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Monopolizing Whiteness

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Erika K. Wilson

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Erika K. Wilson[*]

In racially diverse metropolitan areas throughout the country, school district boundary lines create impermeable borders, separating affluent and predominantly white school districts from low-income, predominantly nonwhite school districts. The existence of predominantly white and affluent school districts in racially diverse metropolitan areas has material consequences and symbolic meaning. Materially, such districts receive greater educational inputs such as higher per-pupil spending, higher teacher quality, and newer facilities than their neighboring more racially diverse districts. Symbolically, owing to the material and status-based value attached to whiteness, the districts are also viewed as elite, which creates a magnetic effect that draws white affluent families.

Despite the material consequences and symbolic meaning of maintaining predominantly white school districts, a limited amount of scholarship addresses racial segregation in schools from the vantage point of white students. This Article fills that void in the school-desegregation legal literature. It analyzes white-student segregation through a sociological framework called social closure, a process of subordination whereby one group monopolizes advantages by closing off opportunities to other groups. This Article argues that the laws surrounding school district boundary lines enable white students in racially diverse metropolitan areas to engage in social closure and to monopolize high-quality schools.

This Article further suggests that equal protection doctrine, the doctrine traditionally used to address racial segregation in schools, cannot capture the monopolization harms caused by white-student segregation. Therefore, it looks to antitrust law for guidance. It demonstrates how principles from antitrust's essential facilities doctrine can help conceptualize and remedy the monopolization harms caused by white-student segregation in racially diverse metropolitan areas.

[W]hites do not see or interpret their own racial segregation and isolation as a racial issue at all.
— Eduardo Bonilla-Silva[1]

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[1] EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 133 (5th ed. 2018).

INTRODUCTION

In pockets of racially diverse metropolitan areas across the country, white students are geographically separated from nonwhite students, walled off not just in racially homogenous individual schools but within entire school districts.[2] The City of Mountain Brook, Alabama, a suburb of Birmingham, provides an illustrative example. Fewer than five miles separate Birmingham and Mountain Brook.[3] Yet the Mountain Brook school district is 96% white,[4] while the neighboring Birmingham City school district is around 70% Black.[5] Most of the students in the Birmingham City school district are classified as low income with 65% of them qualifying for free and reduced lunch.[6] In the Mountain Brook school district, fewer than 1% of the students qualify for free and reduced lunch.[7] The dissonance between the racial and socioeconomic makeup of the Birmingham and Mountain Brook school districts is not an anomaly. Similar disparities exist between neighboring school districts throughout the country.[8]

Historical and continued patterns of racial discrimination result in money, social capital, and access to power being aligned in favor of those raced as white.[9] Consequently, the clustering of whites together in pub-

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[2] *See* Myron Orfield, Milliken*,* Meredith*, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 433–36 (2015) (describing how patterns of white flight in racially diverse metropolitan areas lead to predominantly white school districts in racially diverse metropolitan areas).

[3] Distance Between Birmingham, Alabama and Mountain Brook, Alabama, GOOGLE MAPS, https://goo.gl/maps/T8iY4wk8tgFTcyaW8 [https://perma.cc/JU43-LYJW] (right click on "Birmingham"; then click "Measure distance"; then click on "Mountain Brook").

[4] *Mountain Brook School District*, *AL*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/Programs/Edge/ACSDashboard/0102490 [https://perma.cc/8NAS-KUUT].

[5] *Birmingham City School District*, *AL*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/Programs/Edge/ACSDashboard/0100390 [https://perma.cc/L5DV-U947].

[6] *Fall Free Lunch: 2018–2019*, ALA. STATE DEP'T OF EDUC., https://www.alsde.edu/dept/data/Pages/freelunch-all.aspx [https://perma.cc/54TQ-ATHJ] (select "2018–2019"; then select "2018-2019 Fall Free Lunch (by System-School)") (displaying free and reduced lunch data for Birmingham City).

[7] *Id.*

[8] *See generally* JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA (2011) (chronicling the ways in which demographic disparities between neighboring school districts lead to educational disparities between neighboring school districts); Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1425–50 (2014) (arguing that the combination of metropolitan fragmentation and localism in public education leads to the exclusion of poor and minority students from access to high-quality school districts, which are largely clustered in more affluent and predominantly white localities).

[9] *See, e.g.*, Stephen J. Caldas & Linda Cornigans, *Race/Ethnicity and Social Capital Among Middle- and Upper-Middle-Class Elementary School Families: A Structural Equation Model*, SCH. CMTY. J., Spring/Summer 2015, at 137, 137 ("Black, Hispanic, and mixed-race family status is associated with significantly diminished Total Social Capital, both directly and indirectly via socioeconomic status."); Sarah Mervosh, *How Much Wealthier Are White School Districts than*

lic school districts within racially diverse metropolitan areas has material consequences and symbolic meaning. One immediate material consequence relates to the distribution of educational inputs and outcomes. School districts that enroll predominantly white student bodies are more likely to have high-quality educational inputs like highly qualified teachers, rigorous classes, and new physical facilities.[10] They are also more likely to produce better educational outcomes such as high test scores, graduation rates, and college acceptance rates.[11]

White-student segregation imposes significant costs. Most notably, it impedes the democratic goals of public education and the overall health of the American democracy. Public education is often tabbed as the great equalizer.[12] It is supposed to provide a vehicle through which anyone can obtain social mobility and the skills necessary to participate effectively in the American democracy.[13] When white students cluster together in public schools, it creates school-based economies of agglomeration.[14] Examples of the agglomeration benefits include an increased

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Nonwhite Ones? $23 Billion, Report Says, N.Y. TIMES (Feb. 27, 2019), https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html [https://perma.cc/VB6Q-5CZC] ("School districts that predominantly serve students of color received $23 billion less in funding than mostly white school districts in the United States in 2016, despite serving the same number of students . . . .").

[10] *See, e.g.*, FRANK ADAMSON & LINDA DARLING-HAMMOND, STANFORD CTR. FOR OPPORTUNITY POL'Y IN EDUC., ADDRESSING THE INEQUITABLE DISTRIBUTION OF TEACHERS: WHAT IT WILL TAKE TO GET QUALIFIED, EFFECTIVE TEACHERS IN ALL COMMUNITIES 1 (2011), https://edpolicy.stanford.edu/sites/default/files/publications/addressing-inequitable-distribution-teachers-what-it-will-take-get-qualified-effective-teachers-all-_1.pdf [https://perma.cc/L2W5-CFXM] ("By every measure of qualifications — certification, subject matter background, pedagogical training, selectivity of college attended, test scores, or experience — less qualified teachers tend to serve in schools with greater numbers of low-income and minority students."); Jeannie Oakes, Adam Gamoran & Reba N. Page, *Curriculum Differentiation: Opportunities, Outcomes, and Meanings*, *in* HANDBOOK OF RESEARCH ON CURRICULUM 570, 589 (Philip W. Jackson ed., 1992).

[11] *See* Alana Semuels, *Good School, Rich School; Bad School, Poor School*, THE ATLANTIC (Aug. 25, 2016), https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333 [https://perma.cc/S3VN-U878] (describing lower academic success rates for poor and predominantly minority school districts in comparison to wealthier, predominantly white districts in Connecticut).

[12] *See, e.g.*, HORACE MANN, THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN 87 (Lawrence A. Cremin ed., 1957) ("Education, then, beyond all other divides of human origin, is the great equalizer of the conditions of men — the balance-wheel of the social machinery.").

[13] *See* David F. Labaree, *Public Goods, Private Goods: The American Struggle over Educational Goals*, 34 AM. EDUC. RSCH. J. 39, 41 (1997) (articulating the goals of American public education as democratic equality, social efficiency, and social mobility).

[14] This Article uses the term "economies of agglomeration" as it is used in the urban-economics context to mean material benefits that accrue when firms in the same industry locate next to one another. *See* G.S. Goldstein & T.J. Gronberg, *Economies of Scope and Economies of Agglomeration*, 16 J. URB. ECON. 91, 91 (1984) (defining economies of agglomeration as "concentration[s] of economic activity" where "spatial proximity of activities makes resources more efficient than if such activities are spatially dispersed").

ability to attract high-quality teachers, concentrated pools of middle-class and affluent students with greater social and political capital, and greater per-pupil funding.[15] The agglomeration effects not only advantage students in the predominantly white and affluent districts, but they also disadvantage students in the neighboring, predominantly low-income and nonwhite districts.[16] The net effect is to allow students in predominantly white school districts to hoard the best educational opportunities.

Despite the significant consequences of white-student segregation, much of the legal literature on racial segregation in schools focuses on students of color and the ways in which they are harmed by school segregation.[17] A limited amount of scholarship considers the meaning and consequences of racial segregation in schools for white students.[18] A significant consequence of failing to critically examine white-student

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[15] *See* Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access,* 53 B.C. L. REV. 373, 403 (2012) (describing the benefits that middle-class students bring to public schools); *cf.* Ming Ming Chiu & Lawrence Khoo, *Effects of Resources, Inequality, and Privilege Bias on Achievement: Country, School, and Student Level Analyses*, 42 AM. EDUC. RSCH. J. 575, 591–92 (2005) (finding that unequal distribution of school resources also significantly reduced students' test scores).

[16] *See, e.g.*, Ann Owens, *Income Segregation Between School Districts and Inequality in Students' Achievement*, 91 SOCIO. EDUC. 1, 18 (2018) ("Children from advantaged families accumulate additional resources in segregated places because their families can access the most advantaged contexts. . . . [S]egregation has trade-offs — it may benefit advantaged families and harm disadvantaged families." (citation omitted)).

[17] Michael Heise, Brown v. Board of Education*, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 297 (2005) ("[P]ost-*Brown* de facto school segregation litigation focused on educational harms to minority students flowing from attending racially isolated schools."); *see, e.g.*, Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 121 (2009) (describing the harms of racially segregated schools and arguing that "[b]ecause race is a dominant factor in the unwillingness of parents and teachers to choose high-minority and high-poverty schools, changing the racial identity of schools is effectively a predicate to delivering equitable and quality educational opportunities to many minority children"); Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 327–36 (2009) (documenting the harms to minority students of racially isolated schools and noting that for minority students "racially isolated schools offer inferior educational opportunities and produce inferior outcomes," *id.* at 328); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 284 (1999) (examining the monetary and nonmonetary costs of racially segregated schools for minority students and noting that "[b]ecause minority students are disproportionately poor, racial isolation and socioeconomic isolation (or isolation by class) typically go hand in hand, and race and class clearly interact in the creation and pathology of urban schools").

[18] *See, e.g.*, Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 GEO. J. ON POVERTY L. & POL'Y 1, 19–26 (2008) (describing sociological literature on the impact of race on parental choice in schools and noting that white parents look for schools with few numbers of African Americans); Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 600 (2011) (describing the benefits of racially diverse environments for white students); Erika K. Wilson, *The New White Flight*, 14 DUKE J. CONST. L. & PUB. POL'Y 233, 253–56 (2019) (analyzing the ways in which white parents end up choosing predominantly white schools for their children).

segregation is that it leads to white-student segregation being situated as a process that occurs passively and inadvertently rather than actively and intentionally. Situating white-student segregation as the result of passive and inadvertent processes diminishes the political will to address the issue through policy prescriptions. It also obscures the role of the state in facilitating white-student segregation, thereby limiting the ability of courts to intervene as a matter of law. Simply put, white-student segregation is normalized as an issue for which no political or legal solution is necessary or possible.

This Article takes on the task of critically examining the problem of white-student segregation in racially diverse metropolitan areas. Part I utilizes a sociological framework called social closure to proffer a theory for why white-student segregation persists. Social closure is a dynamic process of subordination in which a dominant group, aided by the state, secures advantages by utilizing exclusionary practices to monopolize scarce resources.[19] This Part analyzes the ways in which white-student segregation is a product of social closure. It argues that laws and policies surrounding school district boundary lines facilitate social closure and allow predominantly white school districts to monopolize high-quality schools.[20] It concludes by demonstrating the ways in which equal protection doctrine falls short of reaching the monopolization harms caused by white-student segregation.

Part II makes a normative argument for turning to a private law framework — antitrust law and the essential facilities doctrine — for guidance. It suggests that the essential facilities doctrine offers a valuable framework through which one can both conceptualize and remedy

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[19] RAYMOND MURPHY, SOCIAL CLOSURE: THE THEORY OF MONOPOLIZATION AND EXCLUSION 8 (1988).

[20] What constitutes a high-quality school is difficult to quantify. This Article uses the term "high-quality schools" to mean schools that have highly qualified teachers, rigorous curricular offerings, well-maintained physical facilities, and high levels of student achievement. Each of these measures is recognized as an important component in assessing the quality of education offered by schools to students. *See, e.g.*, MARISA CANNATA ET AL., THE NAT'L CTR. ON SCALING UP EFFECTIVE SCHS., REACHING FOR RIGOR: IDENTIFYING PRACTICES OF EFFECTIVE HIGH SCHOOLS 45–49 (2013), https://files.eric.ed.gov/fulltext/ED561267.pdf [https://perma.cc/HTU6-4YGH] (defining a rigorous curriculum as one that "[is] intellectually challenging, covers broad and deep content, and prepares students for college and careers," *id.* at 45, and noting the connection between such a curriculum and high-value schools); Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, EDUC. POL'Y ANALYSIS ARCHIVES, January 1, 2000, at 1, 1 (describing the importance of highly qualified teachers and summarizing findings from a fifty-state survey that showed a correlation between highly qualified teachers and student outcomes); MARK SCHNEIDER, NAT'L CLEARINGHOUSE FOR EDUC. FACILITIES, DO SCHOOL FACILITIES AFFECT ACADEMIC OUTCOMES? 16 (2002), https://files.eric.ed.gov/fulltext/ED470979.pdf [https://perma.cc/W4HK-J2QM] (summarizing research findings and noting that "school facilities affect [student] learning").

the monopolization harms caused by white students congregating in predominantly white school districts.[21]

Part III analyzes the problem of predominantly white school districts in racially diverse metropolitan areas monopolizing high-quality schools. It illustrates how the essential facilities framework would capture the monopolization harms wrought by such districts in ways that the equal protection doctrine cannot. Part IV concludes the Article.

I. WHITE-STUDENT SEGREGATION AND SOCIAL CLOSURE

Segregation (and white flight) is like a painkiller, providing instant relief for families looking to avoid diversity . . . .

— Rucker C. Johnson[22]

Schools that enroll racially diverse student bodies provide tangible benefits to all students, including white students.[23] White students who attend racially diverse schools have access to "more robust classroom discussions, the promotion of critical thinking and problem-solving skills and higher academic achievement."[24] Attending racially diverse schools is especially important for white students because, on average, they are more likely to reside in racially segregated neighborhoods where they have limited contact with meaningful numbers of people of color.[25] The lack of contact with people of color deprives white students of valuable skills that are "important for living and working in a pluralistic diverse democracy."[26]

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[21] This Article builds upon the prior work of scholars who approach racial inequality from an antitrust perspective. *See, e.g.*, Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 134 (1994); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 731–32 (2000).

[22] RUCKER C. JOHNSON WITH ALEXANDER NAZARYAN, CHILDREN OF THE DREAM: WHY SCHOOL INTEGRATION WORKS 53 (2019).

[23] *See* THE CENTURY FOUND., THE BENEFITS OF SOCIOECONOMICALLY AND RACIALLY INTEGRATED SCHOOLS AND CLASSROOMS 1 (2019), https://production-tcf.imgix.net/app/uploads/2016/02/26171529/Factsheet_Benefits_FinalPDF.pdf [https://perma.cc/K6C4-XWC4] ("[R]acial and socioeconomic diversity in the classroom can provide students with a range of cognitive and social benefits.").

[24] *See* GENEVIEVE SIEGEL-HAWLEY, THE NAT'L COAL. ON SCH. DIVERSITY, HOW NONMINORITY STUDENTS ALSO BENEFIT FROM RACIALLY DIVERSE SCHOOLS 1–2 (2012), https://www.school-diversity.org/pdf/DiversityResearchBriefNo8.pdf [https://perma.cc/CKB4-FV66].

[25] *See, e.g.*, John Iceland & Gregory Sharp, *White Residential Segregation in U.S. Metropolitan Areas: Conceptual Issues, Patterns, and Trends from the U.S. Census, 1980 to 2010*, 32 POPULATION RSCH. POL'Y REV. 663, 682 (2013) ("White isolation from others is considerably higher than the isolation experienced by other racial/ethnic groups. . . . Whites continue to live in predominately White neighborhoods, while minority groups live in areas characterized by more diversity.").

[26] AMY STUART WELLS ET AL., THE CENTURY FOUND., HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS 27 (2016) (internal

Despite the ways in which racially diverse schools benefit all students, including white students, white students located in racially diverse metropolitan areas continue to enroll in predominantly white school districts. White students make up 48% of the students enrolled in public schools.[27] Yet, in 2016, the average white student attended a school in which 69% of their peers were also white, 8% of their peers were Black, nearly 14% were Latino, and 4% were Asian.[28] Research shows that white parents are likely to seek out schools that are predominantly white.[29] Of all racial and ethnic groups, white students are the most segregated within public schools in many racially diverse metropolitan areas.[30]

When queried, many white parents suggest that racial diversity in schools is important to them.[31] To the extent that white parents espouse support for racially diverse schools and their stated support is taken at face value, the persistence of white-student segregation is paradoxical. A critical first step in addressing the paradox of white-student racial segregation is to construct an appropriate theoretical account for why white-student segregation persists. Constructing such an account is important because the theory influences the policy decisions that are — or are not — made.

To that end, this Part looks to a sociology-based theory called social closure to provide a lens through which to analyze the persistence of white-student racial segregation. It provides context for what social closure is and how it occurs. It then suggests that both de jure segregation and race-neutral laws facilitate forms of social closure that enable white students to situate themselves in predominantly white school districts that monopolize high-quality schools. It concludes by making a normative argument as to the democratic and public-policy harms of white-student segregation.

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quotation marks omitted), https://production-tcf.imgix.net/app/uploads/2016/02/09142501/HowRaciallyDiverse_AmyStuartWells-11.pdf [https://perma.cc/7WKD-MVT6].

27 ERICA FRANKENBERG ET AL., THE C.R. PROJECT, HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER *BROWN* 10 (2019), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf [https://perma.cc/NV2M-4CNE].

28 *Id.* at 22.

29 *See* DeJarnatt, *supra* note 18, at 19–26 (describing sociological literature on the impact of race on parental choice in schools and noting that white parents look for schools with few numbers of African Americans).

30 *See* FRANKENBERG ET AL., *supra* note 27, at 4 ("White and Latino students are the most segregated groups. White students, on average, attend a school in which 69% of the students are white, while Latino students attend a school in which 55% of the students are Latino.").

31 *See, e.g.*, PHI DELTA KAPPA INT'L, THE 49TH ANNUAL PDK POLL OF THE PUBLIC'S ATTITUDES TOWARD THE PUBLIC SCHOOLS K6 (2017) (querying parents on attitudes toward diversity in public schools and finding that 48% of whites described racial and ethnic diversity in schools as being highly important).

A. Defining Social Closure

Professor Max Weber coined the term social closure "to refer to the process of subordination whereby one group monopolizes advantages by closing off opportunities to another group of outsiders[,] . . . which it defines as inferior and ineligible."[32] Social closure occurs when there is competition for scarce resources such as power, prestige, or material wealth.[33] It involves the construction of an in-group and an excluded group. In-groups are likely to form when individuals see an advantage in identifying and competing for resources as a collective.[34] The in-group members often see themselves as socially similar in ways that limit their desire to associate with the excluded group.[35] The success of social closure depends upon clearly defining membership in the in-group and policing the sanctity of the in-group's boundaries.[36]

The excluded group, on the other hand, is often constructed and created because of its otherness. Otherness is usually defined by visible markers such as race, ethnicity, gender, religion, or language.[37] Weber particularly noted the possibility for closure to exist based on race or ethnicity.[38] During the social-closure process, the in-group works to curtail the excluded group from competing for scarce resources.[39] It does so by adopting policies, practices, or cultural norms that favor the in-group and disfavor the excluded group.[40] Social closure results in exclusive opportunities for in-group members to compete for scarce resources.[41] In-group members can consequently monopolize scarce resources by restricting the excluded group's ability to compete for such resources.[42]

Critically, the state plays a vital role in facilitating and reifying the mechanisms that lead to social closure.[43] The state's role is particularly predominant in terms of the creation, reification, and policing of in-

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[32] MURPHY, *supra* note 19, at 8.

[33] *Id.* at 8–12.

[34] *Id.* at 12.

[35] MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 390 (Guenther Roth & Claus Wittich eds., 1968) ("Their similarity rests on the belief in a specific honor of their members, not shared by the outsiders . . . .").

[36] *See id.*

[37] *See id.* at 342.

[38] *See id.* at 385–93.

[39] *See* MURPHY, *supra* note 19, at 9–10.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See* Catherine Albiston & Tristin K. Green, *Social Closure Discrimination*, 39 BERKELEY J. EMP. & LAB. L. 1, 5 (2018) (noting that "the process of social closure creates an 'interest group' that pursues advantage through boundary drawing and exclusion, sometimes in conjunction with the state").

group boundaries.[44] The state institutionalizes categorization of the in-group and aids in exclusion in ways that enable the in-group to maximize its advantage by restricting access for others.[45] Indeed, the in-group engaged in closure often takes on a legally privileged status that protects it from competition.[46] The in-group is therefore aided by the power of the state in both determining in-group membership and policing the boundaries of the in-group. The purpose of such construction and policing of boundaries is "always the closure of social and economic opportunities to *outsiders*."[47]

Professor and sociologist Frank Parkin expanded on Weber's social-closure framework by distinguishing between two types of social closure: exclusionary and usurpationary, both of which are methods of mobilizing power in order to enhance or defend a group's share of resources.[48] Exclusionary closure is an attempt by the dominant group to "secure for itself a privileged position at the expense of some other group through a process of subordination."[49] It involves the dominant in-group closing off opportunities to the excluded group. An example of exclusionary closure is explicitly race-based hiring practices whereby employers open jobs only to members of one race.[50]

Usurpationary closure, on the other hand, is a countervailing action by the excluded or subordinated group.[51] It occurs when the excluded group exercises power in an upward manner to cut into the share of the resources that the dominant group is monopolizing.[52] An example of

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[44] *Id.* at 5–6.

