepting weaponized peace claims in *Palmer v. Thompson*.<sup>154</sup>

#### E. *Pools*: *Palmer v. Thompson*

In 1962, after segregation had been declared unconstitutional, Jackson, Mississippi, decided to close rather than integrate all public swimming pools.<sup>155</sup> The district court found that closing the pools was justified to preserve peace and order and also because the pools could not be operated economically on an integrated basis.<sup>156</sup> The Fifth Circuit affirmed, with a vigorous dissent pointing out that peace was pretext for segregation: "[T]he pools were closed not to promote peace but to prevent blacks and whites swimming in the same water."<sup>157</sup>

Before the Supreme Court, Jackson argued that integrating the pools would lead to violence: It asserted that a preexisting risk of violent clashes between Jackson youth of different racial groups would be exacerbated by

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149. *Cox*, 379 U.S. at 558.

150. *Id.* at 550–51.

151. *Id.* at 551–52.

152. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 7.

153. *Id.* at 8.

154. 403 U.S. 217 (1971).

155. *Id.* at 218–19. Mayor Allen C. Thompson, when asked to explain Jackson's policy with respect to public transportation, stated that peace, prosperity, and happiness in the city had been achieved by separation of the races. See *Bailey v. Patterson*, 199 F. Supp. 595, 611 (S.D. Miss. 1961). Specific to the decision to close public pools, he cited "personal safety" and the maintenance of law and order as reasons to prohibit integration. *Palmer v. Thompson*, 419 F.2d 1222, 1225 (5th Cir. 1969).

156. *Palmer*, 403 U.S. at 219.

157. *Palmer*, 419 F.2d at 1230 (Wisdom, J., dissenting).

their close contact at the pools.<sup>158</sup> Jackson further argued that the promotion of public peace and the preservation of the economic condition could justify an exercise of the police power to maintain racial separation so long as this exercise did not result in unequal treatment.<sup>159</sup> Since all residents would be denied access to public pools, the city suggested that all racial groups were subject to equal treatment by this decision.<sup>160</sup>

Disputing Jackson's account, Hazel Palmer and other Black residents argued that the excuses of safety and economy were "mere smokescreens" based on unsupported speculation: There was no evidence that operating the pools on an integrated basis would endanger public safety.<sup>161</sup> Rejecting that Jackson's history held any peace worth preserving in the first place, Palmer and others explained that "the only peace established during 100 years of segregation was that imposed upon blacks by the force and repression of the dominant white society."<sup>162</sup>

Furthermore, even if Jackson's concerns were true, there was still no justification for closing the pools. Citing *Buchanan v. Warley* and related cases, Black residents drew upon Supreme Court jurisprudence since 1917 that reiterated how Black citizens could not be denied equality and freedom because their enjoyment of equal status might threaten the public peace.<sup>163</sup> They insisted that *Brown v. Board of Education* had not only rejected the exclusionary negative peace of Jim Crow but had also placed the United States on "the road to integration and equality, rather than segregation and repression, as the proper constitutional direction to ultimate racial peace."<sup>164</sup> Although the integration of public pools would not end racial strife, Palmer argued that circumventing integration would maintain it, for "long-suffered repression, not freedom and equality, . . . inevitably leads to violent upheaval."<sup>165</sup>

The United States government also urged the Supreme Court to dismiss Jackson's appeal to public peace.<sup>166</sup> Its brief argued that neither the asserted fears of violence nor the inability to preserve peace was proved at trial beyond speculation or vague claims of city officials; in fact, there was only evidence that transitions from segregated to integrated recreational facilities had been completed peacefully in the past.<sup>167</sup> The brief accepted that such transitions may require public officials to consider problems relating to safety and economy, but it argued that even where these problems

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158. Brief of Respondents at 10, *Palmer*, 403 U.S. 217 (No. 107), 1970 WL 122624.

159. *Id.* at 34.

160. *Id.* at 10.

161. Brief for Petitioners at 10, *Palmer*, 403 U.S. 217 (No. 107), 1970 WL 122623.

162. Reply Brief for Petitioners at 4, *Palmer*, 403 U.S. 217 (No. 107), 1970 WL 122625.

163. Brief for Petitioners, *supra* note 161, at 21.

164. Reply Brief for Petitioners, *supra* note 162, at 4.

165. *Id.* at 4.

166. Brief of the United States as Amicus Curiae at 8, *Palmer*, 403 U.S. 217 (No. 107), 1970 WL 122772.

167. *Id.* at 17.

exist, the solution should be tailored to the problem.<sup>168</sup> While it may be permissible for public facilities to temporarily close to facilitate prompt and orderly desegregation, there was no such objective here.<sup>169</sup>

The United States further cautioned that allowing pool closures would have a chilling effect on antiracism protests: The “price of protest is high,” and now Black people would see that they risked losing access to even segregated facilities and further enraging a white community that would also lose access if they protested segregation.<sup>170</sup> This would further entrench an oppressive negative peace by discouraging justice-seeking efforts in the future.<sup>171</sup>

Despite these arguments, in 1971, the Supreme Court held that Jackson’s decision to close rather than integrate all public swimming pools did not deny equal protection to Black residents.<sup>172</sup> A 5-4 majority agreed with the petitioners that preserving public safety, a fear of hostility, or a need to save money could not support otherwise impermissible state action.<sup>173</sup> However, the majority disagreed that any constitutional rights are denied by the closure of pools to white and Black people alike.<sup>174</sup> The majority considered the complete closure of pools to be permissible state action, irrespective of its basis in unfounded fears of violence.<sup>175</sup> Thus, Jackson could simply cite public peace to close pools, and the Court would not interrogate whether the city had closed pools to keep Black and white people apart.<sup>176</sup> In contrast, the dissent expressly rejected the argument that the pools could not be economical or safely run on an integrated basis, citing a lack of evidence.<sup>177</sup> The dissent found that arguments based on potential violence reflect the views “of a few immoderates” who purport to speak for the whole white population of Jackson.<sup>178</sup>

By permitting Jackson’s pool closures, *Palmer* enabled what author Heather McGhee has termed “drained-pool politics”—racialized zero-sum thinking that “if ‘they’ can also have it, then no one can.”<sup>179</sup> McGhee describes how such unwillingness to share resources harms all Americans by

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168. *Id.* at 18–19.

169. *Id.*

170. *Id.* at 16.

171. *Id.*

172. *Palmer*, 403 U.S. at 226.

173. *Id.*

174. *Id.*

175. *Id.*

176. In 2017, the Trump Administration cited *Palmer* “to categorically insulate its intent in effectuating the Muslim ban.” John-Paul Schnapper-Casteras, *The Problem with Palmer, Take Care* (May 7, 2017), <https://takecareblog.com/blog/the-problem-with-palmer> [<https://perma.cc/W5WW-DGLG>].

177. *Palmer*, 403 U.S. at 241.

178. *Id.* at 260.

179. What “Drained-Pool” Politics Costs America, *N.Y. Times: Ezra Klein Show* (Feb 16, 2021), <https://www.nytimes.com/2021/02/16/opinion/ezra-klein-podcast-heather-mcghee.html> (on file with the *Columbia Law Review*) (documenting a discussion with

preventing policies like universal health care and childcare.<sup>180</sup> Drained-pool politics undermines social peace by pitting Americans against one another despite their aligned interests.<sup>181</sup>

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As these cases highlight, racialized appeals to peace have routinely been used in legal arguments against racial justice. According to these arguments, Black people moving into predominantly white neighborhoods,<sup>182</sup> studying in integrated classrooms,<sup>183</sup> strolling in public parks,<sup>184</sup> sitting in large numbers at white lunch spots,<sup>185</sup> and swimming in public pools<sup>186</sup> were all unacceptable risks to public peace and good order.

For much of its history, the Supreme Court accepted such arguments to preserve an oppressive negative peace.<sup>187</sup> However, in *Cooper v. Aaron*, the Court held that “law and order are not . . . to be preserved by depriving the Negro children of their constitutional rights,”<sup>188</sup> a sentiment that echoed *Buchanan v. Warley*.<sup>189</sup> Yet, *Cooper* did not stop the weaponization of peace. Instead, through a dynamic that Professor Reva Siegel has called “preservation-through-transformation,” the “preservation” of racial separation occurred partly *through* the “transformation” of peace arguments into politically palatable forms.<sup>190</sup> Some integration opponents shifted from arguing for the continued segregation of public facilities, a strategy that the Court rejected in *Watson v. City of Memphis*, to arguing for the more palatable option of their complete closure, which the Court accepted in *Palmer v. Thompson*.<sup>191</sup> In both these cases, vague and dubious appeals to social peace had underpinned state action designed to avoid racial integration. Yet less than a decade after *Watson* and with the votes of two recent Nixon appointees, the Court in *Palmer* failed to interrogate the veracity, purpose, and effect of the peace claims used to justify pool closures.<sup>192</sup>

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Heather McGhee); see also Heather McGhee, *The Sum of Us: What Racism Costs Everyone and How We Can Prosper Together* 273 (2021).

180. What “Drained-Pool” Politics Costs America, *supra* note 179.

181. McGhee, *supra* note 179, at 289.

182. See *supra* section II.A (discussing *Buchanan v. Warley*).

183. See *supra* section II.B (discussing *Cooper v. Aaron*).

184. See *supra* section II.C (discussing *Watson v. City of Memphis*).

185. See *supra* section II.D (discussing *Cox v. Louisiana*).

186. See *supra* section II.E (discussing *Palmer v. Thompson*).

187. See *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), superseded by constitutional amendment, U.S. Const. amend. XIV.

188. *Cooper v. Aaron*, 358 U.S. 1, 16 (1958).

189. 245 U.S. 60 (1917).

190. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 1111, 1113 (1997).

191. 403 U.S. 217, 226 (1971).

192. Compare *id.*, with *Cooper*, 358 U.S. at 26, and *Watson v. City of Memphis*, 373 U.S. 526, 536 (1963).

Taking their cue from these cases, legislators and litigants continued to weaponize peace in facially neutral arguments against racial justice measures. In *Crawford v. Board of Education*, for example, the Supreme Court upheld an amendment to the California Constitution that stripped state courts of the power to order mandatory desegregation except to remedy recognized Fourteenth Amendment violations.<sup>193</sup> The text of the amendment claimed that this was necessary for “preserving harmony and tranquility in this state and its public schools.”<sup>194</sup> In an amicus brief opposing the amendment, Margaret Tinsley and other parents of schoolchildren situated this language in historical context.<sup>195</sup> Citing references to peace, safety, and good order in cases such as *Dred Scott v. Sandford* and *Plessy v. Ferguson*, they argued that “the need for racial peace and harmony has been given as the justification for every other *retrogressive* racial action throughout the history of this country.”<sup>196</sup> They appealed to the *Buchanan–Cooper–Watson* line of cases to show that forsaking justice for the sake of an exclusionary negative peace was both morally and legally wrong.<sup>197</sup> Ignoring this history of weaponized peace, the majority opinion in *Crawford* upheld California’s amendment partly on the premise that it did not embody an explicit racial classification.<sup>198</sup> By contrast, Justice Marshall’s dissenting opinion said that California’s amendment did embody a racial classification and that the purported justification of “harmony and tranquility” could not sustain it.<sup>199</sup>

The expectation that weaponized peace claims will often be made in bad faith and on the basis of limited or poor-quality evidence is one of the many lessons from this legal history that are pertinent to present debates.

### III. WEAPONIZED PEACE IN CURRENT DEBATES

To this day, claims about peace are being deployed to stymie progress toward racial justice in multiple arenas, including police brutality and over-policing of Black and Brown communities, antiracism education, and racial inclusion in schools.<sup>200</sup> These contemporary peace claims share rhetorical and functional similarities with the historical ones discussed above.<sup>201</sup>

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193. See 458 U.S. 527, 531–35 (1982).

194. Cal. Const. art. 1, § 7(a).

195. Brief of Amici Curiae Margaret Tinsley et al in Support of Petitioners at 9–10, *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982) (No. 81-38), 1981 WL 769835.

196. *Id.* at 10.

197. *Id.* at 13.

198. *Crawford*, 458 U.S. at 543 n.29, 544–45.

199. *Id.* at 559 n.6 (Marshall, J., dissenting).

200. These claims often raise familiar concerns about encroachments of property and settled expectations. See *supra* notes 10–12 and accompanying text.

201. Whereas Professor Christopher Bracey considers contemporary “domestic tranquility” arguments to have “rhetorical pedigree” in historical ones, Professor Jill Hasday notices both rhetorical and functional similarities between them. Compare Christopher A.

A. *The Black Lives Matter Movement, Anti-Protest Laws, and Anti-Defund Strategies*

In the Civil Rights Era, racial justice protestors were labeled “unpeaceful” to discredit them and limit their right to gather, speak, and demand justice. Professor Derrick Bell observes that for many white people living through that era, “there really were no peaceful, nondisruptive civil rights protests,” for each protest “represented a most threatening challenge” to white supremacy.<sup>202</sup> As Professor John A. Powell explains, the word “riot” was often used to describe mostly peaceful civil rights protests to convey the “sense of chaos, doom” they evoked for many white people in that era.<sup>203</sup>

This pattern continues today. In the month following George Floyd’s murder in 2020, an estimated fifteen to twenty-six million Americans took to the streets over the police killings of Black people.<sup>204</sup> While these protestors were overwhelmingly peaceful in the face of brutal responses by

Bracey, *The Cul de Sac of Race Preference Discourse*, 79 S. Cal. L. Rev. 1231, 1235–36 (2006), with Hasday, *supra* note 4, at 1500. This Essay adopts a critical stance based on both rhetorical and functional similarities between historical and contemporary peace arguments against racial justice.

This does not mean that historical and contemporary arguments are identical. For example, whereas dominant peace claims were once made with varying degrees of overt racism, similar claims are now made in primarily facially neutral or “colorblind” terms within a legal framework that accepts racism beneath the veil of colorblindness. Thus, even as overt racism has been delegitimized, peace remains a “neutral” principle through which racial exclusion, inequities, and disempowerment may be justified. For critiques of how “colorblind” racial ideology de-historicizes race and divorces it from social meaning, obscures and legitimizes practices that maintain racial inequalities, and actively undermines rather than vindicates constitutional commitments to equality, see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1337 (1988) (“The principal basis of [the Reagan Administration’s] hostility was a formalistic, color-blind view of civil rights.”); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind”*, 44 Stan. L. Rev. 1, 2 (1991) (arguing “that the United States Supreme Court’s use of color-blind constitutionalism . . . fosters white racial domination”); Ian F. Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 Stan. L. Rev. 985, 988 (2007) (“[I]t seems difficult to argue against the insistence that the state should finally eschew all racial distinctions. But as it stands now, this appeal depends almost entirely on the conflation of colorblindness as an ideal vision of a future society, and as a means to achieve this end.”).

202. Derrick Bell, *Race, Racism, and American Law* 555 (5th ed. 2004); see also Etienne C. Toussaint, *Blackness as Fighting Words*, 106 Va. L. Rev. Online 124, 128 (2020) (arguing that the very utterance of the phrase “Black Lives Matter” tends to conjure images of social unrest, disorder, looting, and subversion).

203. Katy Steinmetz, ‘A War of Words.’ Why Describing the George Floyd Protests as ‘Riots’ Is So Loaded, *Time* (June 8, 2020), <https://time.com/5849163/why-describing-george-floyd-protests-as-riots-is-loaded/> (on file with the *Columbia Law Review*).

204. Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, *N.Y. Times* (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> (on file with the *Columbia Law Review*).

police and white supremacist militias,<sup>205</sup> the use of the word “riot” remained widespread in media articles: “[U]se of riot was . . . about 28 times more common than uprising and 175 times more common than rebellion.”<sup>206</sup> Furthermore, their opponents’ rhetoric reduced these protestors to violent disruptors of peace, as opposed to communities in despair over generations of anti-Black state violence.<sup>207</sup> For example, President Donald Trump called the protesters in Minneapolis “thugs” and threatened to use militaristic force against them.<sup>208</sup> Trump’s Attorney General, Bill Barr, called protesters’ actions “fascistic” and bent on “tearing down the system.”<sup>209</sup>

Following these 2020 uprisings, several states introduced legislation expanding penalties for unlawful assembly or civil unrest, what have become known as “anti-riot” or “anti-protest” laws.<sup>210</sup> The United Nations Committee on the Elimination of Racial Discrimination raised concern about these states’ “increase in legislative measures and initiatives . . . that unduly restrict the right to peaceful assembly following anti-racism protests in recent years.”<sup>211</sup> Florida’s Combating Public Disorder Act, which

205. Steinmetz, *supra* note 203; see also Maria Cramer, *New York Will Pay Millions to Protesters Violently Corralled by Police*, N.Y. Times (Mar. 1, 2023), <https://www.nytimes.com/2023/03/01/nyregion/nypd-kettling-blm-protests-settlement.html> (on file with the *Columbia Law Review*).

206. *Id.*

207. See Joshi, *Racial Justice and Peace*, *supra* note 6, at 1346.

208. Safia Samee Ali, ‘Not by Accident’: False ‘Thug’ Narratives Have Long Been Used to Discredit Civil Rights Movements, NBC News (Sept. 27, 2020), <https://www.nbcnews.com/news/us-news/not-accident-false-thug-narratives-have-long-been-used-discredit-n1240509> [<https://perma.cc/NFJ3-B9PR>]. In contrast, Michael McDowell, a local leader of Black Lives Matter, said during the 2020 protests that “Minneapolis is burning” because “[t]here are folks reacting to a violent system.” Joshi, *Racial Justice and Peace*, *supra* note 6, at 1346 (alteration in original) (internal quotation marks omitted) (quoting Holly Bailey, Jared Goyette, Sheila Regan & Tarkor Zehn, *Chaotic Minneapolis Protests Spread Amid Emotional Calls for Justice, Peace*, Wash. Post (May 29, 2020), <https://www.washingtonpost.com/nation/2020/05/29/chaotic-minneapolis-protests-spread-amid-emotional-calls-justice-peace/> (on file with the *Columbia Law Review*)). Similarly, an unnamed Black man guarding his store said: “We want to see peace prevail, but tensions are high right now . . . The pain and the things people are feeling right now is rooted for years.” *Id.* (alteration in original) (internal quotation marks omitted) (quoting Holly Bailey, Jared Goyette, Sheila Regan & Tarkor Zehn, *Chaotic Minneapolis Protests Spread Amid Emotional Calls for Justice, Peace*, Wash. Post (May 29, 2020), <https://www.washingtonpost.com/nation/2020/05/29/chaotic-minneapolis-protestsspread-amid-emotional-calls-justice-peace/> (on file with the *Columbia Law Review*)).

209. Justin Wise, Barr: The Left ‘Believes in Tearing Down the System’, Hill (Aug. 10, 2020), <https://thehill.com/homenews/administration/511271-barr-the-left-believes-in-tearing-down-the-system/> [<https://perma.cc/Z2WU-HF7T>].

210. O’Connor, *supra* note 20; see also Kathleen Bartzen Calver & Douglas M. McLeod, “Anti-Riot” or “Anti-Protest” Legislation? Black Lives Matter, News Framing, and the Protest Paradigm, 4 *Journalism & Media* 216, 216 (2023).

211. Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Tenth to Twelfth Reps. of the United States of America*, U.N. Doc. CERD/C/USA/CO/10-12, at 6 (Sept. 21, 2022), [https://tbinternet.ohchr.org/\\_layouts/](https://tbinternet.ohchr.org/_layouts/)

defines “riot” broadly and increases penalties for crimes committed during protests,<sup>212</sup> was cited as a prototypical example of this concerning pattern of legislation.<sup>213</sup> Florida Governor Ron DeSantis argued that such laws were needed to stop the “professional agitators bent on sowing disorder and causing mayhem in our cities.”<sup>214</sup> His comments echoed segregationists who complained about southern peace being decimated by “outside agitators” like the NAACP.<sup>215</sup>

While Florida’s bill was signed into law in April 2021, an injunction stopped its definition of “riot” from coming into force.<sup>216</sup> A federal district court in Tallahassee noted that the 2020 protests in Florida were “largely peaceful,” as DeSantis himself acknowledged at one point.<sup>217</sup> The court also situated the current law in the larger historical context of Florida’s anti-riot laws: Recalling Florida’s use of anti-riot laws to maintain Jim Crow era mores, the court recognized that “what’s past is prologue” and was correctly skeptical of Florida’s peace-related claims and proposed definition of “riot.”<sup>218</sup>

In the end, the court found that the law’s definition of “riot” was “vague and overbroad,” infringing constitutional rights of free speech and assembly as well as due process protections.<sup>219</sup> The court also acknowledged the concern that the law would be used against Black Floridians protesting racial injustice but not against those threatening or harming peaceful racial justice protesters.<sup>220</sup>

Some lawmakers have also cited the 2021 white supremacist insurrection at the United States Capitol as a reason to criminalize actions

15/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2FUSA%2FCO%2F10-12&Lang=en [https://perma.cc/8U38-TW9Y].

212. H.B. 1, 2021 Leg. (Fla. 2021).

213. Comm. on the Elimination of Racial Discrimination, *supra* note 211, at 6. In a similar vein, the *Miami Herald’s* editorial board derided Florida’s anti-protest legislation as “redundant, racist and totally political,” designed to “make it dangerous for [Black Lives Matter] supporters to take to the streets, however peacefully.” Editorial, *Could Anything Be Worse Than Florida’s Stand Your Ground? Yes, A New, Racist Legislative Proposal*, *Mia. Herald*, Feb. 10, 2021, at A10.

214. O’Connor, *supra* note 20.

215. See, e.g., 102 Cong. Rec. 4461 (1956) (statement of Sen. Thurmond).

216. *Dream Defs. v. DeSantis*, 559 F. Supp. 3d 1238, 1288 (N.D. Fla. 2021).

217. *Id.* at 1250 n.5.

218. “Now this Court is faced with a new definition of ‘riot’—one that the Florida Legislature created following a summer of nationwide protest for racial justice . . . and in support of the powerful statement that Black lives matter.” *Id.* at 1250.

219. *Id.* at 1267. The court said that under Florida’s anti-protest law, “[T]he lawless actions of a few rogue individuals could effectively criminalize the protected speech of hundreds, if not thousands, of law-abiding Floridians.” *Id.* at 1284.

220. *Id.* at 1256. This decision is currently on appeal. Michael Moline, FL Supreme Court to Help Interpret DeSantis’ 2021 Anti-Riot Law, *Mia. Times* (Jan. 18, 2023), [https://www.miamitimesonline.com/news/florida/fl-supreme-court-to-help-interpret-desantis-2021-anti-riot-law/article\\_fbbdfed6-95be-11ed-9b08-cfbd69ef1cb5.html](https://www.miamitimesonline.com/news/florida/fl-supreme-court-to-help-interpret-desantis-2021-anti-riot-law/article_fbbdfed6-95be-11ed-9b08-cfbd69ef1cb5.html) [https://perma.cc/3PJU-ANZA].



otherwise associated with Black Lives Matter protests, such as blocking streets and camping outside state capitols.<sup>221</sup> Weaponized peace claims accordingly featured in state laws prohibiting specific conduct during protests. For example, Florida and other states enacted specific residential picketing laws to “protect[] the tranquility and privacy of the home and protect[] citizens from the detrimental effect of targeted picketing.”<sup>222</sup> These laws curtail protestors’ ability to assemble outside the homes of public officials to demand accountability, such as when groups gathered outside an Orlando home owned by Derek Chauvin, the police officer who murdered George Floyd.<sup>223</sup>

Invoking peace to limit protests against police brutality ignores how status quo policing regularly infringes on the peace of Black and Brown communities. Decades of “tough on crime” policies have led law enforcement to disrupt peace in these communities through constant surveillance and harassment and systematic targeting.<sup>224</sup> In January 2023, Memphis’s SCORPION police unit, which stood for Street Crimes Operation to Restore Peace in Our Neighborhoods, murdered Tyre Nichols, a twenty-nine-year-old Black man.<sup>225</sup> Far from promoting peace, these police officers’ “presence had spread fear in the predominantly low-income neighborhoods they patrolled, and records show that Black men were overwhelmingly their targets.”<sup>226</sup>

Today, racial justice opponents weaponize peace not just by passing laws limiting protest against police brutality but also by resisting efforts to defund the police. Despite the harms policing poses for Black and Brown communities, opponents have resisted reform efforts by depicting policing as the precondition for peace. For example, to counter racial justice cries of “No Justice! No Peace!,” a right-wing advocacy group erected “No

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221. O’Connor, *supra* note 20 (noting that some state officials, including DeSantis, cited the Capitol insurrection in support of anti-protest laws, but reporting that “experts say laws creating new criminal penalties for protesting are sure to be used mainly against minority groups—not far right extremists”).

222. House of Representatives Staff Final Bill Analysis, H.B. 1571, 2022 Leg., at 1 (Fla. 2022), <https://flsenate.gov/Session/Bill/2022/1571/Analyses/h1571z1.CRM.PDF> [<https://perma.cc/KXT6-2SPH>].

223. Crowds at Derek Chauvin’s Florida Vacation Home Prompt County to Consider Protest Limits, *Tampa Bay Times* (June 9, 2021), <https://www.tampabay.com/news/florida/2021/06/09/crowds-at-derek-chauvins-florida-vacation-home-prompt-county-to-consider-protest-limits/> [<https://perma.cc/EJ9K-7APY>].

224. See Monica C. Bell, *Anti-Segregation Policing*, 95 *N.Y.U. L. Rev.* 650, 754–55 (2020).

225. Mike Baker, *Special Memphis Police Unit Was Supposed to Stop Violence*, *N.Y. Times* (Jan. 27, 2023), <https://www.nytimes.com/2023/01/27/us/scorpion-unit-tyre-nichols-death.html> (on file with the *Columbia Law Review*).

226. Steve Eder, Matthew Rosenberg, Joseph Goldstein, Mike Baker, Kassie Bracken & Mark Walker, *Muscle Cars, Balaclavas and Fists: How the Scorpions Rolled Through Memphis*, *N.Y. Times* (Feb. 4, 2023), <https://www.nytimes.com/2023/02/04/us/memphis-police-scorpion.html> (on file with the *Columbia Law Review*).

Police, No Peace” billboards in cities across the United States.<sup>227</sup> According to its executive director, these billboards show that “Americans want safety, security, and a clear vision for how to quell the violence,” and “you cannot have peace without the police.”<sup>228</sup> Others have insisted on increasing police budgets and power to preserve public peace. “It turns out emboldening criminals while undermining law enforcement is not a recipe for peace and tranquility,” Trump’s acting Secretary for Homeland Security and a former police officer asserted in one op-ed.<sup>229</sup> In Texas, Governor Greg Abbott helped pass a measure to make it “fiscally impossible for cities to defund police” on the premise that doing so would invite “crime and chaos” into communities.<sup>230</sup> Such efforts weaponize peace by depicting racial justice protests as unpeaceful and by both downplaying the role of police in generating social unrest and exaggerating their role in maintaining social peace.<sup>231</sup>

Even if policing reduces crime, the reduction of crime is not always the only or necessarily the most important peace interest at stake. Communities also have significant peace interests in being free of the

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227. Joseph Patrick, “No Police, No Peace” Billboards Are Being Erected in Major Cities Across America, *Law Enf’t Today* (Sept. 16, 2020), <https://www.lawenforcementtoday.com/no-police-no-peace-billboards-are-being-erected-in-major-cities-across-america/> [<https://perma.cc/82PS-REHS>].

228. *Id.*

229. Chad Wolf & Scott G. Erickson, Opinion, *The Deadly Consequences of Emboldening Criminals and Undermining Police*, *Hill: Congress Blog* (Dec. 7, 2021), <https://thehill.com/blogs/congress-blog/homeland-security/584795-the-deadly-consequences-of-emboldening-criminals-and/> [<https://perma.cc/RW5X-3NB4>].

230. Brenna Goth & Ayanna Alexander, ‘Defund the Police’ in Cities Faces Ire of State GOP Lawmakers, *Bloomberg L.* (Mar. 16, 2021), <https://news.bloomberglaw.com/social-justice/defund-the-police-in-cities-faces-ire-of-state-gop-lawmakers> (on file with the *Columbia Law Review*).

231. For example, one recent study found that Black Lives Matter protests were significantly more common in cities with at least one police-related death. Vanessa Williamson, Kris-Stella Trump & Katherine Levine Einstein, *Black Lives Matter: Evidence that Police-Caused Deaths Predict Protest Activity*, 16 *Persps. on Pol.* 400, 406, 409 (2018). Another estimated that police lethal use of force fell by 15.8% on average following Black Lives Matter protests, resulting in approximately 300 fewer police homicides between 2014 and 2019. Travis Campbell, *Black Lives Matter’s Effect on Police Lethal Use of Force 15* (May 13, 2021) (unpublished manuscript), [https://papers.ssrn.com/abstract\\_id=3767097](https://papers.ssrn.com/abstract_id=3767097) [<https://perma.cc/N2LR-ZSS5>]; see also Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 *Geo. L.J.* 1479 (2016) (discussing how policing can escalate rather than quell social unrest); Hakeem Jefferson, José Luis Gandara, Cathy J. Cohen, Yanilda M. González, Rebecca U. Thorpe & Vesla M. Weaver, *Beyond the Ballot Box: A Conversation About Democracy and Policing in the United States*, 26 *Ann. Rev. Pol. Sci.* (forthcoming June 2023) (manuscript at 1.2) (discussing how policing undermines democracy); Evelyn Skoy, *Black Lives Matter Protests, Fatal Police Interactions, and Crime*, 39 *Contemp. Econ. Pol’y* 280, 281 (2021) (“[A]n increase in the number of protests within a state is associated with a decrease in the number of Black fatalities from police encounters in the month immediately following the protests, yet there does not appear to be a longer lasting impact on the number of fatalities.”).

harms policing causes<sup>232</sup> and having access to social resources and infrastructure.<sup>233</sup> To assess whether policing advances peace, its impact on a fuller range of peace interests must be evaluated and compared to the alternatives to policing that racial justice advocates have proposed. Simply promoting policing as peacekeeping disguises police harms, distracts from structural inequities, and ignores that advocates' alternatives to policing might better advance peace.

### B. *Antiracism Education, Critical Race Theory Bans, and Affirmative Action Litigation*

During the Civil Rights Era, segregationists sought to preserve “racial harmony” by preventing civil rights protests and the registration of Black voters.<sup>234</sup> Today, dominant groups seek to preserve “racial harmony” by preventing antiracism protests and education.<sup>235</sup> As historically, the present weaponization of peace takes “respectable” form in legislation alongside militant form in acts of domestic terrorism. A recent bomb threat to Tufts University’s diversity department, for example, blamed antiracism education for “causing division in our country.”<sup>236</sup>

As of February 2023, public officials across forty-four states have taken steps to ban what they deem “critical race theory” and other “divisive concepts” from being taught in public schools.<sup>237</sup> For example, an Ohio bill would ban classroom teaching and materials on “divisive or inherently racist concepts,” defined to include, among other things, “critical race theory,” “intersectional theory,” “The 1619 project,” and “diversity, equity, and inclusion learning outcomes.”<sup>238</sup> Other laws, such as those passed in

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232. On the trade-offs “between stopping crime and stopping police violence,” both of which can be understood as peace interests, see Note, Pessimistic Police Abolition, 136 Harv. L. Rev. 1156, 1177 (2023).

233. Professor Monica Bell observes how we live “in a world more focused on the interpersonal violence that shows up in crime statistics than the structural violence that does not.” Monica Bell, Black Security and the Conundrum of Policing, Just Sec. (July 15, 2020), <https://www.justsecurity.org/71418/black-security-and-the-conundrum-of-policing/> [<https://perma.cc/S2QM-PD3K>]. Professor Allegra McLeod describes the abolitionist project as “at once exposing the violence, hypocrisy, and dissembling entrenched in existing legal practices, while attempting to achieve peace, make amends, and distribute resources more equitably.” Allegra M. McLeod, Envisioning Abolition Democracy, 132 Harv. L. Rev. 1613, 1615 (2019); see also Theresa L. Armstead, Natalie Wilkins & Maury Nation, Structural and Social Determinants of Inequities in Violence Risk: A Review of Indicators, 49 J. Cmty. Psychol. 878 (2021).

234. See *supra* text accompanying notes 51–60.

235. See Steve Toth, A Plea for Racial Harmony, Tex. Pub. Pol’y Found. (May 6, 2021), <https://www.texaspolicy.com/a-plea-for-racial-harmony/> [<https://perma.cc/948V-TE67>].

236. Clara McCourt (@McCourtClara), Twitter (Dec. 14, 2022), <https://twitter.com/McCourtClara/status/1603141710892224518> [<https://perma.cc/3TVV-MEJ8>].

237. Schwartz, *supra* note 23.

238. H.B. 616, 134th Gen. Assemb., Reg. Sess. (Ohio 2022).

Arkansas<sup>239</sup> and Virginia,<sup>240</sup> also prohibit any critiques of the notion of “meritocracy” and its role in perpetuating racial inequality.<sup>241</sup> In defending their state’s law, one Texas politician depicts racial justice uprisings as forces of “racial antagonism” that have replaced “normal life” with “lawlessness, violence, and destruction of private property and small businesses.”<sup>242</sup> Their “roadmap for racial harmony” seeks to “prevent Texas cities from becoming Portland and Seattle” by banning any teaching of America’s anti-Black, racist, and colonialist past and present.<sup>243</sup>

The claim that addressing race and racism is “divisive”—and thus disruptive of racial peace and harmony—has also shaped affirmative action law.<sup>244</sup> In 1978 in *Regents of the University of California v. Bakke*, opponents characterized affirmative action as “divisive” of society and the cause of “racial antagonism.”<sup>245</sup> In an opinion that would prove hugely influential in constitutional law, Justice Lewis Powell inscribed their resistance into law by arguing that affirmative action “may serve to exacerbate racial and ethnic antagonisms rather than alleviate them.”<sup>246</sup> Justice Powell concluded that affirmative action should be limited and permitted only in the pursuit of a diverse student body.<sup>247</sup> His opinion required affirmative action programs to use the racially covert and conciliatory language of “diversity,” as opposed to “justice,” to avoid antagonizing white litigants.<sup>248</sup>

But even diversity proved too divisive for staunch affirmative action opponents. In the two affirmative action cases currently before the Supreme Court, these opponents maintain that *any* consideration of race

239. Act 1014, 2021 Ark. Acts 4985.

240. Ending the Use of Inherently Divisive Concepts, Including Critical Race Theory, and Restoring Excellence in K-12 Public Education in the Commonwealth, Va. Exec. Order No. 1 (Jan. 15, 2022), <https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-1-Ending-the-Use-of-Inherently-Divisive-Concepts.pdf> [<https://perma.cc/LX8M-6ERM>].

