

DRAFT  
Last Updated  
August 6, 2020

**MONOPOLIZING WHITENESS**  
Erika K. Wilson\*

*ABSTRACT*

In racially diverse metropolitan areas throughout the country, school district boundary lines create impermeable borders, separating affluent and predominately white school districts from low-income predominately non-white school districts. The existence of predominately 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 magnet effect that draws white affluent families.

Despite the material consequences and symbolic meaning of maintaining predominately 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. Social closure is a process of subordination whereby one group monopolizes advantages by closing off opportunities to other groups. The 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.

The 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. It

---

\* Thomas Willis Lambeth Distinguished Chair, Associate Professor of Law, University of North Carolina at Chapel Hill. I am thankful to Khaled Beydoun, Andrew Chin, John Coyle, Brant Lee, Stacy Hawkins, Osamudia James, and Audrey McFarlane for their helpful comments on earlier drafts. I also appreciate comments received from participants at faculty workshops at the American University Washington College of Law, LatCrit 2019 Georgia State University College of Law, Lutie Lytle Workshop at SMU Dedman School of Law, NYU School of Law Clinical Writers Workshop, University of Maryland Francis King Carey School of Law, Tulane School of Law, and the University of Arkansas School of Law. A special thanks to Drew Bencie, Chennell Coleman, Jonathan Dickerson, Julia Leopold, and Brendan Morrissey for providing invaluable research assistance.

therefore looks to antitrust law for guidance. It demonstrates how principles from the antitrust essential facilities doctrine can help conceptualize and remedy the monopolization harms caused by white student segregation in racially diverse metropolitan areas.

INTRODUCTION	3
I. WHITE STUDENT SEGREGATION AND SOCIAL CLOSURE	9
A. <i>Defining Social Closure</i> .....	10
B. <i>Social Closure and Racial Segregation in Public Schools: Monopolies</i> .....	12
1. Scarcity .....	13
2. Exclusion .....	15
3. Monopolization .....	20
C. <i>The Limits of Equal Protection Doctrine in Regulating Monopolization Caused by Social Closure</i> .....	24
II. SOCIAL CLOSURE AND THE CREATION OF WHITE ISLAND	
SCHOOL DISTRICTS	28
A. <i>School District Boundary Lines: The New Whites Only Signs</i> .....	28
1. School Districts as Impermeable Borders – Detroit and Grosse Pointe, Michigan.....	29
2. Municipal Secessions – Jefferson County, Alabama ...	33
3. Consolidations— Spackenkill and Poughkeepsie, New York .....	35
B. <i>Consequences of White Student Segregation and Isolation</i> .....	37
C. <i>The Normative Case for Regulating White Student Segregation</i> .....	40
III. AN ALTERNATIVE FRAMEWORK: USING ANTITRUST TO RESPOND TO WHITE STUDENT SEGREGATION AND MONOPOLIZATION	42
A. <i>The Efficacy of An Antitrust Analogy</i> .....	42
B. <i>The Essential Facilities Doctrine</i> .....	44
C. <i>High Quality Public Schools as Infrastructure</i> .....	49
IV. ANALYZING WHITE STUDENT SEGREGATION THROUGH AN ESSENTIAL FACILITIES FRAMEWORK	52
A. <i>Essential Facilities Framework Applied to White Island Districts</i> .....	53
1. Monopolists Controlling Access to an Essential Facility.....	53

2. The Feasibility of Duplicating High-Quality Schools .....	56
3. Anticompetitive Conduct .....	58
B. <i>Advantages of Essential Facilities Doctrine and Remedial Application</i> .....	60
C. <i>The Limitations and Critiques of an Essential Facilities Framework and Responses</i> .....	63
V. CONCLUSION .....	65

INTRODUCTION

“*[W]hites do not see or interpret their own racial segregation and isolation as a racial issue at all...*”<sup>1</sup>

In pockets of racially diverse metropolitan areas across the country, white students are geographically separated from non-white students, walled off not just in racially homogenous individual schools, but within entire school districts.<sup>2</sup> The City of Mountain Brook, Alabama, a suburb of Birmingham, Alabama, provides an illustrative example. Less than five miles separate Birmingham and Mountain Brook.<sup>3</sup> Yet the Mountain Brook school district is ninety-six percent white<sup>4</sup> while the neighboring Birmingham City school district is seventy-two percent Black.<sup>5</sup> Most of the students in the Birmingham City school district are classified as low-income with sixty-four percent of them qualifying for free and reduced

---

<sup>1</sup> Eduardo Bonilla-Silva, *RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 116 (3d ed. 2010).

<sup>2</sup> See generally Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 *UCLA L. Rev.* 364, 433 - 436 (2015) (describing how patterns of white flight in racially diverse metropolitan areas lead to predominately white school districts in racially diverse metropolitan areas.).

<sup>3</sup> See Google Maps, *DISTANCE BETWEEN BIRMINGHAM, ALABAMA AND MOUNTAIN BROOK, ALABAMA* <https://www.google.com/maps/dir/Mountain+Brook,+AL/Birmingham,+AL/@33.5036149,-86.7987883,14z/data=!4m14!4m13!1m5!1m1!1s0x888910aa951e9b83:0x5f2202e5780967d6!2m2!1d-86.7522107!2d33.5009384!1m5!1m1!1s0x888911df5885bfd3:0x25507409eaba54ce!2m2!1d-86.8103567!2d33.5185892!5i1> (last visited August 6, 2020).

<sup>4</sup> See National Center for Education Statistics, *Mountain Brook School District Demographics Dashboard*, <https://nces.ed.gov/Programs/Edge/ACSDashboard/0102490> (last visited Aug. 1, 2020).

<sup>5</sup> See National Center for Education Statistics, *Birmingham City School District Demographics Dashboard*, <https://nces.ed.gov/Programs/Edge/ACSDashboard/0100390> (last visited Aug. 1, 2020).

lunch.<sup>6</sup> In the Mountain Brook school district, less than one percent of the students qualify for free and reduced lunch.<sup>7</sup> The dissonance between the racial and socio-economic makeup of the Birmingham and Mountain Brook school districts is not an anomaly. Similar disparities exist between neighboring school districts throughout the country.<sup>8</sup>

Given the historic and continued patterns of racial discrimination that result in money, social capital, and access to power being aligned in favor of those raced as white<sup>9</sup>, the clustering of whites together in public 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 predominately white student bodies are more likely to have high-quality educational inputs like highly-qualified teachers, rigorous classes, and new physical facilities.<sup>10</sup> They are also

---

<sup>6</sup> Free and Reduced Lunch Data for Birmingham City, Ala. State Dept. of Educ., <https://publicdatareports.alsde.edu/publicdatareports/default.aspx> (select “Free Lunch By System and School” in dropdown box; then follow “Go” button; then enter “2018-2019” in “Year” dropdown box and “Mountain Brook City” in “System Name” dropdown box; then follow “View Report”) (last visited Aug. 1, 2020).

<sup>7</sup> Free and Reduced Lunch Data for Mountain Brook, Ala. State Dept. of Educ., <https://publicdatareports.alsde.edu/publicdatareports/default.aspx> (select “Free Lunch By System and School” in dropdown box; then follow “Go” button; then enter “2018-2019” in “Year” dropdown box and “Mountain Brook City” in “System Name” dropdown box; then follow “View Report”) (last visited Aug. 1, 2020).

<sup>8</sup> See generally, James Ryan, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* (2010) (chronicling the ways in which demographic disparities between neighboring school districts leads 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 (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 predominately white localities).

<sup>9</sup> See e.g., Sara Mervosh, *How Much Wealthier Are White School Districts Than Nonwhite School Districts*, *N. Y. TIMES*, (Feb. 17, 2019), <https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html> (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); Stephen J. Caldas and Linda Cornigans, *Race/Ethnicity and Social Capital Among Middle- and Upper-Middle-Class Elementary School Families: A Structural Equation Model*, *SCHOOL COMMUNITY JOURNAL*, Vol. 25, No. 1 (2015) (finding that “Black, Hispanic, and mixed-race family status is associated with significantly diminished Total Social Capital, both directly and indirectly via socioeconomic status.”).

<sup>10</sup> See e.g., Frank Adamson and Linda Darling-Hammond, *Addressing The Inequitable Distribution of Teachers: What Will It Take To Get Highly Qualified, Effective Teachers in All Communities*, *STANFORD CENTER FOR OPPORTUNITY POLICY IN EDUCATION* at 1 (December 2011),

more likely to produce better educational outcomes such as high test-scores, graduation rates, and college acceptance and admission rates.<sup>11</sup>

Notably, schools that enroll racially diverse student bodies provide tangible benefits to all students, including white students.<sup>12</sup> White students who attend racially diverse schools have more robust classroom discussions, improved critical thinking and problem-solving skills, and higher academic achievement.<sup>13</sup> 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.<sup>14</sup> 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.”<sup>15</sup>

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 homogenous predominately white

---

<https://edpolicy.stanford.edu/sites/default/files/publications/addressing-inequitable-distribution-teachers-what-it-will-take-get-qualified-effective-teachers-all-1.pdf> (noting that “[b]y 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, and Reba N. Page, *Curriculum Differentiation: Opportunities, Outcomes, and Meanings*, in HANDBOOK OF RESEARCH ON CURRICULUM 205 (Philip W. Jackson ed., 1992).

<sup>11</sup> 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/> (describing lower academic success rates for poor and predominately minority school districts in comparison to wealthier predominately white districts in Connecticut).

<sup>12</sup> See, The Century Foundation, THE BENEFITS OF SOCIOECONOMICALLY AND RACIALLY INTEGRATED SCHOOLS AND CLASSROOMS, (April 29, 2019), [https://production-tcf.imgix.net/app/uploads/2016/02/26171529/Factsheet\\_Benefits\\_FinalPDF.pdf](https://production-tcf.imgix.net/app/uploads/2016/02/26171529/Factsheet_Benefits_FinalPDF.pdf) (“racial and socioeconomic diversity in the classroom can provide students with a range of cognitive and social benefits.”).

<sup>13</sup> See Genevieve Siegel-Hawley, NAT'L COAL. ON SCH. DIVERSITY, *How Non-minority Students also Benefit from Racially diverse Schools* 1-2 (October 2012).

<sup>14</sup> See e.g., John Iceland and Gregory Sharp, *White Residential Segregation in U.S. Metropolitan Areas: Conceptual Issues, Patterns, and Trends from the US Census, 1980 to 2010*, POPUL RES POLICY REV., Vol. 32, No. 5 at 11 (Oct. 2013) ( finding that “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.”).

<sup>15</sup> Amy Stuart Wells, Lauren Fox, and Diana Cordova-Cobo, *How Racially Diverse Schools And Classrooms Can Benefit All Students*, THE CENTURY FOUNDATION, 27 (Feb. 16, 2016), [https://production-tcf.imgix.net/app/uploads/2016/02/09142501/HowRaciallyDiverse\\_AmyStuartWells-11.pdf](https://production-tcf.imgix.net/app/uploads/2016/02/09142501/HowRaciallyDiverse_AmyStuartWells-11.pdf)

school districts. Indeed, research shows that white parents are likely to seek out schools that are predominantly white.<sup>16</sup> Of all racial and ethnic groups, white students are the most segregated within public schools in many racially diverse metropolitan areas.<sup>17</sup>

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.<sup>18</sup> A limited amount of scholarship considers the meaning and consequences of racial segregation in elementary and secondary public schools for white students.<sup>19</sup> The limited focus on white student racial segregation in elementary and secondary public schools creates two fundamental gaps in the school desegregation legal literature.

---

<sup>16</sup> See generally, Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 Geo. J. on Poverty L. & Pol'y 1, 19-27 (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); Erika K. Wilson, *The New White Flight*, 14 DUKE J. CONST. L. & PUB. POL'Y 233, 253 – 256 (2019) (analyzing the ways in which white parents end up choosing predominantly white schools for their children).

<sup>17</sup> See Gary Orfield, Erica Frankenberg et al., HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER BROWN, CENTER FOR EDUCATION AND CIVIL RIGHT 4 (May 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> (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.).

<sup>18</sup> 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 (2009) (documenting the harms to minority students of racially isolated schools noting that for minority students “racially isolated schools offer inferior educational opportunities and produce inferior outcomes.”); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 284 (1999) (examining the monetary and non-monetary costs of racially segregated schools for minority students, 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.”); Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 297 (2005) (post-Brown de facto school segregation litigation focused on educational harms to minority students flowing from attending racially segregated schools).

<sup>19</sup> See e.g., Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599 (2011) (describing the benefits of racially diverse environments for white students); Wilson, *supra* note 16 (describing the ways in which white families use charters and choice to flee racially integrated school systems).

First, it leads to an under theorization of the reasons why white students continue to cluster together in public schools. White avoidance of racially diverse schools has impeded meaningful school desegregation efforts. Accurately diagnosing why white student segregation persists is critical to solving the practical problem of racial segregation in schools. A significant consequence of failing to articulate a viable theory of why white student segregation persists 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.

Second, it conceals the ways in which white student segregation tangibly harms both the democratic goals of public education and the overall health of the American democracy. Public education is often tabbed as the great equalizer.<sup>20</sup> It is supposed to provide a vehicle through which anyone can obtain social mobility and the skills necessary to effectively participate in the American democracy.<sup>21</sup> White student segregation impedes that goal. When white students cluster together in public schools it creates school-based economies of agglomeration.<sup>22</sup> Examples of the agglomeration benefits include an increased 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.<sup>23</sup> The agglomeration effects not only advantage students in

---

<sup>20</sup> See e.g., Cremin Philip W. Jackson, L. A. THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN (1957) (“Education, then, beyond all other divides of human origin, is a great equalizer of conditions of men—the balance wheel of the social machinery.”).

<sup>21</sup> See David F. Labaree, *Public Goods, Private Goods: The Struggle Over Educational Goals*, AMERICAN RESEARCH JOURNAL, Vol. 34, No. 1 (Spring 1997) (articulating the goals of American public education as democratic equality, social efficiency, and social mobility).