[45] MARA LOVEMAN, NATIONAL COLORS: RACIAL CLASSIFICATION AND THE STATE IN LATIN AMERICA 3 (2014) ("Categorical identification of segments of the population is central to modern bureaucratic administration, which is, according to Max Weber, the definitive and irreplaceable foundation of the modern state's exercise of legal-rational domination.").

[46] WEBER, *supra* note 35, at 342 (commenting on the way in which the dominant group has a "growing tendency to set up some kind of association with rational regulations . . . [that] they can influence . . . [and use to] establish a legal order that limits competition through formal monopolies"); *see, e.g.*, William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 LAW & SOC. INQUIRY 547, 555 (2004) (examining rising state bar regulations through the lens of social closure and suggesting that a state raised the standards needed to pass the bar exam "as an anticompetitive response to a perception that there was an excess supply of lawyers or insufficient demand for legal services").

[47] WEBER, *supra* note 35, at 342.

[48] *See* MURPHY, *supra* note 19, at 10.

[49] FRANK PARKIN, MARXISM AND CLASS THEORY: A BOURGEOIS CRITIQUE 45 (1979).

[50] *See id.*; Albiston & Green, *supra* note 43, at 16 (describing as an example of exclusionary closure the hiring practices at issue in the seminal case *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), whereby prior to the passage of the 1964 Civil Rights Act, Duke Power excluded Black employees from certain departments and had an all-white workforce in those departments).

[51] *See* PARKIN, *supra* note 49, at 45.

[52] *Id.*

usurpationary closure is the use of boycotts by African Americans as a means of obtaining racial equality.[53]

The two forms of closure are connected: usurpationary closure is a result of and response to exclusionary closure. Both forms of social closure can be perpetuated through formal institutional arrangements such as rules or regulations that control who is invited to be a member of the dominant group.[54] They can also "produce[] and capitalize[] on seemingly group-neutral rules" that work to favor the in-group.[55] Further, the social-closure processes that are used to monopolize scarce resources by the dominant group may morph over time to be in line with societal norms.

Notably, social closure is most likely to occur when a resource is perceived as scarce.[56] Scarcity is often socially constructed, generated by a desire to maintain "quality which is often combined with [an] interest in prestige."[57] Put another way, a desire for special social honor generates perceptions of scarcity.[58] Perceptions of scarcity then lead to exclusion that facilitates monopolization of the resource perceived as scarce. Thus, scarcity is both a product of closure and the motivation for closure. It produces a self-fulfilling cycle.

In a nutshell, social closure is a theoretical framework that allows one to analyze domination and exclusion by an in-group and the countervailing response to such exclusion by a subordinated group. As the section that follows demonstrates, social closure is an apt framework to analyze both past and modern racial segregation of white students in public schools.

B. Social Closure and Racial Segregation in Public Schools: Monopolies

Social closure has been used by legal scholars to examine the basis for racial segregation and inequality in areas such as employment, housing, higher education, and professional credentialing.[59] Legal scholars

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[53] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982) (finding that a boycott of white merchants in Mississippi initiated by the NAACP and its members in order to secure compliance with demands for equality and racial justice "clearly involved constitutionally protected activity"); Andre L. Smith, *Boycotts, Black Nationalism, and Asymmetrical Market Failures Relating to Race*, 56 HOW. L.J. 891, 902–06 (2013) (arguing for the use of boycotts as a means of obtaining racial economic justice for Black people).

[54] Albiston & Green, *supra* note 43, at 5–6.

[55] *Id.* at 6.

[56] *See* MURPHY, *supra* note 19, at 9.

[57] WEBER, *supra* note 35, at 46.

[58] *See id.*

[59] *See, e.g.*, Albiston & Green, *supra* note 43, at 5–6 (applying Weberian model of social closure to employment discrimination in the workplace); Deborah L. Brake, *Coworker Retaliation in the #MeToo Era*, 49 U. BALT. L. REV. 1, 8–9 (2019) (explaining that coworker retaliation to a report of sexual harassment is an example of social closure in the employment setting); Stacy Hawkins, *Race-*

have also utilized social-closure theory in describing inequalities in policing and the environment.[60] This section adds to the work done by legal scholars in introducing the concept of social closure to the legal literature. It also adds to the work done by sociologists in examining the link between social closure and racial segregation in public schools.[61] It does so by applying the framework to racial segregation in K-12 public education. It begins by examining the ways in which high-quality public schools are situated as a scarce resource. It then examines the ways in which white students are situated as members of the in-group. It suggests that state-sanctioned school-assignment policies facilitate the exclusion of nonwhite students from high-quality schools, which then enables white students to monopolize those schools.

1. Scarcity. — The starting point in applying the social-closure framework to K-12 public schools is situating public education as a scarce resource. Education is a credential used to determine both economic and social standing.[62] While a free primary and secondary public education is made available to students in all fifty states, school quality

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Conscious Admissions Plans: An Antidote to Educational Opportunity Hoarding?, 42 J. COLL. & U.L. 151, 157 (2017) (discussing social closure as a means of "categorial inequality," a "process by which scarce resources are allocated unequally across social groups" (quoting DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 7 (2007))); Kidder, *supra* note 46, at 548–49 (applying social-closure framework to more stringent bar-examination requirements); Christopher C. Ligatti, *Max Weber Meets the Fair Housing Act: "Life Chances" and the Need for Expanded Lost Housing Opportunity Damages*, 6 BELMONT L. REV. 78, 84–87 (2018) (applying Weber's "life chances" analysis to opportunities in housing and in doing so explaining in part "how privileged groups reduce the opportunities of others," *id.* at 86); Joseph A. Seiner, *The Discrimination Presumption*, 94 NOTRE DAME L. REV. 1115, 1135 (2019) (referencing a study that showed social-closure discrimination was more common in workplaces where the organizations and policies allowed it); Hilary Sommerlad, *Minorities, Merit, and Misrecognition in the Globalized Profession*, 80 FORDHAM L. REV. 2481, 2511–12 (2012) (applying social-closure framework to legal profession). *But cf.* Jeremy Fiel, *Closing Ranks: Closure, Status Competition, and School Segregation*, 121 AM. J. SOCIO. 126, 158–59 (2015) (theorizing racial segregation in schools as a function of social closure and analyzing its relationship to racial composition, resource scarcity, and school decentralization).

60 *See, e.g.*, Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2114–15 (2017) (using the term "legal closure" when applying the ideas of social closure to law enforcement); Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 714 & n.31 (2019) (noting the similarities between "symbolic violence," "social closure," and "opportunity hoarding" while describing police violence experiences by young Black people in Baltimore (quoting P. Bourdieu, *Symbolic Power*, 4 CRITIQUE OF ANTHROPOLOGY 77, 80 (1979))); Geoff Ward, *Microclimates of Racial Meaning: Historical Racial Violence and Environmental Impacts*, 2016 WIS. L. REV. 575, 612 (describing social closure, microaggressions, and implicit bias as examples of "subtle acts" that are illustrative of racial violence).

61 *See* Fiel, *supra* note 59, at 158.

62 *See, e.g.*, RANDALL COLLINS, THE CREDENTIAL SOCIETY: AN HISTORICAL SOCIOLOGY OF EDUCATION AND STRATIFICATION 140–45 (2019) (describing the increased importance and value of education credentials in the United States and the conditions that led to their increased importance); Labaree, *supra* note 13, at 39 (arguing that the increased importance of education in facilitating social mobility is reshaping education into a commodity for the purposes of status attainment).

varies dramatically.[63] Indeed, public education in America contains markers that allow for horizontal differentiation between schools.[64] Stated differently, while America offers a system of free public education for all students, not all students receive the same quality of education. Horizontal differentiation in school quality occurs through a variety of methods, including but not limited to ability grouping or tracking within classrooms, differences in the rigor of the curriculum, and differences in the facilities and educational inputs, such as teachers, made available to students.[65] Given the reality of horizontal differentiation between schools, parents often attempt to obtain access to the highest-quality public schools. Those who can, do so through their choice in residential location.

Professor Charles Tiebout's theory of local expenditures hypothesizes that localities are engaged in an interjurisdictional competition for residents.[66] School differentiation serves as a critical component in the interjurisdictional competition. Residents often choose where they want to live based on the quality of the schools in the locality.[67] Differentiation in school quality is in turn capitalized into housing prices such that there are barriers to access the highest-quality schools.[68] A home located in a school district considered to have high-quality schools will see a significant value increase of up to twenty percent.[69] Indeed, research

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[63] *See, e.g.*, RYAN, *supra* note 8, at 173.

[64] *See* Fiel, *supra* note 59, at 129–30; Hawkins, *supra* note 59, at 159 ("Although we have long provided a universal system of K-12 public education, these educational opportunities are not all created equally.").

[65] *See* Maureen T. Hallinan, Commentary, *Tracking: From Theory to Practice*, 67 SOCIO. EDUC. 79 (1994).

[66] *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419–20 (1956).

[67] *See, e.g.*, Michele Lerner, *School Quality Has a Mighty Influence on Neighborhood Choice, Home Values*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/realestate/school-quality-has-a-mighty-influence-on-neighborhood-choice-home-values/2015/09/03/826c289a-46ad-11e5-8ab4-c73967a143d3_story.html [https://perma.cc/AQZ7-ZBPZ] (describing the way that school quality influenced homeowners' choices of where to buy a home).

[68] *See* WILLIAM A. FISCHEL, MAKING THE GRADE: THE ECONOMIC EVOLUTION OF AMERICAN SCHOOL DISTRICTS 14 (2009) (noting that school district boundary lines are "the most important single determinant of home values in metropolitan areas as disparate as Dallas and Cleveland" (citation omitted)); Wallace E. Oates, *On Local Finance and the Tiebout Model*, 71 AM. ECON. REV. 93, 94 (1981) (suggesting that "fiscal differentials across neighboring jurisdictions tend to become capitalized into property values").

[69] FISCHEL, *supra* note 68, at 3 ("A house built on the favorable side of a school district line may have its value enhanced by 10 or 20 percent . . . ."); *see also* JONATHAN ROTHWELL, BROOKINGS INST., HOUSING COSTS, ZONING, AND ACCESS TO HIGH-SCORING SCHOOLS 14 (2012), https://www.brookings.edu/wp-content/uploads/2016/06/0419_school_inequality_rothwell.pdf [https://https://perma.cc/FZZ7-98QJ] (finding that housing near the highest-scoring schools is 2.4 times as expensive as near the lowest-scoring schools and that "[t]he median home near top-scoring schools has 1.5 additional rooms and the share of rental units is roughly 30 percentage points lower, compared to homes in the neighborhoods of low-scoring schools").

suggests school quality can positively or negatively impact a home's value.[70] Thus, the tether between home prices and school quality means that when parents are buying homes, they are also essentially buying access to schools. This distinctive feature makes public education in America a "quasi-public good," subject to the principles of semi-rivalrousness and exclusiveness, which generate scarcity.[71]

Importantly, scarcity of high-quality schools is not inevitable. Scarcity is socially constructed due to states' reliance upon geographically based school-assignment policies, which have well-known race- and class-based exclusionary effects.[72] Schools in high-income, predominantly white areas are perceived as exclusive or as bestowing special honor on those who can move into a high-income area and attend those schools.[73] Such perceptions lead to members of the in-group (affluent white parents) using their political and social capital to pressure the state to reify exclusionary school-assignment policies so that the schools can retain their prestige.[74] State reification of exclusionary policies in turn creates scarcity in high-quality schools. Thus, exclusionary social-closure mechanisms lead to a scarcity of high-quality schools rather than social closure occurring because of scarcity in high-quality schools.[75] As the sections that follow demonstrate, it is possible for the state to make different choices in how students are assigned to schools.[76] Doing so

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[70] *See* 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*, 77 J. POL. ECON. 957, 966–67 (1969) (concluding that quality of public schools enhances (or decreases) home values); Youngme Seo & Robert A. Simons, *The Effect of School Quality on Residential Sales Price*, 31 J. REAL EST. RSCH. 307, 325 (2009) (finding school-quality variables were positively related to housing prices).

[71] Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J.L. & POL'Y 189, 216 (2016) (examining the ways in which public education is excludable such that it is a quasi-public good); *cf.* John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. 229, 236 (2016) ("[E]ducation is a primary example in the economics literature of a 'quasi-public good' — a good that, although not strictly speaking a nonrivalrous, nonexcludable classic public good, still has such substantial positive externalities and spillover effects as to be within government's purview.").

[72] *See infra* section III.A, pp. 2424–32.

[73] *See, e.g.*, Baltimore Sun Staff, *In Howard County, A "Courageous" Plan to Redraw School Boundaries Tests Community's Commitment to Diversity*, BALT. SUN (Sept. 6, 2019, 10:48 AM), https://www.baltimoresun.com/education/bs-md-howard-school-redistricting-20190906-xhzkmkf2zvgcxdkbd3vqdanblm-story.html [https://perma.cc/V5TZ-9M8G] (describing opposition by affluent parents to redrawing attendance boundary lines, based on the concern that it would diminish the quality of their children's schools).

[74] *See, e.g.*, Annette Lareau, Elliot B. Weininger & Amanda Barrett Cox, *Parental Challenges to Organizational Authority in an Elite School District: The Role of Cultural, Social, and Symbolic Capital*, 120 TCHRS. COLL. REC. 1, 4–5 (2018) (describing the extensive resources that parents employed to block the redrawing of attendance boundaries at two high schools).

[75] *See infra* section III.A.1, pp. 2426–28.

[76] *See id.*

would eliminate the prestige factor that facilitates social-closure mechanisms and leads to scarcity in high-quality schools.

2. Exclusion. — Resources that exhibit characteristics of scarcity — like high-quality schools — provide fertile ground for the process of exclusionary social closure to take place. State laws that required racial segregation in schools were an obvious form of horizontal differentiation that facilitated exclusionary social closure.[77] In the seventeen states that had de jure school segregation, whites were able to attend better-resourced schools, which helped them achieve better educational outcomes.[78] The state-mandated segregation essentially allowed white students to exercise a monopoly over high-quality schools.[79]

Even in states that did not require school segregation by law, practices for assigning students to schools had the effect of facilitating exclusionary closure. For example, in Illinois, racial segregation in schools was unlawful.[80] Yet city school boards allowed white children to transfer out of racially mixed schools and gerrymandered school-attendance zones in order to create all-white schools.[81] Whites also adopted forceful and sometimes violent tactics as a means of policing in-group boundaries and maintaining all-white schools.[82] These explicit segregation practices and laws enabled white students to engage in what this Article labels as *first-order social closure* to monopolize high-quality schools.

The various legal challenges to de jure segregation by the National Association for the Advancement of Colored People (NAACP) Legal

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[77] Fiel, *supra* note 59, at 130 ("De jure school segregation was a particularly stark form of horizontal differentiation.").

[78] *See, e.g.*, CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869–1973, at 49–68 (2018) (describing the ways in which states promulgated taxation and funding schemes for racially segregated schools that led to stark disparities in resources between the schools attended by Black and white students); Orley Ashenfelter, William J. Collins & Albert Yoon, *Evaluating the Role of* Brown vs. Board of Education *in School Equalization, Desegregation, and the Income of African Americans* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 11394, 2005) (finding that "southern-born [B]lacks who finished their schooling just before effective desegregation occurred in the South fared poorly compared to southern-born [B]lacks who followed behind them in school by just a few years").

[79] While Black schools were deprived of the same resources that white schools enjoyed, Black schools still produced graduates who made valuable contributions to American society. Indeed, racially segregated all-Black schools produced top-caliber students who went on to make contributions in all areas of life. *See* Irving Joyner, *Pimping* Brown v. Board of Education*: The Destruction of African-American Schools and the Mis-education of African-American Students*, 35 N.C. CENT. L. REV. 160, 166 (2013) (describing the ways that Black segregated schools better prepared and educated Black students).

[80] *See* DAVIDSON M. DOUGLASS, JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954, at 139 (2005).

[81] *Id.* at 139–40.

[82] *Id.* ("[I]n 1905 a group of white students in Chicago rioted when they were transferred to a predominately [B]lack school . . . in 1908 when two [B]lack students were transferred to a white school they were beaten by their classmates.").

Defense Fund might be viewed as usurpationary closure or the countervailing action to exclusionary closure by the excluded group.[83] Black plaintiffs represented by NAACP Legal Defense Fund lawyers brought litigation seeking to dismantle the legalization of a white in-group that was permitted to monopolize high-quality schools.[84] The Supreme Court's decision in *Brown v. Board of Education*[85] finding that racial segregation in schools was inherently unlawful was supposed to put an end to the first-order social closure that allowed whites to monopolize high-quality schools.[86] With the help of aggressive federal court interpretations of school systems' constitutional obligations to desegregate, and their application of federal civil rights legislation, schools formerly segregated by law experienced high levels of desegregation.[87] Black students who attended desegregated schools obtained access to high-quality schools, and their educational outcomes improved greatly.[88]

Yet the explicit race-based horizontal differentiation that facilitated first-order social closure and white monopolization of high-quality schools was never fully eradicated. Instead, what this Article labels as *second-order social closure* emerged. Second-order social closure utilizes race-neutral methods and institutional arrangements that have the same impact as the race-conscious de jure laws. The race-neutral methods and institutional arrangements interact with structures still marred by the residue of historical racial subordination and exclusion to produce similar racially exclusionary results. In the context of schools, the most apparent race-neutral mechanisms enabling second-order social closure are housing and school district boundary lines.

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[83] *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 408–10 (1975). *See generally* William Elwood, THE ROAD TO *BROWN*, ZINN EDUC. PROJECT (1990), https://www.zinnedproject.org/materials/road-to-brown [https://perma.cc/7B49-YB49] (chronicling the work of Charles Hamilton Houston and the NAACP that dismantled de jure segregation in schools and led to the decision in *Brown v. Board of Education*).

[84] *See* sources cited *supra* note 83.

[85] 347 U.S. 483 (1954).

[86] *See id.* at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

[87] *See* FRANKENBERG ET AL., *supra* note 27, at 7.

[88] JOHNSON WITH NAZARYAN, *supra* note 22, at 60 ("Compared to [B]lack children who were not exposed to integration, [B]lack children who *were* exposed throughout their K-12 years had significantly higher educational attainment, including greater college attendance and completion rates . . . [and] attendance at more selective colleges.").

Students go to school where they live. Past practices such as racially restrictive covenants,[89] Federal Housing Administration (FHA) loan discrimination,[90] and redlining[91] deeply entrenched racial segregation in housing, making where most students live racially segregated. To be sure, the 1968 Fair Housing Act[92] prohibited overt racial discrimination and facilitated limited forms of racial integration in housing.[93] However, the law's prohibitions on discrimination did nothing to address the lost opportunities for Blacks to accumulate wealth through housing as many white Americans did.[94] Nor did it address exclusionary zoning practices, which enable municipalities to enact regulations that, for all practical purposes, exclude residents deemed "undesirable," typically low-income and nonwhite individuals.[95] The net result is that

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[89] Racially restrictive covenants that prohibited whites from selling houses to Blacks were outlawed by the Supreme Court. *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) ("We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand."). However, racially restrictive covenants remained intact in many cities, and courts recognized their lingering effects long after they were outlawed. *See, e.g.*, Oliver v. Kalamazoo Bd. of Educ., 368 F. Supp. 143, 182 (W.D. Mich. 1973) ("[T]he invidious effects of such covenants have persisted into the present to foster and maintain the customary pattern of segregated housing.").

[90] *See* Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 677–80 (2002) (describing the way the FHA explicitly excluded Blacks from getting home loans and facilitated the creation of all-white suburbs).

[91] *See* United Cos. Lending Corp. v. Sargeant, 20 F. Supp. 2d 192, 203 & n.5 (D. Mass. 1998) ("Redlining [was] the practice of denying the extension of credit to specific geographic areas due to the income, race, or ethnicity of its residents. The term was derived from the actual practice of drawing a red line around certain areas in which credit would be denied." *Id.* at 203.).

[92] 42 U.S.C. §§ 3601–3619.

[93] *See* Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 UCLA L. REV. 1140, 1180 (2019) ("[T]he FHA 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. However, it did not address the structural discrimination that would make it impossible for all but a limited number of elite Blacks to escape the ghetto.").

[94] *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 18 (1995) ("The FHA's actions have had a lasting impact on the wealth portfolios of [B]lack Americans. Locked out of the greatest mass-based opportunity for wealth accumulation in American history, African Americans who desired and were able to afford home ownership found themselves consigned to central-city communities where their investments were affected by the 'self-fulfilling prophecies' of the FHA appraisers: cut off from sources of new investment their homes and communities deteriorated and lost value in comparison to those homes and communities that FHA appraisers deemed desirable.").