241. For a critique of traditional ideas of meritocracy, see Lani Guinier, *The Tyranny of the Meritocracy: Democratizing Higher Education in America* 7–17 (2015).

242. Toth, *supra* note 235.

243. *Id.*

244. On the development of affirmative action law, see Yuvraj Joshi, *Racial Indirection*, 52 U.C. Davis L. Rev. 2495, 2513–24 (2019).

245. Brief of Amicus Curiae Young Americans for Freedom at 25, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187991; see also Brief Amici Curiae for the Fraternal Order of Police, the Conference of Pennsylvania State Police Lodges of the Fraternal Order of Police, the International Conference of Police Associations and the International Association of Chiefs of Police at 3, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187969 (cautioning against “the racial quota, with all its divisive and arbitrary effects[] . . . becom[ing] a fixed feature in our professions and occupations”); Brief of the Chamber of Commerce of the United States of America Amicus Curiae at 40, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187976 (“Quotas are divisive and may lead to racial antagonism.”).

246. *Bakke*, 438 U.S. at 298–99 (opinion of Powell, J.).

247. *Id.* at 306–12.

248. *Id.*

in admissions, even in subtle and partial ways that neither guarantee nor preclude the admission of any applicant based on their race, is “inherently divisive.”<sup>249</sup> Essentially, opponents’ preferred “colorblind” approach aims to reduce racial discord by denying the existence of structural inequality and dismissing the salience of race and racism in people’s lives.<sup>250</sup> Meanwhile, their own legal strategies are predicated on inflaming racial resentments.<sup>251</sup> Again, although these arguments may appear different from the overtly segregationist arguments of the Jim Crow era, their functions are similar: to cast the pursuit of racial inclusion as an impediment to racial peace.

#### CONCLUSION: FROM WEAPONIZED TO JUST PEACE

American racial justice opponents have routinely appealed to fears of imagined violence and the preservation of a fragile peace that cannot suffer racial justice. Repeated across centuries and contexts, these peace claims have become a normal feature of American political discourse, making their insidious and unfounded logic easier to conceal.

Given their role in preserving white supremacy and resisting calls for Black equality historically, we should be more skeptical of peace claims that function to preserve an unequal status quo and frustrate racial justice efforts today.<sup>252</sup> Unhesitating acceptance of such claims can cause myriad harms. Weaponized peace claims have historically operated to justify and perpetuate structural inequalities. They have cast racial justice as a threat and its curtailment as a necessity, essentially promising an illusory peace in return for the continued subjugation of Black people. They have also eclipsed the more emancipatory understandings of peace that racial justice advocates have put forward. These features of weaponized peace claims counsel a more critical stance toward them, as reflected in cases like *Buchanan v. Warley*, *Cooper v. Aaron*, *Watson v. City of Memphis*, and *Cox v. Louisiana*. From these cases, we can identify some considerations that should guide judges and other actors assessing contemporary peace arguments.

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249. See Transcript of Oral Argument at 34, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 21-707, (Sup. Ct. Oct. 31, 2022), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2022/21-707\\_9o6b.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-707_9o6b.pdf) [<https://perma.cc/53TR-DVKL>].

250. On the futility and harms of this “colorblind” approach, see Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 Cal. L. Rev. 1139, 1146–47 (2008).

251. Commenting on his Harvard litigation, Edward Blum stated: “I needed Asian plaintiffs . . . so I started . . . HarvardNotFair.org.” Brief for Amicus Curiae Walter Dellinger in Support of Defendant-Appellee on the Issue of Standing at 11, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020) (No. 1:14-cv-14176-ADB), 2020 WL 2847683.

252. See Hasday, *supra* note 4, at 1538 (making a similar claim regarding “mutual benefits” arguments used historically to subordinate women and racial minorities).

First, does a genuine threat to peace exist? Warnings of discord and unrest stemming from racial justice must be backed with reliable evidence to be considered persuasive. But as the cases mentioned above demonstrate, the evidence to support such dire claims is often limited, poor-quality, or nonexistent. For example, an FBI investigation found that Governor Faubus may have relied on “rumors, generalities or sources whose reliability was not fully established” to issue his edict against integration in Little Rock.<sup>253</sup> Similarly, the Court in *Watson v. City of Memphis* found the asserted “fears of violence and tumult” and “inability to preserve the peace” to be merely “personal speculations or vague disquietudes of city officials.”<sup>254</sup> And the Court in *Cox v. Louisiana* found any fear of violence to be similarly speculative and not credible enough to justify arresting Reverend Cox.<sup>255</sup>

Mere resentment or discomfort about racial justice does not necessarily amount to a genuine threat to peace. In the *Brown* litigation, for example, some integrationists disputed the claim that integration would necessarily result in an “immediate danger of open disturbances of the public peace.”<sup>256</sup> These integrationists were “not so naive as to discount the possibility of some forms of resistance” to desegregation but reasoned that “the prophecy of violence has so often been shown to be without substance that it is now made with little conviction.”<sup>257</sup> Indeed, the Little Rock Crisis showed how *elevating* resentment or discomfort about racial justice to a genuine threat may be precisely what leads to social unrest.<sup>258</sup>

Second, what is actually causing a threat to peace? The court of appeals in *Aaron v. Cooper* correctly diagnosed segregationist tactics, as opposed to the integration of Black children, as the cause of unrest in Little Rock: “It is more accurate to state that the fires, destruction of property, bomb threats, and other acts of violence, were the direct result of

253. FBI, No. 44-12284-2673, *Integration in Public Schools: Little Rock, Arkansas: Civil Rights—Contempt of Court*, at A-14 (1957), <https://arstudies.contentdm.oclc.org/digital/collection/p15728coll3/id/43898/rec/23> [<https://perma.cc/3LEW-U95P>]. Historian Tony Freyer notes that the U.S. government never used this “400-page report indicating that Faubus’s claims about violence were essentially groundless,” which further emboldened Faubus. Tony A. Freyer, *Enforcing Brown in the Little Rock Crisis*, 6 J. App. Prac. & Process 67, 72 (2004).

254. 373 U.S. 526, 536 (1963).

255. 379 U.S. 536, 550–51 (1965) (“[T]he ‘compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.’” (quoting *Watson*, 373 U.S. at 535)).

256. Brief for the Congress of Industrial Organizations as Amicus Curiae at 12, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 53-1, 53-2, 53-4, 53-10), 1953 WL 78290.

257. Brief for Amici Curiae (American Council on Human Rights et al.) at 13, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (No. 52-413), 1952 WL 47260.

258. The Little Rock School Board argued in litigation that “[t]he effect of [Governor Faubus’s action] was to harden the core of opposition to the [integration] Plan[,] . . . and from that date hostility to the Plan was increased and criticism of the officials of the School District has become more bitter and unrestrained.” *Cooper v. Aaron*, 358 U.S. 1, 10 (1958) (internal quotation marks omitted).

popular opposition to the presence of the nine Negro students.”<sup>259</sup> The court noted that removing Black students from the school in order to quell an unrest they had not caused was an inappropriate legal solution.<sup>260</sup>

Unrest which stems from illegitimate negative emotions necessitates a different approach than unrest that stems from legitimate emotions.<sup>261</sup> In enforcing school integration in *Aaron v. Cooper*, the court of appeals opinion emphasized that unrest was “the direct result of popular opposition to the presence of the nine Negro students,”<sup>262</sup> and the Supreme Court opinion similarly traced the unrest to “drastic opposing action on the part of the Governor of Arkansas.”<sup>263</sup> In this case, unrest precipitated by white resistance to integration was not deemed worthy of deference because it ran contrary to the demands of law and justice. In contrast, the Kerner Commission Report, released in the wake of the 1967 racial unrest, indicated that unrest stemming from minority frustration was worthy of deference because it advanced the demands of law and justice.<sup>264</sup> Accordingly, the Kerner Commission recommended reforms to employment, education, the welfare system, housing, and policing.<sup>265</sup> Comparing these sources suggests that unrest in response to racial inequities is more democratically legitimate than unrest arising from white racism and protectionism.<sup>266</sup> Law should attend to the causes and consequences of social unrest, recognizing some sources of unrest as more legitimate than others.

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259. 257 F.2d 33, 39 (8th Cir. 1958).

260. *Id.*

261. Political theorist Mihaela Mihai differentiates between “legitimate and illegitimate manifestations of public outrage,” observing:

Our outraged sense of justice can be misguided—oversensitive, lacking proof or solid arguments, or pushing us to perpetuate cycles of violence. . . . While negative emotions can be powerful forces of social change, they can also serve undemocratic purposes. However, if motivated by a concern with what is owed to everyone as an equal member of the political community and expressed in ways that do not push societies further down a spiral of abuse, they can stimulate important debates and catalyze institutional redress.

Mihaela Mihai, *Negative Emotions and Transitional Justice* 9 (2016).

262. *Aaron*, 257 F.2d at 38.

263. *Cooper*, 358 U.S. at 9.

264. Report of the National Advisory Commission on Civil Disorders 5–6 (1967).

265. *Id.* at 11–13.

266. Tracking ongoing far-right political violence in the United States, a report of the Armed Conflict Location and Event Data Project notes:

The strategies and drivers that fuel far-right activity are often inherently exclusionary, oriented around targeting a marginalized ‘other’ — sometimes explicitly for violence. These targets have included political opponents labeled as ‘communists’ and ‘socialists,’ the Black community, the Jewish community, the Muslim community, the LGBT+ community, women, and immigrants, amongst others. Even when such mobilization strategies fail to achieve certain key goals — like election victories — they

Third, what are the consequences of accepting weaponized peace claims? Limiting racial justice measures simply because their opponents cause or threaten unrest may both vindicate and incentivize resistance. The court of appeals in *Aaron v. Cooper* noted that a “‘temporary delay’ in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means” and refused to incentivize this type of opposition.<sup>267</sup> Similarly, Justice Frankfurter’s concurrence warned against vindicating such illegitimate negative emotions. By delaying integration, “the seemingly vindicated feeling of those who actively sought to block . . . progress” would beget further obstruction.<sup>268</sup> Giving in to this resistance would make both peace and justice more difficult to achieve in the long term. Giving them the power to define peace could enable them to dominate and dismantle the public sphere<sup>269</sup> and to privatize public goods like education.<sup>270</sup>

Fourth, are there emancipatory peace claims that outweigh or counterbalance the dominant group’s claims to peace? Racial justice advocates have long underscored the necessity of justice for achieving genuine social peace, and warned that absent justice, tranquility would not last.<sup>271</sup> These advocates have accordingly urged leaders to choose the enduring, positive peace of addressing racism over the illusory, negative peace of avoiding the issue of racism.<sup>272</sup> They have also asked the Supreme Court to move from avoiding racial conflict to affirming racial equity as the proper basis for peace.<sup>273</sup> Yet, even *Cooper v. Aaron* neglected the full range of emancipatory peace claims that were made widely both before and beyond the

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can still fuel a rise in contentious activity and can increase the risks of political violence faced by these targeted communities.

Roudabeh Kishi, *From the Capitol Riot to the Midterms: Shifts in American Far-Right Mobilization Between 2021 and 2022*, Armed Conflict Location & Event Data Project (Dec. 6, 2022), <https://acleddata.com/2022/12/06/from-the-capitol-riot-to-the-midterms-shifts-in-american-far-right-mobilization-between-2021-and-2022/> [https://perma.cc/P8F6-PZWF].

267. *Aaron*, 257 F.2d at 40.

268. *Cooper*, 358 U.S. at 25–26 (Frankfurter, J., concurring).

269. See supra notes 122–123 and accompanying text (discussing Governor Faubus’s invocation of public peace to justify closing public schools); supra Part II.E (discussing Jackson’s appeal to public peace to justify closing public pools).

270. For example, when the people of Little Rock voted to close public schools in the name of public peace, “[a] private school corporation formed to lease public school buildings and hire public school teachers, but federal courts prevented this.” See *Lost Year*, Encyc. of Ark., <https://encyclopediaofarkansas.net/entries/lost-year-737/> [https://perma.cc/FTK5-YM78] (last updated Jan. 30, 2023). Ultimately, private schools “opened to accommodate displaced white students,” but “[n]o private schools for black students emerged.” *Id.*; see also supra notes 122–123.

271. See Joshi, *Racial Justice and Peace*, supra note 6, at 1340–47.

272. A. Philip Randolph, Lester B. Granger, Reverend Martin Luther King, Jr. & Roy Wilkins, NAACP, *A Statement to the President of the United States* (June 23, 1958) (on file with the *Columbia Law Review*).

273. See supra text accompanying notes 164–165.



Court.<sup>274</sup> *Watson v. City of Memphis*, a lesser known case, came closer to recognizing the NAACP's claims about positive peace.<sup>275</sup> Today's chants of "No Justice! No Peace!" demand systemic changes necessary for a more peaceful United States.<sup>276</sup> These claims are important because they foreground the violence involved in maintaining the status quo and the injustice, frustration, and despair felt by marginalized communities. They further demonstrate that any tranquility arising from racial subordination is illusory and that an "obnoxious negative peace"<sup>277</sup> is in fact worth disrupting.

Ultimately, weaponized peace claims are harmful precisely because they thwart disruptions to short-term negative peace that might facilitate long-term positive peace. For decades, Black activists have seen social unrest as a necessary step on the path to justice. As Dr. King observed: "There is probably no way, even eliminating violence, for Negroes to obtain their rights without upsetting the equanimity of white folks. All too many of them demand tranquility when they mean inequality."<sup>278</sup> A. Philip Randolph, who worked closely with Dr. King, felt that Black people needed to disrupt an exclusionary negative peace in order to influence leaders "more concerned with easing racial tensions than enforcing racial democracy."<sup>279</sup> It is also worth remembering that Congress enacted the 1964 Civil Rights Act, which barred discrimination in federally supported programs, following protests throughout the South; the 1965 Voting Rights Act, which aimed to remove barriers to voting, after the historic marches from Selma to Montgomery; and the 1968 Fair Housing Act, which prohibited discrimination in the housing market, amid protests following Dr. King's assassination.<sup>280</sup> The American experience shows that some conflict can be

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274. See Joshi, *Racial Justice and Peace*, supra note 6, at 1360–61 (critiquing *Cooper* on these grounds).

275. See supra text accompanying note 137.

276. See Joshi, *Racial Justice and Peace*, supra note 6, at 1344–47 (discussing invocations of "No Justice! No Peace!" during the 2020 uprisings).

277. Martin Luther King, Jr., Letter From Birmingham Jail (Apr. 16, 1963), [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html) [<https://perma.cc/D9SR-9G97>]. Based on their reading of this letter, Lani Guinier and Gerald Torres argue that "substituting racial peace for racial justice is a recipe for delaying racial justice." Lani Guinier & Gerald Torres, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* 295 (2003).

278. Martin Luther King, Jr., Address Delivered to the Southern Christian Leadership Conference: The Crisis in America's Cities (Aug. 15, 1967), in *The King Issue*, Atlantic (Mar. 31, 2018), <https://www.theatlantic.com/magazine/archive/2018/02/martin-luther-king-jr-the-crisis-in-americas-cities/552536/> [<https://perma.cc/7SEM-2ALN>].

279. A. Philip Randolph, Remarks at the March on Washington (Aug. 28, 1963), in *St. Augustine Rec.*, <https://www.staugustine.com/story/news/2013/08/20/philip-randolphs-1963-march-washington-speech/15818957007/> [<https://perma.cc/D3V5-66DC>].

280. Timeline of the American Civil Rights Movement, Encyc. Britannica (Jan. 13, 2023), <https://www.britannica.com/list/timeline-of-the-american-civil-rights-movement> [<https://perma.cc/XV3V-QCWU>] (chronicling the enactment of these legislations).

constructive and even necessary to the achievement of a more just society—and that not every peace is worth preserving.

# RETHINKING EDUCATION THEFT THROUGH THE LENS OF INTELLECTUAL PROPERTY AND HUMAN RIGHTS

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*This Essay problematizes the increased propertization and commodification of education and calls for a rethink of the emergent concept of “education theft” through the lens of intellectual property and human rights. This concept refers to the phenomenon where parents, or legal guardians, enroll children in schools outside their school districts by intentionally violating the residency requirements. The Essay begins by revisiting the debate on intellectual property rights as property rights. It discusses the ill fit between intellectual property law and the traditional property model, the impediments the law has posed to public access to education, and select reforms that have emerged both inside and outside the property regime. The Essay then turns to the debate on property and education in the human rights context. It argues that the norms and practices relating to the human right to education provide important insights into the debate. It also states that the discussion in the human rights forum will help evaluate the effectiveness and limitations of introducing positive rights to foster public access to education. The Essay concludes by applying the insights gleaned from the debate on property and education in the intellectual property and human rights contexts to the phenomenon surrounding so-called “education theft.” Specifically, the Essay calls for the development of a more sophisticated understanding of property rights in their historical and socioeconomic contexts, a careful evaluation of the expediency of criminalizing residency requirement violations, and an exploration of potential technological solutions to address problems raised by these violations.*

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## INTRODUCTION

In the past few years, courts, policymakers, and commentators have paid considerable attention to how the law engages with education. Later this term, the United States Supreme Court will decide *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, which addresses whether institutions of higher education can factor race into admissions decisions.<sup>1</sup> Politicians, prosecutors, and law enforcement officials have also actively pushed for increased criminal penalties for enrollment fraud or what they have called “education theft.”<sup>2</sup> Invoking property rights to emphasize the conduct’s wrongfulness,<sup>3</sup> this label refers to an intentional violation of residency requirements for school enrollment to obtain “a seat in a classroom that the taxpayers . . . have designated for a resident child”—such as when a parent or legal guardian falsifies a nonresident child’s home address.<sup>4</sup>

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1. 980 F.3d 157 (1st Cir. 2020), cert. granted, 142 S. Ct. 895 (2022); see also Yuvraj Joshi, *Racial Indirection*, 52 U.C. Davis L. Rev. 2495, 2556–67 (2019) (discussing the future of affirmative action that this litigation may have shaped).

2. Kyle Spencer, *Can You Steal an Education? Wealthy School Districts Are Cracking Down on “Education Thieves”*, Hechinger Rep. (May 18, 2015), <https://hechingerreport.org/can-you-steal-an-education/> [https://perma.cc/HXK5-MQDM]. See generally LaToya Baldwin Clark, *Education as Property*, 105 Va. L. Rev. 397, 403–21 (2019) [hereinafter Baldwin Clark, *Education as Property*] (discussing the use of residency, criminal, civil, and education laws to combat the phenomenon of “stealing education”); LaToya Baldwin Clark, *Stealing Education*, 68 UCLA L. Rev. 566 (2021) [hereinafter Baldwin Clark, *Stealing Education*] (discussing the phenomenon of “stealing education”); La Darien Harris, Note, *The Criminalization of School Choice: Punishing the Poor for the Inequities of Geographic School Districting*, 44 J. Legis. 306 (2018) (discussing the criminalization of residency requirement violations).

3. Cf. Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 Tex. L. Rev. 873, 896 (1997) (reviewing James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (1996)) (noting that “‘infringement’ may be a morally neutral term, but ‘theft’ is clearly wrong”).

4. Baldwin Clark, *Education as Property*, supra note 2, at 411; see also id. at 406 & n.47 (listing the statutory provisions that criminalize theft of education); Baldwin Clark,

In academic literature, Professor LaToya Baldwin Clark wrote a pioneering article entitled *Education as Property*, which explores the phenomenon of “stealing education” and criticizes local school districts and law enforcement authorities for perpetuating stratification and inequality through surveillance and punishment.<sup>5</sup> Professor Erika Wilson discusses how the maintenance of predominantly white school districts can generate a process of “social closure” that enables one group to monopolize advantages by closing off opportunities to other groups, usually racialized minorities.<sup>6</sup> Professor Rachel Moran laments how increased commodification, segmentation, and stratification have undermined the “democratic promise of higher education.”<sup>7</sup> And Professors Michelle Wilde Anderson and Nicole Stelle Garnett have separately written about the changing educational landscapes, covering issues such as school closures and the formation and dissolution of school districts.<sup>8</sup>

Although intellectual property law seems quite far away from these issues, it is very familiar with the debate on property and education and has much to contribute. Enacted through a constitutional clause that aims to “promote the Progress of Science and useful Arts,”<sup>9</sup> copyright<sup>10</sup> and patent laws provide incentives to ensure the development of knowledge, learning materials, and educational technologies.<sup>11</sup> Yet, the continuous

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Stealing Education, *supra* note 2, at 592–98 (discussing those laws); Harris, *supra* note 2, at 319–27 (discussing laws criminalizing theft of education in Connecticut, Maryland, Ohio, Oklahoma, Pennsylvania, and the District of Columbia).

5. Baldwin Clark, *Education as Property*, *supra* note 2, at 421–24. See generally LaToya Baldwin Clark, *Barbed Wire Fences: The Structural Violence of Education Law*, 89 U. Chi. L. Rev. 499 (2022) [hereinafter Baldwin Clark, *Barbed Wire Fences*] (arguing that the structure of U.S. education not only fails to address Black childhood poverty but has also caused tangible harm to poor Black children); Baldwin Clark, *Stealing Education*, *supra* note 2 (arguing that laws against “stealing education” contribute to race–class opportunity hoarding and segregation).

6. See Erika K. Wilson, *Monopolizing Whiteness*, 134 Harv. L. Rev. 2382, 2388–414 (2021).

7. See Rachel F. Moran, *City on a Hill: The Democratic Promise of Higher Education*, 7 U.C. Irvine L. Rev. 73, 75 (2017).

8. See generally Michelle Wilde Anderson, *Making a Regional District: Memphis City Schools Dissolves Into Its Suburbs*, 112 Colum. L. Rev. Sidebar 47 (2012); Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools and Broken Windows*, 9 J. Empirical Legal Stud. 347 (2012); Nicole Stelle Garnett, *Disparate Impact, School Closures, and Parental Choice*, 2014 U. Chi. Legal F. 289.

9. U.S. Const. art. I, § 8, cl. 8.

10. The origin of the U.S. copyright law can be traced back to the English Statute of Anne, which was formally titled “An Act for the Encouragement of Learning.” An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned 1710, 8 Ann. c. 19 (Eng.).

11. See William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 294–310 (2003) [hereinafter Landes & Posner, *Economic Structure*] (discussing the economic logic of patent law); William M. Landes & Richard A.

expansion of intellectual property rights has greatly reduced public access to education. By enabling rights holders to charge supracompetitive prices—prices that exceed what can be charged in a competitive market—intellectual property rights have made textbooks, research materials, and educational technologies unaffordable.<sup>12</sup> Even well-resourced universities have struggled with increased subscription fees for academic and scientific journals.<sup>13</sup> In addition, because intellectual property law enables rights holders to decide whether to release the protected products and technologies in local languages or commercially unattractive markets, members of marginalized and disadvantaged communities often do not have ready access to those products and technologies even if they manage to secure the needed economic resources.<sup>14</sup>

This Essay problematizes the increased propertization and commodification of education and calls for a rethink of the emergent concept of “education theft” through the lens of intellectual property and human rights. Part I explores the debate on property and education in the intellectual property context. To foreground the problems raised by property rhetoric in general and the “theft” label in particular, this Part revisits the debate on intellectual property rights as property rights. It discusses the ill fit between intellectual property law and the traditional property model as well as the impediments this law has posed to public access to education. This Part then outlines select reforms advanced by courts, policymakers, and commentators both inside and outside the property regime to improve such access. Because this Essay focuses on education, the discussion of intellectual property rights inevitably gravitates toward copyright law—and, to a lesser extent, patent law. Nevertheless, it is worth keeping in mind that other forms of intellectual property rights can also impede public access to education.<sup>15</sup>

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Posner, *An Economic Analysis of Copyright Law*, 18 *J. Legal Stud.* 325, 326–33 (1989) [hereinafter *Landes & Posner, Economic Analysis*] (discussing the basic economics of copyright).

12. See *infra* text accompanying notes 48–50.

13. See, e.g., Alex Fox & Jeffrey Brainard, *University of California Boycotts Publishing Giant Elsevier Over Journal Costs and Open Access*, *Science* (Feb. 28, 2019), <https://www.science.org/content/article/university-california-boycotts-publishing-giant-elsevier-over-journal-costs-and-open> [<https://perma.cc/E5SW-ZUR3>] (reporting the University of California System’s boycott of journal subscriptions from Elsevier due partly to the publisher’s refusal to reduce subscription fees); Ian Sample, *Harvard University Says It Can’t Afford Journal Publishers’ Prices*, *Guardian* (Apr. 24, 2012), <https://www.theguardian.com/science/2012/apr/24/harvard-university-journal-publishers-prices> [<https://perma.cc/BD7X-T5XY>] (“[A] memo from Harvard’s faculty advisory council said major publishers had created an ‘untenable situation’ at the university by making scholarly interaction ‘fiscally unsustainable’ and ‘academically restrictive’, while drawing profits of 35% or more.”).

14. See *infra* text accompanying notes 63–64.

15. An example that has received considerable attention during the COVID-19 pandemic is the need for disclosure of tacit knowledge to facilitate the development of

Part II turns to the debate on property and education in the human rights context. The human rights forum is selected for two reasons. First, the norms and practices relating to the human right to education provide important insights into this debate. In fact, commentators have increasingly called for the use of a right to education—both domestically and internationally—to improve public access to education.<sup>16</sup> Second, the human rights forum is accustomed to clashes between competing interests cloaked in rights, such as the tensions and conflicts between the right to education and the right to the protection of the interests resulting from intellectual productions.<sup>17</sup> The discussion in the human rights forum will therefore help evaluate the effectiveness and limitations of a key line of reform advanced in the previous Part—the introduction of positive rights to foster public access to education.

Part III applies the insights gleaned from the debate on property and education in the intellectual property and human rights contexts to the phenomenon surrounding so-called “education theft.” This Part calls for the development of a more sophisticated understanding of property rights in their historical and socioeconomic contexts, a careful evaluation of the expediency of criminalizing residency requirement violations, and an exploration of potential technological solutions to address problems raised by these violations.

## I. INTELLECTUAL PROPERTY

Intellectual property law is familiar with the debate on property and education. Although the term “intellectual property” includes the word

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vaccines and other health products and technologies. See Peter Lee, *New and Heightened Public–Private Quid Pro Quos: Leveraging Public Support to Enhance Private Technical Disclosure*, in *Intellectual Property, COVID-19, and the Next Pandemic: Diagnosing Problems, Developing Cures* (Madhavi Sunder & Sun Haochen eds., forthcoming 2023), <https://ssrn.com/abstract=4058717> [<https://perma.cc/2NZC-7SMD>].

16. See *infra* text accompanying notes 122–126.

17. For the author’s prior work in this area, see generally Peter K. Yu, *The Anatomy of the Human Rights Framework for Intellectual Property*, 69 *SMU L. Rev.* 37 (2016) [hereinafter Yu, *Anatomy*]; Peter K. Yu, *Intellectual Property and Human Rights 2.0*, 53 *U. Rich. L. Rev.* 1375 (2019) [hereinafter Yu, *Human Rights 2.0*]; Peter K. Yu, *Intellectual Property and Human Rights in the Nonmultilateral Era*, 64 *Fla. L. Rev.* 1045 (2012) [hereinafter Yu, *Nonmultilateral Era*]; Peter K. Yu, *Intellectual Property, Human Rights, and Methodological Reflections*, in *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives* 182 (Irene Calboli & Maria Lillà Montagnani eds., 2021); Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 *U.C. Davis L. Rev.* 1039 (2007) [hereinafter Yu, *Reconceptualizing Intellectual Property Interests*].

“property” in terminology, statutory language,<sup>18</sup> and case law,<sup>19</sup> commentators have lamented the overemphasis on the property aspects of intellectual property rights and the increased expansion of these rights. To show the ill fit between intellectual property law and the traditional property model, this Part revisits the debate on intellectual property rights as property rights, which became prominent in the 1990s following the mainstreaming of the internet and remained vibrant through the early 2000s.<sup>20</sup> This Part criticizes the usual narrative advanced by policymakers, legislators, and industry representatives that equates intellectual property infringement with theft.<sup>21</sup> It then discusses the impediments intellectual property rights have posed to public access to education. This Part further explores the different reforms advanced by courts, policymakers, and commentators both inside and outside the property regime to cabin the excesses of intellectual property law.

### A. *Property Models*

Intellectual property is fundamentally different from tangible property: It has the characteristics of a nonrivalrous and nonexcludable good.<sup>22</sup> Consider, for instance, the copyrighted content inside a property

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18. See, e.g., 35 U.S.C. § 261 (2018) (“[P]atents shall have the attributes of personal property.”).

19. See, e.g., *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730 (2002) (“The monopoly [provided by patent laws] is a property right . . . .”); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642 (1999) (“Patents . . . have long been considered a species of property.”); *Ex parte Wood*, 22 U.S. (9 Wheat.) 603, 608 (1824) (“The inventor has . . . a property in his inventions; a property which is often of very great value, and of which the law intended to give him the absolute enjoyment and possession.”).

20. See, e.g., Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 *Tex. L. Rev.* 1031 (2005) [hereinafter *Lemley, Free Riding*]; Stewart E. Sterk, *Intellectualizing Property: The Tenuous Connections Between Land and Copyright*, 83 *Wash. U. L.Q.* 417 (2005); Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 *Mich. St. L. Rev.* 1, 1–6 [hereinafter *Yu, Information Ecosystem*]. This debate can be traced back even earlier. See, e.g., Stephen L. Carter, *Does It Matter Whether Intellectual Property Is Property?*, 68 *Chi.-Kent L. Rev.* 715 (1993); Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 *Harv. J.L. & Pub. Pol’y* 108 (1990); Edmund W. Kitch, *Patents: Monopolies or Property Rights?*, 8 *Rsch. L. & Econ.* 31 (1986).

21. For critiques of the industry’s effort, see generally Patricia Loughlan, “You Wouldn’t Steal a Car . . .”: Intellectual Property and the Language of Theft, 29 *Eur. Intell. Prop. Rev.* 401 (2007); Peter K. Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 *Vand. J. Ent. & Tech. L.* 881, 891–93 (2011) [hereinafter *Yu, Confuzzling Rhetoric*].

22. See generally Landes & Posner, *Economic Analysis*, supra note 11, at 344–61 (discussing the nonexcludable and nonrivalrous nature of intellectual property); *Understanding Knowledge as a Commons: From Theory to Practice* (Charlotte Hess & Elinor Ostrom eds., 2007) [hereinafter *Understanding Knowledge as a Commons*] (collecting essays that discuss the importance of treating knowledge as a commons); Joseph E. Stiglitz, *Knowledge as a Global Public Good*, in *Global Public Goods: International*



law casebook. A student's consumption of such content is nonrivalrous, as it does not prevent the casebook author and other students from using the same content. The knowledge derived from that casebook is also nonexcludable because, once that knowledge becomes available, any student can acquire the same knowledge, though not always to the same extent. As a result of these fundamental differences, intellectual property rights do not fit well with a property model<sup>23</sup> that aims to prevent conflicts between neighbors<sup>24</sup> and to reduce wasting scarce tangible resources.<sup>25</sup> Even though it is now common to link intellectual property to property, intellectual property has a longstanding association with tort law—business tort and unfair competition, in particular.<sup>26</sup> A case in point is Henry Wigmore's casebook on tort law.<sup>27</sup> Published more than a century ago, this book included various forms of intellectual property law under the heading "harms to sundry profitable relations."<sup>28</sup>

Moreover, as Professors Mark Lemley and Brett Frischmann and other commentators have pointed out, while the traditional property model

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Cooperation in the 21st Century 308 (Inge Kaul, Isabelle Grunberg & Marc A. Stern eds., 1999) (discussing knowledge as a global public good).

23. See William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* 135 (2004) [hereinafter Fisher, *Promises to Keep*] ("It is far from obvious that legal rules appropriate for managing [unique or scarce] resources . . . would also be appropriate for managing resources [that could, in the absence of legal intervention, be made available to everyone simultaneously]."); Lemley, *Free Riding*, supra note 20, at 1032 ("[T]reating intellectual property as 'just like' real property is a mistake as a practical matter."); Sterk, supra note 20, at 421 ("Real property rights operate to avoid the 'tragedy of the commons'—a problem that does not arise with intellectual works—because once created, those works, unlike land, are non-rivalrous public goods.").

24. See Sterk, supra note 20, at 431–33 (discussing property as protection against breaches of the peace).

25. See *id.* at 426–31 (discussing property in relation to resource allocation). See generally Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347 (1967) (discussing how property rights promote efficiency by internalizing externalities).

26. See Fisher, *Promises to Keep*, supra note 23, at 135 ("For most of American (and world) history, copyrights, like patents, were more likely to be referred to as 'monopolies' than as property rights."); Lemley, *Free Riding*, supra note 20, at 1072 ("[I]n another era we treated intellectual property as a species of business tort, lodging trademarks and trade secrets in the *Restatement of Torts* and including chapters on copyright and patent in tort casebooks."); Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 *Cath. U. L. Rev.* 365, 399 (1989) ("What we now refer to as intellectual property law has long been part of unfair competition law."); Sterk, supra note 20, at 419 ("[C]opyright and patent infringement need not be treated as a species of theft or conversion, but could instead be treated as 'business torts,' akin to unfair competition or trademark infringement.").