<sup>22</sup> This article uses the term “economies of agglomeration” as it is used in 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 JOURNAL OF URBAN ECONOMICS 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.”).

<sup>23</sup> See generally, 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

the predominately white and affluent districts but they disadvantage students in the neighboring predominately low-income and non-white districts.<sup>24</sup>

This article fills gaps in the school desegregation legal literature by 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 secures advantages by utilizing exclusionary practices to monopolize scarce resources.<sup>25</sup> This part makes three important contributions and claims. First it analyzes the ways in which white student segregation is a product of social closure. Second, it argues that agglomeration effects occur when whites situate themselves next to one another which enables whites to both influence the construction of high-quality schools and engage in social closure that results in them monopolizing high quality schools.<sup>26</sup> Lastly, it demonstrates the ways in which equal protection doctrine is ill-suited to capture the monopolization harms caused by white student segregation.

Part II uses three examples to illustrate how laws and policies surrounding school district boundary lines facilitate social closure. It argues that the social closure leads to the creation of what the article calls “white island districts.” It suggests that the white island districts enable white students to monopolize high-quality schools without legal consequence. It concludes by analyzing the ways in which white student monopolization of high-quality schools is detrimental to white students and the democratic goals of public education.

---

benefits that middle class students bring to public schools); M. M. Chiu and L. Khoo, “*Effects of Resources, Inequality, and Privilege Bias on Achievement: Country, School, and Student Level Analyses*,” AMERICAN EDUCATIONAL RESEARCH JOURNAL Vol. 42, no. 4 at 591-592 (2005) (finding that unequal distribution of school resources also significantly reduced students test scores.).

<sup>24</sup> See e.g., Ann Owens, *Income Segregation between School Districts and Inequality in Students’ Achievement*, SOCIOLOGY OF EDUCATION Vol. 91(1) 1–27 (2018) (finding that “[c]hildren from advantaged families accumulate additional resources in segregated places because their families can access the most advantaged contexts..[and] segregation may benefit advantaged families and harm disadvantaged families.”).

<sup>25</sup> Raymond Murphy, SOCIAL CLOSURE THE THEORY OF MONOPOLIZATION AND EXCLUSION 8 (1988).

<sup>26</sup> What constitutes a high-quality school is difficult to quantify. Yet highly qualified teachers, rigorous curricular offerings, high levels of student achievement, and well-maintained physical facilities are recognized as staples in the construction of high-quality schools. See, e.g., Jack Schneider, *What Makes a Great School?*, HARV. GRADUATE SCH. OF EDUC. (Oct. 23, 2017), <https://www.gse.harvard.edu/news/uk/17/10/what-makes-great-school>

Part III of the article turns to a private law framework --antitrust law-- for guidance in thinking about how to best conceptualize and remedy the harms caused by white student monopolization of high-quality schools. It uses principles from antitrust law's essential facilities doctrine as a framing device to help both conceptualize the monopolization harms caused by white student segregation and to consider remedial frameworks for regulating those harms.<sup>27</sup> Part IV considers what regulation of white island district's monopolization of high-quality schools might look like using principles from the essential facilities doctrine. Part V concludes.

#### I. WHITE STUDENT SEGREGATION AND SOCIAL CLOSURE

*“Segregation (and white flight) is like a painkiller, providing instant relief for families looking to avoid diversity.”*<sup>28</sup>

White students make up forty eight percent of the students enrolled in public schools.<sup>29</sup> Yet the average white student attends a school in which sixty-nine percent of their peers are also white, eight percent of their peers are Black, nearly fourteen percent are Latino, and four percent are Asian.<sup>30</sup> Social science research shows that white student segregation and isolation is intentional rather than inadvertent. Research shows that white parents are likely to flee when significant populations of students of color enroll in a school.<sup>31</sup> Research also shows that many whites parents are likely to choose schools in which their children will be in the racial majority and to avoid schools with large percentages of Black students.<sup>32</sup>

---

<sup>27</sup> The article builds upon the prior work of scholars who approach racial inequality from an antitrust perspective. *See e.g.*, Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727 (2000); Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 137 (1994).

<sup>28</sup> Rucker C. Johnson, *CHILDREN OF THE DREAM WHY SCHOOL INTEGRATION WORKS* 53 (2019).

<sup>29</sup> *Id.* at 31.

<sup>30</sup> *Id.* at 31.

<sup>31</sup> Chase M. Billingham & Matthew O. Hunt, *School Racial Composition and Parental Choice: New Evidence on the Preferences of White Parents in the United States*, 89 SOC. EDUC. 99, 99-113 (2016) (finding that “[t]he proportion of Black students in a hypothetical school had a consistent and significant inverse association with the likelihood of white parents enrolling their children in that school net of the effects of the included racial proxy measures,” such as academic quality).

<sup>32</sup> *See, e.g.*, Justine S. Hastings, Thomas J. Kane, & Douglas O. Staiger, *Heterogenous Preferences and the Efficacy of Public School Choice*, NBER Working Papers Series, (May 2009) (finding that parents in an experiment involving the Charlotte Mecklenburg School system all preferred schools in which their race was in the clear majority, but that the preference was especially high for white parents); Mark Schneider and Jack Buckley, *What Do Parents Want from Schools? Evidence from the Internet*, 24 EDUC. EVALUATION & POL’Y ANALYSIS 133, (2002) (reviewing internet searches for schools in Washington D.C. and finding that parents used available demographic data to select

Finally, research shows that some white parents make race related school choices by using proxies for race such as perceived academic quality, test scores, or perceived safety, in ways that create racialized outcomes.<sup>33</sup>

When queried many white parents suggest that racial diversity in schools is important to them.<sup>34</sup> To the extent 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 accounting of why white student segregation persists. Constructing an appropriate theoretical accounting 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 and race neutral laws facilitate forms of social closure that enables white students to monopolize high quality schools. It concludes by arguing that the equal protection framework traditionally used to address racial segregation in schools is ill-equipped to capture the monopolization harms caused by white student segregation.

#### A. *Defining Social Closure*

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 which it defines as inferior and ineligible.”<sup>35</sup> Social closure occurs when there is competition for scarce resources such as power, prestige, or material wealth.<sup>36</sup> 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.<sup>37</sup> The in-group often sees themselves as socially similar in ways that limits their desire to associate with the excluded

---

schools with fewer African American students and schools located in areas with fewer African American residents).

<sup>33</sup> Chase M. Billingham and Matthew O. Hunt, *School Racial Composition and Parental Choice: New Evidence on the Preferences of White Parents in the United States*, 89 SOC. EDUC. 99 (2016) (finding that the proportion of Black students in a hypothetical school had a consistent and significant inverse association with the likelihood of white parents enrolling their children in a school, even when controlling for proxy measures like academic quality).

<sup>34</sup> See, e.g., *The 49th Annual PDK Poll of the Public's Attitudes Toward the Public Schools*, at 5 (Sep. 2017) (querying parents on attitudes towards diversity in public schools and finding that 48% of whites described racial and ethnic diversity in schools as being highly important).

<sup>35</sup> Murphy, *supra* note 25, at 8.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

group.<sup>38</sup> The success of social closure depends upon clearly defining membership in the in-group and policing the sanctity of the in-group's boundaries.<sup>39</sup>

The excluded group on the other hand, is often constructed and created because of their otherness. Otherness is usually defined by visible markers such as race, ethnicity, gender, religion or language."<sup>40</sup> Weber particularly noted the possibility for closure to exist based on race or ethnicity.<sup>41</sup> During the social closure process, the in-group works to curtail the excluded group from competing for scarce resources. They do so by adopting policies, practices, or cultural norms that favor the in-group and disfavor the excluded group. The result of social closure is that it creates exclusive opportunities for in-group members to compete for scarce resources. In-group members can consequently monopolize scarce resources by restricting the excluded group's ability to compete for such resources.

Social closure not only relies on boundaries, it constructs and reifies them.<sup>42</sup> In terms of construction, the in-group engaged in closure may take on a legally privileged status that protects them from competition.<sup>43</sup> 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."<sup>44</sup>

Sociologist Frank Parkin expanded on Weber's social closure framework by distinguishing between two types of social closure: exclusionary and usurpatory, both of which are methods of mobilizing power in order to enhance or defend a group's share of resources.<sup>45</sup> 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."<sup>46</sup> It involves the dominant in-group closing off opportunities to the excluded group. An example of exclusionary closure

---

<sup>38</sup> Max Weber, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 390 (1968) ("their similarity rests on the belief in a specific honor of their members, not shared by the outsiders.").

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 342.

<sup>41</sup> *Id.*

<sup>42</sup> See Catherine Albiston & Tristan K Green, *Social Closure Discrimination*, 39 *BERKELEY J. EMP. & LAB.* 1, 5 (2018) (noting that "[s]ocial closure does more than rely on group boundaries; it constructs and reifies them.").

<sup>43</sup> Weber, *supra* note 38 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.").

<sup>44</sup> *Id.*

<sup>45</sup> Murphy, *supra* note 25 at 10.

<sup>46</sup> Frank Parkin, *MARKETS AND CLASS THEORY A BOURGEOIS CRITIQUE* 44 (1981)

is explicit race-based hiring practices whereby employers open-up jobs only to members of one race.<sup>47</sup>

Usurpatory closure on the other hand is a countervailing action by the excluded or subordinated group.<sup>48</sup> It occurs when the excluded group exercises power in an upward manner in order to cut into the share of the resources that the dominant group is monopolizing.<sup>49</sup> An example of usurpatory closure is the use of boycotts by African-Americans as a means of obtaining racial equality.<sup>50</sup>

The two forms of closure are connected: usurpatory 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.<sup>51</sup> They can also “produce and capitalize on seemingly group-neutral rules, that work to favor the in-group.”<sup>52</sup> 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.

In a nutshell, social closure is most likely to occur when a resource is considered scarce. Concerns about scarcity lead to exclusion that facilitates monopolization of the scarce resource. The social closure framework 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 through which 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,

---

<sup>47</sup> See Albiston & Green, *supra* note 42, at 16 (describing as an example of exclusionary closure the hiring practices at issue in the seminal case *Griggs v. Duke Power* whereby prior to the passage of the 1964 Civil Rights Act Duke Power excluded black employees from certain departments and had an all-white work force in those departments).

<sup>48</sup> Parkin, *supra* note 46, at 44.

<sup>49</sup> *Id.*

<sup>50</sup> *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (upholding the constitutionality of a boycott initiated by the NAACP and its members of white merchants in Mississippi in order to secure compliance with demands for equality and racial justice); Andre L. Smith, *Boycotts, Black Nationalism, and Asymmetrical Market Failures Relating to Race*, 56 *HOW. L.J.* 891, 902 – 906 (2013) (describing the use of boycotts as a means of obtaining racial economic justice for Black people).

<sup>51</sup> Albiston, *supra* note 42, at 5-6.

<sup>52</sup> *Id.* at 6.

higher education, and professional credentialing.<sup>53</sup> Legal scholars have also utilized social closure principles in describing inequalities in policing and the environment.<sup>54</sup> This section adds to the work done by legal scholars in introducing the concept of social closure to the legal literature. 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 how whites as members of the in-group work to exclude non-whites from high quality schools and how those exclusionary tactics enable white students to monopolize high quality 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

---

<sup>53</sup> See e.g., Albiston & Green, *supra* note 42 (applies Weberian model of social closure to age discrimination in the workplace); Hilary Sommerlad, *Minorities, Merit, and Misrecognition in the Globalized Profession*, 80 FORDHAM L. REV. 2481, 2512 (2012); 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, 549 (2004) (applies social closure framework to more stringent Bar Examination requirements); 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-Conscious Admissions Plans: An Antidote to Educational Opportunity Hoarding?* 43 J.C. & U.L. 151, 157 (2018) (discussing social closure as a means of “categorical inequality,” a “process by which scarce resources are allocated unequally across social groups”); 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, 86 (2018) (applying Max Weber’s “life chances” analysis to opportunities in housing and in doing so explaining in part “how privileged groups reduce the opportunities of others”); Joseph A. Seiner, *The Discrimination Presumption*, 94 NOTRE DAME L. REV. 1115, 1135 (2019) (referencing a study which showed that social closure discrimination was more common in workplaces where the organizations and policies allowed it). *But cf* Jeremy Fiel, *Closure, Status Competition, and School Segregation*, 121 AMERICAN JOURNAL OF SOCIOLOGY 126–170 (2015) (theorizing racial segregation in schools as a function of social closure and finding that segregation increases first, when an area is more equally racially comprised, second when economic resources are scarce and those resources are linked to education and third, when schooling markets become less centralized).

<sup>54</sup> See e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2115 (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”); Geoff Ward, *Microclimates of Racial Meaning: Historical Racial Violence and Environmental Impacts*, 2016 WIS. L. REV. 575, 612 (2016) (describing social closure, micro-aggressions, and implicit bias as examples of “subtle acts” that are illustrative of racial violence).

standing.<sup>55</sup> While a free primary and secondary public education is made available to students in all fifty states, school quality varies dramatically across schools.<sup>56</sup> To be sure, public education in America contains markers that allow for horizontal differentiation between schools.<sup>57</sup> Stated differently, while America offers a system of free public education for all students, all students do not receive the same quality of education. Horizontal differentiation in school quality instead 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.<sup>58</sup> 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.<sup>59</sup> School differentiation plays 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.<sup>60</sup> Differentiation in school quality is in turn capitalized into housing prices such that there are barriers to who is able to access the highest quality schools.<sup>61</sup> A home located in a school district considered

---

<sup>55</sup> See e.g., Randal Collins, *The Credential Society*, 128-130 (1979) (describing the increased importance and value of education credentials); David F. Labaree, *supra* note 21 (arguing that the increased goal of social mobility for public education is reshaping education into a commodity for the purposes of status attainment).

<sup>56</sup> See e.g., Logan, J. R., Minca, E., & Adar, S., *The Geography of Inequality: Why Separate Means Unequal in American Public Schools*, *SOCIOLOGY OF EDUCATION*, VOL. 85 No. 3, 287–301 (2012); Ryan, *supra* note 8.