[95] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926) (upholding ability of local governments to engage in exclusionary zoning for purposes of protecting the character of a property); *see also* Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 757–60 (1993) (documenting the ways in which "discriminatory zoning practices have created and perpetuated separate residential communities for African-Americans," *id.* at 757); Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 296, 334–35 (1999) (describing and criticizing the effects of exclusionary zoning and the emergence of community empowerment zones).

housing remains deeply racially segregated due in large part to past discriminatory practices sanctioned or facilitated by the state.[96]

School district boundary lines extrapolate the racial segregation in housing to schools. They serve important political, economic, and social functions.[97] 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.[98] In fact, school districts often take on reputations for being predominantly white and affluent places or predominantly Black and poor places.[99] The characterization of a district in terms of the racial and socioeconomic demographics of the space can influence residents' decisions about whether to live within the boundaries of the school district.[100] Indeed, school district boundary lines are a critical driver of residential sorting decisions.[101]

Unfortunately, many low-income families of color do not have the luxury of making intentional and well-calculated choices about the municipality in which they live for purposes of choosing a school district. Instead, they are more likely to locate to a community that is most affordable or that offers the kinds of support networks that they need to subsist.[102] Thus, they are not choosing schools by choosing homes but

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96 *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (examining the ways in which government policies cemented racial segregation in housing and continue to perpetuate it today).

97 *See* GREGORY R. WEIHER, THE FRACTURED METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION 33–35 (1991).

98 *See id.* at 81–82 ("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.").

99 *Cf.* Alvin Chang, *White America Is Quietly Self-Segregating*, VOX (July 31, 2018, 8:26 AM), https://www.vox.com/2017/1/18/14296126/white-segregated-suburb-neighborhood-cartoon [https://perma.cc/ULU4-AK48] (noting research that showed Illinois "[r]esidents would point to an area they've never been before, an area in the outer suburbs, and assume it was a white and wealthy area. They'd do the same with the inner city but assume it was a poor [B]lack area," and that "[w]ithout any real evidence, there was a mental map built into the city's geography" that influenced their residential location choices).

100 Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 198 (2002) (describing homebuyers' avoidance of purchasing a home in the Westland School District containing predominantly low-income students of color "based upon the assumption that such schools were plagued with discipline problems and that their children would be threatened by what they assumed were more violent children").

101 *See, e.g.*, Kendra Bischoff, *School District Fragmentation and Racial Residential Segregation: How Do Boundaries Matter?*, 44 URB. AFFS. REV. 182, 188 (2008) (noting that school districts give "access to one of the nation's most valued services, and they signal other community characteristics, such as property values, that may be associated with school district quality").

102 *See* Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 193 (2016) (criticizing the community-building rationale for localism because of the constraints placed on low-income families of color that make choice of residence less voluntary).

are instead having schools selected for them based on the home they can afford.

Yet both housing choices and school district boundary lines are ostensibly race neutral. They appear unrelated to the first-order social closure that previously produced all-white schools. A student's race-neutral address rather than their racial classification is now used to deny the student access to a school district. The connection between race and place[103] means that using an address within circumscribed boundary lines to determine who gets access to school districts has a racialized effect that produces similar exclusion as the de jure laws that facilitate first-order social closure. Thus, the combination of residential segregation in housing and school district boundary lines facilitates exclusionary social closure that produces predominantly white schools.

3. Monopolization. — Because of the political and economic functions that boundary lines serve, school district boundary lines play a pivotal role in the construction of the quality of the schools within a district.[104] High-quality schools are schools that, among other things, have highly qualified teachers, rigorous curricular offerings, high levels of student achievement, and well-maintained physical facilities.[105] By these metrics, predominantly white school districts in racially diverse metropolitan areas are arguably monopolizing high-quality schools through race-neutral forms of second-order social closure.

This Article posits that one reason for this is that the aggregation of white students within bounded spaces creates school-based economies of agglomeration. Economies of agglomeration, as defined in the urban economics context, means the "concentration[s] of economic activity . . . [where] spatial proximity of activities makes resources more efficient than if such activities are spatially dispersed."[106] A specific type of agglomeration economy known as a localization economy allows for related industries to do business without the logistical hurdle of distance.[107] Stated differently, within such an economy, a firm derives benefits from the presence in an area of other firms belonging to the same

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[103] Jennifer C. Johnson, *Race-Based Housing Importunities: The Disparate Impact of Realistic Group Conflict*, 8 LOY. J. PUB. INT. L. 97, 125 (2007) (explaining how local tools for regulating land development cabined disadvantage to specific areas, which keeps it "securely excluded from breaching the boundaries of white neighborhoods, and transfers all 'discrimination costs' to minorities. The zoning regulations that effectively exclude people of color turn on community values, protecting the local economy, and ensuring high property values. Each of these aspects of 'white' community valued by protective whites is assumed to be threatened by minority encroachment into white neighborhoods." (internal quotation marks and citation omitted)).

[104] *See* Wilson, *supra* note 8, at 1437–39 (describing how the broad fiscal and political autonomy afforded school districts means that the financial resources available to a district are dependent upon the district's tax base and the types of residents who live within the district).

[105] *See supra* note 20.

[106] Goldstein & Gronberg, *supra* note 14, at 91.

[107] *See id.* at 91–92.

industry. A concrete example is the clothing industry in New York or Los Angeles where the suppliers of the material needed to make clothes (for example, fabric or buttons) are in close spatial proximity to the clothing makers.[108]

In the context of schools, the aggregation of white students together creates a phenomenon analogous to a localization agglomeration economy. When white students cluster together, owing in large part to the tangible and intangible value historically associated with whiteness,[109] this agglomeration facilitates the clustering of educational inputs that create high-quality schools. It also facilitates the amalgamation of intangible resources such as social and political capital that contribute to positive academic outcomes. Scholars recognize that clustering predominantly minority and low-income students into schools creates "resource and other barriers that impede the ability of students in those schools to obtain a quality education."[110] Similarly, this Article argues that clustering affluent and middle-class white students together leads to monopolization of the educational inputs needed to create high-quality schools.

Take, for instance, an educational input like teachers. Teacher quality is widely recognized as a critical component in student achievement.[111] Yet substantial research shows that high-quality teachers are more likely to congregate in schools that are affluent and whiter and to avoid schools that are overwhelmingly poor and minority.[112] The racial demographics of a school directly correlate with where high-quality teachers decide to teach.[113] This is true even when isolating for other factors such as poverty, student achievement, or teacher salary.[114] Thus, the skewed distribution of high-quality teachers is an issue primarily of race, not the poverty level of the students. Nationwide, white students

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[108] *See id.* at 93–94.

[109] For a more nuanced discussion of the value of whiteness, see *infra* section III.B.1, pp. 2434–36.

[110] Black, *supra* note 15, at 403.

[111] Darling-Hammond, *supra* note 20, at 23 ("The most consistent highly significant predictor of student achievement in reading and mathematics in each year tested is the proportion of well-qualified teachers in a state: those with full certification and a major in the field they teach.").

[112] *See, e.g.*, C. Kirabo Jackson, *Student Demographics, Teacher Sorting, and Teacher Quality: Evidence from the End of School Desegregation*, 27 J. LAB. ECON. 213, 217 (2009) ("[R]esearchers 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 et al., *Race, Poverty, and Teacher Mobility*, 26 ECON. EDUC. REV. 145, 146–47 (2007) ("[T]eachers are much more likely to exit schools with large proportions of minority students, and . . . the relationships found for student test scores and poverty rates . . . are highly correlated with the proportion of minority students in a school.").

[113] *See* Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 34–35 (2008) (describing the empirical research that documents the ways in which teacher preferences in schools correlate with race).

[114] *See id.* at 36; Scafidi et al., *supra* note 112, at 147.

are substantially more likely than students of color to attend schools with more qualified and experienced teachers.[115]

In addition to teachers, white students have greater access to more rigorous curricula. For example, during the 2011–2012 school year, only 57% of Black students had access to a full range of math and science courses necessary for college readiness, compared to 71% of white students.[116] White students are also more likely to enroll in Advanced Placement courses.[117]

The largest and most significant way in which white students monopolize high-quality schools is through gross funding disparities. Local property taxes are used to fund a large portion of public schooling. Because some districts have a more ample tax base than others, they can tax themselves at a lower rate and still collect more money to spend toward public education.[118] School districts that have a more limited tax base tax themselves at a higher rate but still collect less money than wealthier and usually whiter districts.[119] The Supreme Court's decision in *San Antonio v. Rodriguez*[120] upheld the constitutionality of local property tax–based school funding schemes that create gross funding disparities between neighboring districts.[121] The result has been that wealthier, predominantly white districts have more money to spend on students.

For example, one study found that school districts that are at least 75% white "average revenue receipts of almost $14,000 per student," while school districts that are at least 75% nonwhite collect just $11,682 per student.[122] The same study also found that, in the aggregate, those predominantly white school districts receive $23 billion more than predominantly nonwhite school districts, despite serving the same number

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115 *See, e.g.*, U.S. DEP'T OF EDUC., OFF. FOR C.R., KEY DATA HIGHLIGHTS ON EQUITY AND OPPORTUNITY GAPS IN OUR NATION'S PUBLIC SCHOOLS 9 (2016), https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf [https://perma.cc/K87Y-L3FS] (finding that "Black, Latino, and American Indian or Alaska Native students are more likely to attend schools with higher concentrations of inexperienced teachers" than white students).

116 *See, e.g.*, U.S. DEP'T OF EDUC., OFF. FOR C.R., DATA SNAPSHOT: COLLEGE AND CAREER READINESS 8 (2014), https://www.uncf.org/wp-content/uploads/PDFs/CRDC-College-and-Career-Readiness-Snapshot-2.pdf [https://perma.cc/Y7BC-B5S2].

117 *Id.* at 11 (noting that 59% of white students enrolled in public high schools took at least one Advanced Placement course during the 2011–2012 school year but only 9% of African-American students and 18% of Latino students did the same).

118 Wilson, *supra* note 8, at 1445 (describing mechanics that allow wealthier districts to assess a lower tax rate and collect more money).

119 Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. DAVIS L. REV. 1835, 1839 (2007) ("[P]oor districts typically tax themselves at higher rates to generate fewer dollars.").

120 411 U.S. 1 (1973).

121 *See id.* at 6.

122 EDBUILD, $23 BILLION, at 4 (2019), https://edbuild.org/content/23-billion/full-report.pdf [https://perma.cc/3UVS-H6EL].

of students.[123] As other scholars have noted, racial segregation in schools "effectively subjugates minority students in the competition for educational resources and deprives them of any basis for reasonable confidence in the evenhanded administration of their schools."[124]

A significant downstream consequence of white monopolization of high-quality schools is that it results in whites hoarding opportunities to access elite colleges and universities.[125] Such opportunity hoarding in turn "provides a range of associated benefits for their social, economic and personal well-being"[126] that are denied to students of color, particularly Black and Latino students.

Notably, class only slightly mediates the advantages that whiteness provides when it comes to accessing high-quality schools. Low-income white students still obtain access to high-quality schools at levels that students of color do not. Educational opportunities available to low-income white students are not as constricted by school district boundaries as they are for students of color. In fact, low-income whites are more likely to reside in neighborhoods that are more affluent than the neighborhoods in which middle-class Blacks reside.[127] Indeed, only "half of poor white students attend high-poverty schools, [while] about eight in 10 poor [B]lack students attend schools with a high percentage of poor students."[128]

Further, the number of white students attending high-poverty schools is relatively low. Only 5% of students attend school in a racially concentrated, predominantly poor and white district.[129] Thus, the aggregation of white students within school districts typically leads to resource monopolization, not deprivation, even for poor whites.

In sum, the combination of residential segregation in housing and school district boundary lines facilitates second-order social closure that enables white students to monopolize high-quality schools. As the section that follows describes, there are normative reasons related to

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123 *Id.* at 2.

124 Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1043 (1984).

125 *See* Hawkins, *supra* note 59, at 163.

126 *Id.*

127 Sean F. Reardon, Lindsay Fox & Joseph Townsend, *Neighborhood Income Composition by Household Race and Income, 1990–2009*, 660 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 95 (2015) ("White households have, on average, greater wealth than [B]lack households, enabling them to afford housing in higher-income neighborhoods than similar-income [B]lack households." (citation omitted)).

128 Emma García, *Poor Black Children Are Much More Likely to Attend High-Poverty Schools Than Poor White Children*, ECON. POL'Y INST. (Jan. 13, 2017), https://www.epi.org/publication/poor-black-children-are-much-more-likely-to-attend-high-poverty-schools-than-poor-white-children [https://perma.cc/7U7S-6PPF].

129 EDBUILD, *supra* note 122, at 3.

maintenance of the American democracy and public policy that necessitate regulating white-student segregation.

C. The Normative Case for Regulating White-Student Segregation

1. Harms to Democracy. — Public schools in America play a critical role within the American democracy. As Professor Elizabeth Anderson notes: "[D]emocracy involves universal and equal citizenship of all the permanent members of a society who live under a state's jurisdiction."[130] Democracy also "consists in the free, cooperative interaction of citizens from all walks of life on terms of equality in civil society."[131] Public education is widely recognized as enhancing these aspects of democracy. It does so by facilitating democratic equality, training skilled workers, and serving as an engine for social mobility.[132] As described in the paragraphs that follow, maintaining white-student segregation undermines the ability of public education to achieve those ends, thereby damaging the health of the American democracy.

With respect to democratic equality, founders of the early common school felt that public schools could foster democratic equality by "provid[ing] citizens of the republic with a common culture and a sense of shared membership in the community."[133] Yet white-student segregation undercuts that goal. It does so by inflicting psychological injuries on white students that make it difficult for them to interact with nonwhite students as equals.[134] Indeed, social science evidence presented but not cited by the Court in *Brown v. Board of Education* found that segregation causes whites to "develop patterns of guilt feelings, rationalizations and other mechanisms which they must use in an attempt to protect themselves from recognizing the essential injustice of their unrealistic fears and hatreds of minority groups."[135] The social science evidence also suggested that racial segregation causes whites to have moral confusion and internal conflict that can lead to uncritical idealization of authority figures and intense hostility toward minority groups.[136]

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130 ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 89 (2010).

131 *Id.*

132 *See* Labaree, *supra* note 13, at 41 (describing the conflicting goals of American public education as democratic equality, social efficiency, and social mobility).

133 *Id.* at 45.

134 *See, e.g.*, ARGUMENT OF CHARLES SUMNER, ESQ., BEFORE THE SUPREME COURT OF MASSACHUSETTS, IN THE CASE OF SARAH C. ROBERTS VS. THE CITY OF BOSTON, DECEMBER 4, 1849, at 14–15 (Washington, F. & J. Rives & Geo. A. Bailey 1870) (describing the effects of segregation on white students and contending that they are "[n]ursed in the sentiment of Caste, . . . [t]heir characters are debased, and they become less fit for the duties of citizenship").

135 Brief for Appellants app. at 6, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1), 1952 WL 47265, at *6.

136 *Id.* app. at 6–7 (citing T.W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY (1950)).

Modern social science research illuminates additional harms that undercut public education's democratic-equality function. Racial segregation of white students limits their interactions with nonwhites at a crucial period when their identity, sense of self, and sense of others are being formed.[137] For white students, being situated in predominantly white schools with better resources and facilities may allow notions of white superiority to develop and go unchallenged.[138] It may also make them more susceptible to internalizing false stereotypes about communities of color,[139] seeing whiteness as the normative baseline of humanity,[140] and having difficulty engaging in healthy and productive interracial relationships.[141] Racial segregation and isolation of white students can generate expectations of a racial hierarchy in which people of color are subordinate to whites.[142] This can in turn lead to whites abandoning a

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137 *See* Lawrence A. Hirschfeld, *The Inheritability of Identity: Children's Understanding of the Cultural Biology of Race*, 66 CHILD DEV. 1419, 1419–20 (1995).

138 ANDERSON, *supra* note 130, at 82 (noting the ways in which segregation enables successful whites to "attribute racial inequality to inherent differences in values between [B]lacks and themselves . . . '[w]e have superior values; "they" have inferior ones; hence "they" deserve their disadvantages'"); PAMELA PERRY, SHADES OF WHITE: WHITE KIDS AND RACIAL IDENTITIES IN HIGH SCHOOL 192 (2002) (suggesting that forms of white-student segregation "covertly reproduc[e] notions of white superiority," and that "because of the ways white dominance is institutionally structured into the society, intraracial experience alone is not sufficient to fully counter its effects. Deep and wide structural change is also required").

139 *See, e.g.*, PERRY, *supra* note 138, at 124–25 (finding that students in a predominantly white school used media representations of Blacks, Asians, and Latinos to construct racial group perceptions of nonwhites); *cf.* Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT'L J. INTERCULTURAL RELS. 1, 14–15 (1996) ("[C]hildhood interracial contact promotes real and lasting improvement in racial attitudes into adulthood, both through the disconfirmation of negative racial stereotypes and through a direct effect on prejudice itself.")

140 *See* PERRY, *supra* note 138, at 33 (noting that "the logic of race-neutrality that was a central organizing principle of social life at [a predominantly white high school] was at least partially constituted and reinforced by, on the one hand, little face-to-face association with racialized 'others' and, on the other, a normative school culture predominantly derived from white European American culture but experienced as natural, commonsense, and normal"); Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How* Brown v. Board of Education *Helped to Further White Supremacy*, 105 VA. L. REV. 343, 357–58 (2019) (summarizing social science research showing that "white children more strongly associate negative traits with the racial background of others and positive traits with their own racial background").

141 *See, e.g.*, Eduardo Bonilla-Silva, Carla Goar & David G. Embrick, *When Whites Flock Together: The Social Psychology of White Habitus*, 32 CRITICAL SOCIO. 229, 234–39 (2006) (finding that although whites espouse positive beliefs about racial integration, whites have little contact with Black people in neighborhoods, schools, colleges, and jobs).

142 *See* MARTHA MINOW, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK 20 (2010) (questioning the reasoning in the Supreme Court's decision in *Brown* and acknowledging the ways in which segregated schooling reinforces racial hierarchy); Onwuachi-Willig, *supra* note 140, at 362 ("[B]y not discussing the ways in which Whites had developed a false sense of superiority over other racial groups and the ways that white privilege visibly and invisibly operates, the Justices who decided *Brown* left the false impression that all that was needed to achieve true racial equality was formal legal access to what Whites had *real access* to.").

commitment to democratic norms if they believe democracy might elevate people of color's station and undo the expected racial hierarchy.[143]

Further, public education is supposed to enhance American democracy by providing "future workers with skills that will enhance their productivity and . . . promote economic growth."[144] The worker-preparation function of public education has increased in importance as the economy undergirding the American democracy has shifted from a skills-based economy to a knowledge-based economy.[145] Political leaders note that this shift means that education is "the single most important factor in determining not just whether [American] kids can compete for the best jobs but whether America can out-compete countries around the world."[146] Whites as a collective have greater access to high-quality schools that have the educational inputs necessary to prepare students to participate in a knowledge-based economy.[147] Maintaining a racially skewed distribution of access to the kinds of high-quality schools needed to compete in a knowledge-based economy unnecessarily limits the pool of qualified American workers, thereby harming the economy undergirding American democracy.[148]

Public education is also supposed to enhance democracy by serving as an engine of social mobility. Social mobility is viewed as a bulwark of a well-functioning democracy because it ostensibly prevents the development of a perpetual ruling class.[149] Yet white student isolation and

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143 *See* Larry M. Bartels, *Ethnic Antagonism Erodes Republicans' Commitment to Democracy*, 117 PROC. NAT'L ACAD. SCIS., 22752, 22758 (2020) (finding a correlation between ethnic antagonism and violations of key democratic norms, and noting that the findings "suggest[] that the effects of millions of White Americans' concerns regarding the prospect of demographic, social, and political change may not be limited to the electoral sphere"); Steven V. Miller & Nicholas T. Davis, *The Effect of White Social Prejudice on Support for American Democracy*, J. RACE, ETHNICITY & POL., 2020, at 1, 2–4 (describing empirical research showing white support for democracy and democratic norms declines as their social intolerances or prejudices for nonwhites increase).

144 Labaree, *supra* note 13, at 48.

145 *See, e.g.*, Walter W. Powell & Kaisa Snellman, *The Knowledge Economy*, 30 ANN. REV. SOCIO. 199, 201 (2004) (describing a shift in the U.S. economy toward a knowledge-based economy characterized by "greater reliance on intellectual capabilities than on physical inputs or natural resources").

146 *See Obama Administration Record on Education*, OBAMA WHITE HOUSE, https://obamawhitehouse.archives.gov/sites/default/files/docs/education_record.pdf [https://perma.cc/YS9W-2MD3].

147 *See infra* section III.A, pp. 2424–32.

148 MCKINSEY & CO., THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA'S SCHOOLS 11 (2009), https://dropoutprevention.org/wp-content/uploads/2015/07/ACHIEVEMENT_GAP_REPORT_20090512.pdf [https://perma.cc/YHC8-55HB] (documenting racialized inequality in access to schools and achievement and noting that "[a]s a greater proportion of [B]lacks and Latinos enter the student population in the United States, the racial achievement gap, if not addressed, will almost certainly act as a drag on overall US educational and economic performance in the years ahead").