27. John Henry Wigmore, *Select Cases on the Law of Torts With Notes, and a Summary of Principles* (1912).

28. *Id.* at 318–543; see also Lemley, *Free Riding*, supra note 20, at 1072 n.167 (noting the inclusion of intellectual property law in Professor Wigmore's casebook).

helps internalize negative externalities, the creation and use of intellectual property can generate positive externalities.<sup>29</sup> Professor Lemley writes:

If I plant beautiful flowers in my front lawn, I don't capture the full benefit of those flowers—passers-by can enjoy them too. But property law doesn't give me a right to track them down and charge them for the privilege . . . . Nor do I have the right to collect from my neighbors the value they get if I replace an unattractive shade of paint with a nicer one, or a right to collect from society at large the environmental benefits I confer by planting trees.<sup>30</sup>

To accrue the social benefits provided by knowledge spillovers and to balance proprietary control and public access, intellectual property law introduces limitations and exceptions to exclusive rights.<sup>31</sup> In doing so, the law avoids completely eradicating free riding. As Professors Eduardo Peñalver and Sonia Katyal remind us, free riding can be beneficial:

[I]ntellectual property rights, no less than rights in tangible property, are sticky. Once created, endowment effects, transaction costs, and political inertia combine to keep them in place. In many cases, some free riding may be essential to combat this inertia and force decision makers to consider altering the status quo.<sup>32</sup>

The views of these commentators coincide with the position taken by many courts, even though other courts have taken contrary positions.<sup>33</sup> As the United States Supreme Court observed in *Dowling v. United States*, which involved the interstate transportation of bootleg Elvis Presley recordings and the National Stolen Property Act:

[I]nterference with copyright does not easily equate with theft, conversion, or fraud. . . . The infringer . . . does not assume physical control over the copyright; nor does he wholly deprive its owner of its use. While one may colloquially like[n] infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex

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29. See Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 *Colum. L. Rev.* 257, 258–85 (2007) (discussing the social benefits of spillovers); Lemley, *Free Riding*, *supra* note 20, at 1046–50 (explaining why the law should not allow property owners to fully capture the social value of their property).

30. Lemley, *Free Riding*, *supra* note 20, at 1048 (footnotes omitted).

31. See *infra* text accompanying notes 81–88.

32. Eduardo M. Peñalver & Sonia K. Katyal, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership* 45 (2010); see also Margaret Chon, *Sticky Knowledge and Copyright*, 2011 *Wis. L. Rev.* 177, 186–99 (discussing the stickiness of knowledge both inside and outside the intellectual property regime).

33. See *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (“‘Thou shalt not steal’ has been an admonition followed since the dawn of civilization. . . . The conduct of the defendants herein . . . violates not only the Seventh Commandment, but also the copyright laws of this country.” (footnote omitted)).

set of property interests than does run-of-the-mill theft, conversion, or fraud.<sup>34</sup>

In a civil action, the United States District Court for the Southern District of New York also maintained: “Copyright and trademark law are not matters of strong moral principle. Intellectual property regimes are economic legislation based on policy decisions that assign rights based on assessments of what legal rules will produce the greatest economic good for society as a whole.”<sup>35</sup> This view hinted at the usual distinction between *malum in se* and *malum prohibitum* in criminal law,<sup>36</sup> with intellectual property infringement falling in the latter category.

Although the traditional property model does not fit very well with intellectual property law, rights holders and their supportive industry groups and governments have continued to use property rhetoric to press for the expansion of intellectual property rights.<sup>37</sup> One only has to recall the motion picture industry’s ill-advised educational campaign in the mid-2000s that compared downloading movies to stealing a car.<sup>38</sup> As commentators have rightly observed, this misguided campaign conflated intangible property with tangible property and wrongly assumed that individual file-sharers could download a car the same way they downloaded music.<sup>39</sup>

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34. 473 U.S. 207, 217–18 (1985).

35. *Sarl Louis Feraud Int’l v. Viewfinder Inc.*, 406 F. Supp. 2d 274, 281 (S.D.N.Y. 2005), vacated, 489 F.3d 474 (2d Cir. 2007).

36. “An offense *malum in se* is properly defined as one which is naturally evil as adjudged by the sense of a civilized community, whereas an act *malum prohibitum* is wrong only because made so by statute.” *State v. Horton*, 51 S.E. 945, 946 (N.C. 1905).

37. See David Fagundes, *Property Rhetoric and the Public Domain*, 94 *Minn. L. Rev.* 652, 691 (2010) (“Content industries currently deploy, with great effect, property romance as a rhetorical strategy designed to protect and extend their entitlements in information resources.”); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 *Harv. J.L. & Tech.* 1, 22 (2003) (“The copyright industries regularly employ the rhetoric of private property to support their lobbying efforts and litigation.”); Yu, *Confuzzling Rhetoric*, *supra* note 21, at 891–92 (noting that “linking intellectual property to tangible property has its rhetorical advantages, especially on the Capitol Hill”); see also Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 31 (1991) [hereinafter *Glendon, Rights Talk*] (“In America, when we want to protect something, we try to get it characterized as a right. To a great extent, . . . when we *especially* want to hold on to something . . . , we try to get the object of our concern characterized as a property right.”); Lemley, *Free Riding*, *supra* note 20, at 1046 (“[P]roperty theory . . . provides intellectual heft to justify the expansion and . . . offers courts an attractive label—“free rider”—that they can use both to identify undesirable conduct and to justify its suppression.”).

38. See Loughlan, *supra* note 21, at 401 (providing the text of the motion picture industry’s commercial).

39. See James Boyle, *The Public Domain: Enclosing the Commons of the Mind* 63 (2008); Loughlan, *supra* note 21, at 402–03; Yu, *Confuzzling Rhetoric*, *supra* note 21, at 892. One cannot help but wonder whether the theft used in this context is closer to what has been termed “literary theft,” “time theft,” or “wage theft.” See, e.g., Rebecca Berke

At the international level, property rhetoric has also been increasingly invoked to strengthen intellectual property protection. In the past decade, some multinational corporations have actively used international investment agreements to strengthen cross-border protection of intellectual property rights.<sup>40</sup> Because arbitrators involved in investor–state disputes tend to emphasize the property aspects of intellectual property rights,<sup>41</sup> these corporations filed investor–state complaints to replace or supplement domestic litigation in host states.<sup>42</sup> Among the most notable cases are complaints filed by Philip Morris against Australia and Uruguay,<sup>43</sup> Eli Lilly against Canada,<sup>44</sup> Bridgestone against Panama,<sup>45</sup> and the Einarssons and Geophysical Service Inc. against Canada.<sup>46</sup>

### B. *Impediments to Education*

Thus far, commentators have heavily criticized the continuous expansion of intellectual property rights. There are three general critiques of intellectual property law in the area of education and scientific research. First, the protection of intellectual property rights prevents or reduces access to educational materials and technologies, especially when those rights do not reflect an appropriate balance between proprietary control

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Galemba, *Laboring for Justice: The Fight Against Wage Theft in an American City* 4 (2023) (“Wage theft . . . occurs when employers underpay workers . . . or refuse to pay them at all . . .”); Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 *Hastings L.J.* 167, 218–28 (2002) (exploring whether plagiarism constitutes theft); Lauren Snider, *Theft of Time: Disciplining Through Science and Law*, 40 *Osgoode Hall L.J.* 89, 90 (2002) (defining time theft “as the misuse of the employer’s time and property by an employee”).

40. See generally Peter K. Yu, *The Investment-Related Aspects of Intellectual Property Rights*, 66 *Am. U. L. Rev.* 829 (2017) [hereinafter Yu, *Investment-Related Aspects*] (discussing the rise of investor–state disputes in the intellectual property context).

41. See Pratyush Nath Upreti, *Intellectual Property Objectives in International Investment Agreements* 54–85 (2022) (discussing the property protection of investment assets); see also Yu, *Investment-Related Aspects*, supra note 40, at 857–58 (criticizing the arbitrators’ tunnel vision in investor–state dispute settlement proceedings).

42. Investor–state dispute settlement allows multinational corporations to use international arbitration to resolve cross-border intellectual property disputes with host states. See Peter K. Yu, *The Pathways of Multinational Intellectual Property Dispute Settlement*, in *Intellectual Property and International Dispute Resolution* 123, 132–36 (Christopher Heath & Anselm Kamperman Sanders eds., 2019).

43. *Philip Morris Asia Ltd. v. Commonwealth of Austl.*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015); *Philip Morris Brands Sàrl v. Oriental Republic of Uru.*, ICSID Case No. ARB/10/7, Award (July 8, 2016).

44. *Eli Lilly & Co. v. Gov’t of Can.*, ICSID Case No. UNCT/14/2, Final Award (Mar. 16, 2017).

45. *Bridgestone Licensing Servs., Inc. v. Republic of Pan.*, ICSID Case No. ARB/16/34, Award (Aug. 14, 2020).

46. *Einarsson v. Gov’t of Can.*, ICSID Case No. UNCT/20/6, Notice of Arbitration (Apr. 18, 2019).

and public access.<sup>47</sup> By enabling rights holders to charge supracompetitive prices while giving them a right to exclude, intellectual property law has made many of these materials and technologies inaccessible to those in need.<sup>48</sup> While the law contains limitations and exceptions that allow the public to access abstract ideas and general knowledge,<sup>49</sup> such access does not extend to educational materials and technologies in their entirety.<sup>50</sup> The use of these educational tools is integral to learning, especially when they have been adapted to meet local needs.<sup>51</sup> Indeed, education experts have widely agreed on the immense benefits provided by textbooks and

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47. See generally Klaus D. Beiter, *Not the African Copyright Pirate Is Perverse, but the Situation in Which (S)He Lives—Textbooks for Education, Extraterritorial Human Rights Obligations, and Constitutionalization “From Below”* in *IP Law*, 26 *Buff. Hum. Rts. L. Rev.* 1 (2020) [hereinafter Beiter, *African Copyright Pirate*] (discussing access to textbooks in Africa in the human rights context); Margaret Chon, *Intellectual Property “From Below”: Copyright and Capability for Education*, 40 *U.C. Davis L. Rev.* 803, 821–27 (2007) [hereinafter Chon, *Intellectual Property “From Below”*] (discussing the limited access to textbooks in developing countries and the linkage between educational access and copyright).

48. See Landes & Posner, *Economic Structure*, supra note 11, at 294–310; Landes & Posner, *Economic Analysis*, supra note 11, at 326–33.

49. See 17 U.S.C. § 102(b) (2018) (denying copyright protection to “idea, procedure, process, system, method of operation, concept, principle, or discovery”); *Diamond v. Diehr*, 450 U.S. 175, 185 (1981) (holding that patent protection does not extend to “laws of nature, natural phenomena, and abstract ideas”).

50. Although the discussion of learning materials tends to focus on textbooks or other physical materials, the availability of educational technologies is equally important. See *Comm. on Econ., Soc. & Cultural Rts., General Comment No. 13: The Right to Education* (Article 13 of the Covenant), ¶ 6(a), U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter *General Comment No. 13*] (noting that the availability requirement in the right to education extends to not only teaching materials but also information technology); Jan van Dijk, *The Digital Divide 77–79* (2020) (noting the importance of digital skills, and often content-related digital skills, in the twenty-first century).

51. See Susan Isiko Štrba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions 27* (2012) (“[A]ccess to educational material is not just a choice, but rather a necessity in order to enable an individual to integrate and compete in society.”); Chon, *Intellectual Property “From Below”*, supra note 47, at 823–24 (discussing the impact of textbook availability on basic learning); Fons Coomans, *Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realization*, in *Human Rights in Education, Science and Culture: Legal Developments and Challenges 183, 220* (Yvonne Donders & Vladimir Volodin eds., 2007) [hereinafter Coomans, *Content and Scope*] (“A school curriculum that is not adapted to the needs of learners and to their cultural identity, diversity and socio-economic background will not help students to acquire knowledge and skills they can use in practice . . . .”); Sharon E. Foster, *The Conflict Between the Human Right to Education and Copyright*, in *Intellectual Property Law and Human Rights 353, 354* (Paul L.C. Torremans ed., 4th ed. 2020) (discussing the improvements that increased access to instructional materials can provide to education systems). See generally Lea Shaver, *The Right to Read*, 54 *Colum. J. Transnat’l L.* 1 (2015) (calling for the creation of the right to read to ensure individual access to an adequate supply of reading material for both learning and pleasure).

other learning materials and technologies.<sup>52</sup> As if the lack of access to these materials and technologies were not challenging enough, the past two decades have seen growing threats to public access to education through an active push by intellectual property rights holders and their supportive politicians and industry groups for finer-grained protections, such as those for data and databases,<sup>53</sup> and the ubiquitous use of contracts and extralegal measures.<sup>54</sup> The latter includes the deployment of technological protection measures to lock up both copyrighted and unprotected educational content.<sup>55</sup>

Second, intellectual property law can prevent the dissemination of knowledge and research. As the U.N. Committee on Economic, Social and Cultural Rights (“CESCR”) recently observed: “[S]ome intellectual property regulations limit the sharing of information on scientific research for a certain period . . . . [T]he excessive price of some scientific publications is an obstacle for low-income researchers, especially in developing countries.”<sup>56</sup> In addition, strong intellectual property rights

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52. See Stephen P. Heyneman, *The Role of Textbooks in a Modern Education System: Towards High Quality Education for All*, in *Textbooks and Quality Learning for All: Some Lessons Learned From International Experience* 31, 38 (Cecilia Braslavsky ed., 2006) (“[T]extbook availability was the single most consistent correlate of academic achievement in developing countries, thus justifying public investment in education reading materials.” (citations omitted)).

53. See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 39.3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (offering protection to undisclosed test or other data for pharmaceutical and agrochemical products); Council Directive 1996/9, art. 7(1), 1996 O.J. (L 77) 20 (EC) (offering sui generis protection to databases that are created as a result of “a substantial investment in either the obtaining, verification or presentation of the [database] contents”); Commission Communication on Building a European Data Economy, at 13, COM (2017) 9 final (Oct. 1, 2017) (proposing a new sui generis data producer’s right for non-personal, anonymized machine-generated data). See generally Peter K. Yu, *Data Exclusivities and the Limits to TRIPS Harmonization*, 46 Fla. St. U. L. Rev. 641, 647–85 (2019) (discussing the protection for test and other data in the TRIPS Agreement and TRIPS-plus bilateral, regional, and plurilateral agreements); Peter K. Yu, *Data Producer’s Right and the Protection of Machine-Generated Data*, 93 Tul. L. Rev. 859, 884–96 (2019) (critiquing the European Commission’s proposal for data producer’s right).

54. See Peter K. Yu, *Five Disharmonizing Trends in the International Intellectual Property Regime*, in *4 Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* 73, 91–96 (Peter K. Yu ed., 2007) [hereinafter *Intellectual Property and Information Wealth*] (discussing the trend of rights holders using mass-market contracts and technological protection measures).

55. See 17 U.S.C. § 1201 (2018) (offering protection against the circumvention of technological protection measures).

56. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights (Article 15(1)(b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), ¶ 61, U.N. Doc. E/C.12/GC/25 (Apr. 30, 2020) [hereinafter *General Comment No. 25*]; see also Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *Copyright Policy and the Right to Science and Culture*, ¶ 79, U.N. Doc. A/HRC/28/57 (Dec. 24, 2014) [hereinafter

could create what Professors Michael Heller and Rebecca Eisenberg have referred to as the “tragedy of the anticommons,”<sup>57</sup> in which “multiple owners each have a right to exclude others from a scarce resource and no one has an effective privilege of use.”<sup>58</sup> It is therefore no surprise that human rights bodies and advocates have strongly supported open-science and open-licensing initiatives.<sup>59</sup> The past few years have also seen commentators and nonprofit organizations actively pushing for the recognition of the right to research to facilitate the use of intellectual property for educational and research purposes—whether authorized or unauthorized.<sup>60</sup>

Third, intellectual property rights can skew the funding for research and for the production of educational materials and technologies.<sup>61</sup> The benefits provided by existing intellectual property law skew production toward commercially successful projects, thereby causing the unavailability of other projects.<sup>62</sup> At the international level, the lack of availability of

Special Rapporteur’s Report on Copyright Policy] (“For-profit academic journals and publishers often prohibit author-researchers from making their own material accessible over the Internet, in order to maximize subscription fees. The prevailing restricted-access dissemination model limits the ability to share published scientific knowledge, inhibiting the emergence of a truly global and collaborative scientific community.”).

57. See generally Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets, Stops Innovation, and Costs Lives* 49–78 (2008) (discussing gridlock in biomedical research); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 *Science* 698 (1998) (discussing the tragedy of the anticommons in biomedical research).

58. Heller & Eisenberg, *supra* note 57, at 698.

59. See General Comment No. 25, *supra* note 56, ¶ 16 (“States should promote open science and open source publication of research. Research findings and research data funded by States should be accessible to the public.”); Special Rapporteur’s Report on Copyright Policy, *supra* note 56, ¶ 113 (“Public and private universities and public research agencies should adopt policies to promote open access to published research, materials and data on an open and equitable basis, especially through the adoption of Creative Commons licences.”).

60. See, e.g., Christophe Geiger & Bernd Justin Jütte, *The Right to Research as Guarantor for Sustainability, Innovation and Justice in EU Copyright Law*, in *Intellectual Property Rights in the Post Pandemic World: An Integrated Framework of Sustainability, Innovation and Global Justice* (Taina E. Pihlajarinne, Jukka Mähönen & Pratyush Upreti eds., forthcoming 2023); Am. Univ. Wash. Coll. of L., Annual Meeting of the Global Expert Network on Copyright User Rights: The Right to Research in International Copyright, Program on Info. Just. & Intell. Prop. (Apr. 21, 2022), <https://www.wcl.american.edu/impact/initiatives-programs/pijip/events/annual-meeting-of-the-global-expert-network-on-copyright-user-rights/> [<https://perma.cc/95XD-U3D5>] (providing information about a public symposium on the right to research in international copyright law).

61. See General Comment No. 25, *supra* note 56, ¶ 61 (“[I]ntellectual property can sometimes create distortions in the funding of scientific research as private financial support might go only to research projects that are profitable, while funding to address issues that are crucial for economic, social and cultural rights might not be adequate . . .”).

62. See generally *Access to Knowledge in the Age of Intellectual Property* (Gaëlle Krikorian & Amy Kapczynski eds., 2010) [hereinafter *Access to Knowledge*] (collecting

foreign-language books is particularly notorious and has caused “book famines” in many countries and communities.<sup>63</sup> As Professor Lea Bishop (née Shaver) laments:

[T]he Zulu language . . . is spoken by ten million people in South Africa. The vast majority of Zulu speakers are literate. Every day, Zulu newspapers sell hundreds of thousands of copies. With an average household income around \$5,000 U.S., however, very few Zulu speakers can afford to purchase books. As a logical consequence, the Zulu book publishing industry is next to non-existent. The Publishers’ Association of South Africa counts only seven hundred Zulu books currently in print.<sup>64</sup>

Beyond these usual critiques, policymakers and commentators have criticized intellectual property law for not offering protection to all forms of creativity and innovation. Notably excluded are traditional knowledge and traditional cultural expressions.<sup>65</sup> These creations reside in the public domain for all to use,<sup>66</sup> due to the fact that they either were created in the past or failed to meet other eligibility requirements under existing intellectual property law.<sup>67</sup> To correct this oversight, the World Intellectual Property Organization (WIPO) established the Intergovernmental

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essays that discuss the need for access to knowledge and the Access to Knowledge Movement).

63. See Special Rapporteur’s Report on Copyright Policy, *supra* note 56, ¶ 68 (“[C]opyright protection offers little financial incentive to write and publish in most of the world’s languages. People able to speak English, French or Spanish can select reading material from millions of books; however, those unable to speak a globally used language may enjoy access to very few.” (footnote omitted)). See generally Lea Shaver, *Ending Book Hunger: Access to Print Across Barriers of Class and Culture* (2019) [hereinafter Shaver, *Ending Book Hunger*] (detailing the difficulties caused by book famine across impoverished communities around the world).

64. Shaver, *Ending Book Hunger*, *supra* note 63, at 7–8.

65. See U.N. High Commissioner for Human Rights, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights*: Rep. of the High Commissioner, ¶ 26, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001) (“[N]o mention is made [in the TRIPS Agreement] of the need to protect the cultural heritage and technology of local communities and indigenous peoples.”). See generally Peter K. Yu, *Cultural Relics, Intellectual Property, and Intangible Heritage*, 81 *Temp. L. Rev.* 433 (2008) (discussing the protection of traditional knowledge and traditional cultural expressions).

66. See Peter K. Yu, Note, *Fictional Persona Test: Copyright Preemption in Human Audiovisual Characters*, 20 *Cardozo L. Rev.* 355, 372 n.104 (1998) (defining the public domain as “the place where fundamental building materials of a new work, such as ideas, concepts, historical facts, discoveries, and technological solutions, reside and are freely available”). For foundational articles on the public domain, see generally Jessica Litman, *The Public Domain*, 39 *Emory L.J.* 965 (1990); David Lange, *Recognizing the Public Domain*, *Law & Contemp. Probs.*, Autumn 1981, at 147.

67. See 17 U.S.C. § 102(a) (2018) (stating that “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression”); 35 U.S.C. § 102(a) (2018) (“A person shall be entitled to a patent unless . . . the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention . . .”).



Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in September 2000 to explore the feasibility of setting new international norms.<sup>68</sup> After more than two decades of back-and-forth negotiations, WIPO members finally agreed in July 2022 to hold a diplomatic conference to consider the Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources.<sup>69</sup> If adopted, this new instrument will strengthen protection of traditional knowledge and traditional cultural expressions and, in turn, support education within and in connection with traditional and Indigenous communities.<sup>70</sup>

Finally, the existing intellectual property system has raised difficult moral questions. Intellectual property law tends to privilege the rich at the expense of the poor.<sup>71</sup> A 2001 World Bank study estimated that the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization, the predominant multilateral intellectual property instrument, has resulted in rent transfers of more than twenty billion dollars from developing countries “to major technology-creating countries—particularly the United States, Germany, and France—in the form of pharmaceutical patents, computer chip designs, and other intellectual property.”<sup>72</sup> As activist Roberto Verzola laments, “If it is a sin for the poor to steal from the rich, it must be a much bigger sin for the rich to steal from the poor.”<sup>73</sup>

In sum, intellectual property law has not only created a mismatch with the traditional property model—thereby calling into question the appropriateness of equating intellectual property infringement with

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68. See generally *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Daniel F. Robinson, Ahmed Abdel-Latif & Pedro Roffe eds., 2017) (collecting essays that offer detailed analyses of the efforts taken by the Intergovernmental Committee).

69. Press Release, World Intell. Prop. Org., WIPO Member States Approve Diplomatic Conferences for Two Proposed Accords (July 21, 2022) [https://www.wipo.int/pressroom/en/articles/2022/article\\_0009.html](https://www.wipo.int/pressroom/en/articles/2022/article_0009.html) [<https://perma.cc/48NV-5ZB7>].

70. See General Comment No. 25, *supra* note 56, ¶ 39 (“Local, traditional and indigenous knowledge . . . [is] precious and ha[s] an important role to play in the global scientific dialogue.”).

71. See generally Glynn S. Lunney, Jr., *Copyright and the 1%*, 23 *Stan. Tech. L. Rev.* 1 (2020) (drawing on data from the PC video game market to show that copyright overpays superstars while offering limited support for the average author and works at the margins of profitability); William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 *Notre Dame L. Rev.* 907 (1997) (criticizing the U.S. copyright system for failing to benefit authors and protecting the idle rich).

72. World Bank, *Global Economic Prospects and the Developing Countries 2002: Making Trade Work for the World’s Poor*, at xvii (2001).

73. Roberto Verzola, *Pegging the World’s Biggest “Pirate”*, *Earth Island J.*, Spring 1997, at 41, 41. Taking note of the problems created by colonial legacy, Professor Klaus Beiter asks similarly: “Who is perverse—the African copyright pirate or the situation in which he or she lives?” Beiter, *African Copyright Pirate*, *supra* note 47, at 78 (emphasis omitted).

theft—but it has also created major impediments to public access to educational materials and technologies. To the extent that the public has an inherent right to access these materials and technologies,<sup>74</sup> which Part II will further discuss in the context of the human right to education, it is not far-fetched to argue that intellectual property law has perpetuated the “theft” of educational opportunities from members of marginalized and disadvantaged communities. The theft label can be used in both directions; such use is not the privilege of intellectual property rights holders and their supportive politicians and industry groups.

### C. *Endogenous Reforms*

To reduce the impediments intellectual property law has posed to education, courts, policymakers, and commentators have advanced different reforms. Thus far, critics have been divided over the courses of action needed to address these impediments. While many critics embrace intellectual property reforms inside the property regime, others locate them outside. This section discusses reforms that are endogenous to the regime.

Those critics who have embraced intellectual property reforms inside the property regime underscore the fact that property rights are not absolute but are filled with limitations, safeguards, and obligations.<sup>75</sup> Examples of these limitations include “adverse possessions, eminent domain, easements, servitudes, nuisance, zoning, irrevocable licenses, the Rule Against Perpetuities, and the waste and public trust doctrines.”<sup>76</sup> Thus, instead of abandoning property rights, these critics recognize the importance of “taking property rights seriously.”<sup>77</sup> For instance, in his

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74. See generally Klaus Dieter Beiter, *The Protection of the Right to Education by International Law* (2005) [hereinafter Beiter, *Right to Education*] (providing a comprehensive treatise on the right to education).

75. See, e.g., Fisher, *Promises to Keep*, supra note 23, at 140 (“Blackstone’s characterization of a right to land as ‘absolute dominion’ over it was an exaggeration even at the time he wrote, and is surely so today. Every one of a landowner’s rights is subject to important limitations and exceptions.”); Joseph William Singer, *Entitlement: The Paradoxes of Property*, at xii (2000) [hereinafter Singer, *Entitlement*] (“Access to property is . . . a fundamental component of social justice.”); Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 *Duke L.J.* 1, 52–81 (2004) (discussing the limits and defenses in property law); Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 *Fla. L. Rev.* 135, 148 (2004) (“Historically, Property rights have never been absolute. They have always involved limitations, often in the form of legal duties owed to others.” (footnote omitted)).

76. Yu, *Information Ecosystem*, supra note 20, at 6; see also Lipton, supra note 75, at 172 (noting among the property owner’s obligations “to maintain the premises in good repair; . . . to allow certain persons access to the Property for particular purposes; . . . to pay taxes when required by the government; and . . . to cede the Property to the government if required”).

77. Fisher, *Promises to Keep*, supra note 23, at 134 (capitalization omitted).

book *Promises to Keep*, Professor William Fisher has devoted an entire chapter to outlining the different limitations and exceptions to property rights that can be used to reform copyright law.<sup>78</sup> Professor Michael Carrier shows how limits and defenses in property law—in particular, those based on development, necessity, and equity—can be utilized to cabin the fast expansion of intellectual property rights.<sup>79</sup> Professor Jacqueline Lipton underscores the need to locate affirmative legal duties of information property holders to facilitate competing interests in their property, such as privacy, moral rights, and cultural rights.<sup>80</sup>

Like property law, intellectual property law is filled with limitations and exceptions. Consider, for example, those relating to education. In copyright law, the fair use provision facilitates the use of copyrighted works for educational purposes, especially on a not-for-profit basis.<sup>81</sup> The preamble of section 107 specifically mentions “teaching (including multiple copies for classroom use), scholarship, or research.”<sup>82</sup> Section 110(1) allows teachers and students to publicly perform or display a copyrighted work “in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction.”<sup>83</sup> Section 108 provides limitations and exceptions for libraries and archives.<sup>84</sup> To facilitate the use of copyrighted works in distance-learning, Congress created new copyright exceptions through the TEACH Act.<sup>85</sup>

In patent law, courts have long held that protection does not extend to “laws of nature, natural phenomena, and abstract ideas.”<sup>86</sup> They have also recognized research exemptions to patent infringement.<sup>87</sup> In addition, section 154 limits patent protection to twenty years from the date of application, a duration that is far shorter than the copyright term of the life of the author plus seventy years.<sup>88</sup> Once the patent expires, the

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78. See *id.* at 134–72.

79. See Carrier, *supra* note 75, at 82–144.

80. See Lipton, *supra* note 75, at 165–89.

81. See 17 U.S.C. § 107(1) (2018) (providing a factor for evaluating “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”).

82. *Id.* § 107.

83. *Id.* § 110(1).

84. *Id.* § 108.

85. Technology, Education and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, § 13301, 116 Stat. 1758, 1910–13 (codified as amended at 17 U.S.C. §§ 110, 112, 802(c)).

86. *Diamond v. Diehr*, 450 U.S. 175, 185 (1981).

87. See generally Katherine J. Strandburg, *The Research Exemption to Patent Infringement: The Delicate Balance Between Current and Future Technical Progress*, in 2 *Intellectual Property and Information Wealth*, *supra* note 54, at 107.

88. Compare 35 U.S.C. § 154(a)(2) (2018) (stipulating the duration of patent protection), with 17 U.S.C. § 302 (stipulating the duration of copyright protection).

invention covered will go into the public domain, and the public, in most cases, will have access to the knowledge generated.<sup>89</sup> After all, a key part of the patent bargain is the disclosure of an invention in exchange for protection for a limited duration.<sup>90</sup>

While limitations and exceptions remain important to addressing the problems posed by intellectual property law, some courts and commentators embrace the introduction of users' rights.<sup>91</sup> Outside the United States, Chief Justice Beverley McLachlin of the Canadian Supreme Court recognized these rights in the copyright context in *CCH Canadian Ltd. v. Law Society of Upper Canada*:

The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor [David] Vaver . . . has explained . . . : "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."<sup>92</sup>

The existence of users' rights has since been affirmed in subsequent cases, including five noted copyright decisions in the early 2010s,<sup>93</sup> which Canadian legal commentators have dubbed the "Copyright Pentalogy."<sup>94</sup>

Interestingly, the Canadian Supreme Court's position on users' rights has found parallels across the border in the United States. In 1991, before the mainstreaming of the internet, Professors Lyman Ray Patterson and

89. As we have seen from the COVID-19 pandemic, the public may need tacit knowledge even if the patented inventions have entered the public domain or are otherwise unprotected. See Lee, *supra* note 15; Peter K. Yu, *Deferring Intellectual Property Rights in Pandemic Times*, 74 *Hastings L.J.* 489, 548–49 nn.313–314 (2023).

90. See, e.g., *ABS Global, Inc. v. Inguran, LLC*, 914 F.3d 1054, 1070 (7th Cir. 2019) ("A crucial part of the inventor's end of the grand patent bargain is the inventor's full disclosure of the invention."); *AK Steel Corp. v. Sollac & Ugine*, 344 F.3d 1234, 1244 (Fed. Cir. 2003) ("As part of the *quid pro quo* of the patent bargain, the applicant's specification must enable one of ordinary skill in the art to practice the full scope of the claimed invention.").

91. See generally Pascale Chapdelaine, *Copyright User Rights: Contracts and the Erosion of Property* (2017) (examining the scope of copyright user rights through the lens of property, copyright, and contract law).

92. [2004] 1 S.C.R. 339, para. 48 (Can.) (quoting David Vaver, *Copyright Law* 171 (2000)).

93. See *Re:Sound v. Motion Picture Theatre Ass'ns of Can.*, [2012] 2 S.C.R. 376 (Can.); *Alberta v. Canadian Copyright Licensing Agency*, [2012] 2 S.C.R. 345 (Can.); *Soc'y of Composers, Authors & Music Publishers of Can. v. Bell Can.*, [2012] 2 S.C.R. 326 (Can.); *Rogers Commc'ns Inc. v. Soc'y of Composers, Authors & Music Publishers of Can.*, [2012] 2 S.C.R. 283 (Can.); *Ent. Software Ass'n v. Soc'y of Composers, Authors & Music Publishers of Can.*, [2012] 2 S.C.R. 231 (Can.).

94. See Michael Geist, *Introduction to The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*, at iii (Michael Geist ed., 2013) ("On 12 July 2012, the Court issued rulings on five copyright cases in a single day, an unprecedented tally that shook the very foundations of copyright law in Canada . . . which were quickly dubbed the 'Copyright Pentalogy' . . .").

Stanley Lindberg published *The Nature of Copyright: A Law of Users' Rights*, which outlined the important rights of copyright users.<sup>95</sup> A few years later, Judge Stanley Birch recognized those rights in *Bateman v. Mnemonics, Inc.*:

Although the traditional approach is to view “fair use” as an affirmative defense, this writer, speaking only for himself, is of the opinion that it is better viewed as a right granted by the Copyright Act of 1976. Originally, as a judicial doctrine without any statutory basis, fair use was an infringement that was excused—this is presumably why it was treated as a defense. As a statutory doctrine, however, fair use is not an infringement. Thus, since the passage of the 1976 Act, fair use should no longer be considered an infringement to be excused; instead, it is logical to view fair use as a right. Regardless of how fair use is viewed, it is clear that the burden of proving fair use is always on the putative infringer.<sup>96</sup>

In the book Professor Patterson and Judge Birch were writing before the former's passing, the authors provocatively explained why copyright should be viewed as an easement: “[C]opyright makes the most sense when viewed as a temporary marketing easement in material taken from the public domain, which leaves room for an easement of use by those to whom copies of the works are marketed.”<sup>97</sup>

Whether in the intellectual property field or beyond, framing limitations and exceptions as rights has important benefits. As Professor Mary Ann Glendon explains, “rights talk” provides rhetorical power and helps generate a sense of absoluteness.<sup>98</sup> Likewise, Professor Laura Underkuffler observes: “A declaration of right clothes an interest with awesome rhetorical, political, and legal power. ‘I have a right’ is a challenge to the world; my interest, which I assert, is—presumptively, at least—superior to all non-rights interests with which it may conflict.”<sup>99</sup>

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95. L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* 191–222 (1991).

96. 79 F.3d 1532, 1542 n.22 (11th Cir. 1996).

97. L. Ray Patterson & Stanley F. Birch, Jr., *A Unified Theory of Copyright* (Craig Joyce ed., 2009), in 46 *Hous. L. Rev.* 215, 237 (2009). Other commentators have made similar claims. See Alexander Peukert, *Fictitious Commodities: A Theory of Intellectual Property Inspired by Karl Polanyi's “Great Transformation”*, 29 *Fordham Intell. Prop. Media & Ent. L.J.* 1151, 1194 (2019) (“[T]he *Grundnorm* of the [intellectual property] system . . . is not ownership as in real property but non-ownership.”); David Vaver, *User Rights: Fair Use and Beyond*, 68 *J. Copyright Soc'y U.S.A.* 337, 339 (2021) (“Could not copyright itself plausibly be the exception, and freedom the rule? . . . Can copyright not be viewed as an island in a sea of user rights: the land stops where the sea begins?”).