<sup>57</sup> See Fiel *supra* note 53, at 129-130; Hawkins, *supra* 53, at 159 (“[a]lthough we have long provided a universal system of K-12 public education, these educational opportunities are not all created equally.”).

<sup>58</sup> See generally, Maureen T. Hallinan, *Tracking: From Theory to Practice*, in *THE STRUCTURE OF SCHOOLING: READINGS IN THE SOCIOLOGY OF EDUCATION* 188 (Richard Arum et. al. eds., 2011).

<sup>59</sup> See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416 (1956).

<sup>60</sup> See e.g., Michele Lerner, *School Quality Has A Mighty Influence On Neighborhood Choice, Home Values*, *WASHINGTON POST*, (Sep. 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://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) (describing the way that school quality influenced homeowners choices in where to buy a home).

<sup>61</sup> See William A. Fischel, *MAKING THE GRADE: THE ECONOMIC EVOLUTION OF THE AMERICAN SCHOOL DISTRICTS* 14 (2009) (noting that school district boundary lines are the most important single determinant of home values in metropolitan areas across the country as disparate as Dallas and Cleveland); Wallace E. Oates, *On Local Finance and*

to have high quality schools has its value increased by upwards of twenty percent.<sup>62</sup> Conversely, a home located in a school district with schools that are considered low-quality will see a decrease in property value.<sup>63</sup> 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-private good,” subject to the principles of semi-rivalrousness and exclusiveness that generate scarcity.<sup>64</sup>

## 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.<sup>65</sup> In the seventeen states that had de jure school segregation, whites were able to attend better resourced schools that helped them to achieve better educational outcomes.<sup>66</sup> The state

---

*the Tiebout Model*, THE AMERICAN ECONOMIC REVIEW, Vol. 71, No. 2, pp. 94 (May 1981) (fiscal differentials across neighboring jurisdictions tend to become capitalized into property values); Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, HARVARD EDUCATIONAL REVIEW, Vol. 72, No. 2, pp. 177-206 (July 2002).

<sup>62</sup> Fischel, *supra* note 61 at 3; *See also* Jonathan Rothwell, *Housing Costs, Zoning, and Access to High-Scoring Schools*, BROOKINGS INSTITUTE at 14 (April 2012) (finding that housing near the highest scoring schools is 2-4 times as expensive as near the lowest scoring schools. The 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.).

<sup>63</sup> 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*, THE JOURNAL OF POLITICAL ECONOMY Vol. 77, Issue 6, pp. 957-971 (Nov.-Dec. 1969) (Concluding that quality of public schools enhances (or decreases) home values).

<sup>64</sup> John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. 229, 236 (2016) (“education is a primary example in the economics literature of a “quasi-public good”--a good that, although not strictly speaking a non-rivalrous, non-excludable classic public good, still has such substantial positive externalities and spillover effects as to be within government's purview.”); 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 and rivalrous such that it is a quasi-private good).

<sup>65</sup> Fiel, *supra* note 53 at 130 (“de jure school segregation was a particularly stark form of horizontal differentiation.”).

<sup>66</sup> *See e.g.*, Spottswood Thomas BOLLING, Et Al., Petitioners, v. C. Melvin SHARPE, Et Al., Respondents., 1952 WL 47278 at 27 (“The history as well as the language of these various acts demonstrates an intention by the legislature at least to guarantee minimum opportunities to the colored children at a time when serious objections were made to any public education for them.”); Orley Ashenfelter, William J. Collins, Albert Yoon, *Evaluating the Role of Brown vs. Board of Education in School Equalization*,

mandated segregation essentially allowed white students to exercise a monopoly over high-quality schools.<sup>67</sup>

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.<sup>68</sup> 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.<sup>69</sup> Whites also adopted forceful sometimes violent tactics as a means of policing in-group boundaries and maintaining all white schools.<sup>70</sup> 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 Defense Fund might be viewed as usurpatory closure or the countervailing action to exclusionary closure by the excluded group.<sup>71</sup> Plaintiffs bought litigation seeking to dismantle the legalization of a white in-group that was permitted to monopolize high quality schools.<sup>72</sup> The Supreme Court’s decision in *Brown v. Board of Education* 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

---

*Desegregation, and the Income of African Americans*, National Bureau of Economics Research, Working Paper No. 11394, (June 2005) (finding that “southern-born blacks who finished their schooling just before effective desegregation occurred in the South fared poorly compared to southern-born blacks who followed behind them in school by just a few years.”).

<sup>67</sup> This is not to suggest that there were no high-quality schools for Black students during the era of segregation. 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 Miseducation of African-American Students*, 35 N.C. CENT. L. REV. 160 (2013) (describing the ways that Black segregated schools better prepared and educated Black students).

<sup>68</sup> Davidson, M. Douglass, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865-1954* 139 (2005).

<sup>69</sup> *Id.* at 139-140.

<sup>70</sup> *Id.* (noting that “in 1905 a group of white students in Chicago rioted when they were transferred to a predominately black school...in 1908 when two black students were transferred to a white school they were beaten by their classmates.”).

<sup>71</sup> See generally, *THE ROAD TO BROWN* (University of Virginia 1989), <https://www.zinnedproject.org/materials/road-to-brown>. (chronicling the work of Charles Hamilton Huston and the NAACP Legal Defense Fund that dismantled state required segregation in schools and led to the decision in *Brown v. Board of Education*); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 408-09 (1975).

<sup>72</sup> *Id.*

high-quality schools.<sup>73</sup> With the help of aggressive federal court interpretations of school systems' constitutional obligations to desegregate, and federal civil rights legislation, schools that were formerly segregated by law experienced high levels of desegregation.<sup>74</sup> Black students who attended desegregated schools obtained access to high quality schools and their educational outcomes improved greatly.<sup>75</sup>

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 that are 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.

With respect to housing, students go to school where they live. Past practices such as racially restrictive covenants<sup>76</sup>, Federal Housing Authority ("FHA") loan discrimination,<sup>77</sup> and redlining<sup>78</sup> deeply entrenched racial segregation in housing, making where most students live racially segregated. To be sure, the 1968 Fair Housing Act prohibited

---

<sup>73</sup> *Brown v. Bd. of Ed.*, 347 U.S. 483, 495, (1955) ("[w]e conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

<sup>74</sup> See Orfield, *supra* note 17

<sup>75</sup> Johnson, *supra* note, 28 at 60 (2019) ("[c]ompared to black children who were not exposed to integration, black 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.").

<sup>76</sup> 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) ("[w]e 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 that their lingering effects long after they were outlawed. See e.g., *Oliver v. Kalamazoo Bd. of Ed.*, 368 F. Supp. 143, 182 (W.D. Mich. 1973) ("the invidious effects of such covenants have persisted into the present to foster and maintain the customary pattern of segregated housing.").

<sup>77</sup> See Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 677- 680 (2002) (describing the way the FHA explicitly excluded Blacks from getting home loans and facilitated the creation of all white suburbs).

<sup>78</sup> 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. See *United Companies Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 203 (D. Mass. 1998).

overt racial discrimination and facilitated limited forms of racial integration in housing.<sup>79</sup> 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.<sup>80</sup> 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 non-white individuals.<sup>81</sup> The net result is that housing remains deeply racially segregated due in large part to past discriminatory practices that were sanctioned or facilitated by the state.<sup>82</sup>

School district boundary lines extrapolate the racial segregation in housing to schools. They serve important political, economic, and social functions.<sup>83</sup> The combination of the political, economic, and social functions of school district boundary lines leads to them conveying critical information that influences residential sorting choices and allows people

---

<sup>79</sup> See Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing As Discrimination Management*, 66 UCLA L. REV. 1140, 1180 (2019)(arguing that "the 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.").

<sup>80</sup> See Melvin Oliver and Thomas Shapiro, *BLACK WEALTH WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 18 (1995) ("[t]he FHA's actions have had a lasting impact on the wealth portfolios of black 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.").

<sup>81</sup> See *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 379 (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 (1993) (documenting the ways in which "discriminatory zoning practices have created and perpetuated separate residential communities for African-Americans."); Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 296 (1999)(describing and criticizing the effects of exclusionary zoning and the emergence of community empowerment zones).

<sup>82</sup> See generally, Richard Rothstein, *THE COLOR OF LAW* (2017) (examining the ways in which government policies cemented racial segregation in housing and the continue to perpetuate it today).

<sup>83</sup> See generally Gregory R. Weiher, *THE FRACTURED METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION* 33-35 (1991)

to fulfill associational preferences.<sup>84</sup> In fact, school districts often take on reputations for being predominately white and affluent places or predominately Black and poor places.<sup>85</sup> The characterization of a district in terms of the racial and socio-economic demographics of the space influences residents' decisions about whether to live within the boundaries of the school district. Indeed, school district boundary lines are a critical driver of residential sorting decisions.<sup>86</sup>

Critically many poor and minority families do not have the luxury of making intentional and well-calculated choices in the municipality in which they live for purposes of choosing a school district. Instead, they are often forced to locate to a community that is most affordable or offers the kinds of support networks that they need in order to subsist.<sup>87</sup> Thus, they are not choosing schools by choosing homes, but 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<sup>88</sup> means that using an address within circumscribed boundary lines

---

<sup>84</sup> *Id.* at 81-82 (arguing that “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”).

<sup>85</sup> See e.g., Alvin Chang, *White America is Quietly Self Segregating*, VOX, (Jul. 31, 2018) (noting research that showed white “[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 black area. Without any real evidence, there was a mental map built into the city’s geography,” that influenced their residential location choices).

<sup>86</sup> See e.g., Kendra Bischoff, *School District Fragmentation and Racial Residential Segregation: How Do Boundaries Matter?*, 44 URB. AFF. 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.”).

<sup>87</sup> 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 makes choice of residence less voluntary.).

<sup>88</sup> Jennifer C. Johnson, *Race-Based Housing Importunities: The Disparate Impact of Realistic Group Conflict*, 8 LOY. J. PUB. INT. L 97, 125 (2007) (“[s]ince tools for regulating land development at the local level were developed in the United States a century ago, diversity of race and class has been contained, ensuring that disadvantage is concentrated in particular places.” This disadvantage is 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

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 predominately white schools.

### 3. *Monopolization*

Because of the political and economic functions that boundary lines play, school district boundary lines play a pivotal role in the construction of the quality of the schools within a district.<sup>89</sup> 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.<sup>90</sup> By these metrics predominately 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.”<sup>91</sup> A specific type of agglomeration economy known as a localization economy allows for industries related to the localization economy to do business without the logistical hurdle of distance.<sup>92</sup> Stated differently, within a localization agglomeration economy, a firm derives benefits from the presence of other firms belonging to the same industry in an area. A concrete example of a localization agglomeration economy is the clothing industry in New York or Los Angeles where the suppliers of the material needed to make clothes (e.g., fabric or buttons) are in close spatial proximity to the clothing makers.

In the context of schools, the aggregation of white students together creates a phenomenon analogous to a localization agglomeration

---

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.”)

<sup>89</sup> See Wilson, *supra* note 8, at 1437-1439 (describing how the broad fiscal and political autonomy afforded school districts means that the financial resources available to a district are dependent upon the districts tax base and the types of residents who live within the district).

<sup>90</sup> See *supra* note 26.

<sup>91</sup> See G.S. Goldstein, T.J. Grunberg, *Economies of Scope and Economies of Agglomeration*, 16 JOURNAL OF URBAN ECONOMICS 91 (1984).

<sup>92</sup> *Id.* at 93.

economy. When white students cluster together, owing in large part to the tangible and intangible value historically associated with whiteness,<sup>93</sup> it 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 recognized that clustering predominately 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.”<sup>94</sup> 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.<sup>95</sup> Yet substantial research shows that high quality teachers are more likely to congregate in schools that are affluent and whiter and to avoid schools which are overwhelmingly poor and minority.<sup>96</sup> Research shows that the racial demographics of a school directly correlate with where high quality teachers decide to teach.<sup>97</sup> This is true even when you isolate other factors such as poverty, achievement, or teacher salary.<sup>98</sup> Thus, the skewed distribution of high-quality teachers is an issue primarily of race, not the poverty level of the students. Nationwide, white students are substantially more likely to attend schools with more qualified and experienced teachers than students of color.<sup>99</sup>

---

<sup>93</sup> For a more nuanced discussion of the value of whiteness, *see* Section III.C., *infra*.

<sup>94</sup> Black, *supra* note 23.

<sup>95</sup> Darling-Hammond, Linda *Teacher Quality And Student Achievement: A Review Of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES, no. 1, at 23, (2000) (“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.”)

<sup>96</sup> *See e.g.*, C. Kirabo Jackson, *Student Demographics, Teacher Sorting, and Teacher Quality: Evidence from the End of School Desegregation*, JOURNAL OF LABOR ECONOMICS 27, no. 2, at 248 (April 2009) (“researchers have found that teachers, particularly those with more experience, in schools with low-achieving students move to higher-achieving schools—leaving districts that have high shares of low-income ethnic minority students with vacancies and unqualified instructors.”); Benjamin Scafidi, David L. Sjoquist, & Todd R. Stinebrickner, *Race, Poverty, and Teacher Mobility*, ECONOMICS OF EDUCATION REVIEW, Vol. 26, No. 20 145 (Apr. 2007) (finding that “teachers are much more likely to exit schools with large proportions of minority students, and that the other univariate statistical relationships are driven to a large extent by their correlation with the minority variable.”)

<sup>97</sup> *See generally*, Wendy Parker, *Desegregating Teachers*, 86 WASH. U.L. REV. 1, 34 (2008) (describing the empirical research that documents the ways in which teacher preferences in schools correlates with race).

<sup>98</sup> *See* Parker, *supra* note 97; Sjoquist, *supra* note 96.