149 *See* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 2 (Henry Reeve trans., London, Longmans, Green & Co. 1889) (1840) ("In the midst of the continual movement which

segregation impedes public education's ability to serve as an engine of social mobility. This is the case because white identity has significant meaning and value in America.[150] Spaces that are characterized as predominantly white — such as schools, neighborhoods, and jobs — afford tangible and intangible benefits that exceed the benefits available in spaces that are characterized as predominantly nonwhite.[151] Racial segregation of white students concentrates the kinds of educational opportunities necessary for social mobility and full participation in the democracy to a limited cohort of citizens.[152] This can have the effect of limiting social mobility for nonwhite Americans, particularly African Americans.[153]

2. Public Policy Rationale. — In addition to the harms white-student segregation causes to the American democracy, there are also normative policy reasons for addressing white-student segregation. For starters, the side effects of white-student segregation and isolation can manifest themselves in ways that are harmful to people of color and social order. Recent research finds a strong correlation between white isolation, structural racism, segregation, and police killings of Black people.[154] The research further suggests that police officer bias is a function

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agitates a democratic community, the tie which unites one generation to another is relaxed or broken; every man readily loses the trace of the ideas of his forefathers or takes no care about them. Nor can men living in this state of society derive their belief from the opinions of the class to which they belong; for, so to speak, there are no longer any classes, or those which still exist are composed of such mobile elements, that their body can never exercise a real control over its members.").

150 *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1726 (1993) (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").

151 Such benefits might include higher property values, higher-quality schools, less policing, and better public infrastructure. *See, e.g.*, Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis,* 107 HARV. L. REV. 1841, 1850–53 (1994); Junia Howell & Elizabeth Korver-Glenn, *The Increasing Effect of Neighborhood Racial Composition on Housing Values, 1980–2015*, SOC. PROBS., 2020, at 1, 19 (finding that houses in predominantly white neighborhoods, since 1980, appreciated in value nearly $200,000 more than similar houses in neighborhoods of color); Douglas S. Massey et al., *The Effect of Residential Segregation on Black Social and Economic Well-Being*, 66 SOC. FORCES 29, 30 (1987) (describing the role that racial residential segregation has on access to public services and life outcomes, noting the dissonance between predominantly Black neighborhoods and predominantly white neighborhoods).

152 *See, e.g.*, RICHARD V. REEVES, DREAM HOARDERS: HOW THE AMERICAN MIDDLE CLASS IS LEAVING EVERYONE IN THE DUST 31 (2017) (describing the ways in which race and class amplify one another, especially for African Americans, and noting that schools that admit students based on geography cluster opportunities so that "advantage piles on top of advantage").

153 KIMBERLY QUICK & RICHARD D. KAHLENBERG, THE CENTURY FOUND., ATTACKING THE BLACK–WHITE OPPORTUNITY GAP THAT COMES FROM RESIDENTIAL SEGREGATION 3–5 (2019) (describing the connection between residential segregation, school segregation, and limited mobility for African Americans).

154 Aldina Mesic et al., *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, 110 J. NAT'L. MED. ASS'N 106, 113 (2018) (finding that "racial residential segregation was the most robust indicator associated with state-level

of structural racism within a state.[155] Racially integrated schools offer an opportunity to bring students of different races together in ways that promote intergroup understanding and reduce the bias wrought by segregation and white isolation that can lead to police killings of Black citizens.[156] Killings of Black citizens, particularly by white police officers, cause significant social unrest.[157] They also erode Black citizens' trust in state institutions like the police and the democratic traditions that are supposed to govern those institutions.[158] The increasing social unrest and racialized distrust in state institutions threaten America's political, financial, and social stability.

Further, limiting Black students from accessing high-quality schools has tangible economic costs. Recent research finds that if "four key racial gaps for Blacks — wages, education, housing, and investment — were closed 20 years ago, $16 trillion could have been added to the U.S. economy."[159] The research points to gaps in education caused by maintaining segregated schools as a key component in creating the income and wealth gaps that deprive the American economy of trillions of dollars.[160]

Finally, as the population in the United States becomes more racially diverse, it is important that white students understand how to operate in racially diverse settings. The stability of the American democracy is threatened by the kinds of prejudiced attitudes that can flourish when

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racial disparities in police shootings of unarmed victims" and that "gaps in employment, education, and incarceration and racial residential segregation are markers for a history of structural violence that in turn may be associated with differences in the way police interact with Black versus White suspects"); Michael Siegel et al., *The Relationship Between Racial Residential Segregation and Black-White Disparities in Fatal Police Shootings at the City Level, 2013–2017*, 111 J. NAT'L MED. ASS'N 580, 582 (2019) (finding correlation between cities' levels of racial residential segregation and police shootings of Black people).

155 Mesic et al., *supra* note 154, at 114 ("Our findings suggest that the degree of racial bias among police officers in a state may be related to underlying levels of structural racism in that state.").

156 WELLS ET AL., *supra* note 26, at 15–16 (describing the ways in which integrated schools promote interracial understanding and reduce bias).

157 *See, e.g.*, Linda Poon & Marie Patino, *CityLab University: A Timeline of U.S. Police Protests*, BLOOMBERG: CITYLAB (Aug. 28, 2020, 4:57 PM), https://www.bloomberg.com/news/articles/2020-06-09/a-history-of-protests-against-police-brutality [https://perma.cc/82JS-RG5L] (describing historical connections between white police violence against African Americans and social unrest).

158 *See, e.g.*, Laura Santhanam, *Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do.*, PBS NEWS HOUR, (June 5, 2020, 12:00 PM), https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do [https://perma.cc/35W9-SERL] (describing racial divides in citizen trust in police officers).

159 DANA M. PETERSON & CATHERINE L. MANN, CITI, CLOSING THE RACIAL INEQUALITY GAPS: THE ECONOMIC COST OF BLACK INEQUALITY IN THE U.S. 3 (2020), https://www.citivelocity.com/citigps/closing-the-racial-inequality-gaps [https://perma.cc/Q2SZ-PSUK].

160 *Id.* at 24 (noting that "[s]egregated housing has facilitated and perpetuated unequal access to quality education for Black Americans, which is pivotal to erasing income and wealth gaps").

whites do not have meaningful interactions with nonwhite students. Indeed, the racism bred by racial segregation and isolation has recently been labeled a national security threat.[161] For these reasons, finding ways to regulate white-student segregation, isolation, and monopolization of high-quality schools is vital. As the next section demonstrates, the traditional equal protection doctrine falls short in addressing white-student segregation.

D. The Limits of Equal Protection Doctrine in Regulating White-Student Segregation and Monopolization

In *Brown v. Board of Education*, racial segregation in schools was outlawed as unconstitutional on the ground that it violates Black students' right to equal protection under the Fourteenth Amendment.[162] Since *Brown*, legal challenges to racial segregation in public schools have focused primarily on legal theories involving equal protection claims.[163] The equal protection doctrine that developed because of *Brown* was successful in curtailing state-mandated school segregation that allowed whites to monopolize high-quality schools through first-order social closure.[164] Yet white students have still been able to monopolize high-quality schools through second-order social closure. Equal protection doctrine is ineffective at curtailing second-order social closure that facilitates white-student segregation for the following reasons.

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[161] *See, e.g.*, Bishop Garrison & Jon B. Wolfsthal, *An Appeal to the National Security Community to Fight Racial Injustice*, FOREIGN POL'Y NEWS (June 2, 2020, 1:38 PM), https://foreignpolicy.com/2020/06/02/race-relations-police-violence-national-security-community [https://perma.cc/EYV5-6MUW] ("Unless the country makes fundamental changes, cities and communities will continue to be torn apart through over-policing and abuse, economic and racial inequity, and other persistent legacies of racism — all undermining both the United States' ability to function as a society and its credibility on the global stage.").

[162] 347 U.S. 483, 495 (1954) ("[W]e hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

[163] Many challenges have also centered around state constitutional provisions that provide a substantive right to education, but those challenges do not directly address the issue of racial segregation and are instead focused on funding inequities that lead to resource- and outcome-based disparities. *See, e.g.*, Leandro v. State, 488 S.E.2d 249, 252 (N.C. 1997); Sheff v. O'Neill, 678 A.2d 1267, 1271–72 (Conn. 1996); Hoke Cnty. Bd. of Educ. v. State, 599 S.E.2d 365, 373 (N.C. 2004).

[164] *See, e.g.*, Green v. Cnty. Sch. Bd., 391 U.S. 430, 437–38 (1968) ("School boards . . . operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.").

First, in *Brown*, the Supreme Court held that racial segregation in public schools is unconstitutional because it inflicts irreparable psychological harms upon Black students.[165] Notably, as documented in the preceding section,[166] the Court was also presented with social science evidence regarding the ways that segregation harms white students.[167] Yet the Court made no findings or mention of the way racial segregation harms white students.[168] As Professor Kevin Brown notes: "[I]t was clear that it was not racial imbalance per se that produced the constitutional harm; rather it was the meaning attached to it"[169] for Black students.

The Court's conclusions and framing regarding the harms of segregation for Black students had profound effects on the development of school-desegregation jurisprudence. Modern school-segregation cases recognize the importance of avoiding racial isolation in public schools.[170] Yet, like *Brown*, they frame the harms of racial isolation from the perspective of students of color, particularly Black students, with no mention of the corresponding harms to white students.[171] As other scholars have argued, framing racial segregation solely in terms of how it harms students of color implies that only students of color receive benefits from racially integrated schools and glosses over the material benefits whites receive from racial segregation.[172] It also limits how courts view their

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165 *Brown*, 347 U.S. at 494 ("To separate [African Americans] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

166 *See supra* note 135 and accompanying text.

167 *See* Brief for Appellants, *supra* note 135, at app. 6–7.

168 In fact, the Court framed the question presented as "Does segregation of children in public schools solely on the basis of race, even though physical facilities and other 'tangible' factors may be equal, deprive the children of the *minority* group of equal educational opportunities?" *Brown*, 347 U.S. at 493 (emphasis added).

169 Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 66 (1992).

170 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 551 U.S. 701, 797 (2005) (Kennedy, J., concurring in part) ("A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.").

171 *See, e.g.*, *id.* at 806 (Breyer, J., dissenting) (citing the fact that "more than one in six [B]lack children attend a school that is 99%–100% minority" as evidence of the resurgence of the same harms that gave rise to and justified the decision in *Brown*).

172 *See, e.g.*, Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. DAVIS L. REV. 1321, 1328–29 (2006) ("The Court's narrow focus on segregation's effects on equal educational opportunity has profoundly shaped the subsequent legal discourse on *Brown*'s meaning. To this day, debates over *Brown*'s substance focus on the soundness of the Court's reasoning regarding the harmful educational effects of racial segregation on [*B*]*lack* schoolchildren." (emphasis added)); Onwuachi-Willig, *supra* note 140, at 354–55 (arguing that *Brown* "failed to acknowledge how white perpetrators and even sympathetic Whites had greatly benefitted from a longstanding system of structural racism, and that it failed to look at the full range of the harms of racial segregation, including the dehumanizing effects of racism on Whites and their damaging consequences for our ability to achieve an equal society").

remedial authority and obligation to address segregation in schools, particularly white-student segregation.[173]

Second, in addition to limiting its understanding of the harms of segregation to Black students, the Supreme Court, in cases interpreting *Brown*, made it clear that de jure racial segregation — segregation mandated by state law — was the sole focus of *Brown's* holding.[174] In parts of the country where schools were racially segregated as a result of de facto segregation rather than de jure segregation, there was an open question as to whether the racial segregation violated the Fourteenth Amendment.[175] The Supreme Court addressed that question for the first time in *Keyes v. School District No. 1*.[176] Critically, the Court affirmed that de jure segregation is unconstitutional and expanded the ways in which a finding of de jure segregation could be made.[177] However, the Court also effectively made the difference between de facto and de jure segregation constitutionally significant. It did so by holding that segregation in schools only violates the Equal Protection Clause if it is the result of segregative intent on the part of the state.[178] Establishing segregative intent on the part of the state when the policies at issue create de facto segregation is extraordinarily difficult. Plaintiffs must show exacting evidence that a policy was enacted precisely because of or with

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[173] *See, e.g.*, Kevin Brown, *The Road Not Taken in* Brown*: Recognizing the Dual Harm of Segregation*, 90 VA. L. REV. 1579, 1589 (2004) ("If the Court in *Brown* had recognized the dual harm inflicted by segregation, then it would not have made sense to draw the de jure and de facto line where it did, because encouraging school desegregation was beneficial to all public school students.").

[174] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 5–6 (1971) ("States having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what *Brown v. Board of Education* was all about.")

[175] Notably, the 1964 Civil Rights Act helped to crystallize a distinction between de facto and de jure segregation by labeling segregation that did not arise as the result of state law as a form of "racial imbalance," which school systems were not obligated to address in order to comply with the Act. *See* Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c(b) ("'[D]esegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."); Erica Frankenberg & Kendra Taylor, *De Facto Segregation: Tracing A Legal Basis for Contemporary Inequality*, 47 J.L. & EDUC. 189, 193–94, 205 (2018) (describing the ways that the 1964 Civil Rights Act helped to usher in meaningful distinctions between de facto and de jure segregation).

[176] 413 U.S. 189 (1973).

[177] *Id.* at 201–03 (finding that, though "a statutory dual system has [n]ever existed" in Denver, "where plaintiffs prove that the school authorities have carried out a systematic program of segregation . . . it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system"). The plaintiffs alleged that school systems had facilitated such a program by manipulating "student attendance zones, school site selection and a neighborhood school policy." *Id.* at 191.

[178] *Id.* at 208 ("We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate.").

the intent to create segregated schools.[179] Courts have found this bar to be met only when there is clear evidence that a school assignment policy was adopted not just in spite of but because of its segregatory effect.[180]

Concurring opinions in *Keyes* by Justice Douglas and Justice Powell warned about the dangers of maintaining a distinction between de jure and de facto segregation and requiring plaintiffs to show segregative intent. Justice Douglas warned that the de facto/de jure distinction unduly narrowed what kinds of actions could be attributed to the state.[181] He suggested that maintaining the distinction would place "subtle types of state action that create or maintain a wholly or partially segregated school system" outside the remedial purview of the court.[182] Justice Powell noted that the segregative-intent requirement "present[s] problems of subjective intent which the courts cannot fairly resolve."[183] Both Justice Douglas's and Justice Powell's admonitions proved prescient. Courts routinely find that schools are racially segregated but fail to find the segregation actionable because plaintiffs cannot show that the de facto segregation is the product of segregative intent by the state.[184]

Another shortcoming of the equal protection doctrine is that it fails to account for the adaptive nature of racial discrimination. As Professor Elise Boddie notes: "[R]acial discrimination *adapts* to the legal and social environment by mutating to evade prohibitions against intentional discrimination."[185] Methods used to create predominantly white schools are no longer obviously race conscious. Race-neutral mechanisms such as neighborhood schools and placement of school district boundary lines are responsible for much of the racial segregation that exists in schools

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179 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (finding that discriminatory intent is shown when "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

180 *See, e.g.*, Diaz v. San Jose Unified Sch. Dist., 733 F.2d 660, 665 (9th Cir. 1984) (finding that the segregative intent requirement was met where the school board rejected alternatives that could have decreased segregation in the public schools and instead chose an alternative that exacerbated segregation); United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1429 (S.D.N.Y. 1985) (finding a pattern of segregative acts by the Board sufficient to give rise to a finding of segregative intent), *aff'd*, 837 F.2d 1181 (2d Cir. 1987).

181 *Keyes*, 413 U.S. at 216 (Douglas, J., concurring) ("If a 'neighborhood' or 'geographical' unit has been created along racial lines by reason of the play of restrictive covenants that restrict certain areas to 'the elite,' leaving the 'undesirables' to move elsewhere, there is state action in the constitutional sense because the force of law is placed behind those covenants.").

182 *Id.* (citing Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972)).

183 *Id.* at 225 (Powell, J., concurring).

184 *See* Frankenberg & Taylor, *supra* note 175, at 228 (conducting an empirical analysis of federal court decisions on de facto school segregation and finding that "[b]eyond the 1980s, the window for judicial action against de facto segregation was largely closed, with the courts mostly in agreement that de facto segregation was beyond the reach of federal intervention").

185 Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1239 (2016).

today.[186] These mechanisms, however, are linked to multiple race-neutral methods of subordination such as exclusionary zoning, high housing costs, and a commitment to local control of schools.[187] Such mechanisms are difficult, if not impossible, to capture through a myopic, linear segregative-intent standard because there may in fact be legitimate rationales unconnected to race for implementing such practices.[188] Consequently, race-neutral policies that allow second-order social closure to flourish are immune from legal scrutiny under modern equal protection doctrine.

Finally, equal protection jurisprudence cannot capture second-order social closure because the Supreme Court made it difficult to reach racial segregation that occurs across school district boundary lines. In *Milliken v. Bradley*,[189] the Sixth Circuit Court of Appeals affirmed a trial court's finding that schools in Detroit were segregated because of state action. Importantly, the court found that "relief of segregation in the public schools in the City of Detroit cannot be accomplished within the corporate geographical limits of the city. The State, however, cannot escape its constitutional duty to desegregate the public schools of the City of Detroit by pleading local authority."[190] The court further held that it could impose a metropolitan-wide desegregation plan in order to desegregate the Detroit city public schools.[191]

The Supreme Court rejected the metropolitan-wide desegregation plan as an appropriate remedy. It reasoned that "the notion that school district lines may be casually ignored or treated as a mere administrative

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[186] *See* Jennifer B. Ayescue & Gary Orfield, *School District Lines Stratify Educational Opportunity by Race and Poverty*, 7 RACE & SOC. PROBS. 5, 5 (2015) (showing that increases in racial segregation in schools are due to school-district fragmentation); GROVER J. "RUSS" WHITEHURST, RICHARD V. REEVES, NATHAN JOO & EDWARD RODRIGUE, BROOKINGS INST., BALANCING ACT: SCHOOLS, NEIGHBORHOODS AND RACIAL IMBALANCE 14 (2017), https://www.brookings.edu/wp-content/uploads/2017/11/es_20171120_schoolsegregation.pdf [https://perma.cc/88Q4-6FD2] ("[T]o a very large extent, then, school segregation is the near-automatic result of residential segregation. America's schools look like America's neighborhoods.").

[187] ROTHWELL, *supra* note 69, at 2 ("[L]imiting the development of inexpensive housing in affluent neighborhoods and jurisdictions fuels economic and racial segregation and contributes to significant differences in school performance across the metropolitan landscape.").

[188] Some of the race-neutral purported benefits of neighborhood schools that courts have accepted include increased parental participation in schools. *See, e.g.*, Spurlock v. Metro. Gov't, No. 09-CV-00756, 2012 WL 3064251, at *44 (M.D. Tenn. July 27, 2012) ("[A]t this final stage of review and subsequent to its finding that Defendants did not have a discriminatory motive in adopting the re-zoning plan, the Court must defer to the testimony of the Task Force and School Board members concerning the benefits of students attending a school close to their home."), *aff'd sub nom.* Spurlock v. Fox, 716 F.3d 383 (6th Cir. 2013).

[189] 418 U.S. 717 (1974).

[190] Bradley v. Milliken, 484 F.2d 215, 244 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974).

[191] *Id.* ("That the court must look beyond the limits of the Detroit school district for a solution to the problem of segregation in the Detroit public schools is obvious; that it has the authority, nay more, the duty to (under the circumstances of this case) do so appears plainly anticipated by *Brown II*.").

convenience is contrary to the history of public education in our country."[192] The Court then held that an interdistrict remedy is appropriate only when "the racially discriminatory acts of one or more districts caused racial segregation in an adjacent district, or where lines have been deliberately drawn based on race."[193]

The legal standard established by the Court in *Milliken* for imposing an interdistrict remedy is a stringent one that few plaintiffs can meet.[194] *Milliken* is recognized by scholars as having insulated racial segregation that occurs between school districts.[195] Simply put, the equal protection doctrine as it is presently constituted does not offer a viable framework for addressing white-student segregation that is a product of second-order social closure and leads to white-student monopolization of high-quality schools. As such, it is necessary to examine new frameworks for recognizing and remedying the monopolistic harms caused by white-student segregation.

II. AN ALTERNATIVE FRAMEWORK: USING ANTITRUST TO RESPOND TO WHITE-STUDENT SEGREGATION AND MONOPOLIZATION

Racial segregation in public schools is often situated as a public problem that must be addressed with public law frameworks. Yet as the preceding sections demonstrate, in modern times, racial segregation in schools is the result of private decisionmaking regarding residence, particularly the school district in which one decides to reside. Because public law frameworks like equal protection do not reach outcomes that are caused by private decisionmaking, this Part suggests that there is merit

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192 *Milliken*, 418 U.S. at 741.

193 *Id.* at 745.

194 *See, e.g.*, Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 778 F.2d 404, 407–08 (8th Cir. 1985) (finding school district segregation an equal protection violation but interdistrict consolidation too intrusive a remedy); United States v. Bd. of Sch. Comm'rs, 637 F.2d 1101, 1104–05 (7th Cir. 1980) (approving an interdistrict remedy after the Housing Authority of the City of Indianapolis built housing projects *only* within the old central City of Indianapolis, leading to Black residents overwhelmingly filling that school district); 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) (addressing a set of school districts which historically followed Kentucky law stating: "No colored person shall attend any college, school or institution where white persons are received as pupils" and *still* postponing effectiveness of interdistrict remedy until all appeals were exhausted).

195 *See, e.g.*, Daniel Kiel, *The Enduring Power of* Milliken*'s Fences*, 45 URB. LAW. 137, 143 (2013) (describing the impact of *Milliken* and noting that "[t]he Court's blessing of lines that were immune from desegregation orders provided the most effective means by which individuals seeking to avoid racially-integrated education could ensure that they would remain beyond the reach of a federal court order"); Cedric Merlin Powell, Milliken*, "Neutral Principles," and Post-Racial Determinism* 40 (U. Louisville Sch. of L. Legal Studs. Rsch. Paper Series, Paper No. 2016-2, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657194 [https://perma.cc/JPD3-ZWAP] ("The rhetorical and analytical formalism of the decision serve to essentially predetermine the result: the preservation of a dual school system in the name of homogenous suburbs.").

in looking to private law frameworks for guidance. It looks to antitrust's Sherman Act[196] to consider how one might articulate and regulate the monopolization harms wrought by second-order social closure that enables white-student segregation.