98. Glendon, *Rights Talk*, supra note 37, at 14; see also Lisa Forman, “Rights” and Wrongs: What Utility for the Right to Health in Reforming Trade Rules on Medicines?, 10 *Health & Hum. Rts.*, no. 2, 2008, at 37, 45 (“Rights-based discourse, litigation, and action appear to have played significant roles in shifting policy, price, and perception around AIDS medicines.”).

99. Laura S. Underkuffler, *The Idea of Property: Its Meaning and Power* 65 (2003).

More specifically in the copyright context, Professor Abraham Drassinower declares: “[A]s soon as fair dealing is a matter of right, we can no longer regard substantial reproduction as wrongful per se. The defendant’s unauthorized copying arises not as a mere exception but under the rubric of right.”<sup>100</sup>

Notwithstanding the rhetorical power generated by users’ rights, right-based rhetoric could harm society by “obscur[ing] the public interests, social values, and relationships that should inform copyright’s development in the digital age.”<sup>101</sup> As Professor Carys Craig explained: “[T]he escalation of rights rhetoric in the copyright debate threatens to compound rather than to contest the moral or proprietary claims to right made o[n] behalf of copyright owners. The concept of ‘user rights,’ then, is potentially a double-edged sword that should be wielded carefully if public interest advocates are to avoid a self-inflicted injury.”<sup>102</sup> Moreover, as Professor Glendon warns more generally, “A tendency to frame nearly every social controversy in terms of a clash of rights . . . impedes compromise, mutual understanding, and the discovery of common ground.”<sup>103</sup> Right-based rhetoric could therefore be counterproductive.

Finally, some commentators have explored the possibility of using other property models to improve the intellectual property system. Although the current system<sup>104</sup> resonates with those embracing a property model that emphasizes the protection of exclusive rights,<sup>105</sup> many property models exist. Some models are also better than others at reconciling the differences between tangible and intangible property and addressing the shortcomings of the existing intellectual property system.

Taking seriously the critique that the current system does not enable Indigenous communities to secure greater protection for their cultural

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100. Abraham Drassinower, *Subject Matter, Scope, and User Rights in Copyright Law*, 67 *Stud. L. Pol. & Soc’y* 59, 64 (2015); see also David Vaver, *Copyright Defenses as User Rights*, 60 *J. Copyright Soc’y U.S.A.* 661, 669 (2013) (“The idea that users have rights just as owners do and that users are equals whose rights deserve the same respect as owners’ rights is of course anathema to copyright holders and those who act for them.”).

101. Carys J. Craig, *Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks*, 33 *Am. U. Int’l L. Rev.* 1, 8 (2017).

102. *Id.* at 8–9.

103. Glendon, *Rights Talk*, *supra* note 37, at xi.

104. See 17 U.S.C. § 106 (2018) (listing the exclusive rights in copyrighted works); 35 U.S.C. § 154 (2018) (“Every patent shall contain . . . a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States . . .”). See generally Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 *Harv. J.L. & Tech.* 321 (2009).

105. See generally Thomas W. Merrill, *Property and the Right to Exclude*, 77 *Neb. L. Rev.* 730 (1998) (arguing that the right to exclude is the *sine qua non* of property); Thomas W. Merrill, *Property and the Right to Exclude II*, 3 *Brigham-Kanner Prop. Rts. Conf. J.* 1 (2014) (revisiting and clarifying the exclusion thesis advanced in the earlier article).

heritage, Professors Kristen Carpenter, Sonia Katyal, and Angela Riley advanced a property model based on the stewardship paradigm.<sup>106</sup> As they explain, it is not that property rights have created problems for the protection of Indigenous cultural heritage, but rather that the undue focus on ownership and the rights to exclude, develop, and transfer has made the traditional property model undesirable.<sup>107</sup> A property model based on the stewardship paradigm will take better account of the Indigenous communities' collective obligations toward land and resources:

The stewardship model captures . . . the fiduciary or custodial duties exercised by tribes in the absence of title and ownership. It also explains why a number of key “sticks” in the proverbial bundle of property rights—rights of use, representation, access, and production—can be exercised by nonowners in the context of tangible and intangible properties.<sup>108</sup>

Unlike the first group of critics, some commentators have moved away from exclusive rights to governance—a choice with which property scholars are familiar.<sup>109</sup> For instance, intellectual property scholars have discussed or advocated the use of regulatory approaches to strike a more appropriate balance between proprietary control and public access.<sup>110</sup> Some legal and economic scholars have also extolled the benefits of using commons or other alternative models to govern property,<sup>111</sup> including

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106. See generally Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, In Defense of Property, 118 Yale L.J. 1022 (2009) (advancing a stewardship model of property to justify the protections for Indigenous peoples' cultural property).

107. See *id.* at 1027. As the authors declare:

The classic view of property law focuses on the predictability and certainty of protecting the individual owner's rights of exclusion and alienation primarily for wealth-maximization purposes. Yet a more relational vision of property law honors the legitimate interests of both owners and nonowners, in furtherance of various human and social values, potentially including nonmarket values.

*Id.* (footnotes omitted).

108. *Id.* at 1124–25.

109. See Henry E. Smith, Exclusion Versus Governance: Two Strategies for Delineating Property Rights, 31 J. Legal Stud. S453, S455 (2002) (“[E]xclusion and governance are strategies that are at the poles of a continuum of methods of measurement, which we can add to the more familiar continuum from private property through the commons to open access.”).

110. See generally Shubha Ghosh, Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor After *Eldred*, 19 Berkeley Tech. L.J. 1315 (2004) (advancing a theory of patent rights that views those rights as a means to regulate primary conduct in the innovation process); Joseph P. Liu, Regulatory Copyright, 83 N.C. L. Rev. 87 (2004) (emphasizing the regulatory aspects of copyright law).

111. See, e.g., Steven N.S. Cheung, The Structure of a Contract and the Theory of a Non-Exclusive Resource, 13 J.L. & Econ. 49, 50–54 (1970) (discussing how contractual stipulations can help facilitate the non-exclusive use of common resources); Carol M. Rose,

property in knowledge-based goods and services.<sup>112</sup> In the past decade, Professors Brett Frischmann, Michael Madison, and Katherine Strandburg have devoted considerable effort to improving our understanding of how knowledge commons are to be governed.<sup>113</sup>

In sum, even if one chooses to stay inside the property regime, many possible reforms exist to improve intellectual property law. If the property aspects of intellectual property rights are to be emphasized, those making such emphasis should recognize the limitations and exceptions in the property regime. They should also actively consider the choice of property models. As Professors Gregory Alexander and Eduardo Peñalver observe: “At the base of every single property debate are competing theories of property—different understandings of what private property is, why we have it, and what its proper limitations are.”<sup>114</sup> In his book on the property aspects of intellectual property, Professor Ole-Andreas Rognstad warns readers up front about the challenges posed by diverging property traditions across the world.<sup>115</sup>

#### D. *Exogenous Reforms*

Not all critics of intellectual property law have embraced reforms inside the property regime. Many of those who rejected endogenous

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Rethinking Environmental Controls: Management Strategies for Common Resources, 1991 Duke L.J. 1, 8–12 (outlining four strategies of commons management).

112. These works often draw on the foundational work of political scientist Elinor Ostrom. See generally Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1990) (providing the foundational work on how to solve common pool resource problems); *Understanding Knowledge as a Commons*, supra note 22 (collecting essays that discuss the importance of treating knowledge as a commons). In addition to commons, commentators have also considered semicommons. See, e.g., James Grimmelmann, *The Internet Is a Semicommons*, 78 *Fordham L. Rev.* 2799, 2799–800 (2010) (considering the internet a striking example of a semicommons, based on the fact that “[i]t mixes private property in individual computers and network links with a commons in the communications that flow through the network”); Robert A. Heverly, *The Information Semicommons*, 18 *Berkeley Tech. L.J.* 1127, 1161–88 (2003) (explaining why information ownership should be viewed as a semicommons).

113. See, e.g., *Governing Knowledge Commons* (Brett M. Frischmann, Michael J. Madison & Katherine J. Strandburg eds., 2014); *Governing Medical Knowledge Commons* (Katherine J. Strandburg, Brett M. Frischmann & Michael J. Madison eds., 2017); *Governing Smart Cities as Knowledge Commons* (Brett M. Frischmann, Michael J. Madison & Madelyn Rose Sanfilippo eds., 2023).

114. Gregory S. Alexander & Eduardo M. Peñalver, *An Introduction to Property Theory*, at xi (2012). For discussions of the notion of property and its place in society and the legal system, see generally J.E. Penner, *The Idea of Property in Law* (1997); Jedediah Purdy, *The Meaning of Property: Freedom, Community, and the Legal Imagination* (2010); Underkuffler, supra note 99; Jeremy Waldron, *What Is Private Property?*, 5 *Oxford J. Legal Stud.* 313 (1985).

115. See Ole-Andreas Rognstad, *Property Aspects of Intellectual Property* 3–6 (2018).



reforms have also emphasized the law's regulatory or welfarist aspects.<sup>116</sup> For illustrative purposes, this section highlights several reforms exogenous to the property regime.

Some of those advocating for exogenous reforms are eager to identify the external limits to intellectual property rights found in other areas, such as human rights, free speech, privacy, or antitrust law.<sup>117</sup> Unlike the users' rights mentioned in the previous section, the rights used to maintain these external limits reside outside intellectual property law. As such, they can provide a powerful countervailing force to help foster a more appropriate balance in the intellectual property system. Nevertheless, as shown in copyright infringement cases invoking the First Amendment defense, courts do not always recognize external limits as an independent counterbalancing tool. Instead, they point out that the intellectual property system has already internalized those limits in the form of built-in safeguards, limitations, and exceptions.<sup>118</sup>

A notable example of the use of external limits, which Part II will further discuss, is the assertion of the human right to education.<sup>119</sup> When using human rights to cabin the excesses of intellectual property law, human rights bodies, judges, and commentators often apply the principle of human rights primacy to ensure that human rights will prevail over intellectual property rights.<sup>120</sup> Recognizing this hierarchy is unsurprising considering the key distinctions between these two sets of rights. As the CESCR declares in an authoritative interpretive comment:

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116. See, e.g., Peter Drahos, *A Philosophy of Intellectual Property* 213 (1996) (characterizing the intellectual property right as "a state-based, rule-governed privilege [that] interfere[s] in the negative liberties of others"); Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 *Brook. L. Rev.* 229, 231 (2003) ("[L]awmakers should apply to the 'authors' welfare' program embodied in U.S. copyright law reforms like those recently applied to U.S. social welfare programs."); Ghosh, *supra* note 110, at 1317 ("[P]atent law should be viewed as a form of regulation integrated into other activities of the modern regulatory state."); Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 *Colum. Bus. L. Rev.* 335, 336 ("Anyone who does not believe that the [intellectual property] laws are a form of regulation has not read the Patent, Lanham, or Copyright Acts and the maze of technical rules promulgated under them.").

117. See Peter K. Yu, *The International Enclosure Movement*, 82 *Ind. L.J.* 827, 904–06 (2007) (discussing the importance of exogenous limits to intellectual property protection).

118. See *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003) (underscoring the various "built-in First Amendment accommodations" in existing copyright law); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression."). But see Peter K. Yu, *The Confuzzling Rhetoric Against New Copyright Exceptions*, in 1 *Kritika: Essays on Intellectual Property* 278, 298–303 (Peter Drahos, Gustavo Ghidini & Hanns Ullrich eds., 2015) (discussing the misreading of *Eldred* and *Harper & Row* in relation to the Supreme Court's views on conflicts between copyright and free speech).

119. See *infra* Part II.

120. See Yu, *Reconceptualizing Intellectual Property Interests*, *supra* note 17, at 1092–93 (discussing the principle of human rights primacy).

Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.<sup>121</sup>

In the domestic context, one could also consider arguments backed by civil rights.<sup>122</sup> As the United States Supreme Court declared in no uncertain terms in *Brown v. Board of Education*, “[T]he opportunity of an education . . . , where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>123</sup> Title VI of the Civil Rights Act of 1964 further prohibits discrimination based on race, color, or national origin in federally assisted programs, including those relating to education.<sup>124</sup> In the past few decades, commentators have also called for greater protection of the right to education as a constitutional matter—at both the federal and state levels.<sup>125</sup> Nevertheless, these efforts still have not

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121. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 17, The Right of Everyone to Benefit From the Protection of the Moral and Material Interests Resulting From Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1(c), of the Covenant), ¶ 1, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006) [hereinafter General Comment No. 17].

122. See, e.g., Dalíé Jiménez & Jonathan D. Glater, Student Debt Is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform, 55 Harv. C.R.-C.L. L. Rev. 131 (2020) (arguing that the disparate impact of student debt on minorities should be viewed as a civil rights issue).

123. 347 U.S. 483, 493 (1952).

124. Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252; see also Jiménez & Glater, *supra* note 122, at 161 (“Equal access to education opportunity is a civil right.”).

125. See, e.g., Susan H. Bitensky, Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis, 86 Nw. U. L. Rev. 550, 553 (1992) (“[The right to education] may be found implicitly to arise from the Fourteenth Amendment’s Due Process Clause and Privileges or Immunities Clause, the First Amendment’s Free Speech Clause, and from another implied constitutional right, the right to vote.” (footnotes omitted)); Derek W. Black, The Fundamental Right to Education, 94 Notre Dame L. Rev. 1059, 1063 (2019) (“[F]rom the United States’ founding principles to the final ratification of the Fourteenth Amendment itself, education has always been understood as a fundamental right. . . . Congress directly linked the ratification . . . to Southern states’ readmission to the Union, as well as to new commitments in their state constitutions to provide education.”); Aretó A. Imoukhuede, Enforcing the Right to Public Education, 72 Ark. L. Rev. 443, 465 (2019) (“Despite the failure of the U.S. Supreme Court to recognize education as a U.S. constitutional right, each state has recognized it as a fundamental right under their state constitutions.”). See generally Matthew Patrick Shaw, The Public Right to Education, 89 U. Chi. L. Rev. 1179 (2022) (advocating the treatment of public education as a property interest protected by due process).

created a right to education that is robust enough to greatly improve public access to education.<sup>126</sup>

Unlike those critics who seek to locate external limits to intellectual property rights, some commentators have called for the development of alternative incentive frameworks to support creators and inventors.<sup>127</sup> These frameworks lie mostly outside the intellectual property system, do not always depend on property entitlements, and are often delinked from the market.<sup>128</sup> Examples in the patent area are “grants, subsidies, prizes, advance market commitments, reputation gains, [and] open source drug discovery.”<sup>129</sup> In the past two decades, commentators have also advanced the “IP without IP” model—which stands for “intellectual production without intellectual property.”<sup>130</sup> Focusing on negative spaces in the intellectual property area and relying on social norms, this model underscores the possibility of promoting creativity and innovation without creating property entitlements.<sup>131</sup>

Finally, many intellectual property users have become so disillusioned with intellectual property law that they simply ignore the law, creating the phenomenon of “property disobedience” that Professors Peñalver and Katyal have captured well in their book *Property Outlaws*.<sup>132</sup> As they observe: “[I]ntentional lawbreaking is typically (though not always) a tool of the have-nots. And in many cases, . . . an initial transgression of a property entitlement is an essential event in provoking a shift in the law.”<sup>133</sup> A case

126. See Rachel F. Moran, *Personhood, Property, and Public Education: The Case of Plyler v. Doe*, 123 Colum. L. Rev. 1271, 1322–24 (2023).

127. See generally Gene Patents and Collaborative Licensing Models: Patent Pools, Clearinghouses, Open Source Models and Liability Regimes (Geertrui Van Overwalle ed., 2009) (collecting essays that discuss patent pools, clearinghouses, open source models, and liability regimes); Incentives for Global Public Health: Patent Law and Access to Essential Medicines 133–283 (Thomas Pogge, Matthew Rimmer & Kim Rubenstein eds., 2010) (collecting essays that discuss prizes, patent pools, and open source drug discovery).

128. See General Comment No. 25, supra note 56, ¶ 62 (calling for the development of alternative incentives “which delink remuneration of successful research from future sales”); Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), Cultural Rights, ¶ 57, U.N. Doc. A/70/279 (Aug. 4, 2015) [hereinafter Special Rapporteur’s Report on Patent Policy] (considering as a key advantage of alternative funding mechanisms their ability to “be tied to social benefit rather than market demand”).

129. Yu, *Anatomy*, supra note 17, at 63.

130. See Rochelle Cooper Dreyfuss, *Does IP Need IP? Accommodating Intellectual Production Outside the Intellectual Property Paradigm*, 31 Cardozo L. Rev. 1437, 1437 n.\* (2010) (crediting Professor Mario Biagioli for coining the term); Amy Kapczynski, *Order Without Intellectual Property Law: Open Science in Influenza*, 102 Cornell L. Rev. 1539, 1543 n.20 (2017) (crediting Professor Rochelle Dreyfuss for making salient the term).

131. See Peter K. Yu, *A Half-Century of Scholarship on the Chinese Intellectual Property System*, 67 Am. U. L. Rev. 1045, 1137 n.370 (2018) (collecting sources that discuss the “IP without IP” model).

132. Peñalver & Katyal, supra note 32, at 7.

133. *Id.* at 14.

in point is the repeat file-sharing conducted by internet users in the United States and other parts of the world,<sup>134</sup> which eventually sparked the development of new business models and the introduction of new copyright laws.<sup>135</sup> Interestingly, even though the copyright industries have repeatedly complained about file-sharing and the resulting economic loss, some rights holders appear to have openly tolerated such activities—sometimes begrudgingly and at other times willingly due in part to the infringing activities’ potential upsides.<sup>136</sup>

When all the proposed endogenous and exogenous reforms are taken together, it is not difficult to see the continuous disagreement among courts, policymakers, and commentators over whether intellectual property reforms should be undertaken inside or outside the property regime. These reforms also reveal the lack of consensus over whether intellectual property rights are property rights. Regardless of one’s position on these two debates, both the endogenous and exogenous reforms have underscored the alarming impediments posed by intellectual property law to public access to education. If policymakers are to improve such access, they will need to introduce intellectual property reforms—whether inside or outside the property regime.

## II. HUMAN RIGHTS

The previous Part has shown that commentators advancing intellectual property reforms both inside and outside the property regime have called for the introduction of positive rights to foster public access to education. To help evaluate the effectiveness and limitations of this key line of reform, this Part turns to the human rights forum, which is accustomed to clashes between competing interests cloaked in rights. Although a greater exploration of the debate on property and education in the human rights context can enrich our understanding of that debate in the intellectual property context, such exploration can also provide important insights into the phenomenon surrounding so-called “education theft.” This Part begins by making a case why policymakers and

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134. See, e.g., Elec. Frontier Found., *RIAA v. The People: Five Years Later 1–9* (2008), <https://www.eff.org/files/eff-riaa-whitepaper.pdf> [<https://perma.cc/A3EF-ZXSS>] (discussing the first five years of the litigation campaign pursued by the Recording Industry Association of America (RIAA)); Peter K. Yu, *P2P and the Future of Private Copying*, 76 *U. Colo. L. Rev.* 653, 663–70 (2005) [hereinafter Yu, *P2P and the Future*] (discussing the first wave of lawsuits the RIAA filed against individual file-sharers).

135. See Yu, *P2P and the Future*, *supra* note 134, at 669 (discussing the launch of the iTunes Music Store in response to rampant file-sharing and RIAA’s lawsuits).

136. See generally Tim Wu, *Tolerated Use*, 31 *Colum. J.L. & Arts* 617, 619 (2008) (“Tolerated use is infringing usage of a copyrighted work of which the copyright owner may be aware, yet does nothing about . . . . [R]easons for tolerating use . . . can include . . . a calculation that the infringement creates an economic complement to the copyrighted work—it actually benefits the owner.”).

commentators should pay greater attention to the debate on property and education in the human rights context and link this debate to debates on property and education in other contexts. It then discusses how human rights bodies and commentators have resolved the tensions and conflicts between the right to education and the right to the protection of the interests resulting from intellectual productions, a right specially named to highlight its coverage of only the human rights aspects of intellectual property rights.<sup>137</sup>

#### *A. Need for Greater Linkage*

The developments in the human rights forum are important to the debate on property and education for five reasons. First, they show that the tensions between property and education exist in many different contexts. While the intellectual property issues discussed in Part I are important because intellectual property law can both incentivize the creation of educational materials and technologies and impede public access to them,<sup>138</sup> the human rights issues are equally important because the right to education can be asserted to foster greater public access to education. Indeed, as the previous Part has noted, some commentators have called for greater protection of the right to education as a civil or constitutional right,<sup>139</sup> similarly to how international and regional human rights instruments recognize that right.<sup>140</sup> A deeper understanding of developments in the human rights forum will therefore enrich our ability to strengthen the protection of the right to education in the civil or constitutional right context, and vice versa.

Second, the efforts to address the tensions between property and education in the human rights forum will reveal helpful techniques used by human rights bodies and commentators. Studying these efforts will also enable one to evaluate the effectiveness and limitations of a key line of reform advanced by courts, policymakers, and commentators both inside and outside the property regime to improve public access to education—namely, the introduction of positive rights to foster such access. Overall, the developments in the human rights forum will make clear that compromises are sometimes inevitable when two sets of competing interests collide.<sup>141</sup> These developments will also provoke policymakers

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137. See *infra* text accompanying notes 173–178.

138. See *supra* section I.B.

139. See *supra* text accompanying notes 122–126.

140. See *infra* section II.B.

141. See Frank I. Michelman, *The Annual John Randolph Tucker Lecture: Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097, 1110 (1981) (“[I]t is possibility of partial resolutions that allows us to experience the contradiction as generative tension rather than as dead end.”); Peter K. Yu, *Intellectual Property Paradoxes in Pandemic Times*, 71 GRUR Int’l 293, 294 (2022) (noting the difficult policy choices during the COVID-19 pandemic that came with both major benefits and significant drawbacks).

and commentators to think more about the possibility for additional reforms—whether alternative or complementary.

Third, the human rights forum provides a neutral venue for engaging the debate on property and education—one that is not constrained by any specific property model. Even though the Universal Declaration of Human Rights (“UDHR”) includes a provision on the right to property,<sup>142</sup> this provision does not guarantee the protection of private property.<sup>143</sup> Instead, article 17(1) merely states that “[e]veryone has the right to own property alone *as well as in association with others*.”<sup>144</sup> Reduced to “a high level of generality,”<sup>145</sup> the chosen language suggests the possibility of having different types of ownership and modalities of protection. It also reflects the fact that the UDHR was drafted by delegates who subscribed to a wide range of political preferences, philosophical backgrounds, and cultural and religious beliefs.<sup>146</sup> Due to Cold War politics and concerns raised by socialist countries, the drafters of the two international covenants that sought to turn the UDHR commitments into enforceable international legal obligations<sup>147</sup> consciously omitted the right-to-property provision.<sup>148</sup> The human rights forum therefore provides a unique venue for exploring how to utilize or adjust property rights to promote public access to education.

Fourth, even though the foundational international human rights instruments either left the right-to-property provision abstract and

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142. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 17 (Dec. 10, 1948) [hereinafter UDHR]. The provision is also included in regional human rights instruments. See, e.g., Organization of American States, OEA/Ser. L./V./II.23, doc. 21 rev. 6, American Declaration of the Rights and Duties of Man art. 23 (May 2, 1948) (“Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”).

143. See Yu, *Anatomy*, supra note 17, at 92–95.

144. UDHR, supra note 142, art. 17 (emphasis added); see also Glendon, *Rights Talk*, supra note 37, at 182 (noting the disagreements between the United States, the United Kingdom, and Latin American and Eastern bloc countries); Yu, *Anatomy*, supra note 17, at 93 (noting the “concerns similar to those raised by the Soviet Union and other Eastern bloc countries during the drafting of the [International Covenant on Economic, Social and Cultural Rights] as well as a strong push by Latin American countries during the drafting of the UDHR”). See generally Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent 139–52* (1999) (discussing the drafting of the right-to-property provision).

145. Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* 183 (2001).

146. See Yu, *Reconceptualizing Intellectual Property Interests*, supra note 17, at 1143–44 (noting the UDHR drafters’ diverse cultural and religious backgrounds).

147. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966); G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) [hereinafter ICESCR].

148. See Yu, *Reconceptualizing Intellectual Property Interests*, supra note 17, at 1085 & n.179.

ambiguous or omitted it in entirety, there remains a special connection between property rights and human rights in some quarters of the human rights community.<sup>149</sup> Language relating to property rights has also featured more prominently in later international human rights instruments.<sup>150</sup> A case in point is article 31(1) of the United Nations Declaration on the Rights of Indigenous Peoples, which states that “Indigenous peoples . . . have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”<sup>151</sup> In addition, like human rights scholars, property scholars have embraced<sup>152</sup> the human capabilities or human flourishing approaches developed by Professors Martha Nussbaum and Amartya Sen.<sup>153</sup> There is also a voluminous literature linking property rights to liberty,<sup>154</sup> personhood,<sup>155</sup> and social morality,<sup>156</sup> not to mention the New Jersey Supreme Court’s apt reminder in *State v. Shack* that “[p]roperty rights serve human values.”<sup>157</sup> Thus, to the extent that policymakers and commentators are eager to make the property regime more human-centered or people-centered, human rights will have an important role to play.

Finally, the discussion of the right to education includes a strong critique on the increased commodification of education, which will be highly valuable to the debate on so-called “education theft.”<sup>158</sup> As Professor Klaus Beiter, the author of a noted treatise on the right to

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149. See, e.g., C.B. Macpherson, *Human Rights as Property Rights*, *Dissent*, Winter 1997, at 72, 77 (advocating the treatment of “the right to a quality of life” as a property right, as opposed to “a human right separate from the property right”).

150. See Yu, *Anatomy*, *supra* note 17, at 92 n.226.

151. G.A. Res. 61/295, *United Nations Declaration on the Rights of Indigenous Peoples* art. 31(1) (Sept. 13, 2007).

152. See *infra* section III.C. Intellectual property scholars have embraced similar approaches. See generally Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (2012); Madhavi Sunder, *IP<sup>3</sup>*, 59 *Stan. L. Rev.* 257 (2006).

153. See generally Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (2011); Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (2000); Amartya Sen, *Development as Freedom* 87–110 (1999).

154. See generally Hanoch Dagan, *A Liberal Theory of Property* (2021) (discussing how property advances society’s commitment to individual autonomy and facilitates individual and collective self-determination).

155. See generally Margaret Jane Radin, *Reinterpreting Property* (1993) (collecting essays that advance the liberal personality theory of property); Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957 (1982) (exploring the relationship between property and personhood).

156. See generally Peter M. Gerhart, *Property Law and Social Morality* (2014) (advancing a theory that links property to social obligations and morality); Carol M. Rose, *The Moral Subject of Property*, 48 *Wm. & Mary L. Rev.* 1897 (2007) (exploring and responding to moral objections to the institution of property).

157. 277 A.2d 369, 372 (N.J. 1971).

158. See *infra* Part III.

education, declares: “A general commercialisation of education would contradict the idea that education is a human right, requiring states to fund a system of public schools, which is devoted to free education of a high quality.”<sup>159</sup> In relation to the growing effort to liberalize trade in the education sector, the Right to Education Project also warned, “[A] conceptual shift towards characterizing education as a ‘property right’ may be a precursor to the subjecting of all education—including compulsory education—to liberalization pressures.”<sup>160</sup> There is a reason why article 26 of the UDHR, which covers the right to education, states explicitly that “[e]ducation shall be free, at least in the elementary and fundamental stages.”<sup>161</sup> These critiques on the increased commodification of education will offer an important contribution to the debate on so-called “education theft,” which seeks to convert education from a public good into a transferable private commodity.<sup>162</sup> They also provide an important reminder that knowledge is a global public good.<sup>163</sup>

In sum, there are many reasons why policymakers and commentators interested in the debate on property and education should pay greater attention to developments in the human rights forum. A greater understanding of the debate on property and education in the human rights context will help foster crossfertilization between developments in the human rights area and those in other areas.<sup>164</sup> For the purpose of this Essay, the discussion of human-rights-related developments can also provide new insights into the phenomenon surrounding so-called “education theft.” These insights can build on the insights gleaned from the earlier discussion of developments in the intellectual property forum.<sup>165</sup>

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159. Beiter, *Right to Education*, *supra* note 74, at 611; see also Klaus D. Beiter, *Why Neoliberal Ideology, Privatisation, and Other Challenges Make a Reframing of the Right to Education in International Law Necessary*, 27 *Int'l J. Hum. Rts.* 425, 445–53 (2023) (criticizing the widespread privatization of education and calling for a reframing of the right to education).

160. Beiter, *Right to Education*, *supra* note 74, at 611.

161. UDHR, *supra* note 142, art. 26.1.

162. See Baldwin Clark, *Education as Property*, *supra* note 2, at 410–12 (discussing education as transferable).

163. See generally Stiglitz, *supra* note 22 (discussing knowledge as a global public good).

164. Cf. Cynthia M. Ho, *A Collision Course Between TRIPS Flexibilities and Investor-State Proceedings*, 6 *U.C. Irvine L. Rev.* 395, 464 (2016) (“[I]ncreased awareness and cross-fertilization in the investment arena of TRIPS norms would be desirable.”); Peter K. Yu, *Crossfertilizing ISDS with TRIPS*, 49 *Loy. U. Chi. L.J.* 321, 347–49 (2017) (discussing the benefits of crossfertilizing investor–state dispute settlement with the WTO dispute settlement process).

165. See *supra* Part I.



### B. *Intellectual Property and Human Rights*

In the human rights regime, the right to education is protected in article 26 of the UDHR,<sup>166</sup> articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),<sup>167</sup> and article 28 of the Convention on the Rights of the Child.<sup>168</sup> As the CESCR declares in its interpretive comment:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth.<sup>169</sup>

Because education directly affects the ability of individuals to fully realize themselves,<sup>170</sup> impeded public access to education has greatly troubled those embracing the human capabilities or human flourishing approaches, whether they focus on human rights or property rights.

Like the right to education, the right to the protection of the interests resulting from intellectual productions is recognized in both the UDHR and the ICESCR. Article 27(2) of the UDHR states: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.”<sup>171</sup> Adopted about two decades later, article 15(1)(c) of the ICESCR closely tracks this language.<sup>172</sup> Although these two instruments recognize the right to the protection of interests resulting from intellectual productions, it is important not to confuse this carefully

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166. UDHR, *supra* note 142, art. 26.

167. ICESCR, *supra* note 147, arts. 13–14.

168. Convention on the Rights of the Child art. 28, Nov. 20, 1989, 28 I.L.M. 1448. The United States signed the ICESCR and the Convention on the Rights of the Child in 1977 and 1995, respectively, but has not ratified either instrument. Status of Ratification Interactive Dashboard, Off. High Comm’r for Hum. Rts., <https://indicators.ohchr.org/> (select “United States of America” from the menu of countries) (on file with the *Columbia Law Review*) (last visited Mar. 18, 2023).

169. General Comment No. 13, *supra* note 50, ¶ 1.

170. See Laurence R. Helfer & Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* 322 (2011) (discussing the connection between education and the idea of self-realization).

171. UDHR, *supra* note 142, art. 27(2).

172. ICESCR, *supra* note 147, art. 15(1)(c) (requiring state parties to “recognize the right of everyone . . . [t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author”).

crafted and universally recognized right with intellectual property rights discussed in Part I.<sup>173</sup> The former covers only the human rights aspects of the latter.

When tensions arose between the right to education and the right to the protection of interests resulting from intellectual productions, many in the human rights community had a natural impulse to apply the principle of human rights primacy to ensure that the former would prevail over the latter.<sup>174</sup> Generally referred to as the “conflict approach,” this approach was widely used until about a decade ago.<sup>175</sup> In recent years, however, many human rights bodies and commentators have recognized the complexities in the tensions and conflicts between intellectual property and human rights. Because the UDHR and the ICESCR protect both the right to education and the right to the protection of interests resulting from intellectual productions,<sup>176</sup> the tensions and conflicts between these two competing human rights have precipitated a true conflict within the human rights regime.<sup>177</sup> Instead of putting the right to education at a higher level of the hierarchy, this conflict readily acknowledges that “some aspects of intellectual property rights are recognized as human rights while the other aspects do not have any human rights basis.”<sup>178</sup>

Thus far, human rights bodies and commentators have identified different techniques, approaches, and solutions to alleviate the tensions and conflicts between competing human rights. For instance, state parties seeking to discharge their obligations to protect the right to education could issue human-rights-based compulsory licenses,<sup>179</sup> which would allow

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173. See General Comment No. 17, *supra* note 121, ¶ 3 (“It is . . . important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1(c).”).

174. See *supra* text accompanying notes 120–121.

175. See Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 *Minn. Intell. Prop. Rev.* 47, 48–49 (2003) (discussing the conflict and coexistence approaches); Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 *Ga. St. U. L. Rev.* 709, 709–11, 716 (2007) (same).

176. ICESCR, *supra* note 147, art. 15(1)(c); UDHR, *supra* note 142, art. 27(2).

177. See Foster, *supra* note 51, at 383–84 (discussing the false conflict “between the right to education and laws implemented to protect authors’ moral and material interests”).

178. Yu, *Anatomy*, *supra* note 17, at 54; see also Special Rapporteur’s Report on Copyright Policy, *supra* note 56, ¶ 26 (“Some elements of intellectual property protection are indeed required—or at least strongly encouraged—by reference to the right to science and culture. Other elements . . . go beyond what the right to protection of authorship requires, and may even be incompatible with the right to science and culture.”); Yu, *Nonmultilateral Era*, *supra* note 17, at 1048 (underscoring “the importance of distinguishing the human rights attributes of intellectual property rights from the non-human rights aspects of intellectual property protection”).