<sup>99</sup> *See e.g.*, U.S. Dept. of Educ., Office for Civil Rights, 2013-2014 CIVIL RIGHTS DATA COLLECTION, at 9 <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>

In addition to teachers, white students have greater access to more rigorous curriculum. For example, during the 2011-2012 school year, only fifty seven percent of black students had access to a full range of math and science courses necessary for college readiness, compared to seventy one percent of white students.<sup>100</sup> White students are also more likely to have access and the ability to enroll in advance placement courses.<sup>101</sup>

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 towards public education.<sup>102</sup> 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.<sup>103</sup> The Supreme Court's decision in *San Antonio v. Rodriguez* upheld the constitutionality of local school funding schemes that create gross funding disparities between neighboring districts.<sup>104</sup> The result has been that wealthier predominately white districts have more money to spend on students.

For example, one study found that school districts that are 75% or more white “average revenue receipts of almost \$14,000 per student,” but that school districts that are 75% or more “non-white receive only \$11,682 per student.”<sup>105</sup> The same study also found that in the aggregate those predominately white school districts receive 23 billion dollars more than predominately non-white school districts, despite serving the same number of students.<sup>106</sup> As other scholars have noted, racial segregation in schools “effectively subjugates minority students in the competition for

---

(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).

<sup>100</sup> See e.g., U.S. Dept. of Educ., Office for Civil Rights, CIVIL RIGHTS DATA SNAPSHOT: COLLEGE AND CAREER READINESS, 8 (March 2014) <https://www.uncf.org/wp-content/uploads/PDFs/CRDC-College-and-Career-Readiness-Snapshot-2.pdf>

<sup>101</sup> *Id.* at 11 (noting that 59% of white students enrolled in public high schools were able to take at least one advance placement course during the 2011-2012 school year but only 9% of African-American students and 18% of Latino students were able to do so).

<sup>102</sup> Wilson, *supra* note 8, at 1445 (describing mechanics that allow wealthier districts to assess a lower tax rate and collect more money).

<sup>103</sup> Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. DAVIS L. REV. 1835, 1839 (2007)

(“poor districts typically tax themselves at higher rates to generate fewer dollars.”)

<sup>104</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>105</sup> EdBuild, \$23 BILLION, (“\$23 BILLION” AT 4 (Feb. 2019)

<https://edbuild.org/content/23-billion/full-report.pdf>

<sup>106</sup> *Id.* at 2.

educational resources and deprives them of any basis for reasonable confidence in the evenhanded administration of their schools.”<sup>107</sup>

A significant downstream consequence of white monopolization of high quality schools is that it results in whites opportunity hoarding access to elite institutes of higher education.<sup>108</sup> Such opportunity hoarding in turn “provides a range of associated benefits for their social, economic and personal well-being,”<sup>109</sup> 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.<sup>110</sup> Indeed, only “half of poor white students attend high-poverty schools, [while] about eight in ten poor black students attend high-poverty schools.”<sup>111</sup>

Further, the number of white students attending high poverty schools is relatively low. Only five percent of students attend school in a racially concentrated predominately poor and white district.<sup>112</sup> 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 described in the section that follows, the equal protection framework traditionally used to address racial segregation in schools cannot capture the

---

<sup>107</sup> *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1043 (1984)

<sup>108</sup> See Hawkins, *supra* note 53, at 163.

<sup>109</sup> *Id.*

<sup>110</sup> Sean F. Reardon et al., *Residential Inequality in American Neighborhoods and Communities*, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, Vol. 660 at 95 (July 2015) (“White households have, on average, greater wealth than black households (enabling them to afford housing in higher-income neighborhoods than similar-income black households.”).

<sup>111</sup> Emma Garcia, *Poor Black Children Are Much More Likely To Attend High Poverty Schools Than Poor White Children*, ECONOMIC POLICY INSTITUTE, (Jan. 13, 2017), <https://www.epi.org/publication/poor-black-children-are-much-more-likely-to-attend-high-poverty-schools-than-poor-white-children/>

<sup>112</sup> \$23 BILLION, *supra* note 105, at 3.

monopolization harms caused by white student segregation in public schools.

*C. The Limits of Equal Protection Doctrine in Regulating Monopolization Caused by Social Closure*

In *Brown v. Board of Education*, racial segregation in schools was outlawed as unconstitutional on the grounds that it violates Black students' right to equal protection under the Fourteenth Amendment.<sup>113</sup> Since *Brown*, legal challenges to racial segregation in public schools have focused primarily on legal theories involving equal protection claims.<sup>114</sup> The equal protection doctrine that developed as a result of *Brown* was successful in curtailing state mandated school segregation that allowed whites to monopolize high quality schools through first order social closure.<sup>115</sup> 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 for three reasons.

First, Supreme Court cases interpreting *Brown* made it clear that de jure racial segregation – segregation that was mandated by state law – was the sole focus of *Brown's* holding.<sup>116</sup> 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.<sup>117</sup> The Supreme

---

<sup>113</sup>347 U.S. at 495 (“we 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.”)

<sup>114</sup> 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 (N.C. 1996); *Sheff v. O’Neil*, 678 S. 2d 1267 (Conn. 1996); *Hoke Cnty. Bd. Of Educ. V. State*, 599 F.2d 365 (N.C. 2004).

<sup>115</sup> See e.g., *Green v. Cty. Sch. Bd. of New Kent Cty., Va.*, 391 U.S. 430, 437–38 (1968) (“[s]chool 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).

<sup>116</sup> *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 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.”)

<sup>117</sup> 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 generally, Erica Frankenberg & Kendra Taylor, *De Facto Segregation: Tracing A Legal Basis for Contemporary Inequality*, 47 J.L. & EDUC. 189, 193 – 194 (2018) (describing the ways that the 1964 Civil Rights Act helped to usher in meaningful distinctions between de facto and de jure segregation).

Court addressed that question for the first time in *Keyes v. School District No.1*.<sup>118</sup>

Critically, the Court affirmed that de jure segregation is unconstitutional and expanded the ways in which a finding of de jure segregation could be found.<sup>119</sup> However, the Court also effectively made the difference between de facto and de jure segregation constitutionally significant. It did so by holding that any segregation in schools only violates the Equal Protection clause if it is the result of segregative intent on the part of the state.<sup>120</sup> 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 the intent to create segregated schools.<sup>121</sup> 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.<sup>122</sup>

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.<sup>123</sup> 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.<sup>124</sup> Justice Powell noted that the segregative intent requirement “present[s] problems of subjective intent which the courts cannot fairly resolve.”<sup>125</sup> Both

---

<sup>118</sup> 413 U.S. 189 (1973).

<sup>119</sup> *Id.* at 191 (finding that the school system in Denver while not segregated by state law, maintained a de jure segregated school system by manipulating “student attendance zones, school site selection and a neighborhood school policy.”).

<sup>120</sup> *Id.* at 208 (“[w]e emphasize that the differentiating factor between de jure segregation and so called *de facto* segregation... is purpose or intent to segregate.”).

<sup>121</sup> *Pers. Adm'r of Massachusetts 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.”).

<sup>122</sup> *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), *aff'd*, 837 F.2d 1181 (2d Cir. 1987) (finding a pattern of segregative acts by the Board sufficient to give rise to a finding of segregative intent).

<sup>123</sup> *Id.* at 216 (“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.”).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 225.

Douglass and Powell’s admonitions proved prescient. Courts routinely find that schools are racially segregated but fail to find the segregation actionable because the segregation is de facto rather than de jure and plaintiffs cannot show that the de facto segregation is the product of segregative intent by the state.<sup>126</sup>

A second shortcoming of the equal protection doctrine is that it fails to account for the adaptive nature of racial discrimination. As Professor Elise Bodie noted, “racial discrimination adapts to the legal and social environment by mutating to evade prohibitions against intentional discrimination.”<sup>127</sup> Methods used to create predominately 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 today.<sup>128</sup> 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.<sup>129</sup> Such mechanisms are difficult, if not impossible, to capture through a myopic singular axis segregative intent standard because there may in fact be valid rationales unconnected to race for implementing such practices.<sup>130</sup> 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

---

<sup>126</sup> See Frankenberg and Taylor, *supra* note 117 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.”).

<sup>127</sup> Elise C. Bodie, *Adaptive Discrimination*, 94 N.C. L. Rev. 1235, 1239 (2016).

<sup>128</sup> See generally, Ayscue, J.B., Orfield, G. *School District Lines Stratify Educational Opportunity by Race and Poverty*. RACE SOC PROBLEMS 7, 5–20 (2015)(showing that increases in racial segregation in schools is due to school district fragmentation). Tom I. Romero, II, J.D., Ph.D., *Kelo, Parents and the Spatialization of Color (Blindness) in the Berman-Brown Metropolitan Heterotopia*, UTAH L. REV. 947, 956 (2008) (describing the role of neighborhood schools in perpetuating school segregation).

<sup>129</sup> Jonathan Rothwell, *Housing Costs, Zoning, and Access to High Scoring Schools*, BROOKINGS INSTITUTE at 2 (April 2012) (finding that “limiting 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.”).

<sup>130</sup> 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 of Nashville*, No. 3:09-CV-00756, 2012 WL 3064251, at 44-45 (M.D. Tenn. July 27, 2012) (“at 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.”).

segregation that occurs across school district boundary lines. In *Milliken v Bradley*,<sup>131</sup> the Court was asked to decide the scope of the trial court's authority to remedy school segregation in Detroit, Michigan. The trial court previously found that because of white flight to suburban districts, a Detroit only remedy would not sufficiently desegregate Detroit schools.<sup>132</sup> The trial court ordered a metropolitan-wide remedy that would involve the suburban districts outside of Detroit.<sup>133</sup>

The Supreme Court rejected the metropolitan wide remedy. It reasoned that "the notion that school district lines may be casually ignored or treated as administrative convenience is contrary to the history of public education in our country."<sup>134</sup> The Court then held that an interdistrict remedy is only appropriate when "the racially discriminatory acts of one or more districts caused racial segregation in an adjacent district, or where lines have been deliberately drawn on the basis of race."<sup>135</sup>

The legal standard set by the Court for imposing an interdistrict remedy is a very stringent one few plaintiffs have been able to meet.<sup>136</sup> *Milliken* is recognized by scholars as having insulated racial segregation that occurs between school districts.<sup>137</sup> As described in the section that follows, school district boundary lines now serve as a race-neutral conduit for second order social closure to occur. School district boundary lines are a critical driver of the white student segregation that enables predominately white school districts to monopolize high quality schools.

---

<sup>131</sup> 418 U.S. 717 (1974).

<sup>132</sup> *Bradley v. Milliken*, 338 F. Supp. 582, 594 (E.D. Mich. 1971). Critically, the predominately white demographics of the Detroit suburbs was shaped in large part by federal, state, and local policies that made it easier for whites to move to the suburbs while at the same time constraining non-whites, particularly Blacks, to urban areas in Detroit. See e.g., MICHIGAN'S PAST AND PRESENT TOLD IN NINE INTERACTIVE MAPS, <https://www.bridgemi.com/michigan-government/michigans-segregated-past-and-present-told-9-interactive-maps>

<sup>133</sup> 338 F. Supp. 582 at 594.

<sup>134</sup> 418 US 717, 741 (1974)

<sup>135</sup> *Id.* at 744

<sup>136</sup> See e.g., *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1*, 778 F.2d 404, 407-08 (8th Cir. 1985); *United States v. Bd. of Sch. Comm'rs*, 637 F.2d 1101, 1116-17 (7th Cir. 1980); *Evans v. Buchanan*, 582 F.2d 750, 756 (3d Cir. 1978); *Newburg Area Council, Inc. v. Bd. of Educ.*, 510 F.2d 1358, 1359-61 (6th Cir. 1974)

<sup>137</sup> Daniel Kiel, *The Enduring Power of Milliken's Fences*, 45 URB. LAW. 137 (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*, 2015 HARV. J. RACIAL & ETHNIC JUST. Online 1, 41 (2015) ("[t]he 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.").

## II. SOCIAL CLOSURE AND THE CREATION OF WHITE ISLAND SCHOOL DISTRICTS

Sixty-five years after the court's decision in *Brown*, laws that yield predominately white schools did not dissipate. They evolved. The evolution was aided in large part by the Supreme Court's decision in *Milliken*. A significant outgrowth of the Supreme Court's decision in *Milliken* is that in racially diverse metropolitan areas throughout the country, virtually all-white and affluent school districts exist right next to predominately minority and low-income school districts.<sup>138</sup> Political boundaries now erect the same barriers that were supposed to be outlawed by *Brown*. The use of school district boundary lines to segregate schools is completely lawful, allows white students to monopolize the highest quality schools, while relegating students of color to schools that are substantially inferior and unequal. This Part examines the ways in which the laws surrounding school district boundary lines facilitate second order social closure and monopolization of high-quality schools. It also examines the consequences of such monopolization for white students and for the health of the democracy.

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

There are nearly fourteen thousand school districts across the country.<sup>139</sup> In nearly one thousand of those districts, the district boundary lines serve as de facto racial borders, separating predominately affluent and white students from predominately low-income and minority students.<sup>140</sup> In many instances, the districts are mere miles apart such that it would be feasible to redraw the district boundary lines in order to obtain greater racial and economic diversity within the districts.

In many of the neighboring districts, the predominately white and affluent districts are able to spend ten percent or more per pupil than their neighboring predominately minority and low income districts.<sup>141</sup> There is also a twenty-five percent or greater variance in the demographic makeup of the districts, as measured by the enrollment percentage of non-white

---

<sup>138</sup> Jennifer J. Holme & Kara S. Finnigan, *School Diversity, School District Fragmentation and Metropolitan Policy*, TEACHERS COLLEGE RECORD VOLUME 115 (Nov. 2013) (describing an increase in racial and economic segregation between school districts).

<sup>139</sup> See NATIONAL CENTER FOR EDUCATION STATISTICS, [https://nces.ed.gov/programs/digest/d12/tables/dt12\\_098.asp](https://nces.ed.gov/programs/digest/d12/tables/dt12_098.asp)

<sup>140</sup> See EdBuild, DISMISSED: AMERICA'S MOST DIVISIVE BORDERS, ("DISMISSED") (July 2019) <https://edbuild.org/content/dismisssed/edbuild-dismisssed-full-report-2019.pdf>

<sup>141</sup> *Id.* at 1.

students.<sup>142</sup> Put another way, the predominately white and affluent districts are enrolling a disproportionately high share of white and affluent students relative to the demographic makeup of the metropolitan area in which the district is located.