A. The Efficacy of an Antitrust Analogy

The purpose of the Sherman Act is to protect the competitive process that spurs economic growth.[197] It protects *only* the competitive process, not individual competitors.[198] "It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of . . . economic resources . . . while at the same time providing an environment conducive to the preservation of . . . democratic political and social institutions."[199]

Unlike equal protection doctrine, the Sherman Act does not require exacting intent requirements to sustain a violation of the Act. Instead, it prohibits conduct that unreasonably restrains trade or results in the acquisition or maintenance of monopoly power.[200] Acquiring or maintaining a monopoly is not in and of itself unlawful.[201] Instead, it is only unlawful if the monopoly is acquired or maintained through anticompetitive or exclusionary conduct.[202] Courts find that conduct is exclusionary or anticompetitive when it "harm[s] the competitive *process* and thereby harm[s] consumers"[203] or has a deleterious effect on a rival's ability to engage in the competitive process.[204] The primary focus of

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196 15 U.S.C. §§ 1–7.

197 *See generally* PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 401–02 (3d ed. 2007).

198 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) ("The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.").

199 N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

200 *See* 15 U.S.C. § 2 (2019); United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

201 *See, e.g.*, Ne. Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 84–85 (2d Cir. 1981) ("[T]he mere possession of monopoly power does not *ipso facto* condemn a market participant. But, to avoid the proscriptions of § 2, the firm must refrain at all times from conduct directed at smothering competition.").

202 *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) ("'Alcoa's' size was 'magnified' to make it a 'monopoly'; indeed, it has never been anything else; and its size, not only offered it an 'opportunity for abuse,' but it 'utilized' its size for 'abuse,' as can easily be shown.")

203 United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001); *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) ("[L]egislative history illuminates congressional concern with the protection of *competition*, not *competitors*.").

204 Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) ("For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals, whether driving them from the market, or, as was alleged to be the goal here, causing them to raise their prices to *supra*competitive levels within a disciplined oligopoly.").

the anticompetitive conduct analysis under the Sherman Act is the impact of the defendant's actions on competition within the market, not the defendant's subjective intent.

Just as the Sherman Act recognizes that competition is vital to a strong economy, political theorists have long recognized the importance of a well-educated and informed citizenry to a well-functioning democracy.[205] An important part of the analysis that is often missed regarding the harms of racial segregation in schools is the extent to which racially segregated schools, particularly predominantly white schools, undermine democracy.[206] They do so by allowing a subset of the population to either hoard or be deprived of the kinds of educational opportunities that allow for social mobility, better life outcomes, and the ability to participate equally in the social and economic life of the democracy.[207] They also do so by facilitating forms of social isolation that deny white students the ability to gain the skills they need to function in a racially diverse country.[208] The net result of those two things is to undermine the economic and social stability of the democracy.

To capture the broader democracy-related harms caused by white-student segregation in public schools, it is imperative that new ways of thinking and new frameworks are introduced to examine the problem. Antitrust doctrine provides an apt analytical lens through which to critically analyze the monopolization harms caused by white-student racial segregation. In effectuating the analogy, fair access to racially integrated high-quality public schools is to a well-functioning democracy as competition is to a well-functioning economy. Thus, the analogy set forth in the sections that follow uses antitrust language and frameworks to elucidate the harms caused by white-student racial segregation and to think about how to remedy those harms.

B. The Essential Facilities Doctrine

The quintessential issue in determining whether a defendant's conduct runs afoul of the Sherman Act is whether the defendant's conduct

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[205] *See, e.g.*, Letter from Thomas Jefferson to John Tyler (May 26, 1810), NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/03-02-02-0365 [https://perma.cc/S842-2YTM] ("[T]wo great measures . . . without which no republic can maintain itself in strength. 1. [T]hat of general education to enable every man to judge for himself what will secure or endanger his freedom. 2. [T]o divide every county . . . [so] that all the children of each will be within reach of a central school in it." (footnote omitted)).

[206] *See* ANDERSON, *supra* note 130, at 108–11 (arguing that racial segregation stigmatizes minority groups and limits access to educational and employment opportunity, which in turn impairs democracy and democratic ideals).

[207] *See* SHERYLL CASHIN, INTEGRATION AS A MEANS OF RESTORING DEMOCRACY AND OPPORTUNITY 4–6 (2017), https://www.jchs.harvard.edu/sites/default/files/a_shared_future_integration_restoring_democracy.pdf [https://perma.cc/TPU2-H6FT].

[208] *See* ANDERSON, *supra* note 130, at 108–09.

is anticompetitive or exclusionary.[209] Anticompetitive or exclusionary conduct comes in many different forms, including predatory pricing and purchasing schemes,[210] exclusive dealing arrangements that require a buyer to purchase supplies from a specific dealer,[211] the bundling of discounts or rebates that create de facto exclusive dealing arrangements,[212] and the denial of an essential facility by a dominant firm.[213]

This Article suggests that the doctrine surrounding denial of an essential facility by a dominant firm is most analogous to what is occurring with white-student racial segregation in predominantly white school districts. Court cases define the contours of the essential facilities doctrine. Under the judicially created doctrine, a firm incurs liability if it does not provide its competitors with access to an essential facility that is necessary for the competitor to compete in a market.[214] The Supreme Court has never expressly embraced or utilized the essential facilities doctrine by name. However, the roots of the doctrine were planted in four Supreme Court cases.

In *United States v. Terminal Railroad Ass'n of St. Louis*,[215] the Court issued an injunction against a coalition that organized to acquire total control of the railroad facilities in St. Louis.[216] Though many railroads converged in St. Louis, none of them passed through the city, thereby making control of the river pivotal.[217] Acquisition of both bridges and all of the riverside facilities prohibited competing railroad services from

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[209] Scholars aptly point out that Supreme Court and lower federal court doctrine articulates vague and conclusory standards for determining whether the exclusionary/anticompetitive element is met. *See, e.g.*, Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 253, 255–57 (2003) (arguing that the monopolization doctrine provides "vacuous standards and conclusory labels that provide no meaningful guidance about which conduct will be condemned as exclusionary," *id.* at 253).

[210] *See, e.g.*, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 315–16 (2007) (noting plaintiff's allegation that defendant attempted to monopolize the finished alder lumber market by overbidding on inputs and raising plaintiff's costs); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 213–26 (1993) (defendant accused of setting below-cost prices to drive plaintiff out of business).

[211] LePage's Inc. v. 3M, 324 F.3d 141, 157 (3d Cir. 2003) (defendant alleged to have entered into express exclusivity contracts with some customers and made payments to other customers "that were designed to achieve sole-source supplier status").

[212] Cascade Health Sols. v. Peacehealth, 515 F.3d 883, 894 (9th Cir. 2008) ("Bundling is the practice of offering, for a single price, two or more goods or services that could be sold separately [and a] bundled discount occurs when a firm sells a bundle of goods or services for a lower price than the seller charges for the goods or services purchased individually.").

[213] *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 592–95 (1985); TCA Bldg. Co. v. Nw. Res. Co., 873 F. Supp. 29, 39 (S.D. Tex. 1995).

[214] *See* Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1195–211 (1999) (describing the contours of the essential facilities doctrine).

[215] 224 U.S. 383 (1912).

[216] *See id.* at 393.

[217] *Id.* at 395.

offering transportation through the city.[218] The Court ultimately required the coalition to allow competitors access to the bridge.[219] Then, in *Associated Press v. United States*,[220] the Court found that the Associated Press violated the Sherman Act by limiting membership in its organization and controlling which competitors could have access to its copyrighted news services.[221] Similarly, in *Lorain Journal Co. v. United States*,[222] the Supreme Court found that the only newspaper disseminating news and advertisements in a town violated the Sherman Act by refusing to accept advertisements from local businesses that placed ads with a competing radio station.[223] Finally, in *Otter Tail Power Co. v. United States*,[224] the Court upheld an injunction against a power company that refused to transmit power generated by rival companies through its transmission system.[225]

In each of these cases, the Court forced firms with near-exclusive control over a facility to share the facility because it determined that no other firms could compete in a particular market without having access to the facility.[226] The Court also determined that fostering competition between the dominant firm and its rivals was beneficial to the public at large.[227] Notably, the Court in these cases emphasized that an intent to monopolize can be inferred from the methods utilized by the dominant firm and the impact on the competitive process.[228]

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[218] *Id.* at 397 ("[A]s a practical matter, [it is] impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the Terminal Company.").

[219] *See id.* at 410–13.

[220] 326 U.S. 1 (1945).

[221] *Id.* at 11–14.

[222] 342 U.S. 143 (1951).

[223] *Id.* at 146–49.

[224] 410 U.S. 366 (1973).

[225] *Id.* at 368–69, 377.

[226] *See Associated Press*, 326 U.S. at 28–29 (Frankfurter, J., concurring) (reasoning that the Associated Press should be required to share its facilities because it "has a relation to the public interest unlike that of any other enterprise pursued for profit" and a "free press is indispensable to the workings of our democratic society," *id.* at 28); United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 410 (1912) ("[R]ailroads are compelled either to desist from carrying on interstate commerce or to do so upon the terms imposed by the [defendant]. This control and possession constitute such a grip upon the commerce of St. Louis and commerce which must cross the river there, whether coming from the east or west as to be both an illegal restraint and an attempt to monopolize.").

[227] *See Associated Press*, 326 U.S. at 20; *Terminal R.R. Ass'n of St. Louis*, 224 U.S. at 409.

[228] *See Associated Press*, 326 U.S. at 13 (emphasizing the impact of the defendants' conduct in finding a violation of the Sherman Act, noting that "[u]ndisputed evidence [showed] that its By-Laws had tied the hands of all of its numerous publishers, to the extent that they could not and did not sell any part of their news so that it could reach any of their non-member competitors," and finding that "AP's By-Laws had hindered and restrained the sale of interstate news to non-members who competed with members"); *Terminal R.R. Ass'n of St. Louis*, 224 U.S. at 395 (noting that whether the defendants' actions violated the Sherman Act "will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce

Despite the essential facilities doctrine's conceptual roots in Supreme Court cases, the Court has never expressly invoked the doctrine to impose liability under the Sherman Act. Every circuit court of appeals, however, recognizes the essential facilities doctrine as a basis for imposing liability under the Sherman Act.[229] In assessing liability under the essential facilities doctrine, modern circuit courts follow the four-part test laid out in the Seventh Circuit case *MCI Communications Corp. v. American Telephone & Telegraph Co*.[230]

In *MCI Communications Corp.*, the defendant AT&T was a regulated monopolist that dominated the market for the provision of local telephone service. AT&T, however, faced competition from upstart companies like the plaintiff MCI for the provision of long-distance service.[231] MCI alleged that AT&T refused to interconnect its long-distance calls through AT&T's local phone system and that this refusal violated the Sherman Act.[232] The Seventh Circuit found AT&T liable under the essential facilities doctrine. In doing so, it established the following four-part test for determining liability: (i) a monopolist controls access to an essential facility; (ii) the facility cannot be reasonably duplicated by a competitor; (iii) the monopolist denies access to a competitor; and (iv) it was feasible to grant access to the competitor.[233] Many lower federal courts have adopted this test.

In applying the *MCI* test, courts are vague in defining what constitutes an essential facility.[234] Nonetheless, a facility is typically deemed essential if it is indispensable for competition in the marketplace and critical to individual competitors' ability to compete in the marketplace.[235] Importantly, courts find that if a plaintiff can show that a facility is essential, the plaintiff will also likely satisfy the requirement

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is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted").

229 *See* Elhauge, *supra* note 209, at 261 ("[E]very federal circuit court has interpreted [the] general monopolization standard to impose an antitrust duty to deal with rivals when sharing is feasible and a monopolist has developed a product that is *so* superior that it is 'essential' for rivals to compete and cannot practicably be duplicated.").

230 708 F.2d 1081, 1132–33 (7th Cir. 1983).

231 *Id.* at 1098.

232 *Id.* at 1096.

233 *See id.* at 1132–33.

234 *See, e.g.*, Allen Kezsbom & Alan V. Goldman, *No Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine*, 1996 COLUM. BUS. L. REV. 1, 27 ("[T]he courts have been exercising substantial discretion in the definition of 'essentiality' because they are trying to evaluate how much of a 'cost advantage' the defendant is entitled to maintain over its competitors and at what point that advantage becomes 'unfair' or 'unreasonable.' Whether a facility is essential 'involves vexing questions of degree.'" (emphasis omitted)). *See generally* Christopher M. Seelen, *The Essential Facilities Doctrine: What Does It Mean to Be Essential?*, 80 MARQ. L. REV. 1117 (1997) (describing the ambiguity in courts' understanding of when facilities are essential).

235 *See* Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 852 (1989).

of showing that it is not capable of duplication.[236] Finally, the determination as to whether the defendant unreasonably denied access to the facility is a fact-sensitive inquiry. Courts focus primarily on whether there is any ability at all for the plaintiff to access the facility.[237]

Admittedly, the essential facilities doctrine is widely criticized by antitrust scholars and courts.[238] The Supreme Court even weighed in, harshly criticizing the doctrine in dicta but not expressly repudiating it.[239] Much of the criticism revolves around opposition to the idea that firms should have a duty to share.[240] Critics of the doctrine express concerns that enforcing a duty to share will chill desirable investment activity and turn courts into regulators, a task beyond their institutional capabilities.[241] The Supreme Court, again in dicta, suggested that the doctrine should be "denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms."[242] The Court's dicta has had the effect of substantially limiting lower courts' application of the essential facilities doctrine.[243]

Yet some scholars and courts have pushed back against these critiques.[244] They suggest that there is an appropriate but narrow place for the essential facilities doctrine in regulating the monopolization of

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[236] *See, e.g.*, City of Anaheim v. S. Cal. Edison Co., 955 F.2d 1373, 1380 (9th Cir. 1992) ("[T]he second element is effectively part of the definition of what is an essential facility in the first place. That is to say, if the facility can be reasonably or practically duplicated it is highly unlikely, even impossible, that it will be found to be essential at all.").

[237] *See, e.g.*, Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1185 (9th Cir. 2016) (denying an essential facilities claim, reasoning that the denial of access prong was not satisfied because "there is no evidence that Aerotec is frozen out of — or even faces a chill in accessing — the parts supply chain"); TrueEX, LLC v. MarkitSERV Ltd., 266 F. Supp. 3d 705, 724 (S.D.N.Y. 2017) (denying plaintiff's essential facilities claim, reasoning that "[b]ecause reasonable access to the essential facility exist[ed] — even if not in a way that [wa]s conducive to [trueEX's] existing business model — [trueEX] cannot establish an essential facilities claim").

[238] *See, e.g.*, Areeda, *supra* note 235, at 841 (arguing for limitations on the essential facilities doctrine); David Reiffen & Andrew N. Kleit, Terminal Railroad *Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly?*, 33 J.L. & ECON. 419, 437 (1990) (examining the *Terminal Railroad* case from which the essential facilities doctrine originated and arguing that the case was wrongly decided because there was no foreclosure and therefore no basis of liability for imposing a duty to share).

[239] Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 410–11 (2004).

[240] *See, e.g.*, Areeda, *supra* note 235, at 852 ("[T]here is no general duty to share. Compulsory access, if it exists at all, is and should be exceptional.").

[241] *Id.* at 853 (arguing that courts should reject finding in favor of regulation on the grounds of the essential facilities doctrine where "compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency").

[242] *Trinko*, 540 U.S. at 411.

[243] *See, e.g.*, Imperial Irrigation Dist. v. Cal. Indep. Sys. Operator Corp., 146 F. Supp. 3d 1217, 1236 (S.D. Cal. 2015) ("Because FERC has 'the power to compel sharing' pursuant to CAISO's tariff, IID's essential facilities claim must be denied." (quoting *Trinko*, 540 U.S. at 411)).

[244] Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1, 3 (2008); Seelen, *supra* note 234, at 1117–18.

infrastructure.[245] Indeed, two of the Supreme Court cases from which the essential facilities doctrine draws its intellectual roots involved monopolization of traditional infrastructure.[246] As demonstrated in the section that follows, high-quality public schools are a form of infrastructure and would therefore be a suitable resource to which to apply an essential facilities–like framework.

C. High-Quality Public Schools as Infrastructure

Professors Brett Frischmann and Spencer Waller offer a helpful and compelling theoretical construct for deciding the appropriate context in which to apply the essential facilities doctrine.[247] They suggest that "[t]he essential facilities doctrine works best as a theory of monopolization when dealing with infrastructure."[248] They recommend applying the essential facilities framework to infrastructure resources for which open access is desirable "to create . . . positive externalities that benefit society as a whole."[249]

Further, they suggest that a resource should be deemed infrastructure when three conditions are met. First, the resource is shareable. Put another way, the resource is capable of nonrivalrous consumption meaning that it is capable of being utilized by multiple users at the same time.[250] Second, the resource is capable of generating "intermediate goods that create social value when utilized productively downstream."[251] In other words, "most of the value [generated by the resource] results from productive use rather than consumption."[252] Finally, "[t]he resource is used as an input into a wide range of goods and services, including private goods, public goods, and/or non-market goods."[253]

Frischmann and Waller emphasize the appropriateness of applying the essential facilities framework to public and social infrastructure. They define public and social infrastructure resources as things that are used to produce public and nonmarket goods.[254] For such resources, they emphasize that open access is critical precisely because "demand

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[245] *See, e.g.*, Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 40 WIS. L. REV. 359, 386 (2008); Frischmann & Waller, *supra* note 244, at 22.

[246] Otter Tail Power Co. v. United States, 410 U.S. 366, 366–67 (1973) (applying essential facilities duty-to-share principles to monopolization of a power grid); United States v. Terminal R.R. Ass'n of St. Louis, 224 U.S. 383, 411 (1912) (using essential facilities principles to find duty to share when a bridge was being monopolized).

[247] *See* Frischmann & Waller, *supra* note 244, at 1.

[248] *Id.* at 22.

[249] *Id.*

[250] *Id.* at 13.

[251] *Id.*

[252] *Id.*

[253] *Id.* at 12.

[254] *Id.* at 17 & n.38.

generated by competitive output markets will tend to reflect the individual benefits realized by a particular user and not take into account positive externalities enjoyed by society as a whole."[255] In other words, when left to market forces, an optimal amount of open access will not occur because the market will not fully appreciate downstream positive externalities to society as a whole.

Using this framework, high-quality public schools would meet the criteria for being considered a public or social infrastructure resource. With respect to the first criterion, nonrivalrousness and shareability, schools are generally characterized as partially rivalrous because the possibility of exclusion exists.[256] Residence requirements and high housing costs are methods used to exclude some students from high-quality schools. Yet exclusion is a choice, not a requirement. High-quality schools can be nonrivalrous and shareable if a state puts in place rules that facilitate open access.

The second criterion requires that the resource generate intermediate goods that create social value when utilized productively downstream. The intermediate good produced by high-quality schools is high-quality educational outcomes.[257] High-quality educational outcomes encompass things such as graduation rates, college attendance rates, post-graduation incomes, and general critical thinking skills that prepare an individual to live as a responsible citizen in the American democracy.[258] Social science research shows that students who attend high-quality schools have better life outcomes, including higher college attendance rates,[259] higher incomes,[260] and a reduced likelihood of encountering the

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255 *Id.*

256 *See* Wilson, *supra* note 71, at 217 n.138, 220 (noting that one could exclude students from schools or refuse to share by requiring that they pay tuition or requiring that they live in a certain area in order to obtain the education).

257 *See* JOHNSON WITH NAZARYAN, *supra* note 22, at 57–60.

258 *See* Labaree, *supra* note 13, at 44.

259 *See* ROBERT L. CRAIN & JACK STRAUSS, SCHOOL DESEGREGATION AND BLACK OCCUPATIONAL ATTAINMENTS: RESULTS FROM A LONG-TERM EXPERIMENT 15, 27–28 (1985) (finding that Black male students who attended desegregated better-quality schools were more likely to attend college and complete more years of college schooling than Black males who went to segregated lower-quality schools); JOHNSON WITH NAZARYAN, *supra* note 22, at 60 (finding that Black children who were exposed to integrated schools in K-12 had significantly higher educational attainment, including greater college attendance and completion rates).

260 JOHNSON WITH NAZARYAN, *supra* note 22, at 62 (finding that the average effects of a five-year exposure to court-ordered school desegregation led to a 15% increase in wages and a 30% increase in annual earnings); Michael A. Boozer et al., *Race and School Quality Since* Brown v. Board of Education, *in* BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 269, 272 (Martin Neil Baily & Clifford Winston eds., 1992) (finding that "[B]lack students who attended racially isolated high schools tend to obtain lower paying jobs than whites" who attended higher-quality schools).

criminal justice system.[261] Thus, the social value created by high-quality schools downstream is a well-educated citizenry capable of functioning in a diverse global workforce. High-quality schools therefore satisfy the second infrastructure criterion.

The third and final criterion necessary to be considered a public infrastructure resource is the ability to serve as an input into a wide range of goods. Again, high-quality schools are used as an input in creating high-quality educational outcomes. High-quality educational outcomes are in turn inputs into public goods such as literacy. Literacy is in turn linked to improved health outcomes and decreased crime rates.[262] High-quality educational outcomes are also a vital input in creating a well-educated workforce. Research demonstrates that a well-educated workforce leads to a stronger economy and that expanding educational opportunities is therefore critical to revitalizing the economy.[263] Thus, high-quality public schools satisfy the final public infrastructure criterion.