179. It is fair to question whether the issuance of these licenses would comply with the Berne Convention for the Protection of Literary and Artistic Works, which provides an optional appendix to cover compulsory reproduction and translation licenses. Berne

authors and inventors to receive compensation for their efforts while facilitating access to the products and technologies protected by intellectual property rights.<sup>180</sup> An example in the educational context is the sale of textbooks and other educational materials and technologies at deep discounts to ensure affordability. The prices of these materials and technologies do not have to go down to zero; they can be set as high as what would enable the relevant authors and inventors to maintain an adequate standard of living.<sup>181</sup> To some extent, publishers have already released deeply discounted textbooks in developing countries—the Asian edition of English-language scientific textbooks immediately comes to mind.<sup>182</sup> The issuance of human-rights-based compulsory licenses will take a step further to turn these voluntary releases into mandatory arrangements.

Another option is a promising proposal advanced by Professor Margaret Chon, who calls on countries to “enact digital-specific educational exceptions where these are relevant and appropriate to their educational development policies.”<sup>183</sup> As she explains:

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Convention for the Protection of Literary and Artistic Works app., Sept. 9, 1886, 828 U.N.T.S. 221 (revised at Paris July 24, 1971); see also Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighboring Rights: The Berne Convention and Beyond* 867–69 (3d ed. 2022) (discussing the incorporation of the Berne Appendix into the TRIPS Agreement and the WIPO Copyright Treaty); Peter K. Yu, *A Tale of Two Development Agendas*, 35 *Ohio N.U. L. Rev.* 465, 481–84 (2009) (discussing the Berne Appendix). Nevertheless, commentators are divided over whether such issuance is Berne-compliant. See, e.g., Štrba, *supra* note 51, at 159–60 (discussing whether developing countries can issue compulsory licenses for printed copyrighted material outside the system provided by the Berne Appendix). Moreover, issuing compulsory licenses to ensure compliance with the human right to education is simply different from issuing those licenses without any human-rights-based justification.

180. See Joshua D. Sarnoff, *The Patent System and Climate Change*, 16 *Va. J.L. & Tech.* 301, 350–51 (2011) (discussing “humanitarian licensing” in the patent field); Yu, *Reconceptualizing Intellectual Property Interests*, *supra* note 17, at 1096–99 (discussing the provision of human-rights-based compulsory licenses); see also Special Rapporteur’s Report on Patent Policy, *supra* note 128, ¶ 72 (discussing the use of “socially responsible” or “humanitarian” licensing).

181. See General Comment No. 17, *supra* note 121, ¶ 2 (noting that the protection of material interests in the UDHR and the ICESCR merely requires that authors be “enable[d] . . . to enjoy an adequate standard of living”); Yu, *Anatomy*, *supra* note 17, at 58 (“Once state parties have reached this minimum threshold, they will enjoy a wide margin of discretion in determining whether additional protection should be granted.”); see also Matthew C.R. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* 287–351 (1995) (discussing the “right to an adequate standard of living”); Helfer & Austin, *supra* note 170, at 189 (noting that “material interests” in the right to the protection of the interests resulting from intellectual productions “are . . . tied to the ability of creators to enjoy an adequate standard of living”).

182. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 526–27 (2013) (discussing the lowly priced Asian edition of English-language textbooks published by a foreign subsidiary of John Wiley & Sons).

183. Chon, *Intellectual Property “From Below”*, *supra* note 47, at 841–42.

[T]he potential for diffusion and dissemination of digital knowledge at almost zero marginal cost (once infrastructure is established) . . . should be used to nurture and expand the basic literacy and educational capacity that are prerequisites to the creation of a functioning future copyright content market. Especially where the danger to copyright interests associated with mass distribution via digital networks is reduced (e.g., because the work is culturally specific or is in a language that is not widely read), networked digital technology can and should be linked to diffusion models of information access.<sup>184</sup>

Taking advantage of the low cost of digital reproduction and distribution, this proposal enables authors and publishers to retain the more lucrative markets in developed countries and for physical copies while forgoing for humanitarian purposes the significantly less remunerative market for digital copies in developing countries. Although quite promising when introduced more than a decade ago, this proposal has faced greater challenges today when more readers from both the developed and developing worlds have migrated to electronic reading, thanks to changing lifestyles and much-improved electronic reading devices.<sup>185</sup> Complications can also arise when printers, photocopiers, and other reproductive devices enable those with digital copies to produce physical copies and then sell the latter on an open market.

In addition, in the past two decades, human rights bodies have actively called for increased public funding and the use of alternative frameworks to help pay for educational products and technologies. As the CESCR recently observed in the context of scientific research:

States should provide adequate financial support for research that is important for the enjoyment of economic, social and cultural rights, either through national efforts or, if necessary, by resorting to international and technical cooperation. States could also resort to other incentives, such as so-called market entry rewards, which delink remuneration of successful research

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184. *Id.* at 841.

185. But see Beiter, *African Copyright Pirate*, *supra* note 47, at 2 (“Not denying the educational value of digital texts, research shows that in-depth understanding still requires browsing through and marking sections in printed texts.”); Caroline B. Ncube, *Using Human Rights to Move Beyond Reformism to Radicalism: A2K for Schools, Libraries and Archives*, in *A Critical Guide to Intellectual Property* 117, 129 (Mat Callahan & Jim Rogers eds., 2017) (“In the Global South, where internet and device availability is high but usually too expensive for disadvantaged portions of society, bulk hard copies are required.”). Such migration has also raised new questions about property rights, considering that digital copyrighted works are usually released under a license, rather than sold as a good. See generally Joshua A.T. Fairfield, *Owned: Property, Privacy, and the New Digital Serfdom* (2017) (discussing the loss of property rights in the digital context); Aaron Perzanowski & Jason Schultz, *The End of Ownership: Personal Property in the Digital Economy* (2016) (discussing the digital challenge to the exhaustion-of-right doctrine).

from future sales, thus fostering research by private actors in these otherwise neglected fields.<sup>186</sup>

To be sure, when public funding is unavailable or insufficient, incentives will still have to be created to facilitate the development of educational materials and technologies. Nevertheless, there is no requirement that the incentives be provided through property rights.<sup>187</sup> Indeed, international human rights instruments, bodies, and commentators have frequently recognized the possibility of using different modalities to realize the right to the protection of interests resulting from intellectual productions.<sup>188</sup> For instance, the former Special Rapporteur in the Field of Cultural Rights observed in her report on copyright policy, “Open access scholarships, open educational resources and public art and artistic expressions are examples of approaches that treat cultural production as a public endeavour for the benefit of all. Those approaches complement the private, for-profit models of production and distribution and have a particularly important role.”<sup>189</sup>

All of these solutions have their individual strengths and weaknesses. One may also note that the proposals for compulsory licensing and the introduction of digital-specific educational exceptions were tailored to the educational needs of developing countries, while the call for increased public funding and greater open access arrangements can be implemented in both developed and developing countries, including the United States.<sup>190</sup> The key objective of this section is not to find the best proposal or to provide the details of a specific proposal; rather, it is to show the wide variety of proposals that human rights bodies and commentators have advanced to alleviate the tensions and conflicts between the right to education and the right to the protection of interests resulting from intellectual productions.

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186. General Comment No. 25, *supra* note 56, ¶ 62.

187. See General Comment No. 17, *supra* note 121, ¶ 16 (“[T]he purpose of enabling authors to enjoy an adequate standard of living can . . . be achieved through one-time payments . . . .”); Yu, *Anatomy*, *supra* note 17, at 62–63 (noting that state parties seeking to protect interests resulting from intellectual productions may consider protections outside the intellectual property regime).

188. See General Comment No. 17, *supra* note 121, ¶ 10 (“[T]he protection under article 15, paragraph 1 (c), need not necessarily reflect the level and means of protection found in present copyright, patent and other intellectual property regimes, as long as the protection available is suited to secure for authors the moral and material interests resulting from their productions . . . .”); Yu, *Anatomy*, *supra* note 17, at 61–62 (advancing the “flexibility principle” that supports different modalities of protection for the human rights interests resulting from intellectual productions); Yu, *Reconceptualizing Intellectual Property Interests*, *supra* note 17, at 1088–92 (discussing the different acceptable modalities of protection that can be used to realize this right).

189. Special Rapporteur’s Report on Copyright Policy, *supra* note 56, ¶ 111.

190. Thanks to Professor Rachel Moran for noting the distinctions between these proposals.

Even though the solutions discussed thus far in this section have a strong domestic orientation, many of them also have a global dimension or can benefit from greater international cooperation.<sup>191</sup> The need for such cooperation has never been more important since the outbreak of the COVID-19 pandemic, during which libraries and universities shut down for an extended period of time and users actively located information online. For users seeking educational materials during the pandemic, it did not matter whether those materials resided locally or abroad.<sup>192</sup> Indeed, the voluntary open licenses issued by established publishers,<sup>193</sup> the Internet Archive's launch of its National Emergency Library,<sup>194</sup> and the public release of research data through initiatives such as the COVID-19 Open Research Dataset<sup>195</sup> have provided important

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191. See General Comment No. 25, *supra* note 56, ¶¶ 77–84 (calling for greater global cooperation); see also ICESCR, *supra* note 147, art. 15(4) (requiring state parties to the ICESCR to “recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields”); Beiter, *Right to Education*, *supra* note 74, at 612–20 (discussing bilateral and multilateral assistance in the educational context).

192. See Ruth L. Okediji, *Reframing International Copyright Limitations and Exceptions as Development Policy*, in *Copyright Law in an Age of Limitations and Exceptions* 429, 486 (Ruth L. Okediji ed., 2017) [hereinafter *Age of Limitations*] (“[I]n the digital environment, least-developed and developing countries rely on L&Es [(limitations and exceptions)] exercised in the developed countries, as much as they might on L&Es enacted in their own domestic copyright laws, to gain access to knowledge and information.”).

193. See, e.g., Andrew Albanese, *Penguin Random House Extends Open License for Online Readings Through 2020*, *Publishers Wkly.* (July 20, 2020), <https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/83898-penguin-random-house-extends-open-license-for-online-readings-through-2020.html> [https://perma.cc/9Y6R-ZMMD]; J.K. Rowling Grants Open Licence for Teachers During Covid-19 Outbreak, *J.K. Rowling* (Mar. 20, 2020), <https://www.jkrowling.com/j-k-rowling-grants-open-licence-for-teachers-during-covid-19-outbreak/> [https://perma.cc/3NCQ-8TU4]; Publishers Make Coronavirus (COVID-19) Content Freely Available and Reusable, *Wellcome* (Mar. 16, 2020), <https://wellcome.ac.uk/press-release/publishers-make-coronavirus-covid-19-content-freely-available-and-reusable> [https://perma.cc/7NH7-D5FG].

194. See Timothy B. Lee, *Internet Archive Offers 1.4 Million Copyrighted Books for Free Online*, *Ars Technica* (Mar. 28, 2020), <https://arstechnica.com/tech-policy/2020/03/internet-archive-offers-thousands-of-copyrighted-books-for-free-online/> [https://perma.cc/7QV5-HAH2]; National Emergency Library, *Internet Archive*, <http://blog.archive.org/national-emergency-library/> [https://perma.cc/3NBA-DGUH] (last visited Mar. 4, 2023) (launching an initiative to make books temporarily available to “support[] emergency remote teaching, research activities, independent scholarship, and intellectual stimulation while universities, schools, training centers, and libraries were closed due to COVID-19”). See generally Aaron Schwabach, *The Internet Archive’s National Emergency Library: Is There an Emergency Fair Use Superpower?*, 18 *Nw. J. Tech. & Intell. Prop.* 187 (2021) (discussing the National Emergency Library).

195. See Press Release, *White House Off. of Sci. & Tech. Pol’y*, *Call to Action to the Tech Community on New Machine Readable COVID-19 Dataset* (Mar. 16, 2020),

benefits to learners and researchers around the world. With the rise of cloud-based educational platforms, which are often globally accessible, the actual location of educational materials has also become less important.<sup>196</sup>

Finally, at the theoretical and policy levels, commentators have advanced many techniques and approaches to address the tensions and conflicts between competing human rights. As I have noted in an earlier article:

[These commentators] have discussed the distinction between true conflicts and false conflicts, drawing on conflict-of-law jurisprudence and scholarship. They have also explored the use of hierarchies, balancing techniques, the proportionality doctrine, and interpretations by reference to external norms—such as scientific norms in relation to the right to enjoy the benefits of scientific progress and its applications. In addition, the Ontario Human Rights Commission introduced a Policy on Competing Human Rights, which outlines a process for reconciling competing human rights claims and providing case-by-case accommodation of individual and group rights.<sup>197</sup>

To alleviate tensions and conflicts between competing human rights, some commentators have further advocated the institution of human rights impact assessment.<sup>198</sup> Even though such assessment can be challenging, the past decades have seen human rights bodies and experts developing a wide array of indicators to measure human rights impacts, including those in the education area.<sup>199</sup> Apart from standard indicators such as literacy and numeracy rates and enrollment numbers and percentages in primary, secondary, and tertiary education,<sup>200</sup> the

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<https://trumpwhitehouse.archives.gov/briefings-statements/call-action-tech-community-new-machine-readable-covid-19-dataset/> [<https://perma.cc/CP48-SZQQ>].

196. See Peter K. Yu, *Towards the Seamless Global Distribution of Cloud Content*, in *Privacy and Legal Issues in Cloud Computing* 180, 181–87 (Anne S.Y. Cheung & Rolf H. Weber eds., 2015) (discussing how cloud platforms break territorial barriers).

197. Yu, *Anatomy*, supra note 17, at 78–79.

198. See General Comment No. 17, supra note 121, ¶ 35 (“States parties should . . . consider undertaking human rights impact assessments prior to the adoption and after a period of implementation of legislation for the protection of the moral and material interests resulting from one’s scientific, literary or artistic productions.”); James Harrison, *The Human Rights Impact of the World Trade Organisation* 233 (2007) (“If States were to conduct human rights-compliant impact assessments as a key component of the negotiating process of any new trade agreement, this would be an important step in ensuring that trade law rules protect and promote human rights.”); Yu, *Nonmultilateral Era*, supra note 17, at 1096–98 (discussing human rights impact assessment).

199. See generally *Human Rights and Statistics: Getting the Record Straight* (Thomas B. Jabine & Richard P. Claude eds., 1992) (identifying good statistical practice in the human rights field); Todd Landman & Edzia Carvalho, *Measuring Human Rights* (2010) (discussing how to measure human rights).

200. See, e.g., *Indicators*, World Bank, <https://data.worldbank.org/indicator> [<https://perma.cc/SZ2Z-G8W7>] (last visited Feb. 3, 2023) (providing a list of indicators in the education area).

assessment exercise can consider more creative quantitative and qualitative metrics, such as the costs of educational materials and technologies in relation to mean per-capita income, the frequency of students sharing these materials and technologies,<sup>201</sup> and the conditions under which they share.

Despite the many helpful solutions advanced by human rights bodies and commentators to alleviate the tensions and conflicts between the right to education and the right to the protection of interests resulting from intellectual productions, complications can arise in those jurisdictions that have extended fundamental right protection to intellectual property. A case in point is the European Union, which offers such protection through the fundamental right to own private property. The right-to-property provision in article 17(2) of the Charter of Fundamental Rights of the European Union states expressly that “[i]ntellectual property shall be protected.”<sup>202</sup> Since the sub-provision’s adoption in December 2000, commentators have debated whether it has upset the existing balance drawn in the right-to-property provision.<sup>203</sup> In *Anheuser-Busch, Inc. v. Portugal*, the Grand Chamber of the European Court of Human Rights also extended the protection of “the peaceful enjoyment of . . . possessions” in article 1 of Protocol No. 1 to the European Convention of Human Rights to cover both registered trademarks and trademark applications of a multinational corporation.<sup>204</sup> This approach has since

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201. See Pernille Askerud, *A Guide to Sustainable Book Provision* 16 (1997) (“Textbooks are a rare commodity in most developing countries. One book per student (in any subject) is the exception, not the rule . . .”); Shaver, *Ending Book Hunger*, *supra* note 63, at 2 (“Today, many countries in sub-Saharan Africa still cannot provide a textbook for every student.”).

202. Charter of Fundamental Rights of the European Union art. 17(2), 2000 O.J. (C 364) 1.

203. See generally Christophe Geiger, *Intellectual Property Shall Be Protected!?*—Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision With an Unclear Scope, 31 *Eur. Intell. Prop. Rev.* 113 (2009); Jonathan Griffiths & Luke McDonagh, *Fundamental Rights and European IP Law: The Case of Art 17(2) of the EU Charter*, in *Constructing European Intellectual Property: Achievements and New Perspectives* 75 (Christophe Geiger ed., 2013); Martin Husovec, *The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter*, 20 *German L.J.* 840 (2019).

204. 45 *Eur. Ct. H.R.* 36 (2007); see also Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 *U.N.T.S.* 262 (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”). From a human rights standpoint, the court’s willingness to extend human-rights-like protection to corporations is a problem in and of itself. See Jack Donnelly, *Universal Human Rights in Theory and Practice* 30 (3d ed. 2013) (“Collectivities of all sorts have many and varied rights, but these are not human rights—unless we substantially recast the concept.”); see also Yu, *Nonmultilateral Era*, *supra* note 17, at 1066–74 (discussing whether human rights protection should be extended to corporate intellectual property rights holders).



been extended to copyright in subsequent cases.<sup>205</sup> In view of these instruments and decisions, the analysis of the tensions and conflicts between intellectual property and human rights will be more complicated in the European Union than in many parts of the world.

### C. Summary

The discussion of the tensions and conflicts between the right to education and the right to the protection of interests resulting from intellectual productions provides several new or updated insights into the debate on property and education. These additional insights will complement those insights already gleaned from the intellectual property forum.<sup>206</sup>

First, the tensions and conflicts between these two competing human rights provide an instructive parallel to the impediments posed by intellectual property rights to education. Studying the interactions between these two rights will therefore show how to utilize or adjust property rights to improve public access to education. Even in the face of a collision between two fundamental rights, there are still many solutions. More importantly, as the reforms, techniques, and approaches identified in this Part have shown, solutions can reside within the property regime—and, by extension, the intellectual property regime—even though the pressures behind the development of these solutions lie outside the regime.

Second, those on either side of the debate on property and education in the human rights context will be supported by a different fundamental right. Each side will therefore have some strong legal entitlements and will assume a good position to advance right-based arguments. Although the adversarial setting in legal analysis makes it tempting to select winners and losers, the narrative concerning whether one group should prevail over another is far from clear. How to resolve this debate will likely depend on a holistic case-by-case evaluation of specific circumstances.

Third, compromises are sometimes needed when two fundamental rights collide. To some extent, the need for human rights bodies and commentators to develop a wide array of proposals, techniques, and approaches to alleviate the tensions and conflicts between the right to education and the right to the protection of interests resulting from

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205. See, e.g., *Bălan v. Moldova*, App. No. 19247/03, ¶¶ 34–46 (Eur. Ct. H.R. Jan. 29, 2008), <https://hudoc.echr.coe.int/eng?i=001-84720> [<https://perma.cc/X78L-94WP>] (finding a violation of article 1 of Protocol No. 1 to the European Convention of Human Rights based on the refusal of Moldovan courts to provide compensation for the unlawful use of the complainant's copyrighted photograph); *Safarov v. Azerbaijan*, App. No. 885/12, ¶¶ 30–37 (Eur. Ct. H.R. Sept. 1, 2022), <https://hudoc.echr.coe.int/eng?i=002-13749> [<https://perma.cc/A7JN-QSF5>] (finding a violation of article 1 of Protocol No. 1 to the European Convention of Human Rights based on the Azerbaijani courts' failure to protect the intellectual property interests in a copyrighted book).

206. See *supra* Part I.

intellectual productions has shown that the introduction of positive rights to foster public access to education alone, while important, does not end the debate on property and education. If policymakers are to improve public access to education, they will need to supplement those positive rights with complementary reforms.

### III. "EDUCATION THEFT"

Parts I and II draw insights from the debate on property and education in the intellectual property and human rights contexts. They highlight the need for reforms to improve public access to education. Building on the discussion of developments in the intellectual property and human rights fora, this Part applies the insights gleaned from these fora to the phenomenon surrounding so-called "education theft." Due to this Essay's limited length, the discussion focuses on only three key insights.

First, property rights have been widely criticized when the public lacks access to essentials and when those essentials have been increasingly propertized and commodified. The response to the various impediments intellectual property rights have posed to education is no exception.<sup>207</sup> Yet, both Parts I and II have shown that property rights may not be the primary culprit. In fact, one could find solutions to improve public access to education even inside the property regime, especially with an appropriate property model.<sup>208</sup> There is no need to throw out the baby with the bathwater.

Second, property rights have a central place in American society<sup>209</sup>—and, for that matter, in societies in many other jurisdictions. Any clash with these rights will therefore invite a clear-cut binary narrative, with winners and losers. In reality, however, the property regime has struggled with historical and systemic inequities.<sup>210</sup> As Lawrence Liang observes in the intellectual property context: "The simplistic opposition between legality and illegality that divides pirates from others renders almost impossible any serious understanding or engagement with the phenomenon of piracy. . . . In other words, before we jump into making normative policy interventions, which often draw[] black-and-white distinctions, we need to explore the various shades and depths of gray."<sup>211</sup> It is therefore important

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207. See *supra* section I.B.

208. See *supra* section I.C–D.

209. See Macpherson, *supra* note 149, at 77 ("We have made property so central to our society that any thing and any rights that are not property are very apt to take second place.").

210. See generally Alfred L. Brophy, Alberto Lopez & Kali Murray, *Integrating Spaces: Property Law and Race* (2011) (collecting cases that cover issues lying at the intersection of property law and race).

211. Lawrence Liang, *Beyond Representation: The Figure of the Pirate*, in *Access to Knowledge*, *supra* note 62, at 353, 361.

to develop a contextualized understanding of property rights—and, by extension, policies emanating from those rights, such as the push for greater criminalization of misappropriation of property.

Third, Part I has shown that those who are eager to improve public access to education welcome the introduction of positive rights to foster such access, regardless of whether they are introduced inside or outside the property regime. Introducing rights to provide a countervailing force to intellectual property rights therefore provides a key line of reform. Nevertheless, Part II has shown that the introduction of positive rights alone is unlikely to provide a satisfactory solution. Instead, policymakers and commentators will need to advance complementary reforms to foster public access to education.

This Part explores these three key insights in turn. It also advances three modest recommendations: (1) the development of a more sophisticated understanding of property rights in their historical and socioeconomic contexts; (2) a careful evaluation of the expediency of criminalizing residency requirement violations; and (3) an exploration of potential technological solutions to address problems surrounding these violations. The first recommendation is more abstract and theoretical, while the next two are more practical and emanate from a more contextualized understanding of property rights.

#### A. *Developing a Contextualized Understanding*

Property rights do not exist in a vacuum.<sup>212</sup> It is therefore important to put these rights in their proper historical and socioeconomic contexts.<sup>213</sup> In doing so, policymakers and commentators can better understand why things are as they are, learn from past experiences, acquire perspectives on current developments, and identify new trends.<sup>214</sup>

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212. As Joseph Singer observes:

[P]roperty rights will differ depending on the context within which they are exercised and the effects they have on other actors; . . . they must be redefined over time to prevent the illegitimate concentration of power in ways that keep individuals from participating in the market system on fair and equal terms.

Singer, *Entitlement*, supra note 75, at 174.

213. See, e.g., Timothy M. Mulvaney, *Property-as-Society*, 2018 *Wis. L. Rev.* 911, 912 [hereinafter *Mulvaney, Property-as-Society*] (discussing the progressive view that “sees property as serving a whole host of evolving social goals”); Stephen R. Munzer, *Property as Social Relations*, in *New Essays in the Legal and Political Theory of Property* 36, 36 (Stephen R. Munzer ed., 2001) (holding the view that “property is best seen as *social* relations among persons with respect to things”); Joseph William Singer, *The Reliance Interest in Property*, 40 *Stan. L. Rev.* 611, 652–63 (1988) (discussing property as social relations). See generally Yu, *Human Rights 2.0*, supra note 17, at 1416–21 (discussing contextual analyses in the human rights context).

214. Cf. Rhona Smith, *Human Rights Based Approaches to Research*, in *Research Methods in Human Rights* 6, 12 (Lee McConnell & Rhona Smith eds., 2018) (“A human

Such a contextualized understanding can also ensure that the property regime is appropriately designed to maximize the opportunities provided to property owners, users, and other members of society.<sup>215</sup> Both objectives will be important to the debate on property and education.

Consider, for example, the property aspects of intellectual property rights. Why do certain groups receive protection while others do not?<sup>216</sup> Why does the current system privilege some forms of creativity and innovation while ignoring others?<sup>217</sup> In the past few years, there has been a growing effort to find ways to make the intellectual property system more inclusive. These efforts not only feature proposals from progressive reformers, but have also been openly embraced by the U.S. Patent and

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rights based approach to research means researching human rights issues with due consideration as to the surrounding circumstances. This can mean ensuring an appropriate historical, cultural, religious, legal and political understanding of the issues which shape the subject.”).

215. See Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 *Cornell L. Rev.* 1009, 1047 (2009) [hereinafter Singer, *Democratic Estates*] (noting the need to understand “the role that property and property law play in a free and democratic society that treats each person with equal concern and respect”).

216. See Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (With Special Reference to Coercion, Agency, and Development)*, 40 *U.C. Davis L. Rev.* 717, 724–47, 758–69 (2007) (discussing the role of Black inventors in the early days of the American patent system and the misappropriation of the works of Black American blues musicians); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 *Hastings Comm’n & Ent. L.J.* 339, 340 (1999) (“African-American music artists, as a group, were routinely deprived of legal protection for creative works under the copyright regime.”); Lateef Mtima, *An Introduction to Intellectual Property Social Justice and Entrepreneurship: Civil Rights and Economic Empowerment for the 21st Century*, in *Intellectual Property, Entrepreneurship and Social Justice: From Swords to Ploughshares* 1, 15–16 (Lateef Mtima ed., 2015) (“Slaves, being property themselves, could not hold patents as a matter of law.”); Dotan Oliar & Marliese Dalton, *Are Men and Women Creating Equal? Contextualizing Copyright and Gender*, in *Intellectual Property, Innovation and Global Inequality* (Daniel Benoliel, Francis Gurry, Keun Lee & Peter K. Yu eds., forthcoming 2023) [hereinafter *Innovation and Global Inequality*] (discussing gender inequality in the intellectual property system); Anjali Vats & Deidre A. Keller, *Critical Race IP*, 36 *Cardozo Arts & Ent. L.J.* 735, 758–59 (2018) (noting the “privileges and presumptions” that Whiteness has brought with it in the intellectual property context). See generally Anjali Vats, *The Color of Creatorship: Intellectual Property, Race, and the Making of Americans* (2020) (discussing intellectual property laws as “discursive formations” shaped by culture, identity, and power).

217. See generally Jessica C. Lai, *Patent Law and Women: Tackling Gender Bias in Knowledge Governance* (2022) (criticizing patent law and the knowledge governance system it supports for being gendered); Colleen V. Chien, *The Inequalities of Innovation*, 72 *Emory L.J.* 1 (2022) (discussing the inequalities of innovation based on income, opportunity, and access and offering legal and administrative solutions to address these inequalities); Alenka Guzmán & Flor Brown, *Building Innovation Skills to Overcome Gender Inequality: Mexico, India and Brazil*, in *Innovation and Global Inequality*, supra note 216 (discussing gender-related variations in innovative activities).

Trademark Office and WIPO.<sup>218</sup> Those advocating inclusivity reforms understand the societal benefits provided by an intellectual property system that is properly designed to maximize the creative contributions from all segments of the population.

Similar questions can be asked about property rights in the educational context—and, more specifically, about the phenomenon surrounding so-called “education theft.” As commentators have widely noted, the problems raised by this old but increasingly salient phenomenon and the eagerness for local school districts and law enforcement authorities to aggressively tackle it can be linked to factors relating to both race and class.<sup>219</sup> If policymakers and commentators are to develop appropriate remedies, they will need to take note of these root causes and analyze the debate on property and education in its proper historical and socioeconomic contexts.

After all, as Parts I and II have shown, there are strong arguments on both sides of the property divide. Those who advocate for stronger protection against so-called “education theft” invoke property rights. By contrast, their opponents advance arguments based on civil, constitutional, or human rights to demand greater public access to education. In a clash between these competing interests, it is not always easy to determine who is right and who is wrong, especially when one takes into account the historical and systemic inequities in the property regime. A greater contextual understanding of property rights is therefore in order.

One strand of property theory that welcomes contextual analyses is what commentators have referred to as the “Progressive Property” school<sup>220</sup> or what Professor Joseph Singer has described as “democratic model of property law.”<sup>221</sup> Focusing on property rights as a social institution and going beyond market efficiency and the power of exclusion, the Progressive Property school calls for a greater focus on “underlying human values that property serves and the social relationships

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218. See Gender Equality, Diversity and Intellectual Property, World Intell. Prop. Org., <https://www.wipo.int/women-and-ip/en/> [<https://perma.cc/4CWL-NU9R>] (last visited Feb. 4, 2023); Inclusive Innovation, U.S. Pat. & Trademark Off., <https://www.uspto.gov/initiatives/equity> [<https://perma.cc/8PRJ-FEAF>] (last visited Feb. 4, 2023).

219. See Baldwin Clark, Education as Property, *supra* note 2, at 398 (“School districts can . . . [legally] restrict access to their schools to only students residing within their boundaries. This practice has a long race and class pedigree dating back to Jim Crow residential segregation and post-*Brown v. Board of Education* efforts to desegregate public schools.” (footnote omitted)).

220. See generally Rachael Walsh, Property Rights and Social Justice: Progressive Property in Action 23–43 (2021) (discussing the Progressive Property school of thought); Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, A Statement of Progressive Property, 94 Cornell L. Rev. 743 (2009) (articulating the vision of this school of property theory).

221. Singer, Democratic Estates, *supra* note 215, at 1047.

it shapes and reflects.”<sup>222</sup> As Professors Alexander, Peñalver, Singer, and Underkuffler declare in *A Statement of Progressive Property*: “Values promoted by property include life and human flourishing, the protection of physical security, the ability to acquire knowledge and make choices, and the freedom to live one’s life on one’s own terms. They also include wealth, happiness, and other aspects of individual and social well-being.”<sup>223</sup>

Scholars subscribing to the Progressive Property school have offered analyses that will help think through not only the phenomenon surrounding so-called “education theft” but also property rights in the educational context. For instance, Professor Alexander draws on the human capabilities approach to develop a “social-obligation norm” in property law to “enable development of the capabilities that are essential for human beings.”<sup>224</sup> Emphasizing marginality thinking in property law, the late Professor A.J. van der Walt called for more attention “on the social position, economic status and personal circumstances of the parties involved in property relations or disputes and less on their legal status or established property rights.”<sup>225</sup> My colleague Professor Timothy Mulvaney declares that “[p]roperty, as an institution crafted to benefit the public interest, necessarily must be accountable to the plural values that characterize the nation’s democratic culture.”<sup>226</sup>

To be sure, there is still an ongoing debate about the strengths and weaknesses of the Progressive Property school, including whether it has attracted sufficient traction among judges, policymakers, and legislators.<sup>227</sup> Nevertheless, Part I has shown the benefits and viability of locating alternative property models when the traditional model does not fit well with the situation at hand, such as in the intellectual property context.<sup>228</sup> Part II also recounts how the drafters of key international and regional human rights instruments refrained from tying international obligations to a specific property model, lest the choice limit state autonomy and backfire on those individuals that the instruments sought to protect.<sup>229</sup>

In the debate on property and education, there remain strong disagreements over what the appropriate arrangements should be. There

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222. Alexander et al., *supra* note 220, at 743.

223. *Id.*

224. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 *Cornell L. Rev.* 745, 768 (2009). See generally Gregory S. Alexander, *Property and Human Flourishing* (2018) (advancing a theory that considers human flourishing as the moral foundation of property rights).

225. A.J. van der Walt, *Property in the Margins* 245 (2009).

226. Mulvaney, *Property-as-Society*, *supra* note 213, at 913.

227. Compare Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 *Calif. L. Rev.* 107, 109–13 (2013) (critiquing the Progressive Property school), with Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 *Calif. L. Rev. Cir.* 349, 352–58 (2014) (offering a response and challenging Professor Rosser’s view on whether private property can foster meaningful progressive change).

228. See *supra* Part I.

229. See *supra* Part II.

is therefore no reason why policymakers and commentators should not explore different property models to find one that would best improve public access to education. Studying property rights in their historical and socioeconomic contexts will help locate these appropriate arrangements. Because determining what constitutes theft depends on rules of property ownership, a more contextualized understanding of property rights will also help evaluate whether the theft label in so-called “education theft” is justified.

### B. *Evaluating the Expediency of Criminalization*

Given the central place property rights have in American society, the push for criminalization to protect property is unsurprising. In the intellectual property field, for example, there has been a growing push for criminal sanctions to protect intellectual property since the 1980s,<sup>230</sup> when intellectual-property-based goods and services became more valuable.<sup>231</sup> In the mid-1990s, following the emergence of new communication technologies and the mainstreaming of the internet, criminalization efforts quickly accelerated.<sup>232</sup> A case in point is the No Electronic Theft Act of 1997, which extended criminal liability to infringing activities that had not resulted in financial gains.<sup>233</sup> Since the early 2000s, the United States has also been actively negotiating bilateral, regional, and plurilateral

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230. See Eldar Haber, *Criminal Copyright* 168–70 (2018) (noting the growing enactment of criminal trademark infringement provisions since the 1980s); Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 *Harv. J.L. & Tech.* 469, 484–85 (2011) (noting the growing enactment of criminal copyright infringement provisions).

231. See R. Michael Gadbaw & Rosemary E. Gwynn, *Intellectual Property Rights in the New GATT Round*, in *Intellectual Property Rights: Global Consensus, Global Conflict?* 38, 45 (R. Michael Gadbaw & Timothy J. Richards eds., 1988) (“The new reality is that the U.S. economy is increasingly dependent for its competitiveness on its ability to protect the value inherent in intellectual property. United States exports are increasingly weighted toward goods with a high intellectual property content.”); Bruce A. Lehman, *Speech Given at the Inaugural Engelberg Conference on Culture and Economics of Participation in an International Intellectual Property Regime*, 29 *N.Y.U. J. Int’l L. & Pol.* 211, 211 (1997) (“Many Americans have begun to derive their livelihoods from products of their minds, as opposed to products of manual labor . . .”). See generally J. Thomas McCarthy, *Intellectual Property—America’s Overlooked Export*, 20 *U. Dayton L. Rev.* 809 (1995) (discussing the need to protect intellectual property rights in an era when information products constitute a major sector of the U.S. economy).