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

*1. School Districts as Impermeable Borders – Detroit and Grosse Pointe, Michigan*

A school district is a “territorial unit within a state that has responsibility for the provision of public education within its borders.”<sup>143</sup> School districts are creatures of the state and possess only the powers that the state afford it.<sup>144</sup> They are government bodies that are generally required only to educate 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.<sup>145</sup> Notably, “the average district on the whiter, wealthier side of [a district line] receives over \$4,000 more per student each year.”<sup>146</sup>

---

<sup>142</sup> *Id.*

<sup>143</sup> 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).

<sup>144</sup> See e.g., *Tecumseh Sch. Dist. No. 7, Shawnee Cty. v. Throckmorton*, 194 Kan. 519, 145–46 (1965) (“school 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 Cty. Bd. of Commissioners*, 805 S.E.2d 320, 341 (N.C. Ct. App. 2017) (“[o]ur Supreme Court has long recognized the plenary power of the General Assembly over counties and over the creation and organization of school districts.”); *Boyd By & Through Boyd v. Gulfport Mun. Separate Sch. Dist.*, 821 F.2d 308, 310 (5th Cir. 1987) (“school 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.”); *Perritt Ltd. P’ship v. Kenosha Unified Sch. Dist. No. 1*, 153 F.3d 489, 493 (7th Cir. 1998) (“in 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.”).

<sup>145</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 11-17 (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).

<sup>146</sup> DISMISSED, *supra* note 140 at 1.

Importantly, as government bodies, school districts are subject to the same constitutional constraints that apply to all government bodies, including the equal protection clause.<sup>147</sup> In the aftermath of *Brown*, school district boundary line changes in the form of municipal secessions, annexations, and detachments were utilized as proverbial swords to fend off school desegregation. 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.<sup>148</sup>

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.<sup>149</sup> Absent proof that a boundary line change impedes a school district's ability to meet its obligation under a federal court desegregation order,<sup>150</sup> courts will generally defer to the state's decision-making on placement of school district boundary lines.<sup>151</sup> 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.

---

<sup>147</sup> Briffault, *supra* note 143, at 25 (noting that local governments including school districts are subject to federal constitutional constraints).

<sup>148</sup> See e.g., *Wright v. Council of City of Emporia*, 407 U.S. 451 (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. State of Tex.*, 321 F. Supp. 1043, 1048 (E.D. Tex. 1970), *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) (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); *Burleson v. Cty. Bd. of Election Comm'rs of Jefferson Cty.*, 308 F. Supp. 352, 352 (E.D. Ark.), *aff'd sub nom. Burleson v. Cty. Bd. of Election Comr's of Jefferson Cty.*, 432 F.2d 1356 (8th Cir. 1970) (holding that predominately white municipality could not petition to detach or secede from a racially diverse school district that was under a federal court desegregation order.).

<sup>149</sup> 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... [w]e 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.”).

<sup>150</sup> See e.g., *Stout by Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 1014 (11th Cir. 2018) (finding unconstitutional a municipalities attempt to secede from the county based school district reasoning that “the finding that a racially discriminatory purpose motivated the Gardendale Board also obliged the district court to deny the motion to secede.”).

<sup>151</sup> See Wilson, *supra* note 87, at 174–75 (2016)(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).

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.<sup>152</sup> Eighty-three percent of the students in the Grosse Pointe school district are white<sup>153</sup> while only ten percent of the students in the Detroit public schools are white.<sup>154</sup> Almost half of the children in the City of Detroit public schools have a family income below the poverty line<sup>155</sup> while only five percent of the children in the Grosse Pointe school district have a family income below the poverty line.<sup>156</sup> Moreover, the median household income in Grosse Pointe is \$90,542 compared to \$26,087 for Detroit.<sup>157</sup> 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.<sup>158</sup>

The substantial differences in the demographics of the two districts has a direct correlation on the ability of the districts to offer high quality educational inputs and to produce high quality educational outcomes.<sup>159</sup> Take teachers for example. Most of the teachers in the Grosse Pointe school district received the state's highest level of qualification.<sup>160</sup> 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

---

<sup>152</sup> Shawn D. Lewis, *Detroit, G.P. Schools Economic Divide Listed As Worst*, THE DETROIT NEWS, (Aug. 22, 2016), <https://www.detroitnews.com/story/news/local/detroit-city/2016/08/22/detroit-grosse-pointe-schools-economic-divide/89131386/>

<sup>153</sup> National Center for Education Statistics, Grosse Pointe Education Demographics and Geographic Estimates, <https://nces.ed.gov/Programs/Edge/ACSDashboard/2625740>

<sup>154</sup> National Center for Education Statistics, City of Detroit Public Schools, Education Demographics and Geographic Estimates, <https://nces.ed.gov/Programs/Edge/ACSDashboard/2612000>

<sup>155</sup> *Id.* (noting that 49.7% of children in Detroit public schools have family incomes below the poverty line).

<sup>156</sup> See note 153, *supra* (noting that 5.6% of the children in Grosse Pointe public schools have family incomes below the poverty line).

<sup>157</sup> EdBuild, *Fault Lines: Americans Most Segregating School District Borders*, <http://viz.edbuild.org/maps/2016/fault-lines/>

<sup>158</sup> Julie Mack, *Per-Pupil Spending, Revenues in Your Michigan School District*, MICHIGAN LIVE, (Jan. 30, 2019), [https://www.mlive.com/news/2018/08/see\\_per-pupil\\_spending\\_revenue.html](https://www.mlive.com/news/2018/08/see_per-pupil_spending_revenue.html)

<sup>159</sup> See Section I.C. *supra*.

<sup>160</sup> Jessica Strachan, *Grosse Pointe School Has Best Teachers*, PATCH, (Oct. 14, 2019), <https://patch.com/michigan/grossepointe/grosse-pointe-school-has-best-teachers-2020>; Citizens Research Council, *Michigan's Leaky Teacher Pipeline Examining Trends in Teacher Demand and Supply*, at vi (Feb. 2019), [https://crcmich.org/PUBLICAT/2010s/2019/rpt404-teacher\\_pipeline.pdf](https://crcmich.org/PUBLICAT/2010s/2019/rpt404-teacher_pipeline.pdf) (noting that "Michigan permits pay and compensation structures to be determined locally such that the more local revenue a district can raise the more they may be able to offer in teacher compensation.").

long-term substitute teachers in many of its schools.<sup>161</sup> 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.<sup>162</sup>

In contrast, schools in the Grosse Pointe district are considered amongst the best in the state, leading residents to locate there specifically for the schools. In line with Weber's theory of social closure, the Grosse Pointe School District fiercely guards its border to prevent non-residents from entry, going as far as setting up an anonymous tip-line for residents to report students suspected of illegally enrolling in the district.<sup>163</sup> The district aggressively pursues individuals suspected of not living in the district.<sup>164</sup> In one academic year, the district spent nearly \$75,000 dollars investigating claims of non-residency.<sup>165</sup> The superintendent of the district acknowledged following students who he suspected of being non-residents, peering through their windows, and asking to see their bedrooms to ensure that they lived there.<sup>166</sup>

Further, the state of Michigan offers a schools of choice program that enables districts to accept transfers from a neighboring school district.<sup>167</sup> Grosse Pointe declines to participate in the school of choice program.<sup>168</sup> The decision not to participate is paradoxical because enrollment in the

---

<sup>161</sup> Mike Wilkinson, *Alarmed By Long-term Subs, Detroit Raised Teacher Pay and Offered Bonuses*, BRIDGE, (Aug. 8, 2019), <https://www.bridgemi.com/talent-education/alarmed-long-term-subs-detroit-raised-teacher-pay-and-offered-bonuses>

<sup>162</sup> *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir.), *reh'g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir. 2020) (finding that five Black students claims that they were deprived of education that could provide access to literacy were sufficient to state a claim their substantive due process rights under Fourteenth Amendment.).

<sup>163</sup> See GROSSE POINTE PUBLIC SCHOOL ENROLMENT ELIGIBILITY INVESTIGATIONS, <https://mi01000971.schoolwires.net/Page/1042> (documenting the number of students investigated for unlawful entry into the district, the number of students excluded from the district); Lauren Slagter, *Grosse Pointe Schools Rethinks the Way It Keeps Detroit Kids and Others Out*, MICHIGAN LIVE, (June 19, 2019), [https://www.mlive.com/news/ann-arbor/2017/09/grosse\\_pointe\\_residency.html](https://www.mlive.com/news/ann-arbor/2017/09/grosse_pointe_residency.html) (describing the anonymous tip line and other stringent enrollment verification tools used to patrol entry into the school system).

<sup>164</sup> National Public Radio, *Grosse Pointe school board members say residency rules burden renters, working parents*, (Sep. 14, 2017), <https://www.michiganradio.org/post/grosse-pointe-school-board-members-say-residency-rules-burden-renters-working-parents>.

<sup>165</sup> *Id.*

<sup>166</sup> Tom Gatnert, *Grosse Pointe Restricts Nonresident Students, Board Member Joins 'Charter School Segregation' Chorus*, MICHIGAN CAPITAL CONFIDENTIAL, (Dec. 8, 2017), <https://www.michigancapitolconfidential.com/grosse-pointe-restricts-nonresident-students-board-member-joins-charter-school-segregation-chorus>

<sup>167</sup> Mich. Comp. Laws Ann. § 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.")

<sup>168</sup> See Ganter, *supra* note 166 166 ("the Grosse Pointe Public School System has chosen not to participate in Schools of Choice.")

Grosse Pointe district is declining due to lower birth rates and an older population within the district.<sup>169</sup> The hyper-policing of the Grosse Pointe boundary line in conjunction with the districts refusal to participate in the school 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 violates 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 predominately white municipalities are seceding from racially diverse school districts.<sup>170</sup> A municipal secession occurs when a municipality leaves a larger territorial based school district to form its own independent and autonomous school district.<sup>171</sup> States have plenary authority to enact laws that determine when and how municipalities can secede from a school district.<sup>172</sup>

Since 2000, one hundred and twenty-eight municipalities have attempted to secede, seventy three of them have been successful in doing so.<sup>173</sup> The secessions follow a similar demographic trend: “compared 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.”<sup>174</sup> The secessions have the effect of creating predominately white and affluent school district enclaves that are situated next to districts that are predominately minority and low-income. The

---

<sup>169</sup> *Id.* (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 school of choice program).

<sup>170</sup> See EdBuild, FRACTURED: THE BREAKDOWN OF AMERICA’S SCHOOL SYSTEM (“FRACTURED”) (2019) (cataloguing municipal secessions from school districts across the country), <https://edbuild.org/content/fractured/fractured-full-report.pdf>

<sup>171</sup> *Id.*

<sup>172</sup> See Wilson, *supra* note 87, at 174-175 (describing the legal context for school district secessions).

<sup>173</sup> FRACTURED, *supra* note 170 at 6.

<sup>174</sup> *Id.* at 1.

Jefferson County School District (“JCS D”) in Alabama provides an illustrative example.

JCS D is a county-based school district that was created in 1819.<sup>175</sup> Alabama has permissive laws regarding municipal secessions. Any municipality that has more than five thousand residents is permitted to form its own school district.<sup>176</sup> After *Brown* was decided, predominately white municipalities within JCS D took advantage of the permissive laws regarding school district creation and began seceding from JCS D. For example, the City of Mountain Brook, Alabama seceded in 1959, four years after *Brown* was decided. In 1965 a federal court in *Stout v. Jefferson County* found that JCS D was de jure segregated and required it to desegregate its schools.<sup>177</sup> However, because Mountain Brook seceded prior to the *Stout* school desegregation order, it was permitted to maintain its separate and autonomous school district.

Even after the *Stout* desegregation order was put in place, in 1970-1971 three other predominately white municipalities-- Pleasant Grove, Vestavia, Midfield, and Homewood, seceded from JCS D.<sup>178</sup> Despite the Supreme Court’s 1972 ruling in *Wright v. Council of City of Emporia*, 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. Although the *Stout* desegregation order remains active, three more municipalities seceded from JCS D between 1988 and 2005—Hoover, Trussville and Leeds.<sup>179</sup> In 2016, the Fifth Circuit finally pushed back against further secessions when it enjoined a secession attempt by the predominately white City of Gardendale.<sup>180</sup>

Yet the damage was already done. Many of the municipalities that seceded from JCS D are predominately white and affluent. For example, the Mountain Brook School District is 96.0% white while the Trussville and Vestavia Hills school districts are 86% and 87% white respectively.<sup>181</sup> Further, those school districts are able to spend an average of over \$3,000

---

<sup>175</sup> Chandler, Vickie M., and Pamela S. King. *Elementary and Secondary Public Education in Jefferson County, Alabama, 1968-1975: A History of the Jefferson County Board of Education*. Birmingham, AL: Jefferson County Board of Education (1978).

<sup>176</sup> Wilson, *supra* note 87, at 167.

<sup>177</sup> See *Stout v. Jefferson County Bd. Of Educ.*, No. 2:65-cv-0396 (N.D. Ala. 1965)

<sup>178</sup> See Erica Frankenberg, *Splintering School Districts: Understanding the Link Between Segregation and Fragmentation*, 34 LAW & SOC. INQUIRY 869, 881 (2009) (describing the history and timeline of municipal secessions from the Jefferson County School District.).

<sup>179</sup> *Id.* at 885.

<sup>180</sup> *Stout by Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988 (11th Cir. 2018)

<sup>181</sup> See National Center for Education Statistics;

<https://nces.ed.gov/Programs/Edge/ACSDashboard/0102490>

more per pupil than JCSD.<sup>182</sup> Critically, the existence of predominately 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 predominately 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.<sup>183</sup> The secessions allow white affluent 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.<sup>184</sup> Three other predominately white districts that also seceded from JCSD- Vestavia Hills, Homewood, and Hoover were also named amongst the top ten school districts in the state.<sup>185</sup> JCSD however was not listed amongst the districts considered the best in the state.