In sum, high-quality schools are a form of public infrastructure. Nondiscriminatory access to high-quality schools is therefore optimal because high-quality schools "generate . . . hard to measure spillovers" that benefit society and American democracy at large.[264] The Part that follows examines the problem of white-student segregation in racially diverse metropolitan areas using the essential facilities framework.

III. ANALYZING WHITE-STUDENT SEGREGATION THROUGH AN ESSENTIAL FACILITIES FRAMEWORK

There are nearly fourteen thousand school districts across the country.[265] In approximately one thousand of the districts, the district boundary lines serve as de facto racial borders, separating predomi-

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[261] JOHNSON WITH NAZARYAN, *supra* note 22, at 62 ("Our results also demonstrate that one of the most effective antidotes to criminal involvement in adulthood is access to high-quality schools as a youth.").

[262] *See* NANCY D. BERKMAN ET AL., AGENCY FOR HEALTH RSCH. & QUALITY, LITERACY AND HEALTH OUTCOMES vi, 6 (2004) (concluding that low reading and writing ability are linked to poor health outcomes).

[263] *See, e.g.*, NOAH BERGER & PETER FISHER, ECON. ANALYSIS RSCH. NETWORK, A WELL-EDUCATED WORKFORCE IS KEY TO STATE PROSPERITY 1–2 (2013), https://www.epi.org/publication/states-education-productivity-growth-foundations [https://perma.cc/8EPU-66R5] (finding a clear correlation between the educational attainment of a state's workforce and median wages in the state and that "[p]roviding expanded access to high quality education will not only expand economic opportunity for residents, but also likely do more to strengthen the overall state economy than anything else a state government can do," *id.* at 2).

[264] *See* Frischmann & Waller, *supra* note 244, at 21.

[265] *See Number of Public School Districts and Public and Private Elementary and Secondary Schools: Selected Years, 1869–70 Through 2010–11*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d12/tables/dt12_098.asp [https://perma.cc/VK6U-FZWZ].

nantly affluent and white students from predominantly low-income students and students of color.[266] In many instances, the districts are mere miles apart such that it would be feasible to redraw the district boundary lines to obtain greater racial and economic diversity within the districts.

The focus of the remainder of this Article's claims are on the types of interdistrict racial segregation that permit predominantly white and affluent districts to exist in the middle of racially and economically diverse metropolitan areas. This Article uses the term "white island districts" to describe these districts. Using examples from three different school districts, this Part provides concrete examples of how school district boundary lines are enabling second-order social closure that leads to white students monopolizing high-quality schools in white island districts.

This Part begins by revisiting the ways in which the laws and policies surrounding school district boundary lines are a product of second-order social closure and facilitate the creation of white island districts. It then applies an essential facilities framework to the problem and demonstrates how the framework would reach white-student segregation and monopolization in ways that the equal protection doctrine could not. It concludes by addressing limitations and critiques of applying such a framework to the problem of white-student segregation in white island districts.

A. School District Boundary Lines: The New "Whites Only" Signs

"A school district is a territorial unit within a state that has responsibility for the provision of public education within its borders."[267] School districts are creatures of the state and possess only the powers that the state affords them.[268] They are government bodies that are

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[266] *See* EDBUILD, DISMISSED: AMERICA'S MOST DIVISIVE SCHOOL DISTRICT BORDERS 1 (2019), https://edbuild.org/content/dismissed/edbuild-dismissed-full-report-2019.pdf [https://perma.cc/KWJ5-4C7H] [hereinafter EDBUILD, DISMISSED].

[267] 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) (emphasis omitted).

[268] *See, e.g.*, Perritt Ltd. P'ship 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 *ex rel.* 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, 104 (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 Supreme Court has long recognized the plenary power of the General Assembly over counties and over the creation and organization of school districts.").

generally required to educate only the students who reside within the boundaries of the district. They are also permitted to raise and spend money solely for the students who reside within the school district, with local revenue for schools generated by the property taxes collected within the school district.[269] Notably, "the average district on the whiter, wealthier side of [a district line between districts with substantial race and revenue gaps] receives over $4,000 more per student each year."[270]

Importantly, as government bodies, school districts are subject to the same constitutional constraints that apply to all government bodies, including the Equal Protection Clause.[271] In the aftermath of *Brown*, school district boundary line changes such as municipal secessions, annexations, and consolidations were utilized in some areas as proverbial swords to fend off school desegregation.[272] Federal courts, however, held that such boundary line changes were unconstitutional if the changes impeded a school district's ability to comply with a federal court order to desegregate.[273]

Yet those same courts made it clear that boundary line changes made in the absence of a federal court desegregation order are subject to less scrutiny.[274] Absent proof that a boundary line change impedes a school district's ability to meet its obligation under a federal court desegregation order,[275] courts will generally defer to the state's decisionmaking

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269 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 10–18 (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).

270 EDBUILD, DISMISSED, *supra* note 266, at 1.

271 Briffault, *supra* note 267, at 25 (noting that public bodies including school districts are subject to federal constitutional constraints).

272 *See, e.g.*, Erica Frankenberg, *Splintering School Districts: Understanding the Link Between Segregation and Fragmentation*, 34 LAW & SOC. INQUIRY 869, 883–86 (2009) (describing the ways in which municipal secession, consolidations, and annexations were used to resist school desegregation in Jefferson County, Alabama).

273 *See, e.g.*, Wright v. Council of City of Emporia, 407 U.S. 451, 452–53 (1972) (enjoining and holding unconstitutional a city's attempt to secede from a county-based school district that was under a federal court school desegregation order and to create its own separate municipally based school district); United States v. Texas, 321 F. Supp. 1043, 1048, 1052 (E.D. Tex. 1970) (finding that the defendant acquiesced in boundary changes such as annexations or detachment of territories for purposes of creating all Black or white schools and that the boundary changes were unconstitutional), *supplemented*, 330 F. Supp. 235 (E.D. Tex. 1971), *aff'd as modified*, 447 F.2d 441 (5th Cir. 1971), and *aff'd*, 447 F.2d 441 (5th Cir. 1971); Burleson v. Cnty. Bd. of Election Comm'rs, 308 F. Supp. 352, 352, 358 (E.D. Ark. 1970) (holding that predominantly white municipality could not petition to detach or secede from a racially diverse school district that was under a federal court desegregation order), *aff'd*, 432 F.2d 1356 (8th Cir. 1970).

274 *See, e.g.*, *Wright*, 407 U.S. at 470 ("Once the unitary system has been established and accepted, it may be that Emporia, if it still desires to do so, may establish an independent system without such an adverse effect upon the students remaining in the county . . . . We hold only that a new school district may not be created where its effect would be to impede the process of dismantling a dual system.").

275 *See, e.g.*, Stout *ex rel.* Stout v. Jefferson Cnty. Bd. of Educ., 882 F.3d 988, 1014 (11th Cir. 2018) (finding unconstitutional a municipality's attempt to secede from the county-based school district,

on placement of school district boundary lines.[276] Thus, boundary lines are permitted to serve as impermeable barriers that facilitate white-student segregation and inequality. The city of Detroit school district and its suburban neighboring Grosse Pointe school district exemplify the point.

1. School Districts as Impermeable Borders: Detroit and Grosse Pointe, Michigan. — The school district boundary line that divides the Detroit and Grosse Pointe, Michigan, systems has been labeled the nation's most racially and economically disparate.[277] Eighty-three percent of the students in the Grosse Pointe school district are white,[278] while only 10% of the students in the Detroit public schools are white.[279] Almost half of the children in the Detroit public schools have a family income below the poverty line,[280] while only 5% of the children in the Grosse Pointe school district have a family income below the poverty line.[281] Moreover, the median household income in Grosse Pointe is $98,063 compared to $27,829 for Detroit.[282] Finally, the spending per pupil in each district is disparate. During the 2016–2017 school year, the most recent year for which data is publicly available, Detroit spent $9,835 per student while Grosse Pointe spent $12,799 per student.[283]

The substantial differences in the demographics of the two districts directly correlate with the ability of the districts to offer high-quality educational inputs and to produce high-quality educational outcomes.[284]

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reasoning that "[t]he finding that a racially discriminatory purpose motivated the Gardendale Board also obliged the district court to deny the motion to secede").

276 *See* Wilson, *supra* note 102, at 174–75 (discussing state laws on boundary changes and noting that the state also has the power to create or alter the boundary lines of all local governments, including school districts).

277 Shawn D. Lewis, *Detroit, G.P. Schools' Economic Divide Listed As Worst*, DET. NEWS (Aug. 25, 2016, 6:43 PM), https://www.detroitnews.com/story/news/local/detroit-city/2016/08/22/detroit-grosse-pointe-schools-economic-divide/89131386 [https://perma.cc/Q6QU-CDA5].

278 *Grosse Pointe Public Schools, MI*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/Programs/Edge/ACSDashboard/2625740 [https://perma.cc/UG4U-PU2Z].

279 *Detroit City School District, MI*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/Programs/Edge/ACSDashboard/2612000 [https://perma.cc/T6YJ-AEBL].

280 *Id.* (noting that 45.5% of children in Detroit public schools have family incomes below the poverty line).

281 *See Grosse Pointe Public Schools, MI*, *supra* note 278 (noting that 6.3% of the children in Grosse Pointe public schools have family incomes below the poverty line).

282 EDBUILD, FAULT LINES: AMERICA'S MOST SEGREGATING SCHOOL DISTRICT BORDERS app. A at 16 (2020).

283 Julie Mack, *See Per-Pupil Spending, Revenues in Your Michigan School District*, MLIVE (Jan. 30, 2019), https://www.mlive.com/news/2018/08/see_per-pupil_spending_revenue.html [https://perma.cc/6UXK-33ZX].

284 *See supra* section I.C, pp. 2404–09; CITIZENS RSCH. COUNCIL OF MICH., MICHIGAN'S LEAKY TEACHER PIPELINE: EXAMINING TRENDS IN TEACHER DEMAND AND SUPPLY, at xi (2019), https://crcmich.org/PUBLICAT/2010s/2019/rpt404-teacher_pipeline.pdf [https://perma.cc/74WX-MB7T] (noting that Michigan permits "pay and compensation structures [to be]

Take teachers, for example. Many of Grosse Pointe's teachers have been rated the state's best.[285] In contrast, the City of Detroit has a shortage of teachers, few of whom are deemed highly qualified by the state, and the district often has to rely on long-term substitute teachers in many of its schools.[286] The educational outcomes for the City of Detroit public schools are so abysmal that plaintiffs recently sued the state alleging that the state failed in its obligation to ensure that students were literate.[287]

In contrast, schools in the Grosse Pointe district are considered among the best in the state.[288] In line with Weber's theory of social closure, the Grosse Pointe school district fiercely guards its border to prevent nonresidents from entry, going as far as setting up an anonymous tip line for residents to report students suspected of illegally enrolling in the district.[289] The district aggressively pursues individuals suspected of not living in the district.[290] In three academic years, the district spent nearly $75,000 investigating claims of nonresidency.[291] The superintendent of the district acknowledged following students whom he suspected of being nonresidents, peering through their windows, and asking to see their bedrooms to ensure that they lived there.[292]

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determined locally," such that the more local revenue a district can raise, the more it may be able to offer in teacher compensation).

[285] Jessica Strachan, *Grosse Pointe School Has Best Teachers for 2020*, PATCH (Oct. 14, 2019, 2:06 PM), https://patch.com/michigan/grossepointe/grosse-pointe-school-has-best-teachers-2020 [https://perma.cc/GP3S-VZQK].

[286] Mike Wilkinson, *Alarmed by Long-Term Subs, Detroit Raised Teacher Pay and Offered Bonuses*, BRIDGE MICH. (Aug. 8, 2019), https://www.bridgemi.com/talent-education/alarmed-long-term-subs-detroit-raised-teacher-pay-and-offered-bonuses [https://perma.cc/KKS6-C9KN].

[287] Gary B. v. Whitmer, 957 F.3d 616, 621 (6th Cir.) (ruling that seven Black students' claims that they were deprived of education that could provide access to literacy were sufficient to state a claim that their substantive due process rights under the Fourteenth Amendment were violated), *vacated and reh'g en banc granted,* 958 F.3d 1216 (6th Cir. 2020).

[288] Jessica Strachan, *Grosse Pointe School Among Best in State, Says Niche*, PATCH (Aug. 8, 2019, 3:04 PM), https://patch.com/michigan/grossepointe/grosse-pointe-school-among-best-state-says-niche [https://perma.cc/PNN3-6BZF].

[289] *See Enrollment Eligibility Investigations*, GROSSE POINTE PUB. SCH. SYS., https://mio1000971.schoolwires.net/Page/1042 [https://perma.cc/CQ25-U9E2] (documenting the number of students investigated for unlawful entry into the district, the number of students excluded from the district, and the number of residency tips received); Lauren Slagter, *Grosse Pointe Schools Rethinks Way It Keeps Detroit Kids and Others Out*, MLIVE (Jan. 19, 2019), https://www.mlive.com/news/ann-arbor/2017/09/grosse_pointe_residency.html [https://perma.cc/2F64-Z54E] (describing the anonymous tip line and other stringent enrollment verification tools used to patrol entry into the school system).

[290] Mich. Radio Newsroom & Catherine Shaffer, *Grosse Pointe School Board Members Say Residency Rules Burden Renters, Working Parents*, NPR (Sept. 14, 2017), https://www.michiganradio.org/post/grosse-pointe-school-board-members-say-residency-rules-burden-renters-working-parents [https://perma.cc/ZL46-ZA7L].

[291] *Id.*

[292] Tom Gantert, *Grosse Pointe Restricts Nonresident Students, Board Member Joins "Charter School Segregation" Chorus*, MICH. CAPITOL CONFIDENTIAL (Dec. 8, 2017), https://www.

Further, the State of Michigan offers a schools-of-choice program that enables districts to accept transfers from a neighboring school district.[293] Grosse Pointe has declined to participate in the program.[294] The decision not to participate is illogical because enrollment in the Grosse Pointe district is declining due to lower birth rates and an older population within the district.[295] The hyperpolicing of the Grosse Pointe boundary line in conjunction with the district's refusal to participate in the schools-of-choice program has had a disproportionate impact on Detroit students who could benefit from a more permeable border, many of whom are Black.

The disparities between the Detroit and Grosse Pointe districts arguably violate the spirit, if not the letter, of the Supreme Court's opinion in *Brown*. Yet because of the autonomy afforded district boundary lines by *Milliken*, little can be done to compel the state to require the school districts to share resources or to assign students across district boundary lines. Consequently, the legal impermeability of school district boundary lines is an institutional arrangement that facilitates second-order social closure and enables white monopolization of high-quality schools.

2. Municipal Secessions: Jefferson County, Alabama. — Another mechanism used to facilitate second-order social closure and enable whites to monopolize high-quality schools is municipal secessions. Across the country, affluent, predominantly white municipalities are seceding from racially diverse school districts.[296] A municipal secession occurs when a municipality leaves a larger territorial-based school district to form its own independent and autonomous school district.[297]

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michigancapitolconfidential.com/grosse-pointe-restricts-nonresident-students-board-member-joins-charter-school-segregation-chorus [https://perma.cc/U8NA-9UKN].

[293] MICH. COMP. LAWS § 388.1705c (2019) ("[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.")

[294] *See* Gantert, *supra* note 292 ("Grosse Pointe Public Schools is one of the few districts that does not participate in the state School of Choice law . . . .").

[295] Tom Gantert, *Grosse Pointe Schools' Lower Enrollment in Part Their Choice*, MICH. CAPITOL CONFIDENTIAL (Mar. 27, 2019), https://www.michigancapitolconfidential.com/grosse-pointe-schools-lower-enrollment-in-part-their-choice [https://perma.cc/LXQ6-MJPZ] (noting that "Grosse Pointe's enrollment has fallen from 8,399 students in the 2010–11 school year to 7,638 in 2018–19," but that Grosse Pointe continues to decline participation in the schools-of-choice program).

[296] *See generally* EDBUILD, FRACTURED: THE ACCELERATING BREAKDOWN OF AMERICA'S SCHOOL DISTRICTS (2019), https://edbuild.org/content/fractured/fractured-full-report.pdf [https://perma.cc/2HBZ-N35Z] [hereinafter EDBUILD, FRACTURED (2019)] (cataloging municipal secessions from school districts across the country).

[297] *See* EDBUILD, FRACTURED: THE BREAKDOWN OF AMERICA'S SCHOOL DISTRICTS 3 (2017), *in* EDBUILD, FRACTURED (2019), *supra* note 296 [hereinafter EDBUILD, FRACTURED (2017)].

States have plenary authority to enact laws that determine when and how municipalities can secede from a school district.[298]

Since 2000, 128 municipalities have attempted to secede and seventy-three of them have been successful in doing so.[299] The secessions follow a similar demographic trend: "[C]ompared to the districts they . . . leave behind, they have higher property values, higher incomes, and . . . lower numbers of nonwhite students and those living below the poverty line."[300] The secessions have the effect of creating predominantly white and affluent school district enclaves situated next to districts that are predominantly minority and low income. The Jefferson County School District (JCSD) in Alabama provides an illustrative example.

JCSD is a county-based school district that traces its roots to 1819.[301] Alabama has permissive laws regarding municipal secessions. Municipalities that include over five thousand residents may establish a separate school district.[302] After *Brown* was decided, predominantly white municipalities within JCSD took advantage of the permissive laws regarding school district creation and began seceding from JCSD. For example, the city of Mountain Brook, Alabama, seceded in 1959, five years after *Brown* was decided.[303] In 1965 a federal court in *Stout v. Jefferson County*[304] found that JCSD was de jure segregated and required it to desegregate its schools.[305] However, because Mountain Brook seceded prior to the *Stout* school desegregation order, it was not affected by that order.[306]

Even after the *Stout* desegregation order was put in place, in 1970–1971, three other predominantly white municipalities — Vestavia, Midfield, and Homewood — seceded from JCSD.[307] Despite the Supreme Court's 1972 ruling in *Wright v. Council of Emporia*[308] that municipal secessions are unlawful where the impact is to impede school desegregation efforts, the Fifth Circuit failed to enjoin the secessions and allowed them to go forward.[309] Although the *Stout* desegregation order

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[298] *See* Wilson, *supra* note 102, at 174–75 (describing the legal context for school district secessions).

[299] EDBUILD, FRACTURED (2019), *supra* note 296, at 1.

[300] *Id.*

[301] *See* VICKIE M. CHANDLER & PAMELA S. KING, ELEMENTARY AND SECONDARY PUBLIC EDUCATION IN JEFFERSON COUNTY, ALABAMA, 1968–1975, at i (1978).

[302] Wilson, *supra* note 102, at 177 (citing ALA. CODE § 16-11-1 (1975)).

[303] Erica Frankenberg, *Splintering School Districts: Understanding the Link Between Segregation and Fragmentation*, 34 LAW & SOC. INQUIRY 869, 883 (2009).

[304] No. 65-396 (N.D. Ala. June 24, 1965) (reproduced in Stout v. Jefferson Cnty. Bd. of Educ., 250 F. Supp. 3d 1092, 1187–90 (N.D. Ala. 2017)).

[305] *See id.* at 2–4 (reproduced in *Stout*, 250 F. Supp. 3d at 1188–90).

[306] Frankenberg, *supra* note 303, at 883 n.14.

[307] *See id.* at 880–87 (describing the history and timeline of municipal secessions from the JCSD).

[308] 407 U.S. 451 (1972).

[309] *See* Frankenberg, *supra* note 303, at 878–79, 885.

remains active, three more municipalities seceded from JCSD between 1988 and 2005 — Hoover, Leeds, and Trussville.[310] In 2018, the Eleventh Circuit (formerly part of the Fifth Circuit) finally pushed back against further secessions when it denied a secession attempt by the predominantly white city of Gardendale.[311]

Yet the damage was already done. Many of the municipalities that seceded from JCSD are predominantly white and affluent. For example, the Mountain Brook School District is 96% white while the Trussville and Vestavia Hills School Districts are 87% and 88% white respectively.[312] Further, smaller separated school districts are able to spend an average of over $3,000 more per pupil than do the large school districts from which they secede.[313] Critically, the existence of predominantly white districts outside of JCSD serves a recruitment function. Parents with greater social capital, who can exercise choice in where they send their children to school, gravitate to the predominantly white school districts outside of JCSD, which leaves JCSD to absorb responsibility for educating a disproportionate share of low-income students of color who cost more to properly educate.[314] The secessions allow affluent white enclaves like Mountain Brook to serve as a haven for white students. They also facilitate second-order social closure and monopolization of high-quality schools. Indeed, Mountain Brook was recently named the best school district in Alabama.[315] Three other predominantly white districts that also seceded from JCSD — Vestavia Hills, Homewood, and Hoover — were also named among the top ten school districts in the state.[316] JCSD, however, was not.

3. Consolidations: Spackenkill and Poughkeepsie, New York. — Finally, refusing to make boundary-line changes also facilitates segregation of white students. After the Court's decision in *Brown*, school-district consolidations were often utilized as a tool to desegregate racially

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310 *Id.* at 886.

311 Stout *ex rel.* Stout v. Jefferson Cnty. Bd. of Educ., 882 F.3d 988, 992, 1013 (11th Cir. 2018).

312 *See Mountain Brook City School District, AL*, *supra* note 4 (displaying demographic data for Mountain Brook); *Trussville City School District, AL*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/Programs/Edge/ACSDashboard/0100013 [https://perma.cc/L9MT-8VQQ] (same for Trussville); *Vestavia Hills City School District, AL*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/Programs/Edge/ACSDashboard/0103430 [https://perma.cc/V6JB-7KMP] (same for Vestavia Hills).