232. See Haber, *supra* note 230, at 163 (“Technology (combined with other considerations) has played and still plays a leading role in copyright criminalization.”).

233. Pub. L. No. 105-147, 111 Stat. 2678 (1997). See generally Eric Goldman, *A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 *Or. L. Rev.* 369 (2003).

trade agreements, which include new international minimum standards for criminal sanctions on intellectual property infringement.<sup>234</sup>

The logic behind these criminalization efforts is simple. Eager to protect the value in intellectual-property-based goods and services, intellectual property rights holders and their supportive policymakers and industry groups embrace the logic “if value, then right.”<sup>235</sup> When intellectual property rights are protected as property rights, this logic becomes “if value, then property right.” Because the protection of property right frequently attracts criminal liability—which helps shift the enforcement burden from private right holders to governments (and, in turn, taxpayers)<sup>236</sup>—that logic quickly evolves into “if value, then criminal liability.” The latter logic helps explain the increasing push for criminal liability in intellectual property law at both the domestic and international levels.

Yet, as many legal and intellectual property commentators have noted, the logic “if value, then right”—and, by extension, the logics “if value, then property right” and “if value, then criminal liability”—is seriously flawed.<sup>237</sup> Legal philosopher Felix Cohen is one of the earliest

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234. See, e.g., Dominican Republic–Central America Free Trade Agreement arts. 15.5, 15.8, 15.11, Aug. 5, 2004, [https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file934\\_3935.pdf](https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file934_3935.pdf) [<https://perma.cc/5PGQ-JR2U>]; United States–Australia Free Trade Agreement, U.S.–Austl., arts. 17.4, 17.7, 17.11, May 18, 2004, [https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset\\_upload\\_file148\\_5168.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf) [<https://perma.cc/445J-24G2>]; United States–Singapore Free Trade Agreement, U.S.–Sing., arts. 16.6, 16.9, May 6, 2003, [https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset\\_upload\\_file708\\_4036.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf) [<https://perma.cc/8G8Q-VEXR>].

235. Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 *Notre Dame L. Rev.* 397, 405 (1990) [hereinafter Dreyfuss, *Expressive Genericity*].

236. See Henning Grosse Ruse-Khan, *Re-delineation of the Role of Stakeholders: IP Enforcement Beyond Exclusive Rights*, in *Intellectual Property Enforcement: International Perspectives* 43, 51–52 (Li Xuan & Carlos Correa eds., 2009) [hereinafter *Intellectual Property Enforcement*] (noting the “trend for externalizing the risks and resources to enforce [intellectual property] rights away from the originally responsible right-holders towards state authorities”); Li Xuan, *Ten General Misconceptions About the Enforcement of Intellectual Property Rights*, in *Intellectual Property Enforcement*, *supra*, at 14, 28 (“[S]hifting responsibility . . . would shift the cost of enforcement from private parties to the government and ensure right-holders are beneficiaries without taking responsibility.”); Peter K. Yu, *Six Secret (and Now Open) Fears of ACTA*, 64 *SMU L. Rev.* 975, 1029 (2011) (“[G]reater criminal enforcement could shift costs, responsibility, and risks from private rights holders to that of national governments.”).

237. See, e.g., Dreyfuss, *Expressive Genericity*, *supra* note 235, at 405–07 (criticizing the “if value, then right” logic); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 *Va. L. Rev.* 149, 178–80 (1992) (criticizing the “value is property” model). See generally Alfred C. Yen, *Brief Thoughts About If Value/Then Right*, 99 *B.U. L. Rev.* 2479 (2019) (discussing the “if value/then right” principle and its consequences for intellectual property law).



critics of such logic, calling it “transcendental nonsense.”<sup>238</sup> As he explains, this logic “purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value . . . depends upon the extent to which it will be legally protected.”<sup>239</sup> The reasoning, in his view, is circular.

To make matters worse, the increased push for criminal liability in intellectual property law not only reflects flawed logic but can also be highly undesirable. Because of heavy lobbying by self-interested industry groups,<sup>240</sup> the penalty imposed is often disproportional to the harm<sup>241</sup>—an important issue in not only criminal law but also human rights law.<sup>242</sup> In addition, there may be limited deterrence.<sup>243</sup> As Professor Geraldine Moohr explains in the copyright context, “Criminal laws are most effective in educating the public when the prohibition is ‘Thou Shalt Not,’ and are less so when the prohibition is ‘Thou shalt not copy under certain circumstances and certain conditions.’”<sup>244</sup> Even worse, because unauthorized creative and innovative activities can generate positive

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238. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum. L. Rev.* 809, 811–12 (1935).

239. *Id.* at 815; see also Dreyfuss, *Expressive Genericity*, *supra* note 235, at 409 (“By equating ‘value’ with ‘right,’ the decisions fail to create an internal reference point against which to measure the need for exclusivity.”).

240. See generally Monica Horten, *A Copyright Masquerade: How Corporate Lobbying Threatens Online Freedoms* (2013) (discussing how corporate lobbying for copyright law has undermined online freedoms); Brink Lindsey & Steven M. Teles, *The Captured Economy: How the Powerful Enrich Themselves, Slow Down Growth, and Increase Inequality* 64–89 (2017) (discussing legislative capture in the intellectual property area).

241. See Peter K. Yu, *Digital Copyright Reform and Legal Transplants in Hong Kong*, 48 *U. Louisville L. Rev.* 693, 704 (2010) (discussing why imposing a criminal penalty on unauthorized file-sharing is disproportionate to the offense).

242. See General Comment No. 17, *supra* note 121, ¶ 23 (“Limitations must . . . be proportionate, meaning that the least restrictive measures must be adopted when several types of limitations may be imposed.”). See generally Jonas Christoffersen, *Human Rights and Balancing: The Principle of Proportionality*, *in* *Research Handbook on Human Rights and Intellectual Property* 19 (Christophe Geiger ed., 2015) (discussing the use of the proportionality principle to balance conflicting interests and adjudicate disputes placed before the European Court of Human Rights); Henning Grosse Ruse-Khan, *Proportionality and Balancing Within the Objectives for Intellectual Property Protection*, *in* *Intellectual Property Law and Human Rights*, *supra* note 51, at 201 (calling for the use of proportional balancing as a guiding principle in the interpretation of the TRIPS Agreement); Wouter Vandenhole, *Conflicting Economic and Social Rights: The Proportionality Plus Test*, *in* *Conflicts Between Fundamental Rights* 559 (Eva Brems ed., 2008) (calling for the introduction of a “proportionality plus test,” which prioritizes vulnerable groups and emphasizes the core of the rights).

243. See Haber, *supra* note 230, at 249–50 (discussing the deterrence of criminal sanctions).

244. Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 *Am. U. L. Rev.* 783, 797–98 (2005).

externalities,<sup>245</sup> increased criminalization could reduce knowledge spillovers and, in turn, social benefits.<sup>246</sup>

The disturbing analysis concerning overcriminalization in intellectual property law extends equally well to so-called “education theft,” which occurs when parents, or legal guardians, enroll children in schools outside their school districts.<sup>247</sup> Through intentional violations of the residency requirements, these parents allegedly steal “seats” in the classroom, creating a potential negative impact on the affected school districts,<sup>248</sup> the relevant taxpayers, and otherwise eligible school-age children. Considering the immense value provided by education—and, in particular, education in preferred school districts—one can easily apply the logics “if value, then property rights” and “if value, then criminal liability” mentioned above. Yet, like overcriminalization in intellectual property law, increased criminalization in the education field can be ineffective, undesirable, and unnecessary.

To begin with, the appropriateness and effectiveness of criminal penalties depend on one’s perception of the severity of an alleged crime—something a more contextualized understanding of property rights is likely to change.<sup>249</sup> As Professor Tom Tyler reminds us, people obey laws when “following a law is the morally right thing to do” and when “laws and legal authorities are legitimate and ought to be obeyed.”<sup>250</sup> Likewise, Professor Stuart Green declares, “Whether it is wrong to violate a given law against theft, and whether it is therefore just to be subjected to criminal penalties for doing so, depends on whether the property regime within which such law functions is itself just.”<sup>251</sup>

In his book *Thirteen Ways to Steal a Bicycle*, Professor Green recounts a very interesting study that he conducted to explore the different degrees of blameworthiness between “illegally taking a fifty-dollar physical book [and] illegally attending a fifty-dollar lecture”—the latter not too different from the theft of a classroom seat in a preferred educational institution.<sup>252</sup> As he reports:

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245. See *supra* text accompanying notes 29–30.

246. See Peñalver & Katyal, *supra* note 32, at 175 (“[T]he law should be especially careful not to overdeter infringement *ex ante* through an overreliance on laws whose penalties are so severe that they foreclose all types of transgressions.”).

247. See *supra* text accompanying notes 2–4.

248. See Baldwin Clark, Education as Property, *supra* note 2, at 406–07 (noting the differential in funding between resident and nonresident students).

249. See *supra* section III.A.

250. Tom R. Tyler, Compliance With Intellectual Property Laws: A Psychological Perspective, 29 N.Y.U. J. Int’l L. & Pol. 219, 234 (1997).

251. Stuart P. Green, Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age 103 (2012) [hereinafter Green, Thirteen Ways to Steal a Bicycle].

252. *Id.* at 233.

Sixty-seven percent said that taking the physical book was more blameworthy, 10 percent said that listening to the lecture without paying was more blameworthy, and 22 percent said there was no difference. In addition, 55 percent said it was worse for [the perpetrator] to sneak into the hall if it was full, 7 percent said it was worse to sneak into a partially empty hall, and 38 percent said there was no difference. On a scale from 1 to 9, the average blameworthiness score was 7.65 for taking the physical book, 6.01 for sneaking into the full hall, and 5.17 for sneaking into the partially empty hall.<sup>253</sup>

This study is interesting because it shows that the public generally does not view the theft of a seat in a lecture hall the same way as the theft of a book—a physical object. Equally illuminating is the fact that one’s perception of the former depends on whether extra seats are available in the lecture hall. This factor is important to the debate on so-called “education theft” because governments do have obligations to provide for education,<sup>254</sup> even if they ignore the right to education and other related human rights obligations. Because the number of available seats will affect one’s perception of the theft of a classroom seat, and, in turn, one’s view on the appropriate criminal sanction, it is hard to delink the debate on so-called “education theft” from the governments’ obligation to provide for education. Such linkage is particularly important considering the many well-documented systemic problems and inequities in the existing education system, especially in relation to racialized minorities.<sup>255</sup> Even if facially neutral legislation is to be introduced, those systemic problems and inequities virtually guarantee that any criminal penalties introduced will have disparate impacts on those harmed by the current system.<sup>256</sup>

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253. *Id.*

254. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”).

255. See Baldwin Clark, *Barbed Wire Fences*, *supra* note 5, at 511 (noting “a long history of state and public actions segregated the United States by race and class”); Baldwin Clark, *Education as Property*, *supra* note 2, at 398 (“Th[e] practice [of prosecuting the crime of ‘stealing education’] has a long race and class pedigree dating back to Jim Crow residential segregation and post-*Brown v. Board of Education* efforts to desegregate public schools.”); Baldwin Clark, *Stealing Education*, *supra* note 2, at 570–71 (“[R]ace-class segregation so pervades public education that many Black children, especially working-class and poor Black children, continue to experience the same subordination that accompanied de jure segregation.”); Jiménez & Glater, *supra* note 122, at 133 (noting the “communities of color [that have been] historically excluded from higher education opportunities”); Wilson, *supra* note 6, at 2437 (“[T]he historical and present correlations between race, class, power, and social capital have very real consequences in the context of attracting parents and students to a school district.”).

256. Worse still, such effort may “allow[] taxpayers to use the state to protect this perceived property right through the aggressive exclusion of others.” Baldwin Clark, *Education as Property*, *supra* note 2, at 416.

Moreover, it is unclear that increased criminalization will be desirable. As Professor Baldwin Clark reminds us, “Parents . . . have obligations to their children to provide them with an education, and . . . [they] will do what they can to provide the best education possible to their child.”<sup>257</sup> There are undoubtedly immense social benefits for encouraging parents to provide the best education possible to their children.<sup>258</sup> There are also significant upsides, or positive externalities, to developing a more educated citizenry even if the educational opportunities are not allocated according to the original intent of the local school districts.<sup>259</sup> As the United States Supreme Court declared in *Brown v. Board of Education*: “[E]ducation . . . is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship.”<sup>260</sup> In addition, Professors Frischmann and Lemley observe, “Using a work for educational purposes . . . not only benefits the users themselves, but also, in a small way, benefits others in the users’ community with whom users have interdependent relations.”<sup>261</sup> As if the significant diffused societal benefits generated by education were not enough to tip the balance in a cost–benefit analysis, criminalization can incur considerable social costs, such as the costs of incarceration and rehabilitation as well as reduced child welfare due to criminal sanctions on guilty parents.<sup>262</sup> The cost–benefit analysis is therefore more complex than what the advocates for increased criminalization are ready to admit.<sup>263</sup>

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257. *Id.* at 402.

258. See Frischmann & Lemley, *supra* note 29, at 258 (“Your decision to educate your children well, making them into productive, taxpaying, law-abiding members of society, benefits the people who buy the goods they will produce, the people who will receive the government benefits their taxes fund, and the people they might otherwise have robbed.”).

259. See General Comment No. 13, *supra* note 50, ¶ 1 (“As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”); Coomans, *Content and Scope*, *supra* note 51, at 185 (noting that education “helps to achieve economic growth, health, poverty reduction, personal development and democracy”); Fons Coomans, *In Search of the Core Content of the Right to Education*, in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* 217, 220 (Audrey Chapman & Sage Russell eds., 2002) (“Education enhances social mobility and helps to escape from discrimination based on social status.”); see also Morsink, *supra* note 144, at 214–16 (discussing the importance and benefits of an educated citizenry); Okediji, *supra* note 192, at 488 (“Economic growth is potentiated . . . because knowledge helps to shape the structural conditions in society, making it better equipped to absorb new ideas and to leverage them productively.”). See generally Beiter, *Right to Education*, *supra* note 74, at 28–30 (discussing the right to education as an empowerment right).

260. 347 U.S. 483, 493 (1952).

261. Frischmann & Lemley, *supra* note 29, at 289.

262. See Harris, *supra* note 2, at 327–32, 335–37.

263. That analysis becomes even more complicated when one takes note of the fact that the costs to one school district can become gains in another. See *id.* at 337 (noting “the societal gain received by the offender’s properly assigned school which enjoyed the offender’s local tax revenues without the costs of educating her child”).

Finally, as attractive as it is for policymakers, legislators, and law enforcement officials to show toughness on so-called “education theft,” there is no need to create new criminal liability based on this emergent concept. There are already laws against fraud in the criminal system and against conversion, trespass to chattel, and misappropriation through civil action.<sup>264</sup> One can debate whether those laws need to be reformed in light of the systemic problems and inequities in the existing education system, as well as whether the disenrollment of the nonresident student and restitution to the affected school district would provide sufficient remedies. Regardless of this debate, however, there is already a full arsenal of weapons for those eager to combat so-called “education theft.” There is simply no need to invoke property rhetoric to create new weapons, not to mention the longstanding view held by many that criminal law should only be used as a last resort.<sup>265</sup>

### C. *Exploring Potential Technological Solutions*

Technology has played important roles in the legal system, and law in turn has deeply affected technological development.<sup>266</sup> Although commentators have paid growing attention to the interplay between law and technology<sup>267</sup> and between law, technology, and society,<sup>268</sup> the interplay of law and technology does not receive much attention in the field of property law.

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264. See Green, *Thirteen Ways to Steal a Bicycle*, supra note 251, at 134–37 (discussing tortious conversion, conversion, trespass to chattel, and misappropriation).

265. See *id.* at 155–57 (discussing whether criminal sanctions are justified as a last resort); Harris, supra note 2, at 311 (“[T]raditionally, it was rare for school districts to seek criminal charges against parents, opting for disenrollment of the student instead.” (footnote omitted)).

266. See Peter K. Yu, *Teaching International Intellectual Property Law*, 52 *St. Louis U. L.J.* 923, 939 (2008) [hereinafter Yu, *Teaching International IP Law*] (“As [technological and legal] protection[s] interact with each other, and improve over time, they result in a technolegal combination that is often greater than the sum of its parts. It is therefore important to understand not only law and technology, but also the interface between the two.”).

267. See generally Symposium, *Toward a General Theory on Law and Technology*, 8 *Minn. J.L. Sci. & Tech.* 441 (2007) (collecting articles that explore the interplay between law and technology).

268. See, e.g., *Elgar Law, Technology and Society Series*, Edward Elgar Publ'g, <https://www.e-elgar.com/shop/usd/book-series/law-academic/elgar-law-technology-and-society-series.html> [<https://perma.cc/KEQ6-Q3KL>] (last visited Feb. 2, 2023) (providing a list of books in a series focusing on the interplay between law, technology, and society).

A rare exception<sup>269</sup> is intellectual property law, which has co-evolved with technology.<sup>270</sup> Whether it is the use of technological protection measures or the deployment of artificial intelligence and machine learning, what technology can do will affect how the law is designed, how it operates, and what further adjustments it will require.<sup>271</sup> The converse is also true. The enacted law will also strengthen or undermine technological development.

Consider, for instance, the laws concerning technological protection measures, such as those technologies requiring users to enter passwords or product keys or limiting access to a certain country or geographical region.<sup>272</sup> The growing popularity of the internet in the mid-1990s and the active release of digital content<sup>273</sup> have given rise to the increased deployment of technological protection measures and the enactment of a new law to protect against their circumvention.<sup>274</sup> Yet, the overuse of these measures to protect digital content, including educational and cultural content, has provided a justification for the development of new exceptions to support circumvention and the development of circumvention technologies.<sup>275</sup>

In the area involving so-called “education theft,” the interplay of law and technology can play two important roles. First, it can serve a remedial

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269. Another exception is the protection of property rights in the virtual world—and, more recently, the Metaverse. See generally Greg Lastowka, *Virtual Justice: The New Laws of Online Worlds* (2010) (discussing the legal challenges posed by virtual worlds); Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. Rev. 1047 (2005) (advancing a theory of virtual property and identifying its challenges); F. Gregory Lastowka & Dan Hunter, *The Laws of Virtual Worlds*, 92 Calif. L. Rev. 1 (2004) (offering a pioneering article discussing legal issues relating to virtual worlds).

270. See Peter K. Yu, *Marshalling Copyright Knowledge to Understand Four Decades of Berne*, 12 IP Theory, no. 1, 2022, at 59, 69–76 (discussing how the Berne Convention for the Protection of Literary and Artistic Works “has evolved to keep pace with new technology”).

271. See Peter K. Yu, *Artificial Intelligence, the Law-Machine Interface, and Fair Use Automation*, 72 Ala. L. Rev. 187, 214–25 (2020) (discussing the “law-machine interface” in the artificial intelligence context); Yu, *Teaching International IP Law*, *supra* note 266, at 939 (discussing “technolegal” protections in the context of technological protection measures).

272. See Peter K. Yu, *Region Codes and the Territorial Mess*, 30 Cardozo Arts & Ent. L.J. 187, 192–95 (2012) [hereinafter Yu, *Region Codes*] (discussing DVD region codes).

273. See generally Comm. on Intell. Prop. Rts. & the Emerging Info. Infrastructure, *Comput. Sci. & Telecomms. Bd. & Comm’n on Physical Scis., Mathematics, & Applications*, Nat’l Rsch. Council, *The Digital Dilemma: Intellectual Property in the Information Age* (2000) (discussing the threat posed by digital technology to the copyright system).

274. 17 U.S.C. § 1201 (2018). See generally Peter K. Yu, *Anticircumvention and Anti-anticircumvention*, 84 Denv. U. L. Rev. 13, 32–40 (2006) (discussing and criticizing the anticircumvention provision in copyright law).

275. See Peter K. Yu, *A Hater’s Guide to Geoblocking*, 25 B.U. J. Sci. & Tech. L. 503, 519–22 (2019) (discussing the need for the introduction of a geocircumvention exception); Yu, *Region Codes*, *supra* note 272, at 245–52 (discussing the right to circumvent in the context of DVD region codes).

function by expanding the “pie” of educational opportunities. To the extent that there are inequities that would cause parents to eagerly violate residency requirements in the hope of giving their children better educational opportunities,<sup>276</sup> technology can strike the middle ground by increasing the availability and affordability of these opportunities.<sup>277</sup> With increased opportunities, parents may see less urgency to enroll children outside their relevant school districts,<sup>278</sup> although factors affecting enrollment decisions are diverse and not limited to knowledge acquisition.<sup>279</sup>

In the past decade, many institutions of higher education have actively offered massive open online courses or more selective interactive online courses<sup>280</sup>—with MIT and its open courseware being a pioneer in this area.<sup>281</sup> While these examples focus on higher education, one could easily envision the application of similar approaches to primary and secondary education,<sup>282</sup> especially with the help of state and local governments,

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276. See *supra* text accompanying note 4.

277. One tricky issue concerns the technology’s ability to empower users to obtain unauthorized access to educational materials and technologies, such as through illegal reproduction or hacking. While one should not condone such activities, the analysis will likely follow the earlier debate about property and education in the intellectual property context. See *supra* section I.B. Indeed, there have been difficult cases in the United States and other parts of the world concerning whether copy shops should be allowed to produce “coursepacks” filled with copyrighted materials. See, e.g., *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1383 (6th Cir. 1996) (finding copyright infringement when a commercial copyshop distributed “coursepacks” that reproduced without authorization substantial segments of copyrighted works); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991) (finding copyright infringement when a document reproduction company sold course “packets” that included without authorization and payment excerpts from copyrighted books); *The Chancellor, Masters & Scholars of the University of Oxford v. Rameshwari Photocopy Services*, 233 (2016) DLT 279, para. 101 (India) (finding non-infringement when a photocopy service sold course packs that compiled without authorization substantial extracts from copyrighted works).

278. There are benefits for parents to keep their children in their school districts, especially if these children are less likely to be bullied or may have better social experiences. Obviously, these experiences vary from district to district. See Harris, *supra* note 2, at 311–15 (discussing the diverse factors affecting enrollment decisions).

279. Cf. *id.*

280. See generally William W. Fisher III, *Lessons from CopyrightX*, in *Age of Limitations*, *supra* note 192, at 315 (discussing an interactive online copyright course provided through HarvardX); James Grimmelman, *The Merchants of MOOCs*, 44 *Seton Hall L. Rev.* 1035 (2014) (discussing the strengths and weaknesses of massive open online courses).

281. See MIT Open Courseware, MIT, <https://ocw.mit.edu> [<https://perma.cc/CH3U-NVU5>] (last visited Feb. 3, 2023).

282. See, e.g., *Highlights for High School* (MIT OpenCourseWare), MIT, <https://fullsteam.mit.edu/projects/highlights-for-high-school/> [<https://perma.cc/Y7EC-QHCC>] (last visited Mar. 1, 2023) (stating that *Highlights for High School*, a recently ended companion website to MIT OpenCourseWare, “provide[d] open educational resources for high school educators and students” and “contain[ed] an abundance of resources that

charitable foundations, and not-for-profit organizations. To be sure, the provision of these new educational opportunities cannot substitute for the experiences provided by enrollment in preferred educational institutions. Nevertheless, they do reduce the inequities that have contributed to residency requirement violations.

As promising as these online offerings may be, it is important to avoid a deterministic or overly optimistic view that assumes that technology will provide a panacea to the problems raised by these violations.<sup>283</sup> The more residency requirement violations are motivated by the parents' eagerness to ensure the safety of their children, enable these children to avoid harsh school policies, or to obtain material benefits, such as free books and supplies or better meal support,<sup>284</sup> the less effective these technological solutions will be. Moreover, as teachers and students learned the hard way during the COVID-19 pandemic, online offerings cannot always substitute for face-to-face teaching, which improves the children's learning experiences while also strengthening their social skills and other non-academic abilities.<sup>285</sup>

Just as technology can serve a remedial function, it can also exacerbate the situation by further impeding public access to education. For instance, technology can be used to provide or tighten the surveillance instituted to determine whether nonresident students have enrolled in schools or participated in educational programs in violation of the residency requirements. During the COVID-19 pandemic, governments across the world already deployed technology to keep track of citizens and visitors who had tested positive for the virus.<sup>286</sup> It is only a matter of time before those eager to combat so-called "education theft" demand the use of similar technology to track students. To the extent that commentators are concerned about the inappropriate surveillance of minority students and their parents or guardians, technology may subject these individuals to even more surveillance.

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cover[ed] not only science and mathematics, but also engineering, humanities, and social sciences").

283. Thanks to Professor Rachel Moran for pushing the author to consider these limitations.

284. See Harris, *supra* note 2, at 311–15 (discussing the different motivations behind residency requirement violations).

285. See, e.g., Cory Turner, 6 Things We've Learned About How the Pandemic Disrupted Learning, NPR (June 22, 2022), <https://www.npr.org/2022/06/22/1105970186/pandemic-learning-loss-findings> [<https://perma.cc/B4EW-XNCW>] (discussing the academic toll of the COVID-19 pandemic).

286. For discussions of surveillance during the COVID-19 pandemic, see generally David Lyon, *Pandemic Surveillance* (2022); *Pandemic Surveillance: Privacy, Security, and Data Ethics* (Margaret Hu ed., 2022); Jennifer D. Oliva, *Surveillance, Privacy, and App Tracking*, in *Assessing Legal Responses to COVID-19* 40 (Scott Burris, Sarah de Guia, Lance Gable, Donna E. Levin, Wendy E. Parmet & Nicolas P. Terry eds., 2020).



Technology can also be used to close off online educational opportunities to nonresident students the same way these students are denied access to offline opportunities. As if the lack of access were not bad enough, unauthorized access to online educational materials and technologies could attract not only intellectual property infringement lawsuits but also criminal prosecution under the Computer Fraud and Abuse Act.<sup>287</sup> To the dismay of legal commentators and consumer advocates, this statute, which was originally enacted to tackle computer hacking, has now been broadly used in contexts involving the alleged misuse of computing technology or the internet.<sup>288</sup> The overzealous prosecution under this statute has also led legislators and commentators to call for reform.<sup>289</sup>

The second role technology can play is the mediating function. The availability of technology-enhanced educational opportunities helps courts, policymakers, and commentators determine why residency requirement violations occur and enables them to design appropriate remedies. When educational opportunities become widely available to the public online, such availability makes the perpetrator's actions less excusable. By contrast, when those opportunities are unavailable—or available but difficult to access—it is understandable, though not always excusable, that those parents who want their children to be better educated will look for ways to obtain the cherished educational arrangements. To some extent, the availability of online courses or other technology-enabled educational opportunities can be used as either an aggravating or mitigating factor for determining the perpetrator's culpability and the appropriate remedy. In considering whether to charge or arrest a perpetrator, prosecutors and law enforcement officials can also take these opportunities into account.

Nevertheless, judges and law enforcement officials need to be cautious when they use the availability of technology-enhanced educational opportunities as an aggravating factor. Just because those opportunities are available does not mean that nonresident students will have ready access. Commentators have widely discussed the problems raised by the digital divide,<sup>290</sup> which is defined as the proverbial gap

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287. 18 U.S.C. § 1030 (2018).

288. See generally Symposium, *Hacking Into the Computer Fraud and Abuse Act: The CFAA at 30*, 84 *Geo. Wash. L. Rev.* 1437 (2016) (collecting articles that discuss and critique the Computer Fraud and Abuse Act).

289. See, e.g., H.R. 2454, 113th Cong. (2013). Titled “Aaron’s Law,” this bill was introduced following the suicide of internet activist Aaron Swartz, who was criminally prosecuted under the statute. See generally Justin Peters, *The Idealist: Aaron Swartz and the Rise of Free Culture on the Internet* (2016) (discussing the life of Aaron Swartz in relation to the internet free culture movement).

290. See Peter K. Yu, *The Algorithmic Divide and Equality in the Age of Artificial Intelligence*, 72 *Fla. L. Rev.* 331, 337 nn.17–19 (2020) [hereinafter Yu, *Algorithmic Divide*]

between “those with access to the Internet, information technology, and digital content from those without.”<sup>291</sup> This gap is particularly pronounced in marginalized and disadvantaged communities, with commentators lamenting the linkage between race and class on the one hand and unequal access to communications technology and digital contents on the other.<sup>292</sup> The lack of access to such technology can greatly limit the nonresident students’ access to online educational opportunities.

### CONCLUSION

“Education theft” is a new property-based label attached to the misappropriation of educational opportunities by those who do not belong to the relevant school districts. Yet, who belongs is a sociopolitical issue that is subject to endless debate.<sup>293</sup> As this Essay has shown, in both the intellectual property and human rights contexts, what is seen as education theft by one segment of the population can often be seen by another as the provision of educational opportunities.<sup>294</sup> This dual perspective brings to mind Pierre-Joseph Proudhon’s slogan “La propriété, c’est le vol!” which is sometimes translated as “Property is theft!” or “Property is robbery!”<sup>295</sup> Although this Essay does not go so far as to equate property with theft, it does show that, in the educational context, what some consider as property may be viewed by others as theft, and vice versa. Understanding this dual perspective will be important to the debate on property and education—and, in turn, the debate on “education theft.”<sup>296</sup>

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(collecting sources that discuss the digital divide). See generally Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 *Cardozo Arts & Ent. L.J.* 1 (2002) (providing an overview of the digital divide and discussing the divide at both the domestic and global levels).

291. Yu, *Algorithmic Divide*, *supra* note 290, at 334.

292. See generally Raneta Lawson Mack, *The Digital Divide: Standing at the Intersection of Race & Technology* (2001) (discussing the relationship between the digital divide and racialized social, economic, and educational segregation).

293. See, e.g., LaToya Baldwin Clark, *Whose Child Is This? Exclusion, Inclusion, and Belonging*, 123 *Colum. L. Rev.* 1201, 1215–20 (2023) (discussing how claims to educational property go beyond access and exclusion and implicate property as belonging).

294. The same can be said about intellectual property. See Peter Jaszi, *A Garland of Reflections on Three International Copyright Topics*, 8 *Cardozo Arts & Ent. L.J.* 47, 63 (1989) (“One might say that one nation’s ‘piracy[.]’ is another man’s ‘technology transfer.’”).

295. Pierre-Joseph Proudhon, *What Is Property? An Inquiry Into the Principle of Right and of Government* 12 (Benjamin R. Tucker trans., Dover Publ’ns 1970) (1840). Professor Madhavi Sunder has a forthcoming work discussing intellectual property as theft. Madhavi Sunder, *Intellectual Property Is Theft!* (Feb. 2022) (unpublished manuscript) (on file with author).

296. This type of perspective is not uncommon when one engages in correlative thinking. See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as*

Although policymakers, legislators, and law enforcement officials have thus far defined the latter debate quite narrowly, that debate can be easily broadened to cover the “theft” of all educational opportunities, especially from members of marginalized and disadvantaged communities. By drawing insights from the debate on property and education in both the intellectual property and human rights contexts, this Essay problematizes the increased propertization and commodification of education while calling for a rethink of the emergent concept of “education theft.” It shows that reforms can be undertaken both inside and outside the property regime and have been advanced in intellectual property, human rights, and other contexts. Understanding these myriad reforms and their limitations will help inform the future engagement with the debate on the “theft” of educational opportunities.

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Applied in Judicial Reasoning (David Campbell & Philip Thomas eds., Ashgate 2001) (1919) (applying correlative thinking to explore judicial reasoning); Joshua E. Weishart, Reconstituting the Right to Education, 67 Ala. L. Rev. 915 (2016) (providing a Hohfeldian analysis of the right to education); Peter K. Yu, Intellectual Property, Asian Philosophy and the Yin-Yang School, 7 WIPO J. 1, 7–10 (2015) (discussing correlative thinking in the Yin-Yang school of Chinese philosophy).



# ETHNIC STUDIES AS ANTI-SEGREGATION WORK: LESSONS FROM STOCKTON

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*In 2021, California became the first U.S. state to require that public high schools teach ethnic studies. Given polarized politics over what that mandate might mean, this Essay reflects on the role of ethnic studies curriculum in one place, through the voices of three people. The place is Stockton—the most diverse city in America and home to more than twenty years of grassroots investment in ethnic studies courses. Oral histories from three generations of the leaders who built that local curriculum—each of whom was shaped by their own ethnic studies education—offer a personal window into what the work has been about. Set in a city, like many others, with a long history of neighborhood and school segregation, these Stockton stories provide a chance to reflect on the curriculum’s legal history as a court-ordered remedy for de jure and de facto school segregation. Ethnic studies could not integrate Stockton’s schools but it could, and did, finally integrate the content of their lessons to reflect the people in the room.*

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## INTRODUCTION

Dillon Delvo grew up in Stockton, California, in what scholars call a tri-generational family. His father was sixty-three when Delvo was born and decades older than Delvo's mother. As a young boy, Delvo was embarrassed of their age difference, mortified to think that his dad was "a horny old man." Behind his father's back, Delvo tried to pass him off as his grandfather. But Delvo's views began to change after he left for college in San Francisco. He took his first Asian American studies course, majored in ethnic studies, and completed a thesis on Filipino history in California. The reason tri-generational families were common among Filipino Americans, he learned, was not rooted in a preference for younger women. That pattern reflected the fact that Delvo's father and other Filipino men were legally and practically barred from marrying during their prime years. Filipinos like Delvo's father were recruited to labor in California agriculture at ratios of about fourteen men to every one woman.<sup>1</sup> Those men were then subject to strict anti-miscegenation laws until 1948, which prohibited them from marrying anyone classified as white—a bar that, under California race law at the time, included the Mexican American women who lived in Filipinos' segregated neighborhoods. Strict immigration quotas barred Filipino men from returning to the Philippines to marry and moving back to California.<sup>2</sup> They were also subject to prohibitions on land ownership under so-called Alien Land Laws until 1942, which made the community reliant on cash wages without the ability to build wealth to support a family.<sup>3</sup>

College research and courses taught Delvo another aspect of his father's generation: They were not passive victims. They were leaders in shaping a more ethical California. They had been organizers in the California farmworker movement of the 1960s, one of the most legendary civil and economic rights battles in U.S. history.<sup>4</sup> Delvo learned that the downtown blocks that he grew up calling "Skid Row" used to be a hub for some of this organizing and the home of the largest Filipino community outside of the Philippines. The area's older nickname had been "Little Manila." Filipinos owned businesses there, pooled their funds to secure dignified burials for their dead, and eventually opened a community center to support civic ties and cultural practices.