### 3. Consolidations— *Spackenkill and Poughkeepsie, New York*

Finally, in addition to affirmative boundary line changes, 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 segregated school systems.<sup>186</sup> Similar to secessions, states have plenary authority to decide the conditions under which school district consolidations occur.

Most states—thirty-nine—make school district consolidation a voluntary endeavor meaning that it only happens if the districts agree to merge.<sup>187</sup> Some states provide financial incentives to encourage consolidation.<sup>188</sup> Yet few states--only nine--provide a mechanism through which the state can mandate school district consolidation.<sup>189</sup> Even when states provide a mechanism for mandating consolidation, the conditions under which consolidation are mandated vary substantially by state. Some states have broad authority to mandate consolidation while other states can

---

<sup>182</sup> See FRACTURED, *supra* note, 170 at 14.

<sup>183</sup> See Wilson, *supra* note 87, at 183-186 (describing the ways in which municipal secessions from school districts allow for the seceding municipalities to draw residents with more money and social capital).

<sup>184</sup> Leada Gore, *50 best school districts in Alabama*, AL.COM. (Jan. 24, 2018), [https://www.al.com/news/2018/01/50\\_best\\_school\\_districts\\_in\\_al.html](https://www.al.com/news/2018/01/50_best_school_districts_in_al.html)

<sup>185</sup> *Id.*

<sup>186</sup> See *e.g.*, *United States v. State of Mo.*, 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.”).

<sup>187</sup> EdBuild, STRANDED HOW STATES MAROON DISTRICTS IN FINANCIAL DISTRESS (“STRANDED”), at 3, <https://edbuild.org/content/stranded/full-report.pdf>

<sup>188</sup> See *e.g.*, Ohio Rev. Code Ann. § 3311.231; Ohio Rev. Code Ann. § 3311.241.

<sup>189</sup> See STRANDED, *supra*, note 187 at 10.

only mandate consolidation under very limited circumstances such as financial insolvency.<sup>190</sup>

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

The Spackenkill community in New York encompasses an area that is only six miles wide within the town of Poughkeepsie, New York.<sup>191</sup> Spackenkill and Poughkeepsie have two separate and autonomous school districts. Spackenkill has a distinct history that allowed it to draw affluent and well-educated residents. Historically it was buoyed financially by the presence of an IBM plant which attracted high income earners who could afford expensive homes.<sup>192</sup>

In contrast, the town of Poughkeepsie became financially distressed after losing manufacturing plants and residents.<sup>193</sup> 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.<sup>194</sup> The Poughkeepsie district on the other hand is able spend and raise four times less from local sources at \$6,118 per student.<sup>195</sup> The Spackenkill district is 63% white<sup>196</sup> while the Poughkeepsie district is only 7% white.<sup>197</sup>

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.<sup>198</sup> The state of New York offered generous financial incentives to encourage a consolidation of the

---

<sup>190</sup> See e.g., N.C. Gen. Stat. Ann. § 115C-66.5 (a) (“[t]he 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.”).

<sup>191</sup> See Sue Brooks, *The Politics of School Districting: A Case Study in Upstate New York*, EDUCATIONAL FOUNDATIONS at 16 (Summer-Fall 2006).

<sup>192</sup> *Id.* at 17.

<sup>193</sup> *Id.*

<sup>194</sup> STRANDED, *supra* note 187, at 8.

<sup>195</sup> *Id.*

<sup>196</sup> SPACKENKILL HIGH SCHOOL ENROLLMENT (2017 - 18),

<https://data.nysed.gov/enrollment.php?year=2017&instid=800000053239>

<sup>197</sup> POUGHKEEPSIE CITY SCHOOL DISTRICT ENROLLMENT (2017 -

18)<https://data.nysed.gov/enrollment.php?year=2018&instid=800000053351>

<sup>198</sup> See STRANDED, *supra* note 187, at 9 (noting that “school districts that consolidate in New York receive an additional 40% in operating aid for five years, phasing out over a further nine years.”).

districts, namely a five-year, ten percent increase in operating funds for a consolidated and combined district—but Spackenkill declined.<sup>199</sup> The end result is that school district boundary lines permit the predominately white Spackenkill district to monopolize the highest quality schools in the area. Spackenkill High School for example received the National Blue-Ribbon Award for academic excellence, offers fourteen advance placement classes, and had ninety-five percent of its graduating class of 2018 go on to college.<sup>200</sup> In contrast, Poughkeepsie High School had an abysmal forty seven percent high school graduation rate and offered few advance placement courses.<sup>201</sup>

As the sections that follow demonstrate, allowing school district boundary lines to facilitate second order closure that leads to white student racial segregation and monopolization of high-quality schools is not costless. Indeed, failure to pay attention to the white racial segregation and educational opportunity hoarding in places like Grosse Pointe, Michigan, Spackenkill, New York, or Mountain Brook, Alabama has negative consequences not only for the white students attending schools in racially segregated districts, but also for the health of the American democracy.

B. *Consequences of White Student Segregation and Isolation*

In *Brown*, the Supreme Court held that racial segregation in public schools is unconstitutional because it inflicts irreparable psychological harms upon Black students.<sup>202</sup> The Court relied on social science evidence to support its conclusion.<sup>203</sup> Notably, the Court was also presented with social science evidence regarding the ways that segregation harms white students.<sup>204</sup> Yet the Court made no findings or mention of the way racial segregation harms white students. As Professor Kevin Brown noted, “it was clear that it was not racial imbalance per se that

---

<sup>199</sup> Brooks, *supra* note 191, at 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.”).

<sup>200</sup> See Tiana Headley, *A Tale of Two Districts: History of Poughkeepsie Schools*, *The Miscellany News*, (Nov. 7, 2019), <https://miscellanynews.org/2019/11/07/news/a-tale-of-two-districts-history-of-poughkeepsie-schools/>.

<sup>201</sup> *Id.*

<sup>202</sup> *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.”).

<sup>203</sup> *Id.* at 494 n. 11.

<sup>204</sup> See Brief for Appellant app. at 6-8, 347 U.S. 483, available at 1952 WL 47265.

produced the constitutional harm; rather it was the meaning attached to it,”<sup>205</sup> for Black students.

The Court’s conclusions and framing regarding the harms of segregation for Black students had profound effects on the way that segregation in schools is conceptualized today. Modern school segregation cases recognize the importance of avoiding racial isolation in public schools.<sup>206</sup> Yet, like the Court in *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.<sup>207</sup> 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.<sup>208</sup> It also limits how courts view their remedial authority and obligation to address racial segregation in schools.<sup>209</sup>

While the school desegregation case law focuses almost exclusively on the harms of racial segregation for students of color, a substantial body of research shows that racial segregation impacts white students in harmful ways as well. Social science evidence presented but not cited by the

---

<sup>205</sup> Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?* 78 CORNELL L. REV. 1, 66 (1992)

<sup>206</sup> *Parents Involved in Community Schools v. Seattle School District, No. 1*, 136, 551 U.S. 701, 797 (2005) (J. Kennedy concurring in part) (holding that “a compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue it.”).

<sup>207</sup> See e.g. *Reed v. Rhodes*, 422 F. Supp. 708, 755 (N.D. Ohio 1976), aff’d in part, 607 F.2d 714 (6th Cir. 1979) (There is no justification for black schools to be at 130.9% capacity while nearby white schools were at only 81.4% capacity. Adherence to a neighborhood school policy under these circumstances had the effect of creating or perpetrating racial segregation in these schools. Moreover, the vast disparity in utilization reflects an equally wide difference in the quality of education being provided. Under these circumstances, the schools were not only separate, but also unequal.”).

<sup>208</sup> 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 (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.”); Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How Brown v. Board of Education Helped to Further White Supremacy*, 105 Va. L. Rev. 343, 354–55 (2019) (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.”).

<sup>209</sup> 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.”).

Court in *Brown* 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.”<sup>210</sup> It also found that racial segregation causes whites to have moral confusion and internal conflict that results in harmful side-effects such as uncritical idealization of authority figures and intense hostility towards minority groups.<sup>211</sup>

Modern social science research illuminates additional harms. Racial segregation of white students limits their interactions with non-whites at a crucial period when their identities, sense of self and others are being formed.<sup>212</sup> For white students, being situated in predominately white schools with better resources and facilities may reify notions of white superiority. It may also make them more susceptible to internalizing false stereotypes about communities of color,<sup>213</sup> to seeing whiteness as the normative baseline of humanity,<sup>214</sup> and to have difficulty engaging in healthy and productive interracial relationships.<sup>215</sup> Finally, racial segregation and isolation of white students can generate expectations of a racial hierarchy in which people of color are subordinate to whites. This can in turn lead to whites abandoning a commitment to democratic norms

---

<sup>210</sup> Brief for Appellant app. at 6, 347 U.S. 483, available at 1952 WL 47265.

<sup>211</sup> *Id.* at 6-7.

<sup>212</sup> See Lawrence A. Hirschfeld, “The Inheritability of Identity: Children’s Understanding of the Cultural Biology of Race,” *Child Development* 66, no. 5 (1995): 1418-3

<sup>213</sup> See e.g., Pamela Perry, *SHADES OF WHITE: WHITE KIDS AND RACIAL IDENTITIES IN HIGH SCHOOL* (2002) (finding that students in predominately white used media representations of Blacks, Asians, and Latinos to construct racial group perceptions of non-whites); *But cf.*, Peter B. Wood and Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, *JOURNAL OF INTERCULTURAL RELATIONS* 20, no. 1 at 15 (1996) (finding that “childhood 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.”)

<sup>214</sup> See Perry, *supra* note 213, at 33 (noting that logic of race-neutrality that was a central organizing principle of social life at [a predominately 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.”); Onwuachi-Willig, *supra* note 208, 357-358 (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.”).

<sup>215</sup> See e.g., Eduardo Bonilla-Silva, Carla Goar and David G. Embrick, *When Whites Flock Together: The Social Psychology of White Habitus*, *Critical Sociology*, Volume 32, Issue 2-3, (2006) (finding that although white espouse positive beliefs about racial integration, whites have little contact with black people in neighborhoods, schools, colleges, and jobs).

if they believe democracy might elevate people of color's station and undo the expected racial hierarchy.<sup>216</sup>

*C. The Normative Case for Regulating White Student Segregation*

Normatively, white student isolation and segregation matters not just for purposes of preventing harm to white students, but also for the health of America's democracy. White identity has significant meaning and value.<sup>217</sup> 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 predominately non-white.<sup>218</sup> Racial segregation of white students distorts the American democracy by concentrating the kinds of educational opportunities necessary for social mobility and full participation in the democracy to a limited cohort of citizens.<sup>219</sup> Thus, there are strong public policy arguments related to preserving the health of the American democracy for regulating white student racial segregation.

For starters, the side-effects of white racial 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 and

---

<sup>216</sup> See Miller, Steven V. and Nicholas T. Davis, *The Effect of White Social Prejudice on Support for American Democracy*, JOURNAL OF RACE, ETHNICITY, AND POLITICS, (forthcoming 2020) (manuscript available, <https://github.com/svmiller/woi/blob/master/ms.pdf>) (describing empirical research showing white support for democracy and democratic norms declines as their social intolerances or prejudices for nonwhites increases); Onwuachi-Willig, *supra* note 208, at 362 (“by 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.”).

<sup>217</sup> See e.g., Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 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.”)

<sup>218</sup> 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- 1853 (1994); Elijah Anderson, *The White Space*, 1 SOC. RACE & ETHNICITY 10 (2015).

<sup>219</sup> 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 student based on geography cluster opportunities so that “advantage piles on top of advantage.”).

police killings of Black people.<sup>220</sup> The research suggests that white officers limited contact with Blacks can cause them to imbue negative stereotypes about Blacks as dangerous and to feel unnecessarily threatened by them.<sup>221</sup> Killings of Black citizens by white police officers in turn causes significant social unrest.<sup>222</sup> It also erodes Black citizens trust in state institutions like the police and the democratic traditions that are supposed to govern those institutions.<sup>223</sup> The increasing social unrest and racialized distrust in state institutions threatens the stability of America's democracy.

In addition, limiting access to high quality schools helps to transmit intergenerational social inequality.<sup>224</sup> Access to high-quality schools helps to create better life outcomes. To the extent that whites as a collective have greater access to high quality schools than other groups, it reinforces racialized inequality and entrenches a racial caste system that continues to favor white citizens. Continued entrenchment of racialized inequality moves the country even further away from the democratic opportunity for all ethos for which America is known.

Further, from a public policy perspective, maintaining a skewed distribution of access to high-quality schools cements a deleterious connection between race and place. Businesses are more likely to locate in areas with a highly qualified workforce. Situating high quality schools in predominately white areas causes interregional disparities that negatively impacts economic development and growth in areas that are predominately non-white. The result is racially disparate and contoured spaces that undermine citizens sense of community.

Finally, as the population in the United States becomes more racially diverse, it is important that white students understand how to operate in

---

<sup>220</sup> Aldina Mesic et al., *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, JOURNAL OF THE NATIONAL MEDICAL ASSOCIATION, VOL. 110, NO 2, APRIL 2018 (finding that “racial residential segregation was the most robust indicator associated with state-level racial disparities in police shootings of unarmed victims.”).

<sup>221</sup> *Id.*

<sup>222</sup> See e.g., Linda Poon and Marie Patino, *The Latest Protests Against Police Violence Toward African Americans Didn't Appear Out Of Nowhere. They're Rooted In Generations Of Injustice And Systemic Racism*, Bloomberg City Lab, (June 9, 2020), <https://www.bloomberg.com/news/articles/2020-06-09/a-history-of-protests-against-police-brutality> (describing historical connections between white police violence against African-Americans and social unrest).

<sup>223</sup> See e.g., Laura Santhanam, *Two-thirds of black Americans don't trust the police to treat them equally. Most white Americans do*, PUBLIC NEWS HOUR, (June 5, 2020), <https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do> (describing racial divides in citizen trust in police officers).