313 *See* EDBUILD, FRACTURED (2017), *supra* note 297, at 4.

314 *See* Wilson, *supra* note 102, at 187–89 (describing the ways in which municipal secessions from school districts allow for the seceding municipalities to draw residents with more money and social capital).

315 Leada Gore, *50 Best School Districts in Alabama*, AL.COM (May 18, 2019), https://www.al.com/news/2018/01/50_best_school_districts_in_al.html [https://perma.cc/BMM7-TBNM].

316 *Id.*

segregated school systems.[317] Similar to secessions, states have plenary authority to decide the conditions under which school district consolidations occur.[318]

Most states — thirty-nine — usually make school-district consolidation a voluntary endeavor, meaning that it happens only if the districts agree to merge.[319] Some states provide financial incentives to encourage consolidation.[320] Yet few states — only nine — provide a mechanism through which the state can mandate school-district consolidation.[321] Even when states provide a mechanism for mandating consolidation, the conditions under which consolidation is mandated vary substantially.[322] Some states have broad authority to mandate consolidation while other states can mandate consolidation only under very limited circumstances such as financial insolvency.[323]

When there are no mechanisms for the state to require consolidation, more affluent, predominantly white districts are more likely to decline consolidation requests made by low-income, predominantly minority districts, even when offered substantial financial incentives. Such was the case with two school districts in upstate New York.

The Spackenkill community in New York encompasses an area that is only six miles wide within the town of Poughkeepsie, New York.[324] Spackenkill and Poughkeepsie have two separate and autonomous school districts.[325] Spackenkill has a distinct history that allowed it to draw affluent and well-educated residents. Historically, it was buoyed by the presence of an IBM plant that attracted high-income earners who could afford expensive homes.[326]

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317 *See, e.g.*, United States v. Missouri, 515 F.2d 1365, 1366 (8th Cir. 1975) ("The purpose of the consolidation is to achieve a meaningful desegregation of Kinloch, a racially segregated and inadequately funded school district which has been established and maintained by state action in violation of the equal protection clause.").

318 *See* Wilson, *supra* note 102, at 174–75 ("[T]he state also has the power to create or alter the boundary lines of all local governments, including school districts.").

319 EDBUILD, STRANDED: HOW STATES MAROON DISTRICTS IN FINANCIAL DISTRESS 3 (2018), https://edbuild.org/content/stranded/full-report.pdf [https://perma.cc/BE4V-RJEQ] [hereinafter EDBUILD, STRANDED].

320 *Id.* at 11; *see, e.g.*, OHIO REV. CODE ANN. §§ 3311.231, .241 (West 2021).

321 *See* EDBUILD, STRANDED, *supra* note 319, at 10.

322 *Id.*

323 *Id.*; *see, e.g.*, N.C. GEN. STAT. ANN. § 115C-66.5(a) (West 2021) ("The State Board of Education shall have the authority to consolidate and merge contiguous county school administrative units or a group of county school administrative units in which each county unit is contiguous with at least one other county unit in the group.").

324 *See* Sue Books, *The Politics of School Districting: A Case Study in Upstate New York*, J. EDUC. FOUNDS., Summer-Fall 2006, at 15, 16.

325 *See id.*

326 *Id.* at 17.

In contrast, the city of Poughkeepsie became financially distressed after losing manufacturing plants and residents.[327] In light of the connection between local property taxes and school funding, the two school districts reflect those same fortunes today. The Spackenkill district thrives and can raise and spend $21,569 per student from local sources.[328] The Poughkeepsie district, on the other hand, is able to spend and raise four times less from local sources at $6,118 per student.[329] The Spackenkill district is 63% white[330] while the Poughkeepsie district is only 7% white.[331]

New York's laws regarding school-district consolidation offer districts substantial financial incentives to consolidate but have no mechanism by which the state can force a consolidation.[332] The State of New York offered generous financial incentives to encourage a consolidation of the districts, namely a five-year, 10% increase in operating funds for a consolidated and combined district — but Spackenkill declined.[333] The end result is that school district boundary lines permit the predominantly white Spackenkill district to monopolize the highest-quality schools in the area. Spackenkill High School, for example, received the National Blue Ribbon academic excellence award, offers fourteen advanced placement classes, and had 95% of its graduating class of 2018 go on to attend college.[334] In contrast, Poughkeepsie High School had an abysmal 48% high school graduation rate, aging infrastructure, and worse educational outcomes.[335]

B. Essential Facilities Framework Applied to White Island Districts

White island districts exist because of the legal sanctity afforded school district boundary lines. Yet the school district boundary lines

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[327] *Id.* at 17–18.

[328] EDBUILD, STRANDED, *supra* note 319, at 8.

[329] *Id.*

[330] *Spackenkill High School Enrollment (2016–17)*, N.Y. STATE EDUC. DEP'T, https://data.nysed.gov/enrollment.php?year=2017&instid=800000053239 [https://perma.cc/GVA2-K9XV].

[331] *Poughkeepsie City School District Enrollment (2017–18)*, N.Y. STATE EDUC. DEP'T, https://data.nysed.gov/enrollment.php?year=2018&instid=800000053351 [https://perma.cc/PE5D-NQWL].

[332] *See* EDBUILD, STRANDED, *supra* note 319, at 9 ("[S]chool districts that consolidate in New York receive an additional 40% in operating aid for five years, phasing out over a further nine years.").

[333] Books, *supra* note 324, at 18, 25 (describing Spackenkill's decision to turn down consolidation requests and noting that "[t]he Spackenkill Board of Education and its advocates used the language of local control not to defend funding inequities directly, but rather to justify the creation of a haven," *id.* at 25).

[334] *See* Tiana Headley, *A Tale of Two Districts: History of Poughkeepsie Schools*, MISCELLANY NEWS (Nov. 7, 2019), https://miscellanynews.org/2019/11/07/news/a-tale-of-two-districts-history-of-poughkeepsie-schools [https://perma.cc/D3VV-2MJ4].

[335] *Id.*

that are creating them do not violate the Equal Protection Clause, in large part because the doctrine does not recognize the monopolistic harms wrought by the boundary lines as a cognizable injury. This section uses the elements of the essential facilities doctrine as set forth in *MCI Communications Corp.* to demonstrate how the essential facilities framework would recognize the monopolization harms caused by white-student segregation in white island districts. Notably, the analysis offered in this section is not meant to encapsulate the strict legal criteria required to state a claim under the essential facilities doctrine. Instead, it uses the essential facilities framework only as an analogous construct to illustrate what a legal framework looks like that could appropriately recognize the monopolization harms caused by white-student segregation.

To understand how the analogy works, a few definitional parameters are necessary. First, this section proceeds from the assumption that the predominantly white island districts are the monopolists. The racial demographics of a school district play a critical role in perceptions regarding the quality of a school district.[336] Perceptions regarding school district quality in turn play a substantial role in where parents with greater material and nonmaterial resources decide to enroll their children.[337] From this perspective, white parents serve as consumers of the school district. The district is in turn able to use the collective aggregation of white consumer parents to engage in cartel conduct[338] and serve as monopolists.

Second, in the antitrust realm, a monopolist is a firm that has the ability "to control prices or exclude competition" in a relevant market.[339] The relevant market is determined by the reasonable interchangeability of products.[340] In the context of this analogy, the relevant market is the metropolitan area in which white island school districts like Grosse Pointe, Mountain Brook, and Spackenkill are situated. The metropolitan area is an appropriate relevant market because research shows that municipalities within metropolitan areas compete for residents in part through the quality of schools offered.[341]

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[336] *See* Wilson, *supra* note 18, at 256–59 (describing the ways in which the racial demographics of a school influence parental choices about enrolling their children in a school).

[337] *See, e.g.*, Holme, *supra* note 100, at 194 ("[T]he parents in [the] study surmised a great deal about a school's quality by the status of its students: those 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.").

[338] For a fuller discussion of how the districts engage in cartel conduct, see *infra* section III.B.3, pp. 2439–40.

[339] United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)).

[340] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 325–26 (1962).

[341] *See, e.g.*, GOVERNANCE AND OPPORTUNITY IN METROPOLITAN AMERICA 28–32 (Alan Altshuler et al. eds., 1999).

Finally, predominantly low-income minority districts situated next to the white island districts are competitors for purposes of the analogy. They are competing for the high-quality educational inputs like teachers, funding, and students that are critical to the construction of high-quality schools. While the neighboring low-income districts are the competitors, it is the students within those districts who are prohibited from accessing the high-quality schools being monopolized by the white island districts. From that vantage point, this section highlights the ways in which the essential facilities framework can recognize and respond to monopolization harms in ways that an equal protection analysis cannot.

In applying the essential facilities framework analogy, this section will show: (1) predominantly white island school districts are monopolists that control access to an essential facility in high-quality schools; (2) high-quality schools cannot be reasonably duplicated by a competitor; and (3) the white island districts are denying access to students in neighboring districts when it is feasible to grant access.

1. Monopolists Controlling Access to an Essential Facility. — Like the coalition in *United States v. Terminal Railroad Ass'n of St. Louis*,[342] which monopolized the market by acquiring the only railroad bridge that went across the Mississippi River, white island districts control the flow of educational inputs necessary to create high-quality schools. A comparison of the educational inputs available to a white island district like Mountain Brook in contrast with those available to neighboring districts underscores this point.

In 2017–2018, Mountain Brook spent $14,748 per student, of which $9,666 came from local taxes, while its neighboring, more racially diverse district JCSD was able to spend only $10,440 per student, of which only $3,495 came from local taxes.[343] Indeed, Mountain Brook has been labeled the best school district in Alabama.[344] Its schools have a low student-to-teacher ratio at 14:1 and the average teacher salary is in excess of $65,000 per year.[345] Consequently, the district as a whole has a 97% graduation rate with over 84% of its students deemed proficient in math and reading.[346]

One might counter that white island districts are able to control the flow of educational inputs that create high-quality schools because of money, not race. Yet that supposition obscures the extent to which

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[342] 224 U.S. 383 (1912).

[343] *Jefferson County School District Details — Fiscal*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/ccd/districtsearch [https://perma.cc/JTX9-7ZXX] (enter "0101920" for NCES District ID; then click "Jefferson County;" then click "Fiscal" tab).

[344] Stephen Niedzwiecki, *The Best School District in Every State*, KAKE NEWS (July 20, 2020, 12:14 PM), https://www.kake.com/story/42388632/the-best-school-district-in-every-state [https://perma.cc/TC9B-NABV].

[345] *Id.*

[346] *Id.*

whiteness impacts both the money available to a white island district like Mountain Brook and the social value attached to whiteness that draws parents and students with high levels of social capital.

With respect to the money, the inherent link between race and class in America enables ostensibly race-neutral land use control laws to concentrate the flow of more affluent white residents within discrete borders like Mountain Brook. Put another way, race generally and whiteness specifically influences residential sorting patterns and the tax base from which a district can draw.[347] In Jefferson County in particular, the secession of predominantly white municipalities has had a significant impact both on residential sorting patterns and tax bases from which the districts draw.[348]

Further, as noted by race law scholars such as Professor Daria Roithmayr and Professor Brant Lee, who also analogize to antitrust law, whiteness has network economic effects.[349] In the antitrust literature, the term network economic effects means that "certain goods, once established as a market standard, reap network effects that enable them to dominate a market persistently."[350] The Microsoft Windows operating system provides a concrete example. In the seminal antitrust case against Microsoft, the United States alleged that network economic effects, along with anticompetitive conduct by Microsoft, strengthened its monopoly power in the operating systems market. The United States specifically alleged: "The more users a particular operating system has, the more applications software developers will write for that operating system; and that, in turn, will make the operating system more attractive to more users, resulting in positive feedback reinforcing its dominance."[351] As the network economic effects analogy is applied to whiteness, it means that whiteness is the dominant racial standard in America. It is the Microsoft Windows of racial identities.[352] Just as

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[347] *See* EDBUILD, *supra* note 122, at 2.

[348] *See* ERICA FRANKENBERG & KENDRA TAYLOR, SCHOOL DISTRICT SECESSIONS: HOW BOUNDARY LINES STRATIFY SCHOOL AND NEIGHBORHOOD POPULATIONS IN JEFFERSON COUNTY, ALABAMA, 1968–2014, at 15–19 (2017) (describing the increase in home values for majority white municipalities that seceded from JCSD and the impact on the district's tax base). Seceding districts that saw decreases in median home values subsequently became predominantly nonwhite. *Id.* at 16.

[349] *See* Brant T. Lee, *The Network Economic Effects of Whiteness,* 53 AM. U. L. REV. 1259, 1267 (2004); Roithmayr, *supra* note 21, at 734.

[350] Lee, *supra* note 349, at 1267.

[351] Roithmayr, *supra* note 21, at 733 n.18 (quoting Memorandum of the United States in Support of Motion for Preliminary Injunction at 17, United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000) (No. 98-1232), 1998 WL 34201987).

[352] *See* Lee, *supra* note 349, at 1267 ("Whiteness operates as a racial standard that provides network economic advantages. An important consequence of this analysis is that the dominant and persistent nature of network standards — rather than 'merit' — explains current racial disparities.").

consumers presume the Microsoft Windows operating system to be the best because of network effects and developers continue to write for the system thereby making it the best, whiteness is also seen as the best relative to other racial identifications, thereby drawing people and resources to the white island districts. In other words, the inputs associated with high-quality schools, such as teachers, students, and money, will continue to flow to white island districts if they are permitted to exist because places characterized as predominantly white are presumed to be of the highest quality.[353] It becomes a self-fulfilling prophecy and enables monopolization of the educational inputs needed to create high-quality schools.[354] From that lens, the white island districts are indeed monopolists that control access to high-quality schools.

Finally, one would also need to show that high-quality schools are indeed essential facilities. In the antitrust context, facilities are deemed essential when they are indispensable to competition in a marketplace.[355] In the education context, access to high-quality schools is indispensable to the economic and social health of the democracy. As it stands now, experts express concern about students of color being warehoused in low-quality schools and the eventual impact that will have on the social and economic fabric of the democracy.[356] Thus, high-quality schools can fairly be situated as an essential facility.

2. The Feasibility of Duplicating High-Quality Schools. — The next inquiry within the essential facilities framework requires an assessment of whether the essential facility can reasonably be duplicated. For purposes of this analogy, the inquiry would be whether it is likely that high-

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[353] An example of this is the experiment done in which law partners rated the same memo differently based on their belief as to the race of the associate who wrote the memo. *See, e.g.*, Debra Cassens Weiss, *Partners in Study Gave Legal Memo a Lower Rating When Told Author Wasn't White*, A.B.A. J. (Apr. 21, 2014, 12:09 PM), http://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases [https://perma.cc/J5AV-SBLQ]. When partners believed the associate who wrote the memo was white, they found fewer errors and were more likely to rate the memo as excellent. *Id.* In contrast, when partners believed the associate who wrote the memo was Black, they found numerous errors and rated the memo as low quality, even though the same memo was reviewed by all of the partners. *Id.*

[354] *See, e.g.*, Elise C. Boddie & Dennis D. Parker, Opinion, *Linda Brown and the Unfinished Work of School Integration*, N.Y. TIMES (Mar. 30, 2018), https://www.nytimes.com/2018/03/30/opinion/linda-brown-school-integration.html [https://perma.cc/ZB5P-FGSJ] ("Segregation often undermines property wealth in [B]lack and Latino communities because of the close relationship between the demand for housing and the perceived quality of local schools. This has the effect of limiting the pool of available tax revenue for funding local school districts.").

[355] *See supra* section II.B, pp. 2416–21.

[356] *See, e.g.*, Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 12, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915), 2006 WL 2927079 ("Because of the growing number of minority students in public schools, if existing educational trends continue, the nation risks something it has never before seen: an intergenerational decline in its educational level, a threatening outcome in a knowledge-based, global economy.").

quality schools could be duplicated in neighboring more racially diverse districts. White island districts' monopolization over the educational inputs needed to create high-quality schools is the crux of what enables them to monopolize high-quality schools. Therefore, assessing the feasibility of duplication requires one to consider whether the educational inputs needed to create high-quality schools could be duplicated in neighboring districts.

The most obvious and relevant educational input is money. The lived reality is that because of the commitment to local school financing schemes, school districts that have lower tax bases have not been able to spend the same as higher-wealth districts, even after receiving funding by the state meant to increase the minimum amount spent by districts.[357] Moreover, improving the minimum amount all districts can spend has not stopped wealthier districts from spending substantially above the minimum.[358] The distributional flow of educational inputs in metropolitan areas is arguably a question of relativity. If wealthier districts can spend more money relative to neighboring districts, they will continue to be able to offer higher-quality facilities, curricular offerings, and pay and attract the highest-quality teachers.

Further, the 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. Of all the educational inputs, an appropriate mix of students is most critical to creating high-quality schools. The social science evidence is clear that the presence of middle-income and typically white students has a profound impact on the creation of high-quality schools.[359] Schools that lack middle-class and typically white students tend to have less access to high-quality teachers, a rigorous curriculum, and high-quality physical facilities.[360] They also have less access to intangible educational inputs,

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[357] *See* Laurie Reynolds, *Skybox Schools: Public Education as Private Luxury*, 82 WASH. U. L.Q. 755, 759 (2004) (describing state efforts to equalize spending between school districts).

[358] *Id.* (noting that "in most states, school districts retain the ability to set their own upper limits on spending").

[359] *See, e.g.*, Black, *supra* note 15, at 410; *see also* JOHNSON WITH NAZARYAN, *supra* note 22, at 57–60 (describing the impact of racial integration in increasing the quality of previously segregated public schools); Black, *supra* note 15, at 404 (arguing for a constitutional right to equal access to middle-income peers and noting that "[i]n at least six major academic categories, predominantly poor and minority schools cause harm or deliver inferior educational opportunities to students").

[360] *See supra* section I.B.2, pp. 2396–400; *see also* Valerie Strauss, Perspective, *Too Many of America's Public Schools Are Crumbling — Literally. Here's One Plan to Fix Them.*, WASH. POST (Mar. 5, 2019, 2:06 PM), https://www.washingtonpost.com/education/2019/03/05/too-many-americas-public-schools-are-crumbling-literally-heres-one-plan-fix-them [https://perma.cc/PYB2-F78S] (describing the crumbling conditions in the predominantly Black Detroit public schools and noting that the water in some of the schools had to be shut off due to lead and copper risks connected to outdated plumbing).

namely the types of social capital that enhance peer-to-peer learning.[361] The absence of these inputs affects educational outcomes.[362] Significantly, it is not that middle-class and typically white students have magical powers that make schools better. Instead, it is the power and status associated with the way whiteness and class are constructed in America that make the absence of middle-class white students in schools correlate with lower-quality schools. Empirical research substantiates this notion, finding that the very act of desegregating schools has a substantial impact on both tangible and intangible resources within a school and students' educational outcomes.[363]

Importantly, simply increasing school funding in predominantly minority low-income districts is not a panacea. Research shows that funding alone is not sufficient to create high-quality schools.[364] While funding certainly helps to address resource deficits, one must also address holistically all the components that go into creating high-quality schools, which include student-body composition.[365] As such, the ability of the predominantly low-income and minority neighboring school districts to duplicate the quality of education that the white island districts offer is dubious.

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[361] Black, *supra* note 15, at 409 ("Due to the opportunities they receive outside of school, middle- and high-income students tend to bring more educational capital to school and, thus, elevate the learning of those around them. . . . [The] students come from families that tend to have higher academic expectations for their children. When these students are the majority in a school, the students create a culture of high achievement that benefits everyone. . . . [M]iddle-income students' parents tend to place high expectations on school officials and hold them accountable. As a result, these schools are more effective than others." (footnotes omitted)).

[362] *Id.* at 407 ("[U]nequal access to teachers and curriculum has the natural result of negatively impacting student achievement. Students in predominantly poor and minority schools routinely achieve much lower than students in predominantly white schools.").

[363] *See, e.g.*, JOHNSON WITH NAZARYAN, *supra* note 22, at 58 (finding that the enactment of school desegregation plans resulted in "sharp increases in per-pupil spending (by an average of 22.5 percent) and significant reductions in the average class sizes experienced by [B]lack children").

[364] *See, e.g.*, Sarah Gonzalez, *What Happened When One of New Jersey's Poorest School Districts Increased Spending*, WNYC NEWS (Apr. 24, 2016), https://www.wnyc.org/story/what-happened-when-one-new-jerseys-poorest-school-districts-increased-spending [https://perma.cc/XM6U-L7JS] (explaining that school finance reforms in New Jersey led Camden, a low-income predominantly Black district, to spend $23,000 per student — 2.5 times the national average — but that academic outcomes improved only marginally); *see also* Eric Hanushek & Alfred Lindseth, *Performance-Based Funding*, HOOVER INST.: DEFINING IDEAS (June 9, 2009), https://www.hoover.org/research/performance-based-funding [https://perma.cc/XRW3-QU8H] ("[S]pending per pupil has almost quadrupled since 1960 (after allowing for inflation). Achievement, however, has remained largely flat . . . .").

[365] *See, e.g.*, Jo Craven McGinty, *To Shrink Achievement Gap, Integrate School Districts*, WALL ST. J. (Oct. 4, 2019, 7:00 AM), https://www.wsj.com/articles/to-shrink-achievement-gap-integrate-school-districts-11570186801 [https://perma.cc/7GYP-YX6F] (describing the ways in which racial integration in schools contributes to higher-quality educational outcomes for all students).