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1. These facts, like many about Stockton's Filipino community, were assembled in a masterful urban history by Dawn Bohulano Mabalon, whose academic research and activism for historical preservation have partnered with and been an inspiration for Delvo and many of the ethnic studies leaders mentioned in this Essay. See Dawn Bohulano Mabalon, *Little Manila Is in the Heart: The Making of the Filipina/o American Community in Stockton, California* 152 (2013).

2. *Id.* at 86, 155–58; Gabriel J. Chin & Anna Ratner, *The End of California's Anti-Asian Alien Land Law: A Case Study in Reparations and Transitional Justice*, 29 *Asian Am. L.J.* 17, 18 (2022).

3. Mabalon, *supra* note 1, at 169, 235.

4. *Id.* at 254–63.

None of these facts were discussed during Delvo's childhood or in the Filipino community in Stockton. His network had "melting pot, not salad bowl people," Delvo says.<sup>5</sup> Look ahead, Delvo was taught. In Stockton public schools, where local and California history started and ended with the Gold Rush, Delvo didn't learn any of this history either. But he got the education he needed just in the nick of time. Before his father died, Delvo had learned his truer family story: His father had to wait until his 50s before he could fall in love, marry, and become a parent; and he had spent his youth organizing for Filipino farmworkers' labor rights alongside the visionary leader Larry Itliong.<sup>6</sup> That context, Delvo said, "allowed me to say thank you to my father before he died."<sup>7</sup> As Delvo spoke, he paused and swallowed, noticing how that description failed to live up to what he meant to convey. "It was so much deeper than words can express."<sup>8</sup>

Ethnic studies had given Delvo a truer history of his state and his city, which in turn transformed how he understood his own family. That kind of curriculum is ascendant in America.<sup>9</sup> So too, ethnic studies is under assault in America.<sup>10</sup> In this moment of polarized politics, this Essay reflects on the role of that curriculum in one place, for three people. The place is Stockton—the most diverse city in America and home to a grassroots, DIY

5. Interview with Dillon Delvo, Exec. Dir., Little Manila Rising, in Stockton, Ca. (Mar. 27, 2018) (on file with the *Columbia Law Review*).

6. Mabalon, *supra* note 1, at 258–65; Gayle Romasanta, Why It Is Important to Know the Story of Filipino-American Larry Itliong, *Smithsonian Mag.* (July 24, 2019), <https://www.smithsonianmag.com/smithsonian-institution/why-it-is-important-know-story-filipino-american-larry-itliong-180972696/> [<https://perma.cc/8Y9A-RA2B>].

7. Interview with Dillon Delvo, *supra* note 5.

8. *Id.*

9. See Natalie Escobar, How 50 Years of Latino Studies Shaped History Education, *Atlantic* (Sept. 7, 2018), <https://www.theatlantic.com/education/archive/2018/09/how-50-years-of-latino-studies-shaped-history-education/569623/> (on file with the *Columbia Law Review*); Dana Goldstein, Push for Ethnic Studies in Schools Faces a Dilemma: Whose Stories to Tell, *N.Y. Times* (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/us/california-ethnic-studies.html> (on file with the *Columbia Law Review*); Sophie Quinton, Good Teachers Embrace Their Students' Cultural Backgrounds, *Atlantic* (Nov. 11, 2013), <https://www.theatlantic.com/education/archive/2013/11/good-teachers-embrace-their-students-cultural-backgrounds/281337/> (on file with the *Columbia Law Review*).

10. Melinda D. Anderson, The Ongoing Battle Over Ethnic Studies, *Atlantic* (Mar. 7, 2016), <https://www.theatlantic.com/education/archive/2016/03/the-ongoing-battle-over-ethnic-studies/472422/> (on file with the *Columbia Law Review*); John Fensterwald, Civics Proponents Urge Common Ground in Battles Over Ethnic Studies, *EdSource* (Sept. 28, 2021), <https://edsource.org/2021/civics-proponents-urge-middle-ground-in-battles-over-ethnic-studies/661561> [<https://perma.cc/7F9A-3FHP>]; see also, e.g., Editorial, California's Ethnic Studies Mandate, *Wall St. J.* (Mar. 16, 2021), <https://www.wsj.com/articles/californias-ethnic-studies-mandate-11615935133> (on file with the *Columbia Law Review*) (opposing California's ethnic studies curriculum and describing it as "invert[ing] traditional American ideas of individual merit, opportunity and success"); Bret Stephens, Opinion, California's Ethnic Studies Follies, *N.Y. Times* (Mar. 9, 2021), <https://www.nytimes.com/2021/03/09/opinion/californias-ethnic-studies.html> (on file with the *Columbia Law Review*) (opposing ethnic studies as "a curriculum that magnifies differences, encourages tribal loyalties and advances ideological groupthink").

ethnic studies movement dating back to the 2000s.<sup>11</sup> Stockton can be a reference point for other school districts and states, including California, which in 2021 became the first U.S. state to require that public high schools teach ethnic studies.<sup>12</sup> Three generations of leaders of ethnic studies curriculum in Stockton—each of whom was shaped personally by their own ethnic studies education—offer a window into what the work has been about.

Our purpose is more modest than to take up the academic or political debate about the merits of the curriculum, or even the choice about whether to standardize it statewide.<sup>13</sup> We simply intend to sit with the more personal vantage points of three people (each a teacher or a student) in one city as a way of regrounding those debates. What follows is a brief racial history of the city of Stockton (in Part I) and a look at the origin and legal context of the city's ethnic studies curriculum (in Part II). Three personal narratives (in Part III) help chronicle the development of the curriculum and bring its impacts to life. In the Conclusion, in light of the ongoing history of segregation and inequality in Stockton, we reflect back on the use of ethnic studies as a court-ordered remedy for *de jure* and *de facto* school segregation.

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11. Gaby Galvin, *America's Most Diverse City Is Still Scarred by Its Past*, U.S. News & World Rep. (Jan. 22, 2020), <https://www.usnews.com/news/cities/articles/2020-01-22/stockton-california-americas-most-diverse-city-is-still-scarred-by-its-past> [<https://perma.cc/9F4F-GQFW>].

12. Mackenzie Mays, *California Students Will Have to Take Ethnic Studies to Get a Diploma*, Politico (Oct. 14, 2021), <https://www.politico.com/news/2021/10/14/california-students-ethnic-studies-diploma-515972> [<https://perma.cc/EC9L-7EK7>].

13. For valuable law review articles evaluating the controversies over K–12 ethnic studies (most of which focus on the political battles in Arizona), see generally Steven W. Bender, *Silencing Culture and Culturing Silence: A Comparative Experience of Centrifugal Forces in the Ethnic Studies Curriculum*, 33 U. Mich. J.L. Reform 329 (2000) (personal reflection on silence and race in undergraduate ethnic studies classes); Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. Rev. 1513 (2013) (framing the legal battles over ethnic studies, including in Arizona, as “the right to learn one’s own history and culture”); Nicholas B. Lundholm, *Cutting Class: Why Arizona’s Ethnic Studies Ban Won’t Ban Ethnic Studies*, 53 Ariz. L. Rev. 1041 (2011) (presenting a close analysis of the history of Arizona’s H.B. 2281 and the ethnic studies curriculum it targeted); Ronald L. Mize, *The Contemporary Assault on Ethnic Studies*, 47 J. Marshall L. Rev. 1189 (2014) (providing a critical analysis of why “ethnic studies knowledge [is] deemed dangerous”); Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. Mich. J.L. Reform 263 (2000) (drawing from humanities and cultural analysis of silence and silencing to analyze and critique law school pedagogy); Lupe S. Salinas, *Arizona’s Desire to Eliminate Ethnic Studies Programs: A Time to Take the “Pill” and to Engage Latino Students in Critical Education About Their History*, 14 Harv. Latino L. Rev. 301 (2011) (describing the history of and backlash against the Mexican American Studies Program in the Tucson Unified School District). Salinas’s piece makes the additional valuable point that “high school students . . . are also mature enough to learn of the injustices that our country perpetrated . . . Only then can we live up to the true meaning of the First Amendment by allowing those with knowledge to share it and those who lack it to receive that wisdom.” *Id.* at 323.



Ethnic studies, these voices convey, is part of how Stockton is healing from more than 150 years of racial segregation in housing and education. In a city (like so many others) where race determined housing and housing determined educational opportunity, Stockton has needed to rescue its students' self-confidence, educational ambition, sense of possibility, and trust in one another. In public high schools that are majority non-white (which is also common<sup>14</sup>), that work has meant diversifying the authors, leaders, and historical facts that youth meet during their school years. What segregation long degraded—the sense of self and possibility—ethnic studies has tried to rebuild. Ethnic studies could not integrate Stockton's schools but it could, and did, finally integrate the content of their lessons to reflect the people in the room.

### I. LEARNING FROM STOCKTON

Stockton, California has been ranked the most diverse big city in America.<sup>15</sup> To earn that status, the city beat even famously international cities like Los Angeles and New York. Its people are a portal into domestic and global history. The city is about 45% Latino, 21% Asian, 18% white, 11% Black, 1% Native American, and 0.5% Native Hawaiian/Pacific Islander, with about 18% of the population crossing categories to identify as multiracial.<sup>16</sup> One in four of its residents were born abroad.<sup>17</sup> Stockton's community was diverse hundreds of years before the arrival of Europeans: The first residents of this area, the Yokuts, lived at the geographic center of a wider temperate and fertile valley that provided for distinct Native American and Indigenous communities who spoke dozens of languages and dialects.<sup>18</sup> Today, the residents of Stockton are descendants or refugees of the California Genocide and Spanish colonization, the Gold Rush, rural poverty in nineteenth century China and Japan, American war

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14. For one of many windows into rising racial diversity overall in American public schools, but the ongoing racial segregation within any given school, see Katherine Schaeffer, U.S. Public School Students Often Go to Schools Where at Least Half of Their Peers Are the Same Race or Ethnicity, Pew Rsch. Ctr. (Dec. 15, 2021), <https://www.pewresearch.org/fact-tank/2021/12/15/u-s-public-school-students-often-go-to-schools-where-at-least-half-of-their-peers-are-the-same-race-or-ethnicity/> [<https://perma.cc/M7XB-BT58>].

15. Katelyn Newman, America's Most Racially Diverse Big Cities, U.S. News & World Rep. (Jan. 22, 2020), <https://www.usnews.com/news/cities/slideshows/the-10-most-racially-diverse-big-cities-in-the-the-us?slide=11> (on file with the *Columbia Law Review*) (calculating estimates based on cities with more than 300,000 residents, using 2018 Census data).

16. QuickFacts: Stockton City, California, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/stocktoncitycalifornia/INC110220> [<https://perma.cc/PE94-R4G8>] (last visited Feb. 1, 2023) (conveying 2017 to 2021 Census data).

17. *Id.*

18. Chris Clarke, Untold History: The Survival of California's Indians, KCET (Sept. 26, 2016), <https://www.kcet.org/shows/tending-the-wild/untold-history-the-survival-of-californias-indians> [<https://perma.cc/KW6G-VW4D>].

and occupation in the Philippines, the Dust Bowl, the Great Migration of African Americans fleeing the American South, the Vietnam War, the Khmer Rouge in Cambodia, and generations of war, economic colonialism, and interdependence with Mexico.<sup>19</sup> This is a city built by strivers and survivors.

Stockton's diversity makes it a magnificent laboratory for the wider American experiment—to unite a global people under a single democracy. But within the city, Stockton has not always been integrated or equitable. In 2012, public health researchers discovered a grim fact that captured drastic internal inequality: Life expectancy in a high-income neighborhood called Lincoln Village was twenty-one years longer than that in the neighborhoods of downtown and South Stockton.<sup>20</sup> The two sections of the city are as little as seven miles apart. This difference tracks other metrics of wealth and well-being. An in-depth analysis of Stockton's Health Development Index (a composite of educational, income, and life expectancy data) found that the score for the more affluent North Stockton was nearly twice as high as the score for South Stockton.<sup>21</sup> The high school graduation rate in the school district serving the southern neighborhoods has improved in recent years, but it remains fourteen percentage points lower than that of the northern neighborhoods.<sup>22</sup> The 2020 Census revealed some neighborhoods in Stockton (nearly all on the South Side) with poverty rates above 50%, while the higher-income neighborhood of Brookside had a poverty rate of less than 1%.<sup>23</sup> South

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19. Michelle Wilde Anderson, *The Fight to Save the Town: Reimagining Discarded America* 38–44 (2022) [hereinafter Anderson, *Fight to Save the Town*]; see also Maya Abood, *San Joaquin Valley Fair Housing and Equity Assessment* 30–33 (2014), <https://www.frbsf.org/wp-content/uploads/sites/3/SJV-Fair-Housing-and-Equity-Assessment.pdf> [<https://perma.cc/U75F-68B7>].

20. Health Pol'y Inst., Joint Ctr. for Pol. & Econ. Stud., *Place Matters for Health in the San Joaquin Valley: Ensuring Opportunities for Good Health for All* 17 (2012), <https://www.nationalcollaborative.org/wp-content/uploads/2016/02/PLACE-MATTERS-for-Health-in-San-Joaquin-Valley.pdf> [<https://perma.cc/NRF2-NGNJ>]; Joe Goldeen, *Two Neighborhoods, Years Apart*, Recordnet.com (Feb. 29, 2012), [https://www.recordnet.com/article/20120301/A\\_NEWS/203010317](https://www.recordnet.com/article/20120301/A_NEWS/203010317) [<https://perma.cc/Y9G6-X4LX>].

21. Measure of America, *A Portrait of California 2014–2015: Stockton Metro Area Close-Up* 3, [http://www.measureofamerica.org/wp-content/uploads/2014/12/Portrait\\_of\\_CA-Stockton.pdf](http://www.measureofamerica.org/wp-content/uploads/2014/12/Portrait_of_CA-Stockton.pdf) [<https://perma.cc/PY84-BYRC>] (last visited Feb. 1, 2023) (reporting a Human Development Index score of 4.62 for Stockton City North versus a score of 2.86 for Stockton City South).

22. Compare Cohort Graduates, Lincoln Unified, Ed-Data, <http://www.ed-data.org/district/San-Joaquin/Lincoln-Unified> [<https://perma.cc/N45Y-NKQF>] (last visited Feb. 1, 2023) (reporting a 2020–2021 high school graduation rate of 94% for Lincoln Unified School District), with Cohort Graduates, Stockton Unified, Ed-Data, [http://www.ed-data.org/district/San-Joaquin/Stockton-Unified/ps\\_NTY0Njg%5E](http://www.ed-data.org/district/San-Joaquin/Stockton-Unified/ps_NTY0Njg%5E) [<https://perma.cc/DJ3D-MT3C>] (last visited Feb. 1, 2023) (reporting a 2020–2021 high school graduation rate of 79.4% for Stockton Unified School District).

23. See Aaron Leathley, *Where Are the Most—And Least—Impoverished Areas in Stockton? This Map Will Show You*, The Record (May 13, 2022), <https://www.recordnet.com/story/business/economy/2022/05/13/survey-shows-which-stockton-areas-most-and->

Stockton included seven of the ten unhealthiest neighborhoods across all cities and rural areas in San Joaquin County.<sup>24</sup> A comprehensive demographic analysis found that the city's most disadvantaged neighborhoods (all of which are in central or South Stockton) are more than 93.8% persons of color (including Latinos), compared with 69.3% countywide.<sup>25</sup> Nearly one-third of the households in those neighborhoods spend over 50% of their income on rent.<sup>26</sup>

A child growing up in Stockton would not need those kinds of data points to learn about neighborhood inequality. Prosperity and poverty are obvious on the visible surface of the city and in its social "common sense." The best northern neighborhoods have tree-lined sidewalks, decorative lakes, and scenic canals; the poorest central and southern ones have potholed streets and scrappy young street trees planted by nonprofits. Casual discourse refers to the "good" schools in and around Lincoln Village and Brookside, and the "bad" ones downtown and on the South Side. Decade after decade, children learned that north side neighborhoods were seen as the safe ones, and that police acted like "keeping it that way" meant keeping people of color out. "The unsaid thing, when you're growing up in South Stockton," said Dillon Delvo, "is that you're in this community because your family is not good as the more affluent families. There was always a sense of shame and unworthiness—a feeling like you don't have a right to thrive."<sup>27</sup> It is a sentiment that one hears again and again from people who grew up on the poor and non-white side of Stockton's color line.<sup>28</sup>

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least-impooverished/9722077002/ [https://perma.cc/5M67-SSGZ] (noting that "the percentage of poor residents was as high as 52% in parts of Stockton in 2020" while "fewer than 1% of residents were poor" in other areas); see also U.S. Census Bureau Profile, Census Tract 31.17 San Joaquin County, American Community Survey 5-Year Data (2021), [https://data.census.gov/map?q=United+States&t=Income+and+Poverty:Poverty&g=0500000US06077\\$1400000&tid=ACSST5Y2020.S1701&cid=S1701\\_C03\\_001E&vintage=2020&layer=VT\\_2020\\_140\\_00\\_PY\\_D1&mode=thematic&loc=37.9662,-121.3135,z10.3436](https://data.census.gov/map?q=United+States&t=Income+and+Poverty:Poverty&g=0500000US06077$1400000&tid=ACSST5Y2020.S1701&cid=S1701_C03_001E&vintage=2020&layer=VT_2020_140_00_PY_D1&mode=thematic&loc=37.9662,-121.3135,z10.3436) (on file with the *Columbia Law Review*) (highlighting low levels of poverty in Brookside compared to the rest of San Joaquin County).

24. See Ad Lucem Consulting, San Joaquin County 2019 Priority Neighborhood Profiles 1–22 (2019), [https://www.healthiersanjoaquin.org/pdfs/2019/2019\\_SJC\\_CHNA\\_Priority\\_Neighborhoods\\_Handout\\_5-10-19.pdf](https://www.healthiersanjoaquin.org/pdfs/2019/2019_SJC_CHNA_Priority_Neighborhoods_Handout_5-10-19.pdf) [https://perma.cc/Z8EL-AHJA] (including data for Priority Neighborhoods 1, 2, 3, 4, 5, 6, and 7, all of which are in South Stockton).

25. See UCLA Luskin Ctr. for Innovation, Stockton Rising: A Baseline and Progress Report on Early Implementation of the Transformative Climate Communities Program Grant 23, 66 (2022), <https://innovation.luskin.ucla.edu/wp-content/uploads/2022/06/Stockton-Rising-Baseline-and-Progress-Report.pdf> [https://perma.cc/3D3M-GRBS] (showing table of demographic statistics).

26. *Id.* at 78 tbl.A7.6.1.

27. Interview with Dillon Delvo, *supra* note 5.

28. Former city councilmember Jesús Andrade characterized what it was like to grow up in South Stockton in the 1980s and 1990s: "You see fights, needles, blighted lots, dogs everywhere . . . You go to the north side and you see lush lawns, grocery stores. You have an inferiority complex and don't even know that. You think it's our fault we can't keep nice things." Anderson, *Fight to Save the Town*, *supra* note 19, at 31.

Because racial segregation tracked the wealth gap, it endangered the self-confidence required for children of color to believe they could succeed in school and beyond. Legal scholar Richard Delgado predicted as much when he wrote:

A minority child from a low-income background could easily conclude that something is wrong with her people and that the whites who enjoy a better standard of living are superior—more intelligent, more energetic, and with a better culture and habits than hers. If we are poor, such a child may reason, it must be our fault.<sup>29</sup>

Without education about the city's history of segregation and disinvestment, more prosperous residents, city staff, or public officials may also treat the poor neighborhoods of color as lost causes of their own making. African American community worker Andre Belion captured that concern in a 2018 interview when he observed that white Stocktonians seemed to think less of the people who lived on the south side, as if “that’s just the way they live.”<sup>30</sup> It was not just non-white youth, his remark conveyed, who needed to understand why Stockton looked the way it did.

The differences between wealthy and poor neighborhoods were not determined by talent, work ethic, or culture. They were set in motion by the basic facts of the city's history. Northern subdivisions like Lincoln Village were developed for all-white occupancy using racially restrictive covenants, which favored white applicants for mortgage lending and investment on 1930s Home Owners' Loan Corporation (HOLC) redlined maps.<sup>31</sup> Ever since, Northern subdivisions have been protected from “locally undesirable land uses” that depress neighbors' quality of life and property values even as they benefit the city as whole. Highway route planning favored northwestern neighborhoods' access, but spared those areas the harms of demolition and fragmentation borne by downtown and southern neighborhoods.<sup>32</sup> South Stockton was reinforced as the non-white, high-poverty side of town. State and local public housing authorities placed all of the city's large-scale public housing developments in South Stockton and surrounding neighborhoods, making them some of the poorest and most racially segregated neighborhoods in the state. Segregationist policing ticketed or endangered non-white motorists when they entered northern neighborhoods, a pattern that Stockton residents

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29. Delgado, *supra* note 13, at 1538.

30. Interview with Andre Belion, Case Manager, Fathers & Families of San Joaquin, in Stockton, Ca. (Mar. 28, 2018) (on file with the *Columbia Law Review*).

31. Lange Luntao, A City With No Center, Placeholder Mag. (Sept. 3, 2014), <https://www.placeholdermag.com/culture/2014/09/03/a-city-with-no-center.html> [<https://perma.cc/DJ28-ZR2F>].

32. *Id.*; see also National Parks Service, Civil Rights in America: Racial Discrimination in Housing 24, 39 (2021), [https://www.nps.gov/subjects/nationalhistoriclandmarks/upload/Civil\\_Rights\\_Housing\\_NHL\\_Theme\\_Study\\_revisedfinal.pdf](https://www.nps.gov/subjects/nationalhistoriclandmarks/upload/Civil_Rights_Housing_NHL_Theme_Study_revisedfinal.pdf) [<https://perma.cc/PAJ9-JZBG>].

experience to this day.<sup>33</sup> South Stockton was also skipped over for all types of investments—from mortgage lending for homeowners to public spending on street trees, from subsidies for grocery stores to spending on parks.<sup>34</sup> A San Joaquin County grand jury investigation in 2014 found that Stockton’s City Hall had never served South Stockton “in any sustained and meaningful way.”<sup>35</sup>

North and South Stockton have another giant difference that both explained and reinforced segregation. They are in separate school districts.<sup>36</sup> The Stockton Unified School District covers all historic parts of the city and is nearly 96% non-white.<sup>37</sup> The Lincoln Unified School District was formed as a new school district as part of a political bargain with developers to minimize their taxes, maximize land values, and avoid school integration. Then and now, educational quality has tracked property values; and in a mutually reinforcing cycle, property values have reflected the stronger educational opportunity available to northern homeowners. As school-based segregation broke down within the Stockton Unified School District after *Brown v. Board of Education* in 1954, white families fled across the school district border into Lincoln Unified to avoid integration efforts in Stockton schools.<sup>38</sup> The Lincoln Unified School District has become much more diverse since the 1990s as families of color have been displaced to Stockton by rising Bay Area real estate prices, and exploitative subprime lending across the city hurt these newer northside households.<sup>39</sup> Yet there nonetheless remains a stubborn gap in access to financial resources between the two districts.<sup>40</sup> The median household income of

33. Anderson, *Fight to Save the Town*, supra note 19, at 41; see also Michael Friedrich, *A Police Department’s Difficult Assignment: Atonement*, Bloomberg (Oct. 23, 2019), <https://www.bloomberg.com/news/articles/2019-10-23/what-police-community-reconciliation-can-look-like> [<https://perma.cc/27YJ-Y43A>].

34. Anderson, *Fight to Save the Town*, supra note 19, at 40–41, 48–49.

35. San Joaquin Cnty. Grand Jury, *South Stockton Quality of Life: As the South Side Goes, So Goes Stockton 7* (2015), <http://standaffordablehousing.org/wp-content/uploads/2015/06/Grand-Jury-Report-on-South-Stockton-5-13-15.pdf?44cce4> [<https://perma.cc/Y48W-DMQ8>].

36. School Districts: San Joaquin County Geographic Information Systems, San Joaquin Cty. (Mar. 1, 2022), [https://sjmap.org/mapdocs/FrontCounter\\_School\\_Districts.pdf](https://sjmap.org/mapdocs/FrontCounter_School_Districts.pdf) [<https://perma.cc/FME5-D9NN>].

37. Cal. Dep’t of Educ., *Enrollment Multi-Year Summary by Ethnicity, Stockton Unified Report (39-68676)*, <https://dq.cde.ca.gov/dataquest/dqcensus/EnrEthYears.aspx?cde=3968676&agglevel=district&year=2021-22> [<https://perma.cc/6PDE-HB49>] (last visited Jan. 31, 2023).

38. Professor Julia Mendoza’s forthcoming ethnographic history of Stockton’s education system, from the desegregation movement to the modern effort to remove police from schools, will bring this history to life in the most personal terms. See Julia Mendoza, *The Miseducation of the Barrio: The School to Prison Pipeline in Stockton, California* (unpublished manuscript) (on file with author (Anderson)).

39. Ameer Chew & Chione Lucina Muñoz Flegal, *Facing History, Uprooting Inequality: A Path to Housing Justice in California* 34 (2020), [https://www.policylink.org/sites/default/files/pl\\_report\\_calif-housing\\_101420a.pdf](https://www.policylink.org/sites/default/files/pl_report_calif-housing_101420a.pdf) [<https://perma.cc/H2K2-AJ5T>].

40. See id.

families living within Lincoln Unified is more than \$20,000 higher than it is for families living within Stockton Unified.<sup>41</sup>

While the thousands of young people growing up in South Stockton saw the impact of these policy decisions in their neighborhoods, the broader root causes of these disparities were absent from school and civic conversations until recently. Seeking to mitigate the sense of shame and internalized racism that was passing from parents to children, a generation of Stockton college graduates (including Delvo) began to build a grassroots educational after-school program. They set out to give the youth of color in the Stockton Unified School District, many of whom were experiencing poverty, a sense of their history. Pride in the interracial origins of the region's agricultural and industrial productivity enhanced how students understood their families, neighbors, and neighborhoods. Spurred to action by generations of activists who came before, students then led local campaigns to seek district funding and approvals for one of California's earliest public school ethnic studies programs.

## II. ETHNIC STUDIES IN STOCKTON AND CALIFORNIA

California's ethnic studies mandate (enacted in 2021) will go into effect between 2029 and 2030.<sup>42</sup> In giving an overview of one early implementation of this curriculum in Central California, this Part explores how these programs might begin to counteract some of the negative consequences of historic educational segregation, redlining, and disinvestment from school systems serving Black and Brown students.<sup>43</sup> Proponents of the state's new ethnic studies requirement note that in districts like San Francisco Unified (which has offered ethnic studies courses for decades), these classes have had a positive impact on student attendance, graduation rates, and college enrollment—particularly among students of color.<sup>44</sup> After this requirement was signed into law,

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41. Stockton Schs. Initiative, Community Report 7 (2018), <https://drive.google.com/file/d/1GBzWBLkanR3vtjrzyvw2IS-BcqnjuMY/view> [<https://perma.cc/WX2W-X7JQ>].

42. John Fensterwald, California Becomes First State to Require Ethnic Studies in High School, EdSource (Oct. 8, 2021), <https://edsources.org/2021/california-becomes-first-state-to-require-ethnic-studies-in-high-school/662219> [<https://perma.cc/E2AC-LHJM>] [hereinafter Fensterwald, California Becomes].

43. See id.; see also Iris Kim, California Plans to Make Ethnic Studies a Requirement for Public-School Students. Here's the History Behind the Idea, Time (Sept. 15, 2020), <https://time.com/5888853/ethnic-studies-california/> [<https://perma.cc/J8HS-TQ67>] (providing a history of the curriculum and the politics of adoption in California).

44. See, e.g., Thomas S. Dee & Emily K. Penner, The Causal Effects of Cultural Relevance: Evidence From an Ethnic Studies Curriculum, 54 Am. Educ. Rsch. J. 127, 158–60 (2017) (finding large, causal effects on attendance, grade point average, and credits earned when at-risk students in the San Francisco Unified School District took courses rooted in ethnic studies or other “culturally relevant pedagogy”); see also Christine E. Sleeter, The Academic and Social Value of Ethnic Studies: A Research Review 20 (2011), <https://files.eric.ed.gov/fulltext/ED521869.pdf> [<https://perma.cc/7Y9J-EUBG>] (conducting a literature review of social science assessing the outcomes of ethnic studies

California Secretary of State Dr. Shirley Weber (herself an emerita professor of Africana Studies at San Diego State University) said, “[A]t a time when some states are retreating from an accurate discussion of our history . . . California continues to lead in its teaching of ethnic studies,” which has the capacity to help students “build character,” “learn how people from their own or different backgrounds face challenges, overcome them,” and “contribute[] to American society.”<sup>45</sup> The state will invest at least \$50 million to support K–12 districts, county offices of education, and charter schools to develop and implement this curriculum over the next several years.<sup>46</sup>

While the state’s commitment to ethnic studies in the K–12 system is new, educators, students, and community leaders have worked for decades to introduce liberatory, inclusive history into California’s public schools. In cities like Stockton, San Francisco, Long Beach, and Los Angeles, teachers have long worked to build ethnic studies programs that seek to combat racism and promote social justice—often without formal support from local policymakers.<sup>47</sup> Inspired by the wide-ranging college student protests at San Francisco State University and UC Berkeley in the late 1960s (which led to the establishment of the first courses in African American, Chicano, Asian American, and Native American studies at state universities),<sup>48</sup> these grassroots, community-driven initiatives offer an example of what it could look like to use ethnic studies programs to build an inclusive system that provides a high-quality education to all students.

Stockton’s efforts to build that kind of program began in 2009, when a handful of educators (largely coordinated through the organization Little Manila Rising) launched a series of volunteer-led after-school programs with the intention of someday formalizing this curriculum during the school day. Dillon Delvo, Alma Riego, Aldrich Sabac, and Brian Batugo—all Stockton-raised teachers who had been trained at California State University and University of California campuses—built the Little Manila After School Program, specifically focused on introducing students at Edison High School in South Stockton to local Filipina/o history.<sup>49</sup>

In 2016, a related, broader project emerged when a dozen teachers came together to teach an after-school class. Rather than call the class

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curriculum and finding considerable evidence of positive academic and social impacts for students of varied ages).

45. Fensterwald, *California Becomes*, supra note 42 (internal quotation marks omitted) (quoting Shirley Weber, Cal. Sec’y of State).

46. *Id.*

47. Sherry Posnick-Goodwin, *Ethnic Studies Trailblazers*, Cal. Tchrs. Ass’n (Dec. 14, 2021), <https://www.cta.org/educator/posts/ethnic-studies-trailblazers> [<https://perma.cc/3LXF-XMF8>].

48. *Id.*

49. *Why We Advocate for More Than Local Filipino American History*, Little Manila Rising, <https://littlemanila.org/more-than-history> [<https://perma.cc/Z7NF-Y8E6>] (last visited Feb. 25, 2023).

“U.S. History,” they called it “us History,” reflecting coursework they had studied in Black Feminist Theory, Chicana Studies, LGBT+ studies, and local history.<sup>50</sup> In 2017, these teachers and their students pushed the Stockton Unified School District to approve the first course description for a pilot ethnic studies class, which several of the us History educators then taught.<sup>51</sup> In 2019, the school board for Stockton Unified passed a resolution strengthening and expanding the existing ethnic studies program, establishing dedicated staffing to develop a district-wide curriculum, and providing resources for teachers to collaborate to improve the program.<sup>52</sup> These courses are now offered at all Stockton Unified high schools. According to a 2020 study administered by the program, “92 percent [of students who took the courses] had developed an increased appreciation for other cultures, 90 percent enjoyed the course, and 85 percent would recommend it to other students.”<sup>53</sup>

Stockton’s multiethnic coalition of teachers had succeeded in launching some of the first ethnic studies courses in any public schools in the California interior, a region of roughly seven million people.<sup>54</sup> They had to overcome political opposition, interethnic competition, and the resource scarcity inherent in a district that serves a student population that is more than 80% low income.<sup>55</sup>

### III. THE EXPERIENCE OF ETHNIC STUDIES IN STOCKTON

Some of the best spokespeople for Stockton’s ethnic studies curriculum are its builders and its beneficiaries. In their own lives and educations, they experienced the limitations of standard history curricula and saw the community-building potential of more inclusive stories. Their observations have useful implications for managing changing student demographics—a particularly relevant insight for California and other

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50. This group of teachers included one of this Essay’s authors, Lange Luntao. For a fuller history of this effort, see generally Susan Brenna, *Recovering From Historical Amnesia*, *Teach for Am. Mag.* (Jan. 30, 2018), <https://www.teachforamerica.org/one-day/magazine/recovering-from-historical-amnesia> [<https://perma.cc/7RM3-599X>].

51. Stockton Unified School District Governing Board Meeting Agenda 3074 (Apr. 11, 2017), <https://www.stocktonusd.net/cms/lib/CA01902791/Centricity/domain/159/agendas/2016-2017/2017-04-11%20Regular%20Board%20Meeting.pdf> [<https://perma.cc/R8DH-6PQD>].

52. Stockton Unified School District Governing Board Meeting Minutes (Dec. 17, 2019), <http://go.boarddocs.com/ca/susd/Board.nsf/goto?open&id=BJQRFL6DCCE7> [<https://perma.cc/G4D4-BEFN>].

53. Posnick-Goodwin, *supra* note 47.

54. California’s Central Valley Finds Itself on the Political Map, PBS Newshour (Nov. 1, 2010), <https://www.pbs.org/newshour/politics/californias-central-valley-finds-itself-on-the-political-map> [<https://perma.cc/3V76-SHQ6>].