<sup>224</sup> See generally, Charles Tilly, DURABLE INEQUALITY (1999).

racially diverse settings. The stability of the American democracy is threatened by the kinds of prejudiced attitudes that can flourish when whites do not have meaningful interactions with non-white students. Indeed, the racism bred by racial segregation and isolation has recently been labeled a national security threat.<sup>225</sup> For these reasons, finding ways to regulate white student segregation that leads to white students being isolated from students of color and monopolization of high-quality schools is vital.

### III. 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 demonstrated, in modern times, racial segregation in schools is the result of private decision-making 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 decision-making, this Part suggests that there is merit in looking to private law frameworks for guidance. It looks to the antitrust Sherman Act 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.<sup>226</sup> It protects *only* the competitive process, not individual competitors.<sup>227</sup> It rests upon “the premise that the unrestrained interaction of competitive forces will yield the best allocation of... economic resources...while at the same time providing an

---

<sup>225</sup> See e.g., Bishop Garrison and John B. Wolfsthal, *An Appeal to the National Security Community to Fight Racial Injustice*, FOREIGN POLICY NEWS, (June 2, 2020), <https://foreignpolicy.com/2020/06/02/race-relations-police-violence-national-security-community/> (“[u]nless 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.”).

<sup>226</sup> See generally Phillip E. Areeda *et al.*, Antitrust Law ¶ 402 (3d ed. 2007).

<sup>227</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (“[t]he 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.”).

environment conducive to the preservation of ..democratic political and social institutions.”<sup>228</sup>

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.<sup>229</sup> Acquiring or maintaining a monopoly is not in and of itself unlawful.<sup>230</sup> Instead, it is only unlawful if the monopoly is acquired or maintained through anticompetitive or exclusionary conduct.<sup>231</sup> Courts find that conduct is exclusionary or anti-competitive when it “harm(s) the competitive *process* and thereby harm consumers”<sup>232</sup> or has a deleterious effect on a rival’s ability to engage in the competitive process.<sup>233</sup> The primary focus of 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.<sup>234</sup> 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 white student racial segregation in schools,

---

<sup>228</sup> *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

<sup>229</sup> See 15 U.S.C. § 2 (2019); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

<sup>230</sup> See e.g., *Ne. Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 84–85 (2d Cir. 1981) (“the mere possession of monopoly power does not ipso facto condemn a market participant. But, to avoid the proscriptions of section 2, the firm must refrain at all times from conduct directed at smothering competition.”).

<sup>231</sup> 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.”)

<sup>232</sup> *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, 510 (1962) (“legislative history illuminates congressional concern with the protection of competition, not competitors.”).

<sup>233</sup> *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (“[f] or 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.”).

<sup>234</sup> See e.g., *Thomas Jefferson to John Tyler, 1810*, (“two great measures, . . . without which no republic can maintain itself in strength: 1. That of general education, to enable every man to judge for himself what will secure or endanger his freedom. 2. To divide every county . . . [so] that all the children of each will be within reach of a central school in it.”).

undermines democracy.<sup>235</sup> It does 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.<sup>236</sup> It also does so by facilitating forms of social isolation that denies white students the ability to gain the skills they need to function in a racially diverse country. 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 racial segregation in schools, it is imperative that new ways of thinking and new frameworks be introduced to examine the problem. Antitrust doctrine provides an especially apt analytical lens through which to critically analyze the monopolization and hoarding harms caused by white student racial segregation. In effectuating the analogy, racially integrated public schools are 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 metaphorically 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 is anticompetitive or exclusionary.<sup>237</sup> Anticompetitive or exclusionary conduct comes in many different forms, including predatory pricing and purchasing schemes,<sup>238</sup> exclusive dealing arrangements that require a

---

<sup>235</sup> See generally, Elizabeth Anderson, *THE IMPERATIVE OF INTEGRATION* (2010) (arguing that racial segregation stigmatizes minority groups, limits access to educational and employment opportunity, which in turn impairs democracy and democratic ideals).

<sup>236</sup> See Sheryll Cashin, *INTEGRATION AS A MEANS OF RESTORING DEMOCRACY AND OPPORTUNITY*, [https://www.jchs.harvard.edu/sites/default/files/a\\_shared\\_future\\_integration\\_restoring\\_democracy.pdf](https://www.jchs.harvard.edu/sites/default/files/a_shared_future_integration_restoring_democracy.pdf) at pp. 5-6 (2017).

<sup>237</sup> 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 (2003) (arguing that the monopolization doctrine provides vacuous standards and conclusory labels that do not provide meaningful guidance on whether conduct should be deemed exclusionary).

<sup>238</sup> See e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (defendant accused of setting below-cost prices to drive plaintiff out of business); *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007) (plaintiff alleged that defendant attempted to monopolize the finished alder lumber market by overbidding on inputs and raising plaintiff's costs).

buyer to purchase supplies from a specific dealer,<sup>239</sup> bundling of discounts or rebates that create de facto exclusive dealing arrangements,<sup>240</sup> and the denial of an essential facility by a dominant firm.<sup>241</sup>

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 predominately white island school districts. Court cases define the contours of the essential facilities doctrine. Under the judicially created doctrine, a firm incurs liability if they do not provide their competitors with access to an essential facility that is necessary for the competitor to compete in a market.<sup>242</sup> 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 Rail Road Association of St. Louis*, the Court issued an injunction against a coalition that organized to acquire railroad facilities including the only railway bridge that went across the Mississippi river.<sup>243</sup> The acquisition of the bridge prohibited competing railroad services from offering transportation across the bridge. The Court required the coalition to allow competitors access to the bridge<sup>244</sup>. Further, in *Associated Press v. United States*, the Court found that the Associated Press violated the essential facilities doctrine by limiting membership in its organization and controlling which competitors could have access to its copyrighted news services.<sup>245</sup> Also in *Lorain Journal Co. v. United States*, 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.<sup>246</sup> Finally, in *Otter Tail Power Co. v. United*

---

<sup>239</sup> *LePage's Inc. v. 3M*, 324 F.3d 141, 158 (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 status.").

<sup>240</sup> *Cascade Health Solutions 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.").

<sup>241</sup> See e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *TCA Building Co. v. Nw. Resources Co.*, 873 F. Supp. 29, 39 (S.D. Tex. 1995).

<sup>242</sup> See generally Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187 (1999) (describing the contours of the essential facilities doctrine).

<sup>243</sup> *U.S. v. Terminal R.R. Association of St. Louis*, 224 U.S. 383 (1912).

<sup>244</sup> *Id.* at 397 ("as a practical matter, 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.").

<sup>245</sup> 326 U.S. 1 (1945).

<sup>246</sup> 342 U.S. 143, 146-49, 156 (1951).

*States*, the Court upheld an injunction against a power company that refused to transmit power generated by rival companies through its transmission system.<sup>247</sup>

In each of these cases the Court forced firms with a monopoly over a facility to share the facility because they determined that no other competitors could compete in a particular market without having access to the facility.<sup>248</sup> They also determined that fostering competition between the dominant firm and its rivals was beneficial to the public at large.<sup>249</sup> 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.<sup>250</sup>

Despite having its conceptual roots in Supreme Court cases, the Supreme Court has never expressly imposed liability under the Sherman Act in the name of the essential facilities doctrine. Every circuit court of appeals however recognizes the essential facilities doctrine as a basis for imposing liability under the Sherman Act.<sup>251</sup> In assessing liability under the essential facilities doctrine, modern circuit courts follow the four part

---

<sup>247</sup> 410 U.S. 366 (1973).

<sup>248</sup> *Terminal R.R. Association of St. Louis*, 224 U.S. at 410 (“railroads 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.”); *Associated Press*, 326 U.S. 1 at 28-29 (Frankfurter, J. concurring) (reasoning 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. A free press is indispensable to the workings of our democratic society.”).

<sup>249</sup> *Id.*

<sup>250</sup> *Terminal R.R. Association 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 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.”); *Associated Press*, 326 U.S. 1 at 13 (emphasizing the impact of the defendants conduct in finding a violation of the Sherman Act and 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. In this respect the Court did find, and that finding cannot possibly be challenged, that AP’s By-Laws had hindered and restrained the sale of interstate news to non-members who competed with members.”).

<sup>251</sup> See Elhauge, *supra* note 237, at 261 (noting that “every 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.”).

test laid out in the Seventh Circuit case *MCI Communications Corp. v. American Tel. & Tel. Co.*<sup>252</sup>

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.<sup>253</sup> MCI alleged that AT&T refused to interconnect its' long distance calls through its local phone system and that their refusal violated the Sherman Act.<sup>254</sup> 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 under the essential facilities doctrine: (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.<sup>255</sup> Most lower federal courts have adopted this test.

In terms of application of the *MCI* test, courts are vague in defining what constitutes an essential facility.<sup>256</sup> Nonetheless, a facility is typically deemed essential if is indispensable for competition in the marketplace and critical to individual competitors ability to compete in the market place.<sup>257</sup> Importantly, courts find that if a plaintiff can show that a facility is essential, they will also likely satisfy the requirement of showing that it is not capable of duplication.<sup>258</sup> Finally, the determination as to whether the defendant unreasonably denied access to the facility is a fact sensitive

---

<sup>252</sup> 708 F.2d 1081, 1132-33 (7<sup>th</sup> Cir. 1983).

<sup>253</sup> *Id.* at 1096

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 1132.

<sup>256</sup> 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 (1996) (the 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."); 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).

<sup>257</sup> See Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 852 (1989).

<sup>258</sup> See e.g., *City of Anaheim v. S. California Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992) ("the 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.").

inquiry. Courts focus primarily on whether there is any ability at all for the plaintiff to access the facility.<sup>259</sup>

Admittedly, the essential facilities doctrine is widely criticized by antitrust scholars and courts.<sup>260</sup> The Supreme Court even weighed in, harshly criticizing the doctrine in dicta but not expressly repudiating it.<sup>261</sup> Much of the criticism of the essential facilities doctrine revolves around opposition to the idea that firms should have a duty to share.<sup>262</sup> 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.<sup>263</sup> 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.”<sup>264</sup> The Court’s dicta has had the effect of substantially limiting lower courts application of the essential facilities doctrine.<sup>265</sup>

Yet, some scholars and courts have pushed back against critiques of the essential facilities doctrine.<sup>266</sup> They suggest that there is an appropriate if not narrow place for the essential facilities doctrine in regulating the monopolization of infrastructure.<sup>267</sup> Indeed, two of the

---

<sup>259</sup> See e.g., *TrueEX, LLC v. MarkitSERV Ltd.*, 266 F. Supp. 3d 705, 724 (S.D.N.Y. 2017) (denying plaintiff’s essential facilities claim reasoning that reasonable access to the facility existed- though not in a way that was conducive to the plaintiff’s business model.”); *Aerotec Int’l, Inc. v. Honeywell Int’l, Inc.*, 836 F.3d 1171, 1185 (9th Cir. 2016) (denying an essential facilities claim reasonable 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.”).

<sup>260</sup> See e.g. Areeda, *supra* note 257, at 841 (arguing for limitations being placed on the essential facilities doctrine); David Reiffen and Andre N Klett, ‘*Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly*’ (1990) JL & ECON VOL. 32 No. 2 419 (1990) (examining the Terminal Railroad case from which the essential facilities doctrine originated and arguing that the case wrongly decided because there was no foreclosure and therefore no basis of liability for imposing a duty to share.).

<sup>261</sup> *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004)

<sup>262</sup> Phillip Areeda *supra* note 257, at 852 (1989) (“there is generally no duty to share. Compulsory access, if it exists at all, is and should be exceptional.”)

<sup>263</sup> *Id.* at 853 (arguing that courts should reject finding in favor of regulation on the grounds of the essential facilities where “compulsory access requires the court to assume day-to-day controls characteristic of a regulatory agency.”).

<sup>264</sup> *Trinko*, 540 U.S. at 411.

<sup>265</sup> See e.g., *Imperial Irrigation Dist. v. California 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.”).

<sup>266</sup> Brett Frischmann and Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST LJ 1 (2008); Christopher M. Seelen, *The Essential Facilities Doctrine: What Does It Mean to Be Essential?* 80 MARQ. L. REV. 1117 (1997).

<sup>267</sup> See e.g., Spencer W. Waller, *Areeda, Epithets, and Essential Facilities*, 40 WISC. L. REV. 359 (2008); Frischmann and Waller, *supra* note 266.

Supreme Court cases from which the essential facilities doctrine draws its intellectual roots involved monopolization of traditional infrastructure.<sup>268</sup> 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.<sup>269</sup> They suggest that “[t]he essential facilities doctrine works best as a theory of monopolization when dealing with infrastructure.”<sup>270</sup> 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.”<sup>271</sup>

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 non-rivalrous consumption meaning that it is capable of being utilized by multiple users at the same time.<sup>272</sup> Second, the resource is capable of generating intermediate goods that create social value when utilized productively downstream.<sup>273</sup> In other words, “most of the value [generated by the resource] must result from productive use rather than consumption.”<sup>274</sup> Finally, the resource is used as an input into a wide range of goods and services, including private goods, public goods and/or non-market goods.<sup>275</sup>

Professors 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 non-market goods.<sup>276</sup> For such resources, they emphasize that open access is critical precisely because “demand generated by competitive output markets will tend to reflect the

---

<sup>268</sup> *Terminal R.R. Association of St. Louis*, 224 U.S. at 383( using essential facilities principals to find duty to share when a bridge was being monopolized); *Otter Tail Power Co.*410 U.S. at 366 (applying essential facilities duty to share principles to monopolization of a power grid).

<sup>269</sup> Frischmann and Waller, *supra*, note 266 at 1.

<sup>270</sup> *Id.* at 22.

<sup>271</sup> *Id.* at 22.

<sup>272</sup> *Id.* at 13.

<sup>273</sup> *Id.* at 14.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 12.