3. Anticompetitive Conduct. — The final line of inquiry in the essential facilities analogy is whether white island districts' monopolization of high-quality schools is the result of anticompetitive conduct, particularly denying students of color access to high-quality schools when it is feasible to grant access. The primary facilitator of second-order social closure that leads to monopolization for white island districts is school district boundary lines. Beginning with the Supreme Court's decision in *Milliken*, school district boundary lines became potent racialized dividing lines between high-quality and low-quality schools.

The legal sanctity afforded school district boundary lines provides white island districts the opportunity to behave like what Professor Daria Roithmayr calls "racial cartels." Racial cartels engage in collective action and utilize anticompetitive strategies to exclude nonwhites from certain realms.[366] She suggests that racial-cartel conduct allows whites to "derive significant economic, social and political benefits" by excluding nonwhites.[367] Roithmayr further notes that, like traditional cartels, racial cartels can be state sponsored, using state laws to run cartel operations.[368]

An example of a racial cartel that used state laws to run cartel operations is the white planters who, after the Civil War, organized and persuaded state legislatures to enact Black Codes,[369] which had the effect of preventing full integration of Black workers into agricultural labor markets.[370] Another example is the white legislators from the South who collaborated with the Roosevelt Administration to exclude Black domestic and agricultural workers from receiving social security benefits.[371]

With respect to the analogy advanced in this Part, white island districts engage in racial-cartel conduct that amounts to anticompetitive conduct by either pushing for or taking advantage of state laws surrounding school district boundary lines that have the effect of excluding meaningful numbers of nonwhite students, particularly Black and Latino students. Take, for example, the way that the Grosse Pointe school district polices its boundary line,[372] the methods used to advance secession in the JCSD,[373] or the refusal to consolidate in Spackenkill.[374]

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366 *See* Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45, 52 (2010).

367 *Id.*

368 *Id.* at 50–51.

369 DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGES 33 (2014).

370 *See id.* at 36.

371 *Id.* at 37.

372 *See supra* section III.A.1, pp. 2426–28.

373 *See supra* section III.A.2, pp. 2428–30.

374 *See supra* section III.A.3, pp. 2430–32.

It would be feasible for white island districts like Grosse Pointe, Mountain Brook, and Spackenkill to use voluntary mechanisms within the laws surrounding school district boundary lines to open their borders. They all decline to do so. Grosse Pointe declines to participate in the schools-of-choice transfer program that would allow students from neighboring districts like Detroit to enroll.[375] Similarly, Spackenkill was offered several incentives to consolidate with the Poughkeepsie district but continues to decline the option, preferring instead to maintain its own independent and homogenous district.[376] The school districts' failure to voluntarily open their borders results in school district boundary lines being used in ways that exclude nonwhite students, especially Black and Latino students. Whether that is their subjective intent is irrelevant under the essential facilities analysis. Instead, the key inquiry is the impact of their actions.

This section demonstrated what an analysis of the problem of white-student racial segregation in white island districts would look like using an essential facilities framework. The section that follows discusses the ways in which the essential facilities framework offers advantages over an equal protection framework, in terms of both recognizing and affording a remedy to the problem of white-student segregation in white island districts and the monopolization of high-quality schools.

C. Doctrinal Advantages of Applying an Essential Facilities Framework

Critically, the essential facilities framework offers significant advantages over an equal protection framework. One advantage is the ability to recognize monopolization as a cognizable injury. Under an equal protection framework, monopolization is not in and of itself a cognizable harm. To get at the monopolization harms under an equal protection framework, one would have to show that the state is intentionally providing disparate educational opportunities because of race. Demonstrating this intent would prove difficult if not impossible. Boundary lines are race neutral. As such, under an equal protection analysis, courts would assume the lines are constitutional and review them in a highly deferential manner unless there was compelling evidence of discriminatory intent.[377] Thus, demonstrating that the boundary lines were the product of discriminatory intent would, in most cases, be a barrier to relief.

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[375] *See supra* section III.A.1, pp. 2426–28.

[376] *See supra* section III.A.3, pp. 2430–32.

[377] *See* Washington v. Davis, 426 U.S. 229, 237, 245–48 (1976) (finding that a facially neutral employment test that excluded four times as many Black as white applicants did not violate equal protection because there was no showing of discriminatory intent).

Unlike equal protection doctrine, as antitrust scholars have noted, the essential facilities doctrine does not preclude a finding of liability in the absence of anticompetitive intent.[378] Instead, courts find that "liability is particularly appropriate when . . . denial of access [to an essential facility] is motivated by an anticompetitive animus."[379] Yet the presence of anticompetitive intent is only one piece of the analysis. The absence of anticompetitive intent does not preclude liability if the court finds that the effect of the defendant's conduct is to unreasonably restrain trade or to maintain a monopoly in ways that harm competition.[380] When an essential facilities framework is applied to the problem of predominantly white island districts, the effect of the school district boundary lines on the ability of the districts to exclude and the resultant harms to democracy, rather than intent, would be the determining factors.

Further, under an equal protection analysis, the court would require the identification of a state-entity perpetrator that is at fault for the racial disparities.[381] The racial composition of schools is often situated as the result of private parental choice in residential location, not the result of state action.[382] The Supreme Court has embraced this result as well,

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[378] *See, e.g.*, Robert Pitofsky et al., *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 450 (2002); Frank X. Schoen, Note, *Exclusionary Conduct After* Trinko, 80 N.Y.U. L. REV. 1625, 1649 (2005) ("A reading that takes from [Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004),] an increased emphasis on anticompetitive intent, however, would be mistaken given the Supreme Court's firm (and very clear) statements elsewhere against giving subjective intent weighty consideration.").

[379] Pitofsky et al., *supra* note 378, at 450; *see, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 603 (1985) (finding the defendant liable under an essential facilities theory when the defendant changed its business practices with the intent of excluding competition); Byars v. Bluff City News Co., 609 F.2d 843, 856 (6th Cir. 1979) ("[T]he distinction between the 'intent' theory and the 'bottleneck' theory is that the former focuses on the monopolist's state of mind while the latter examines the detrimental effect on competitors."); Apartment Source of Pa., L.P. v. Phila. Newspapers, Inc., No. 98-5472, 1999 WL 191649, at *11 (E.D. Pa. Apr. 1, 1999) ("The Court recognizes that, separate and apart from the essential facilities doctrine, a plaintiff can rely on a theory of predatory intent as a basis of recovery in a refusal to deal case."); Sunshine Cellular v. Vanguard Cellular Sys., Inc., 810 F. Supp. 486, 497 (S.D.N.Y. 1992) (citing *Aspen*, 472 U.S. at 601–02) (finding that "[a monopolist] may not refuse to deal with [its competitor] if its refusal is motivated by anticompetitive animus").

[380] *See* 15 U.S.C. § 2; United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

[381] *See generally* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (critiquing Supreme Court antidiscrimination jurisprudence).

[382] *See* Missouri v. Jenkins, 515 U.S. 70, 116 (1995) (Thomas, J., concurring) ("The continuing 'racial isolation' of schools after *de jure* segregation has ended may well reflect voluntary housing choices or other private decisions."). *But see* Jared A. Levy, Note, *Blinking at Reality: The Implications of Justice Clarence Thomas's Influential Approach to Race and Education*, 78 B.U. L. REV. 575, 607 (1998) (criticizing the myopic application of the state action doctrine by Justice Thomas, noting that a "reductionist view of state action, requiring a *particular* and *discrete* government entity to have caused segregation intentionally, ignores the many complex and interrelated state policies that collectively result in the segregation of public schools").

holding that racial disparities in schools that are the result of individual citizens' ostensibly private residential choices cannot be linked to the state and are therefore beyond the Court's remedial purview.[383] The essential facilities framework, on the other hand, looks at the actual conditions that exist without the need to ascribe intent to a perpetrator. By obviating the need to identify a perpetrator, the framework allows one to focus instead on the disparate access — in this case white monopolization of high-quality schools — rather than focusing on assigning fault for the racially disparate distribution of access to high-quality schools.

Moreover, the inquiry into the question of duplicability protects the integrity of competition within a market. If the facility is indeed essential to competition and cannot be duplicated, then the essential facilities framework recognizes that the competitive process is harmed. Equal protection doctrine, on the other hand, is unable to account for the broader harms to democracy caused by racial segregation in public schools. The doctrine is undergirded by the premise that racial segregation is harmful only when it occurs because of explicit state action in creating segregated schools.[384] It also situates the harms of such state-sponsored racial segregation as intangible psychological harms rather than concrete economic, political, and social harms.[385]

Equal protection doctrine also decontextualizes the significance of race and ignores the salience of schools being racially identifiable as predominantly white. Race to the Supreme Court is seen as "neutral, apolitical descriptions, reflecting merely 'skin color' . . . [completely] unrelated to ability, disadvantage, or moral culpability."[386] The Supreme Court's conceptualization of race in this manner ignores the network effects of whiteness that enable predominantly white school districts to monopolize high-quality schools. An essential facilities framework can account for these network effects that enable monopolization through its focus on the larger resultant harms that monopolization causes to the competitive process — or, in the case of public schools, to democracy.

The greatest advantage an essential facilities framework offers is in its remedial possibilities. When a violation of the essential facilities doctrine is found, a mandatory-access remedy is imposed. The mandatory-access remedy requires the monopolist to provide access to the "facility" that the monopolist controls and that is deemed necessary for effective competition.[387]

In the context of the white island districts, that would look like requiring, rather than permitting, school district consolidation in the case

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[383] *See* Freeman v. Pitts, 503 U.S. 467, 495 (1992) ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications.").

[384] *See supra* section I.D, pp. 2409–14.

[385] *See supra* section I.D, pp. 2409–14.

[386] Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 4 (1991).

[387] *See* Lipsky & Sidak, *supra* note 214, at 1190–91.

of Spackenkill and Poughkeepsie. Similarly, it might place an affirmative obligation on states to draw regional rather than local school district boundary lines to prevent the kinds of monopolization that occur along the borders between Detroit and Grosse Point. It might also look like prohibiting municipal secessions in JCSD.

Finally, even if a mandatory-access remedy is employed, one must address structural racism issues within racially integrated schools. To be sure, mechanisms such as ability grouping or racially discriminatory exclusionary discipline techniques are examples of tools that might be used to facilitate intraschool social closure that results in white students monopolizing the best educational opportunities.[388] Embracing principles such as de-tracking and providing high-level curricula to all students within a school would be an essential component of fulfilling any mandatory-access remedy.[389]

D. Responding to the Limitations and Critiques of Applying an Essential Facilities Framework

While the essential facilities framework offers a useful tool for illuminating the monopolization harms caused by white-student segregation in white island districts, the framework is not without its limitations and critiques. This section sets forth and responds to these potential concerns.

The first objection might be that the denial of access to high-quality schools component of the framework does not lend itself to precise or appropriate calculation. For example, there are no overt mechanisms stopping students of color, particularly Black and Latino students, from obtaining access to predominantly white island school districts. In theory, such students have the possibility of access just as white students do. They can simply move into the school district.

While this is true in theory, the reality is that few students of color do gain access. The reasons for this are undoubtedly complex. They

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[388] Schools that are racially and socioeconomically integrated may face issues related to racially disparate discipline and discriminatory access to curricula, known as second-generation segregation, that are beyond the scope of this Article. *See generally, e.g.*, Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513 (2003) (describing various forms of second-order segregation that deny Black students in integrated schools access to high-quality educational opportunities). While this Article's claims focus on segregation between districts, any methods used to remedy such interdistrict segregation would also need to be cognizant of and address the possibility of second-order segregation within schools that creates social closure.

[389] *See, e.g.*, Hoots v. Pennsylvania, 118 F. Supp. 2d 577, 613 (W.D. Pa. 2000) (ordering as a remedy in a school-desegregation case "detracking in the mathematics curriculum by eliminating lower level courses and providing a single, detracked math curriculum for all at the secondary level").

are very much related to the interplay between race and class, specifically policies at the state, federal, and local levels that prevent families of color from accumulating the wealth[390] needed to locate in school districts with high-quality schools. Indeed, high-quality schools are often located in predominantly white affluent areas that are not accessible to Black and Latino families due to the existence of racialized wealth gaps.[391] Moreover, even when such families are able to afford to move into school districts with high-quality schools, they may contend with concerns about racial isolation that lead them to seek a more racially diverse school over a high-quality school in a predominantly white school district.[392] These factors contribute to race being a preeminent factor in the monopolization effects.

A broader critique of the analogy is that comparing white island districts to monopolists unfairly essentializes white parents. Such a comparison, the critique might continue, does not appropriately grapple with the nuance involved in why parents make the choices of where to live and where to send their children to school. The response to this critique is that the use of the essential facilities doctrine is meant to be a structural critique, not a personal one. The analogy is useful for analyzing and critiquing the existing structures that lead to white-student monopolization of high-quality schools, not whites as individuals.

Another critique of the analogy is that it does not address the intraschool disparities that students of color face even when they obtain access to racially integrated, ostensibly high-quality schools. The dominant public education paradigm is flawed in many ways for students of

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390 *See* ROTHSTEIN, *supra* note 96, at 184–85 (noting that median white household wealth is $134,000 while median Black household wealth is $11,000 and that a good portion of the disparity is "attributable to the government's racial housing policy," *id.* at 185); Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYS.: FEDS NOTES (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm [https://perma.cc/Y3G3-XUN8] (noting that the typical white family has about eight times the wealth of the typical Black family and five times the wealth of the typical Hispanic family).

391 *See* PATRICK SHARKEY, STUCK IN PLACE 27–28 (2013) (finding that two out of three Black students ages thirteen to twenty-eight live in neighborhoods categorized as poor while only 6% of white students in the same age cohort live in such neighborhoods).

392 *See, e.g.*, Kimberly Seals Allers, Perspective, *The Tough Choices Black Parents Face When Choosing a School for Their Children*, WASH. POST (Mar. 21, 2019, 6:00 AM), https://www.washingtonpost.com/lifestyle/2019/03/25/head-or-heart-black-parents-face-tough-trade-offs-when-it-comes-education [https://perma.cc/QX4Y-X8ZW] (describing choices Black parents make regarding school selection and noting that "while a certain school may be a better option academically, if it lacks racial diversity there is almost always a price [B]lack children will pay in terms of their sense of self and identity").

color.[393] Indeed, even when students of color, particularly Black students, have access to high-quality predominantly white schools, many have disparate educational experiences and outcomes in comparison to white students.[394]

Yet from a utilitarian perspective, while there are still impediments to be overcome in racially integrated schools for students of color, racially integrated schools have the ability to provide better educational outcomes than the alternative.[395] Indeed, racially integrated schools are the one solution that is proven to work in terms of eliminating racial achievement gaps and broadening access to better educational outcomes for students of color.[396] Thus, the application of an essential facilities framework can advance opportunities for students of color within the public education paradigm as it currently exists, while simultaneously acknowledging the flaws that exist for students of color within the current system and continuing to work to address those flaws.

Some might suggest that the framework offers little utility beyond a thought exercise as it does not lend itself to a framework that might be adopted by courts. Yet the primary value offered by the framework is in showing the ways in which the laws surrounding school district boundary lines facilitate monopolistic conduct that leads to educational opportunity hoarding. That value might be practically realized in three ways.

First, it might offer a blueprint for challenges under right-to-education clauses in state constitutions. All states have an "education article" in their constitutions that guarantees a minimum type of free

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393 *See* John B. Diamond, *Still Separate and Unequal: Examining Race, Opportunity, and School Achievement in "Integrated" Suburbs*, 75 J. NEGRO EDUC. 495, 498 (2006) ("Because they live in a racialized society, African American and White students, even in the same schools and communities, navigate a racialized educational terrain.").

394 *See, e.g.*, *id.* at 495 ("While Black students in integrated, affluent suburbs often outperform Black students in urban schools and less affluent suburbs, wide gaps in grades, test scores, and course-taking practices exist between Black and White students . . . ."); Justin Murphy & Georgie Silvarole, *Fewer AP Classes, Suspended More Often: Black Students Still Face Racism in Suburbs*, USA TODAY (Feb. 8, 2019, 5:19 PM), https://www.usatoday.com/story/news/education/2019/02/04/black-history-month-february-schools-ap-racism-civil-rights/2748790002 [https://perma.cc/ZXG5-8UFP] (describing the experience of students of color in a high-achieving school district outside Rochester, New York, noting that "[t]he problem is not only a matter of academics and discipline," as "[s]tudents of color reported feeling alienated, overscrutinized and underestimated").

395 Diamond, *supra* note 393.

396 *See, e.g.*, JOHNSON WITH NAZARYAN, *supra* note 22, at 136 (describing substantial gains in closing race-based achievement gaps when Black students attended desegregated schools).

public education.[397] Plaintiffs have argued that these clauses entitle students to an "equitable" or "adequate" education.[398] As Professor Derek Black notes: "The scope of rights and duties declared in equity and adequacy decisions is sufficiently broad to theoretically capture almost any education policy imaginable."[399] While most challenges under education clauses have involved funding claims, such challenges do not have to be limited to funding.[400] The essential facilities framework might offer an analytical lens through which to argue that state education clauses preclude the types of monopolization of high-quality schools that current configurations of boundary lines facilitate.

Second, it offers a tool that can be used to continue pushing courts to engage in a more expansive interpretation of the Equal Protection Clause. Scholars have noted the fallacies in relying on an intent-based equal protection doctrine that maintains a rigid distinction between de jure and de facto segregation.[401] The essential facilities framework proposed in this Article unearths the ways in which the lingering vestiges of intentional discrimination are shielded from judicial scrutiny by the intent-based regime. It provides a valuable mechanism by which to argue for the dismantling of the intent-based equal protection regime, particularly with respect to school segregation. It also provides a valuable tool through which to show a connection between intentional government segregation in housing and school segregation. It could be used to advance creative claims that the types of segregation seen in white island districts are actionable forms of de jure segregation.

Third, it could offer a state legislature guidance when determining how to develop laws around school district boundary lines such as secessions or consolidations. Because states have plenary authority in drawing school district boundary lines,[402] this analysis is particularly helpful in illustrating the salience of boundary lines and the distributional consequences of how they are drawn. State legislatures could also use the essential facilities framework to understand the racial impact of current configurations of boundary lines.

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397 *See* EMILY PARKER, EDUC. COMM'N OF THE STATES, CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION (2016), http://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf [https://perma.cc/UR48-ABUP].

398 *See generally* Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995) (describing the various types of legal claims made under state right-to-education clauses).

399 Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75, 123 (2016).

400 *Id.*

401 *See, e.g.*, Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 39–47 (2016) (describing the Supreme Court's embrace of the de facto/de jure distinction while noting the unintended but devastating consequences for achieving school desegregation).

402 *See supra* note 268 and accompanying text.

A final critique of the analogy might be that it adopts market-based language to describe the problem. Some might suggest that using a market-based analogy reifies the problem of public education being conceptualized as a private good for consumption rather than a public good that benefits society.[403] Yet adopting market-based language in this context is solely for the purpose of considering how different kinds of legal frameworks might do a better job of actually disseminating public education as if it were a public good that benefits all of society rather than a private good for individual consumption. Given the erosion of rights-based frameworks like equal protection, it is imperative that we consider employing new frameworks through which to assess the problem of racial segregation in schools. Further, traditional uses of market-based language and frameworks employ such language for purposes of arguing for less government intervention in the distribution of public education.[404] This Article uses that language to demonstrate the need for more government intervention, pointing out how current structures facilitate what is a clear "market failure."

CONCLUSION

This Article analyzed the prevalence and persistence of white-student segregation in racially diverse metropolitan areas. It theorized that white-student racial segregation in racially diverse metropolitan areas is a byproduct of social closure. Owing to the historical and modern alignment of whiteness with power and resources, it argued that social closure leads to predominantly white school districts monopolizing high-quality schools. It further argued that the monopolization creates stark racial disparities between school districts within metropolitan areas. Those regional disparities have harmful consequences for American democratic norms that go unaddressed.

Equal protection doctrine is the common legal framework used to regulate racial disparities in public education. Yet this Article demonstrated that equal protection doctrine is ill-suited to address white-student segregation because it does not recognize monopolization as a legally cognizable harm. Nor does it account for the broader harms that racial disparities in public education have on American democratic norms. Instead, equal protection doctrine, with its stringent subjective

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[403] *See* Wilson, *supra* note 71, at 193–95 (describing the harms of conceptualizing public education as a private good).

[404] *See* Erika K. Wilson, *Charters, Markets, and Universalism*, 26 GEO. J. ON POVERTY L. & POL'Y 291, 304–06 (2019) (describing public-school market-based reforms and the ways in which market-based reforms are premised upon government retrenchment); Wilson, *supra* note 18, at 250 (describing the emergence of market-based school reforms and noting that "[Professor Milton] Friedman suggested that removing the government from the school assignment process and instead substituting individual parental choice would allow parents to gravitate towards schools that met, among other things, their racial associational preferences").

intent requirements and decontextualization of the significance of racially identifiable schools, allows white-student racial segregation to persist unabated. Indeed, the doctrine unwittingly serves as a conduit through which whites can engage in second-order social closure that facilitates monopolization of high-quality schools without legal scrutiny.

This Article therefore turned to a framework used to regulate monopolization for guidance. Using examples from three predominantly white school districts, it demonstrated how principles from antitrust law — namely the essential facilities doctrine — if extrapolated to the public-school context could be a useful lens through which to conceptualize the monopolization and harms to democracy caused by white-student segregation. It also demonstrated a potential remedial path forward. Most importantly, it provided a blueprint for courts, legislators, and the public at large to reframe the way in which white-student segregation is viewed and to consider alternative rationales and mechanisms for addressing it.