55. Free and Reduced-Price Meals, Stockton Unified, Ed-Data, <http://www.ed-data.org/district/San-Joaquin/Stockton-Unified> [<https://perma.cc/5BTD-3899>] (last visited Feb. 1, 2023).



states with a minority-white student body in their public schools.<sup>56</sup> What follows are lightly edited oral histories from three graduates of Stockton public schools: one “elder” leader, one current teacher, and one college student.

A. *Dillon Delvo: Program Founder*<sup>57</sup>

*Delvo, whose story opened this Essay, is a father, educator, youth minister, nonprofit founder, and a second-generation Filipino American who was born and raised in South Stockton. After graduating from Edison High School, Delvo attended San Francisco State University, where Asian American studies helped him make sense of his own family’s migration history. After graduation, an elementary school friend (the late Dr. Dawn Bohulano Mabalon) alerted him to the impending destruction of some of the last buildings in Stockton’s historic Little Manila. He and Mabalon established Little Manila Rising, which has developed neighborhood and youth programs in martial arts, dance, health outreach, urban forestry, and historical/cultural preservation. Delvo continues to lead the organization as Executive Director and has been among the city’s leading advocates for adoption of ethnic studies in Stockton schools.*

I never learned Filipina/o history while I was in Stockton. I only learned it when I went to San Francisco State. The very first class I ever took in college was called “The Psyche and Behavior of Filipinos.” And I was like, “I’ll get an easy A! What’s in the final—how to wrap lumpia?” [*Delvo laughs.*]

But once I took that class, it proved how wrong I was and how little I knew. It reshaped me as a student. It gave context to my own existence, meaning that I had a direct relation to the first generation of Filipinos in America. I remember vividly how that first class started: The professor walked in, and he was dressed as a homeless person. I didn’t know that he was the professor—he sat with the students, and we were just waiting for the professor to show up. Finally, this guy that was dressed as a homeless person stood up and said, “Where is the professor?” And then he slowly started undressing while giving a monologue, and by the end he was in full Barong Tagalog [Filipino formal attire]. His point was to talk about Filipino American identity and how we were invisible. My mind was blown!

Just that first class alone was transformational for me and made me question what I had learned back at home. It eventually made me so passionate that I actually went back to my U.S. History teacher kind of angry. She was my favorite teacher at Edison High School, Sarah Davenport—one of the best teachers ever. I asked her: “You teach U.S. history—how come none of our history is a part of this? How could we

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56. Public School Enrollment, By Race/Ethnicity, Kids Data, <https://www.kidsdata.org/topic/36/school-enrollment-race/table> [<https://perma.cc/VLG7-SFD6>] (last visited Feb. 1, 2023) (documenting that 21.7% of California’s public school students are white).

57. This section is an oral history told in the voice of Dillon Delvo (described above). Interview with Dillon Delvo, *supra* note 5.

come from our city without learning any of our city's history?" She did that teacher jiu-jitsu thing. [*Delvo laughs.*] Very apologetically, she said, "I never learned about this either. I would love for you to come back to my class and teach one day of my U.S. history class." I agreed, which I immediately regretted, because when I was like eighteen or nineteen years old, I had this huge fear of public speaking.

I wanted to do this because *someone* had to help—how could this not be taught at the high school level, or in Stockton? Because by then I was changing into a different student. Prior to this, I wanted to get an easy A in a Filipino History class, but after the class I began wondering, I should have known the history of my family, right? I should have known this about my neighborhood. I should have known this about my community. Shouldn't you understand this history to be able to function as a person from Stockton or as a person from California or just as a citizen of the United States? That's what was going on for me at a macro level, but at a micro level, it's like I didn't even know who my parents were. I felt so betrayed. I began to understand the effects of colonialism on family relationships and formation. I realized that these interactions that we've had weren't expressions of disagreement with me and my dreams, but the only way that other generations could express love. It changes everything. I became really passionate about that, and so I taught that class every year at Edison. I was terrified, but I was more angry than terrified.

My visits to Ms. Davenport's class turned into a workshop on the importance of ethnic studies. I would basically tell the folks in the class, "When you go to college, take these courses because they're not teaching us this here and it will change your world. These courses help you make sense of why our community is the way it is. It's not our fault." I was trying to expose the unsaid thing, which is that when you're growing up in South Stockton, you're in this community because your family is not as good as the more affluent families. There was always a sense of shame and unworthiness—a feeling like you don't have a right to thrive. It's not talked about, but it's deep down in our psyche. It informs our imposter syndrome. I'm approaching fifty and I'm just starting to understand the depths of the damage done to me.

Looking back on my history education when I was a kid in Stockton, what was missing was a sense of relevance. I'm not related to George Washington. George Washington's story doesn't tell anything about my ancestors and their sacrifices. Not that I shouldn't learn those other things, but I think there's a concerted effort to erase other histories. This makes our country into a very monolithic narrative instead of the incredibly organic tapestry of what America really is. This has a lot to do with the economy, too, especially if you come from an immigrant family. Especially for Filipinos, we're only allowed into this country because there was an economic need in the United States in the 1920s and '30s for field labor in California agriculture. Slavery had ended. Chinese and Japanese immigrants were already excluded. They needed a source for cheap labor.

That's the only reason my father came to this country. Then, of course later on, with the Vietnam War, immigration was only restarted for Filipinos because of the need for nurses. So the narrative of conventional U.S. history is you're only allowed into our country so you can become a cog in this economic engine. That's not a great narrative for our young people! But that is what's taught. We're taught to expect that you go to school so that you can get a job and make good money. If you're a young person with hopes and dreams—no one dreams of growing up just to add to the economy. No kid does that! You grow up wanting to change the world, to make a difference, to help your family and community. Yet none of the curriculum supported that.

Taking ethnic studies courses made me a better student because it gave me context to learn, "How did I even have the opportunity to be in this college class when I'm just one generation removed from my father, who could only become a field worker?" It helped me understand his struggle, which I had known nothing about. It made me realize: Oh, I *do* need to get good grades. There is a legacy that I need to live up to and uplift and to spread. That's why [Dr.] Dawn [Bohulano Mabalon]'s work is so important, because she's basically saying in [her book] *Little Manila Is in the Heart*: "This is a story that was not told to you. It belongs to you. It's a better definition of you and us, and it's beautiful." And that's just square one! The real question, which you've got to answer for the rest of your life, is "*What are you going to do with it?*"

The simple truth is, if you ask any student that is engaged in ethnic studies what the content is about, you learn the history of your own family and this history in context, but it also leads to better understanding of others' histories. Every culture has their own unique experience, but what I've learned is how much more alike we are. There's this narrative that "if we teach ethnic studies it's going to divide us!" For me, ethnic studies taught me about allyship, what that really means and entails.

So, to go back to my timeline, I took that Filipino Studies class, became very passionate, ended up taking a major in Film and a minor in Asian American studies, and graduated from San Francisco State in 1997. I came back to Stockton and became a youth minister at St. George Catholic Church in 1997. Then, around 1999, I connected with Dawn, who was my friend in the seventh grade but we had fallen out of touch. She had just graduated from UCLA and we reconnected at Barrio Fiesta (an annual Filipino festival). She was in this booth and selling these Filipino empowerment t-shirts called Downright Pinoy. At the time, I had started an organization with another friend called PAK—Philippine American Kaibigan. It was a Filipino youth group that taught about Filipino American history. It was a precursor to Little Manila After School Program and we were doing it out of a church. The students in our program happened to be in charge of entertainment for this Barrio Fiesta. And I remember Dawn walking up to me and she had tears in her eyes, and she said, "This is so beautiful! This is what needs to happen in Stockton!" And

she asked me, “Did you know that they’re going to destroy the last remaining buildings of Little Manila?” and I said, “No.” She was about to go back to Stanford to start her dissertation on Stockton’s Filipino American history but she was so upset that no one was doing anything to preserve our community’s history. We talked some more and realized that it was too late to save the original building, but I had a film degree so we agreed that if this was going to happen, at least someone was going to document it—and then we started organizing to protect it long-term. But that’s the main thing: Dawn and I in high school were two completely different people from the ones that reconnected after college. It was because of ethnic studies.

My teacher asking me to teach one class is really the seed that put me on a trajectory to believing that ethnic studies content needs to come into a classroom. When we started Little Manila, Dawn was all about historic preservation—we need to fight the city, we need to make sure these developers don’t take over. My first reaction is always pessimism. I said, “Oh, there’s no way. How the hell are we supposed to fight these millionaires? We just graduated from college! I have to figure out how to pay back my student loans.” Dawn’s thinking, “We’re going to fight the city, we’re going to win.” I was on board, but in the back of my mind I was thinking about how we also needed to be focused on getting this content in the classroom. At that time, we did not have the power to prevent these buildings from coming down, but then the way we could fight back was through informing the youth. If we can’t preserve the buildings physically, we could at least preserve them through the curriculum and the things that we’re teaching our children. We focused on Filipino American history because that was my specialty and that’s what I could teach, but I believed that we needed this to happen for *all* our people.

A few years later, I was elected to the school board and asked, “Shouldn’t we have ethnic studies?” And there wasn’t really a model for how to do this at that time, so we decided to start small and launched an after-school program. Alma [Riego] was graduating from UCLA and she came to help me with this, and so we started going to Filipino clubs that were meeting at lunch. We gave a pitch to students: “Hey, want to come to our after-school program? You won’t get any credit. There may or may not be food for you.” But people came! And they started bringing their friends. We didn’t have anything to offer them except knowledge—what a concept! But I think that’s the power of ethnic studies.

Then eventually Brian [Batugo] and Aldrich [Sabac] came back, and they had actually been trained to be teachers. I turned it over to them, and they took Little Manila After School Program to the next level. The next step was to launch us History, because *of course* this should not just be about Filipino history, but all of our histories. [The founding educators of us History were Aldrich Sabac, Brian Batugo, Gustavo Gonzalez, Dr. Nancy Huante, Dr. Anna NtiAsare Tubbs, Phillip Merlo, Donald Donaire, Nikki Chan, Elaine Barut, CaseyAnn Carbonell, and Lange Luntao.]

As the program grew, our students didn't agree with our timeline. They would ask, "Why are we learning this after school rather than during school?" And my response would be, "We have this five-year timeline to bring ethnic studies to Stockton Unified." [Delvo was no longer on the school board at this time.] And the students would ask, "You mean we can't do this *now*?" So we shifted into thinking about what knowledge we could give them around direct action and organizing, and then they got it! At the school board meeting where the students made their case, the adults didn't have to say one word. I was just sitting in the back at a school board meeting, and I didn't have to say one word. I just watched our students with tears of pride streaming down my face.

B. *Gustavo Gonzalez: Ethnic Studies Teacher*<sup>58</sup>

*Gonzalez is a social studies, history, and ethnic studies teacher at Edison High School, a school of over 2,200 students and the educational heart of South Stockton. The son of immigrants from Jalisco, Mexico, he was raised in Stockton and attended Edison before earning a scholarship to study Comparative Studies in Race and Ethnicity and pursuing his teaching credential at Stanford. He taught the first Mexican American History classes at Edison and later helped design the ethnic studies curriculum for all of the district's high schools.*

My grandparents were poor ranchers in Mexico, and the future prospects looked the same for my parents. My dad would see when his uncles and people from the village would go *al norte*, go north, and come back with watches and cars, and you know, he wanted that for himself too. So he started migrating to the United States to work seasonally. Eventually he married my mom and they settled down in Stockton.

Why Stockton? Sometimes I wonder that myself. [*Gonzalez laughs.*] Someone from the village had a factory up here, so that chain migration—having a connection here, brought us up here. My parents really emphasized schooling and homework. My mom would take us to the library even though she couldn't really read English books herself. It was little picture books at first. After that, it became a habit every week or two to go to the Chavez Library and read. That helped me do well in school.

I didn't learn the term "ethnic studies" until college. There was nothing like that around [when I was growing up]. I always loved history—I'm a history teacher now. I was one of the only ones in my class who would actually read a textbook and try to pore through the pages. I was always interested in learning about Mexican history. In my U.S. History class, you wouldn't expect to necessarily see that history, but there was hardly anything about Mexico in there. The one time there was, it was about the Mexican war. It was only a page or two, and we're the "bad guys." That's

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58. This section is an oral history told in the voice of Gustavo Gonzalez. Interview with Gustavo Gonzalez, Tchr., Edison High Sch., in Stockton, Cal. (Nov. 21, 2022) (on file with the *Columbia Law Review*).

all they have about us? You know, I remember wanting to hear more, wanting to know more.

In my English classes, the books that they chose were from the typical standard curriculum—*Brave New World*, *Canterbury Tales*, just all very Western content. Looking back on it, I don't remember reading much by authors of color. Even though a lot of my teachers were people of color and tried to build connections between their students and the content, I feel like the curriculum wasn't really rooted in these stories. And I never heard anything about the history of Stockton in my schools.

When I was in high school, I also started to notice inequities in the schools. I did sports at Edison and I would go to Lincoln [High School] or West and Tracy and go to other high schools and think, "Oh, their buildings are a lot nicer than ours." We had peeling orange carpet from the seventies and old textbooks. I started to see that there are some differences in which schools and which areas get money and which don't. I started to pay attention to that a little bit.

I remember when I was in high school there was a report from Johns Hopkins that talked about "dropout factories" in America. This was basically just a list of the worst high schools in America. Edison was on there, and I think Stagg and Franklin, so all the big public high schools around here. It basically said, "These schools failed their students." And I remember thinking: That's not my experience! I have some pretty good teachers. I like my experience at Edison. Even though maybe other schools have more money, they're a little nicer. I started to think: Why do people see us that way? And why don't people finish school? Why do some of my neighbors and classmates want to continue to pursue education and go to college or not? And I saw that there are some teachers who made a difference in their classes, who maybe made people feel a little bit more comfortable. I think from that point on I knew I wanted to be a teacher—to hopefully create a class environment where people would want to learn and people would want to be invested in improving their community.

I went to Stanford and that's when I started to learn about ethnic studies because of what was happening in Arizona at the time. SB 1070 was happening, the "Show Me Your Papers" Law, and then hearing about what was happening in Tucson—where they tried to shut down the Mexican American Studies classes. I hadn't really taken classes like that yet, but I remember reading about it and thinking, "That's wrong." People should be able to learn about their history. And that's what inspired me the next year, my sophomore year at Stanford, to take ethnic studies classes.

After I graduated, I taught middle school in San José for a year. I taught at a charter school affiliated with the National Hispanic University on the East Side, which was modeled off of Historically Black Colleges and Universities (HBCUs). There was a history teacher opening, and when I got to the interview, they told me I would be teaching Mexican American History. The administrators were Latino, the teachers were Latino, and it

really interested me that this was a community-controlled school. I had never seen that before. And I got the chance to learn it as I was teaching it.

There was not much support and the school had its own struggles (as many charter schools do), but I had the opportunity to develop interesting projects with interesting lessons. Some lessons were a hit and some were not, but I think definitely teaching about the Indigenous backgrounds, talking about the Aztecs and the Maya, I've always found that students really find an interest in that because it's rarely touched upon in schools. When you tell them about the complexity of Tenochtitlan and how some of our ancestors built this amazing city that wowed the Spanish conquerors that came in. Those are fascinating stories. There should be so many Hollywood movies about them.

I always knew I was going to come back to Stockton—it was kind of just a matter of time. I know that teaching is tough and that your first few years are going to be difficult. But after four years in San José I started to think: Let's see what's going on in Stockton. I had heard about the good work going on. I had seen some articles about people, former classmates of mine, doing ethnic studies in Stockton. This was at the time they were doing the us History Program. I wanted to get involved with that. So I reached out to see if I could be a guest speaker and lead one workshop at this after-school ethnic studies program. I got to teach a workshop on the Chicano Walkouts of 1968. It was fun to teach. It really solidified in my head that all these things I had learned so far in San José, I could bring home. I talked to Dillon, who was the leader of Little Manila Rising and who had set the ultimate goal of getting ethnic studies started in schools, rather than after school. And I got a job at my alma mater, Edison.

My first year at Edison, Ethnic Studies was not officially part of course registration. I was teaching World History and Economics/Government. But I worked with the counselors to put Ethnic Studies on the course registration, and then I worked with students to help recruit others. I made flyers, they helped me distribute them all across campus, and after that first year we had about 200 students register—eight sections! So we had had to get multiple teachers to teach the course that first year.

I went in excited to teach Ethnic Studies, but this was an introductory course where students learned about people of different backgrounds, with themes and principles that I had never taught before. So I connected with other teachers across the district and we were kind of building it as we went. This was a teacher-led effort from the beginning. We weren't getting paid to meet after school. We just really wanted to make good lessons and do justice to Ethnic Studies. So I worked with JR [Ed Arimboanga, Jr.] and Oscar [Garibay] that summer to plan out our units. We met twice a month throughout the year to go over how the lessons were going and what should we do next week. We were co-constructing lessons and units together. JR's experience from San Francisco rooted it, but it was all of us coming together and having discussions. It was beautiful. You

don't see that too often. It was very powerful and inspiring. I felt like I definitely made the right decision to come home. There was a good community of teachers who were pushing the good work that I believed in.

There was a ton of momentum building across all of our schools and our sites. We also worked together to write a resolution to secure support and funding for the program and to clarify that the program is about teaching race, gender, ethnicity, addressing some of the historical wrongs and trying to correct them. It also went on to establish a teacher on special assignment role, which JR filled.

We were bringing community members together to build an inclusive curriculum, and then COVID-19 happened and paused a lot of that. You can't really teach an authentic ethnic studies course unless you're having authentic conversations, you know, in person—so that did a bit to stifle some of the work. But also we remained super connected in terms of talking about politics and keeping our work together. That gave me a lifeline connection with the ethnic studies teachers. I don't know how long I'd be in Stockton Unified School District if I didn't have that group of teachers to work with and bond with. Without ethnic studies, I definitely would have felt very isolated as a teacher throughout that whole "Zoom year."

There have been challenges. As we left COVID, we lost our leader [Ed Arimboanga, Jr.] and our work has been stifled a bit. The politics of the board flipped; it had a more conservative tilt for a couple of years. Despite the fact that our school board and leadership are full of people of color, when we proposed to expand ethnic studies into other branches of African American studies and Native studies, the courses never even went up for a vote.

It was only recently that newly elected leadership in the district did approve new courses for the next school year—"Black & African American Studies," "Native American Indian Studies," and "Art & Ethnic Studies." These course offerings make it so that more of our students have the opportunity to see their families' stories represented in the curriculum. These new additions provide me hope, but this experience also showed me how there is a constant state of advocacy that ethnic studies teachers must have in addition to their regular responsibilities as an educator.

I want to emphasize that ethnic studies is not the silver bullet that's going to keep kids in school, but I think it can help. I think there are some students who are really drawn to it and for some reason those are the classes that they really enjoy. It's one potential solution out of many that needs to happen. But I think the true power of ethnic studies is in the stories and uncovering histories about ourselves and about our city. Our city, Stockton, has a lot of historical significance, and it also has a lot of trauma. There are so many problems that have happened and continue to happen. Unless we can look at it and really understand it, we're never



going to learn and grow from that. It was really cool for us to take these stories, for students to see: Hey, some of your neighbors are immigrants. They left from Mexico for this reason. Some of your neighbors are from Laos. They escaped because of U.S. involvement in the Vietnam War out there. It really humanized—for me, and for some of our students—the people around us. It helped us to better understand each other. That’s really what our class is about.

C. *Gloria Alonso: Edison High School Graduate*<sup>59</sup>

*Gloria Alonso was interviewed when she was a senior at the California State University of Sacramento, majoring in Geography (Metropolitan Area Planning). She grew up in Tijuana, Mexico, as the daughter of an Indigenous man from Michoacán and a woman from Oaxaca. Her family moved to the United States when Alonso was a teenager. She was one of the first students to participate in the Stockton us History after-school program while she attended Edison High School. The course helped her gain the confidence, social foothold, and self-advocacy skills she needed to learn English, transfer into general education courses, graduate from high school, and imagine herself going to college. She became a leader in formalizing ethnic studies courses throughout Stockton Unified School District. Alonso’s homeland experiences have shaped her advocacy around environmental issues, equitable land use, and immigration reform, and she now works as a Climate Water Advocate with Restore the Delta, a local nonprofit organization.*

I migrated in 2014 when I was fourteen years old from Tijuana, Baja California, in Mexico. My parents were economically distressed, so they had to migrate and we ended up landing in Stockton. After arriving in the community, I was really earnest to acquire education and just get myself enrolled, but my mom had very strong fears. So in my first few months of being in the United States, I worked in the fields with my mom, and I was okay. I was fine with that.

The person I was there and then was someone already forming beliefs. I remember vividly how I had always been exposed to immigration; within Tijuana there were a lot of asylum seekers and refugees. A lot of people there were not just there because economically induced displacement caused their migration from South America to Tijuana. There were also climate migrants, people that were coming from Haiti or other places like that.

In Stockton we were living in a shared house in one room that was also shared, in the most affordable neighborhood. People in the house had kids who went to school; Mom was encouraged to enroll me. When I finally convinced my mom to enroll me in the closest high school, Edison High School, we struggled because no one was there to speak in Spanish. So my first experience in a U.S. school was having straight-up language

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59. This section is an oral history told in the voice of Gloria Alonso. Interview with Gloria Alonso, Alumna, Edison High Sch., in Stockton, Cal. (Nov. 21, 2022) (on file with the *Columbia Law Review*).

barriers. Later on, we tried again. We took our papers from my schooling in Mexico, and I was able to translate them on Google (This isn't sponsored by Google!). We submitted those things, we filled out a form, and they returned with my schedule. I started my freshman year in late spring, a few months before the school year ended. My actual first day of school was just with a counselor who didn't speak Spanish. It was funny because later on down the road, when I graduated, this was the same counselor that told me I could not apply for financial aid to go to school, which was not true. It was like that.

I remember my first classes were the English Language Development (ELD) classes. First level ELD, Spanish, and I don't remember the other two classes. I was expected to learn English from someone that spoke only English. It was just really difficult those first years, like assimilating completely into what the education system was like and understanding that those were the structural barriers I would have to overcome. A lot of the staff were underqualified to teach migrant students.

It was really explicit to me that I had to level up in the ELD classes to make it out of ELD. I had to pass the standardized test to make it also out of the whole ELD category and access better developed classes, courses that would actually build capacity within me to pursue higher education. So after that first class, I remember I started to emphasize in every single task or assignment or interaction that I had with my teacher that I wanted to get out of ELD because I wanted to complete all my general education requirements and graduate on time—because I was already super behind!

In my sophomore year, one of my teachers was Mr. Sabac, a founding educator of us History. He was really eloquent, he was really passionate, he was really strict, but he was also really community oriented. And Mr. Sabac would go beyond his duties. He'd really connect with students. He would use his phone as a resource and literally translate whatever the students were saying to English and then give back the same energy to interact or create some kind of social education between all the students. I remember students would laugh and would say stuff in Spanish, bad words. Mr. Sabac would be culturally competent enough to say, "I know that's like a bad word. You shouldn't be doing that. You should be doing your work." He was someone who cared. I remember his classroom. He had a lot of posters around. He was really open about pursuing higher education. He was really proud of attending San Francisco State and UCLA and how community members within Stockton helped him get there.

My first interaction with ethnic studies was actually through a flyer! It was outside of Mr. Sabac's classroom. I actually remember explicitly and vividly the day that I walked out of the classroom and I was like, "Oh, Mr. Sabac, what is this?" And he was like, "It's an after-school program! We're meeting this week. It's our second meeting. You should come." Back then I didn't know how to speak English as fluently, but I still tried because I was craving a community and a sense of place.

At the first meeting we were a really energized group. But it made me sad that I couldn't say anything. [The us History educators] did an amazing job at bridging those gaps. Mr. Sabac was there so I had already had one educator I felt comfortable with. And then I met Nancy [Huante], and I was like "What?! There is a whole person that can teach Chicano culture, and Mexican culture, and connect it to the larger Hispanic culture—and she's fluent in Spanish?" So it was super easy to connect with her.

To understand my later education, there's an important story from my childhood. When I was living in Tijuana, I participated in a program with Save the Children to do a short documentary on something that we were interested in. And I chose immigration, so I went to the "wound," as some scholars call it,<sup>60</sup> the crossing between Tijuana and San Diego. You have various trains crossing, a lot of economic activity goes on there. You have a lot of people that are selling stuff without regulations, people that have literally just been deported, people that live in *el bargo*, which is a canal. I was ten years old, and we made a whole narrative out of it, and I ended up winning an award. It was really fun. It was interesting to record these experiences and learn something from it, but they're not your experiences. In hindsight, it's also kind of a narrative exploitation.

Ethnic studies is doing the complete opposite of narrative exploitation. It's as though, now you have this group of people who have suffered all this stuff, but how can we help them to put their lives into context and actually make sense of them under the structure that we live in?

I think when I first came here, I just understood Stockton as a place where I could rest my head after school. After joining ethnic studies, my perspective changed. I cared more about land use—understanding this whole critical perspective about social movements and how disadvantaged communities are affected by industrial zoning. It opened my eyes to how, because of the working conditions, employment opportunities, even climate conditions, people can no longer afford the community they live in—they're going to be displaced. In general, throughout all my schooling, I would have liked to be more explicit or have my educators be more explicit about place, especially because from a very, very young age that was important to me.

Now that I'm doing a lot of water justice work and understanding urban ecology, I see a lot of teaching from cultures that have been erased or oppressed. All community members have a cultural bond to their landscape. They learn about how the landscape works, and they put that to work in their daily lives. So when you talk about water justice, there are Indigenous tribes that have literally been the stewards of waterways for

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60. This term came originally from Gloria Anzaldúa, *Borderlands/La Frontera: The New Mestiza* 3 (1987) ("The U.S.-Mexican border *es una herida abierta* [is an open wound] where the Third World grates against the first and bleeds.").

millennia. They have learned how to take care of the environment. They have learned how to make it sustainable, prevent mass wildfires. If we can apply these concepts that people have developed over time into creating more sustainable infrastructure for the state and localities, that will be fairer. That's the work I want to do with my college degree.

#### CONCLUSION: ETHNIC STUDIES AS DESEGREGATION

With exceptional levels of racial and ethnic diversity and a student body that was overwhelmingly non-white, Stockton's ethnic studies leaders built a curriculum to celebrate and reflect the city's global heritage, to contextualize local inequality, and to humanize groups separated by barriers of language and other cultural differences. It was integration work in a deeper democratic sense: They were laying the foundation for future trust and cooperation in a diverse city. They were helping to break the intergenerational harms of segregation and racial inequality by freeing individuals to imagine they could draw courage, talent, and role models from all of Stockton's ancestors.

As it happens, the desegregation function of ethnic studies in Stockton is connected to the curriculum's history. In 1974, the Supreme Court in *Milliken v. Bradley* held that federal courts did not have the power to move school district boundaries to remedy a history of school and housing segregation.<sup>61</sup> Courts could, however, order states and school districts to invest in the life chances of children growing up in segregated, non-white districts.<sup>62</sup> For at least two decades, in school districts from Delaware to Indianapolis, from Minneapolis to Tucson, courts approved remedial desegregation orders that included funding for an ethnic studies curriculum and teacher training.<sup>63</sup> Courts understood this curriculum as

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61. 418 U.S. 717 (1974).

62. See *Milliken v. Bradley*, 433 U.S. 267, 294 & n.2 (1977) (Powell, J., concurring) (upholding a remedial order in a desegregation case in which the state was required to fund new educational opportunities for Detroit children, including "inclusion of 'multiethnic studies' in the curriculum, with a request for federal funds to support 'in-service training for teachers involved in such programs'" (quoting *Bradley v. Milliken*, 402 F. Supp. 1096, 1144 (E.D. Mich. 1975))); see also *Berry v. Sch. Dist. of City of Benton Harbor*, 515 F. Supp. 344, 374 (W.D. Mich. 1981), aff'd and remanded, 698 F.2d 813 (6th Cir. 1983) (ordering the Coloma and Eau Claire School Districts to adopt a policy monitoring and approving textbook selection to ensure "lack of racial bias and depicting black participation in all aspects of American learning, society and culture"); *Bradley*, 402 F. Supp. at 1144 ("Multi-ethnic studies are essential elements of the curriculum of any outstanding school system; desegregation serves only to emphasize the need for inclusion of these studies."). See generally M. Isabel Medina, *Silencing Talk About Race: Why Arizona's Prohibition of Ethnic Studies Violates Equality*, 45 *Hastings Const. L.Q.* 47 (2017) (examining the role of ethnic studies curriculum as a desegregation remedy, exploring the roots of Tucson's Mexican American Studies curriculum in the city's desegregation litigation history, and arguing for the virtues of ethnic studies in the context of racial inequality).

63. For Delaware, see *Evans v. Buchanan*, 582 F.2d 750, 771 (3d Cir. 1978) (affirming a district court's remedial order that curriculum "must preserve respect for the racial and ethnic backgrounds of all students" and "emphasize and reflect the cultural pluralism of

a deliberate remedy for segregation—a source of relief from the shame and hopelessness experienced by children of color raised in schools that were both poor and racially segregated. Scholar Richard Delgado captured this idea in plain terms:

For such a child, ethnic history and literature come as a tonic, for they supply reasons for her community's low estate. Nothing is wrong with her people. Their poverty, lack of cultural capital, and statistically low levels of achievement are the product of years of systematic suppression. With the burden of self-blame lifted, the child can dive into school and, learning with a strong heart, resolve to become knowledgeable and an agent for social change.<sup>64</sup>

The harms of segregation, the old cases held, could not be wished away—especially given that *de facto* racial segregation among school districts would continue. Majority-minority school districts unable to integrate with suburban, majority-white districts would instead need to draw more youth of color into the fold of education, helping them believe in themselves as agents of change. Describing the role of ethnic studies in desegregation cases, scholar M. Isabel Medina put it this way: “Ethnic identity, like any other group-based identity, historically has been used to denigrate, repress, and target; better, instead, to use it as a cause for celebration and as a way to maximize individual opportunity.”<sup>65</sup> Without the ability to desegregate the districts and children, in other words, courts turned to *integrating the curriculum* to include the literature, histories, and leaders from communities of color.

In the Stockton Unified School District, ethnic studies was built for similar purposes. It was never about rage or blame against white people. Ethnic studies in Stockton has been about education—learning the history

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the students”). For Indianapolis, see *United States v. Bd. of Sch. Comm’rs*, 506 F. Supp. 657, 672 (S.D. Ind. 1979), *aff’d in part, vacated in part*, 637 F.2d 1101 (7th Cir. 1980) (“History courses . . . which ignore the contribution of racial and ethnic groups are antithetical to the successful implementation of a . . . desegregation plan. . . . [A]ll schools should assess their curricular offerings for . . . bias. If present, this bias should be replaced by instruction which is in keeping with the goal of cultural pluralism.”). For Minneapolis, see Paula G. Forbes & James A. Cunningham, Jr., *Desegregation & the Minneapolis Public Schools*, 17 *Hamline J. Pub. L. & Pol’y* 209, 214 (1996) (describing a remedial desegregation order in Minneapolis requiring curricula and programs, such as ethnic studies, as well as “multi-ethnic learning materials”). For Tucson, see *Fisher v. Tucson Unified Sch. Dist.*, 329 F. Supp. 3d 883, 952 (D. Ariz. 2018) (quoting the 2013 desegregation order’s mandate to “develop and implement culturally relevant courses of instruction designed to reflect the history, experiences, and culture of African American and Mexican American communities” as a strategy to improve student achievement); *González v. Douglas*, 269 F. Supp. 3d 948, 950–51 (D. Ariz. 2017) (describing the 1974 school desegregation case brought by Latino and Black students against Tucson Unified School District, which became the *Fisher* case, leading to a remedial consent decree and thus the district’s 1998 implementation of a Mexican American Studies (MAS) program intended to help close the achievement gap between Mexican American and white students).

64. Delgado, *supra* note 13, at 1538.

65. Medina, *supra* note 62, at 90–91.

of high school students' families, the backstories of their neighbors' families, the origins of their neighborhood environments, mechanisms of activism and democracy, and the power to create change across generations. It has carried forth Stockton's broader, truer history—not just as a Gold Rush town, but as a jewel of American diversity. “Little Manila and the Filipino American story is one of activism and people fighting for their rights,” says Delvo. “It’s panning for gold. That’s the real El Dorado. The gold is our history.”<sup>66</sup> The classrooms Delvo helped to build found gold in the voices and writings of Stockton's global ancestors, whether rooted in Mexico or Cambodia, the Black South or the Native tribes of California, or dozens of points beyond.

At “us History” sessions and other youth gatherings in Stockton, former Stockton Mayor Michael Tubbs sometimes described how he felt in seventh grade when he read a poem by Tupac Shakur about a rose that grew from concrete.<sup>67</sup> It gave him courage to think that he could grow that way, too. Tubbs recited the poem to call forth his city's next generation of roses:

Did you hear about the rose  
that grew from a crack in the concrete?  
Proving nature's laws wrong,  
It learned to walk without having feet.  
Funny it seems, but by keeping its dreams,  
It learned to breathe fresh air.  
Long live the rose that grew from concrete  
When no one else even cared!<sup>68</sup>

Ethnic studies has helped a new generation of Stockton youth imagine that they can grow and thrive despite adversity. In a video celebrating that curriculum with a series of “I am” messages about the speaker's families and the resilience and activism in their diverse communities' histories, a high school student named Nikki Chan cracked a joke—a loving reference to her region's most celebrated crop. “I am,” Chan began before a comic pause followed by laughter, “The asparagus that grew from concrete.” Stockton's future will rely on all of its seedlings breaking through, each one softening the earth for those coming behind.

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66. Anderson, *Fight to Save the Town*, supra note 19, at 43–44; Interview with Dillon Delvo, supra note 5.

67. See, e.g., Jake Lamarra, *Rose That Grew From Concrete*, StaggOnline (Oct. 29, 2010), <https://staggonline.net/student-life/rose-that-grew-from-concrete/> [<https://perma.cc/4QAF-PQA5>].

68. Tupac Shakur, *The Rose That Grew From Concrete*, in *The Rose That Grew From Concrete* 3 (1999).

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