<sup>276</sup> *Id.* at 16.

individual benefits realized by a particular user and not take into account positive externalities enjoyed by society as a whole.”<sup>277</sup> 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, non-rivalrousness and shareability, schools are generally characterized as partially rivalrous because the possibility of exclusion exists.<sup>278</sup> 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 non-rivalrous and shareable if a state puts in place rules that facilitate open access.

For example, mandatory consolidation laws could be put in place such that white island districts like Spackenkill are required to merge with more diverse districts like Poughkeepsie. Similarly, states could make it hard for municipalities like Mountain Brook to secede and form their own districts. Admittedly, school districts have capacity limits. An infinite number of students cannot attend one school district. Nevertheless, the argument advanced here is that predominately white island districts are concentrating high quality schools within their borders only. The suggestions made in this article would facilitate more open access, not complete open access, such that the distribution of high-quality schools could be more evenly distributed within districts instead of unevenly distributed across districts. As such it is possible for high quality schools to meet the non-rivalrous and shareability criterion for infrastructure.

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 quality educational outcomes.<sup>279</sup> Quality educational outcomes encompasses 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.<sup>280</sup> Social science research is clear that students who attend high quality schools

---

<sup>277</sup> *Id.*

<sup>278</sup> See Wilson, *supra* note 64, at 232 (2016) (noting that you 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.).

<sup>279</sup> See, Johnson, *supra* note 28 (2019).

<sup>280</sup> Labaree, *supra* note 21, at 44 (1997).

have better life outcomes, including higher incomes,<sup>281</sup> higher college attendance rates<sup>282</sup>, and a reduced likelihood of encountering the criminal justice system.<sup>283</sup> 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 an 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.<sup>284</sup> High quality educational outcomes are also a vital input in creating a well-educated work force. Research is clear that a well-educated work force leads to a stronger economy and that expanding educational opportunities is therefore critical to revitalizing the economy.<sup>285</sup> Thus, high quality public schools satisfy the final infrastructure criterion.

In sum, high quality schools are a form of public infrastructure. Nondiscriminatory access to high quality schools is therefore optimal because they “generate ...hard to measure spillovers” that benefit society

---

<sup>281</sup> Johnson, *supra* note 28, at 62 (finding that the average effects of a five year exposure to court ordered school desegregation led to a 15 percent increase in wages and a 30 percent 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 272 (Martin Neil Bailey & Clifford M. Winston eds., 1992) (finding that black students who attended racially isolated high schools tend to obtain lower paying jobs than whites who attended higher quality schools).

<sup>282</sup> Johnson, *supra* note 28, 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); 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).

<sup>283</sup> Johnson, *supra* note 28, at 62 (“[o]ur results demonstrate that one of the most effective antidotes to criminal involvement in adulthood is access to high quality schools as a youth.”).

<sup>284</sup> See Berkman ND, Dewalt DA, Pignone MP, et al. *Literacy and Health Outcomes: Summary*, AHRQ EVIDENCE REPORT SUMMARIES (2004) (concluding that low reading and writing ability are linked to poor health outcomes).

<sup>285</sup> See e.g., Noah Berger and Peter Fishman, *A Well-Educated Workforce Is Key to State Prosperity*, ECONOMIC POLICY INSTITUTE, (Aug. 22, 2013) (finding a clear correlation between the educational attainment of a state’s workforce and median wages in the state, 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.”).

and American democracy at large.<sup>286</sup> The Part that follows applies an essential facilities framework to the problem of white student segregation in island districts. It illustrates how the framework can be used to frame and apply appropriate remedies to the problem of white student segregation in ways that an equal protection analysis cannot.

#### IV. ANALYZING WHITE STUDENT SEGREGATION THROUGH AN ESSENTIAL FACILITIES FRAMEWORK

This Part 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 island districts. Notably, the analysis offered in this Part 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 Part proceeds from the assumption that the predominately white island districts are the monopolists. The racial demographics of a school district plays a critical role in perceptions regarding the quality of a school district.<sup>287</sup> Perceptions regarding school district quality in turn plays a substantial role in where parents with greater material and non-material resources decide to enroll their children.<sup>288</sup> 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<sup>289</sup> 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.”<sup>290</sup> The relevant market is determined by the reasonable interchangeability of

---

<sup>286</sup> Frischmann and Waller, *supra*, note 266 at 21.

<sup>287</sup> See generally, 16 at 256 (describing the role that the racial composition of schools plays in parent’s decisions to enroll or recommend a school to a friend.).

<sup>288</sup> See e.g., Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 194 (2002)([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 (white 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.”).

<sup>289</sup> For a fuller discussion of how the districts engage in cartel conduct see section IV.A.3 *infra*.

<sup>290</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)

products.<sup>291</sup> 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<sup>292</sup>

Finally, predominately 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 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 white island districts. From that vantage point, this Part highlights the ways in which the essential facilities framework can recognize and respond to monopolization harms in ways that an equal protection analysis cannot. It concludes by acknowledging and responding to the limitations of applying an essential facilities analogy.

A. *Essential Facilities Framework Applied to White Island Districts*

In applying the essential facilities framework analogy this section will show: (i) predominately white island school districts are monopolists that control access to an essential facility in high quality schools; (ii) high quality schools cannot be reasonably duplicated by a competitor; (iii) the 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 Association* that monopolized the market by acquiring the only railroad bridge that went across the Mississippi river, the 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 comparison to neighboring districts underscore this point.

Mountain Brook spends \$14,048 per student, of which \$9,263 comes from local taxes,<sup>293</sup> while its neighboring more racially diverse district

---

<sup>291</sup> See *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325-326 (1962).

<sup>292</sup> See e.g., Transportation Research Board and National Research Council, *Governance and Opportunity in Metropolitan America* 28-38 (1999).

<sup>293</sup> National Center for Education Statistics, MOUNTAIN BROOKE SCHOOL DISTRICT FISCAL,

JCSD is only able to spend \$9,539 per student of which only \$3,097 comes from local taxes.<sup>294</sup> Indeed, Mountain Brook has been labeled the best school district in Alabama.<sup>295</sup> 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.<sup>296</sup> Consequently the district as a whole has a 97% graduation rate with over 84% of its students deemed proficient in math and reading.<sup>297</sup>

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 whiteness impacts both the money available to an 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.<sup>298</sup> In Jefferson County in particular, the secession of predominately white municipalities has had a significant impact both on residential sorting patterns and tax bases from which the districts draw.<sup>299</sup>

---

[https://nces.ed.gov/ccd/districtsearch/district\\_detail.asp?Search=1&InstName=mountain+brook&DistrictType=1&DistrictType=2&DistrictType=3&DistrictType=4&DistrictType=5&DistrictType=6&DistrictType=7&DistrictType=8&NumOfStudentsRange=more&NumOfSchoolsRange=more&ID2=0102490&details=4](https://nces.ed.gov/ccd/districtsearch/district_detail.asp?Search=1&InstName=mountain+brook&DistrictType=1&DistrictType=2&DistrictType=3&DistrictType=4&DistrictType=5&DistrictType=6&DistrictType=7&DistrictType=8&NumOfStudentsRange=more&NumOfSchoolsRange=more&ID2=0102490&details=4)

<sup>294</sup> National Center for Education Statistics, JEFFERSON COUNTY SCHOOL DISTRICT FISCAL,

[https://nces.ed.gov/ccd/districtsearch/district\\_detail.asp?Search=1&InstName=mountain+brook&DistrictType=1&DistrictType=2&DistrictType=3&DistrictType=4&DistrictType=5&DistrictType=6&DistrictType=7&DistrictType=8&NumOfStudentsRange=more&NumOfSchoolsRange=more&ID2=0102490&details=4](https://nces.ed.gov/ccd/districtsearch/district_detail.asp?Search=1&InstName=mountain+brook&DistrictType=1&DistrictType=2&DistrictType=3&DistrictType=4&DistrictType=5&DistrictType=6&DistrictType=7&DistrictType=8&NumOfStudentsRange=more&NumOfSchoolsRange=more&ID2=0102490&details=4)

<sup>295</sup> Stephen Niedzwiecki, *The Best School District in Every State*, ABC News (July 20, 2020) <https://www.kake.com/story/42388632/the-best-school-district-in-every-state>

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> See \$23 BILLION, *supra* note 105 at 2.

<sup>299</sup> See Erica Frankenberg and Kendra Taylor, *School District Secessions: How Boundary Lines Stratify School and Neighborhood Populations in Jefferson County, Alabama, 1968-2014*, Center for Education and Civil Rights, at 17-19 (Dec. 17, 2017) (describing the increase in home values for municipalities that seceded from JCSD and the impact on the districts tax bases).

Further, as other race law scholars analogizing to antitrust law note, whiteness has network economic effects.<sup>300</sup> In the antitrust literature, network economic effects means that “certain goods, once established as a market standard, reap network effects that enable them to dominate a market persistently.”<sup>301</sup> The Microsoft Windows operating system provides a concrete example. In the seminal antitrust case against Microsoft, the United States alleged that network 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.<sup>302</sup>

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.<sup>303</sup> Just as 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 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 as long as they are permitted to exist because places characterized as predominately white are presumed to be of the highest quality.<sup>304</sup> It becomes a self-fulfilling prophecy and enables

---

<sup>300</sup> See generally, Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U. L. REV. 1259, 1267 (2004); Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727 (2000).

<sup>301</sup> Lee, *supra* note 300 at 1267.

<sup>302</sup> Roithmayr, *supra* note 300 at 799 n.18.

<sup>303</sup> See Lee, *supra* note 300 at 1267 ( analogizing the Windows operating system to whiteness and noting “[w]hiteness 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.”).

<sup>304</sup> 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. 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. In contrast, when partners believed the associate who wrote a 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. See e.g., Debra Cassens Weiss, *Partners in study gave legal memo a lower*

monopolization of the educational inputs needed to create high quality schools.<sup>305</sup> From that lens, the white island districts are indeed monopolists that control access to high quality schools.

Finally, in addition to showing that white island districts are monopolists, one would also need to show that high quality schools are indeed an essential facility. In the antitrust context, facilities are deemed essential when they are indispensable to competition in a marketplace.<sup>306</sup> In the education context, as discussed in Section II.C *supra*, 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.<sup>307</sup> 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 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

---

*rating when told author wasn't white*, ABA JOURNAL, (April 21, 2014), [http://www.abajournal.com/news/article/hypothetical\\_legal\\_memo\\_demonstrates\\_unconscious\\_biases](http://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases)

<sup>305</sup> See e.g., Elise C. Boddie and Dennis Parker, *Linda Brown and the Unfinished Work of School Integration*, N.Y. TIMES, (March 30, 2018) (describing the impediments to school integration and noting that “Segregation often undermines property wealth in black and Latino communities because of the close relationship between the demand for housing and the perceived quality of local schools...:[t]his has the effect of limiting the pool of available tax revenue for funding local school districts.”), <https://www.nytimes.com/2018/03/30/opinion/linda-brown-school-integration.html>

<sup>306</sup> See Section III.B *supra*.

<sup>307</sup> See e.g., Brief of 553 Social Scientists as Amici Curiae, *Parents Involved in Community Schools v. Seattle School District No. 1*, 2006 WL 2927079, 12 (2006) (“because of the growing number of minority students in low-quality 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.”).

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.<sup>308</sup> Moreover, improving the minimum amount all districts can spend has not stopped wealthier districts from spending substantially above the minimum.<sup>309</sup> The educational input distributional flow 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 correlation between race, class, power, and capital, has 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 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.<sup>310</sup> Schools that lack middle class and typically white students tend to have much less access to high quality teachers, rigorous curriculum, and high-quality physical facilities.<sup>311</sup> They also have less access to the types of intangible educational inputs, namely the types of social capital, that enhances peer to peer learning.<sup>312</sup> The absence of these

---

<sup>308</sup> See Laurie Reynolds, *Skybox Schools: Public Education As Private Luxury*, 82 WASH. U. L.Q. 755, 759 (2004) (describing state efforts to increase minimum spending).

<sup>309</sup> *Id.* (noting that “in most states, school districts retain the ability to set their own upper limits on spending.”).

<sup>310</sup> See e.g., Black, *supra* note 23, at 404 (2012) (arguing for a constitutional right to equal access to middle income peers noting that “in at least six major academic categories, predominantly poor and minority schools cause harm or deliver inferior educational opportunities to students.”); Johnson, *supra* note 28 at 57-60 (describing the impact of racial integration in increasing the quality of previously segregated public schools).

<sup>311</sup> See Section II.B.3, *supra*. See also Valerie Strauss, *Too Many of America’s Public Schools Are Crumbling, Literally*, WASHINGTON POST, (Mar. 5, 2019), <https://www.washingtonpost.com/education/2019/03/05/too-many-americas-public-schools-are-crumbling-literally-heres-one-plan-fix-them/> (describing the crumbling conditions in the predominately Black Detroit public schools noting that the water in some of the schools had to be shut off due to lead and copper risks connected to outdated plumbing).

<sup>312</sup> Black, *supra* note 23, 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. Middle-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.”).

inputs impacts educational outcomes.<sup>313</sup> 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 is constructed in America that makes 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.<sup>314</sup>

Importantly, increasing school funding in predominately minority low-income districts is not a panacea. Research shows that funding alone is not sufficient to create high quality schools.<sup>315</sup> While funding certainly helps to address resource deficits, one must also address holistically all the components that go into creating high quality schools, which includes student body composition.<sup>316</sup> As such, the ability of the predominately low-income and minority neighboring school districts to duplicate the same quality of education as the white island districts is dubious.

### 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 island districts is school district boundary lines. Beginning with the

---

<sup>313</sup> *Id.* at 410 (“unequal access to teachers and curriculum has the natural result of negatively impacting student achievement. Students in pre-dominantly poor and minority schools routinely achieve much lower than students in predominantly white schools.”).

<sup>314</sup> See e.g., Rucker, *supra* note 28 at 58 (finding that the enactment of school desegregation plans resulted in “sharp increases in per-pupil spending by an average of 22.5% and significant reductions in the class sizes experienced by black students.”).

<sup>315</sup> See e.g., Eric A. Hanushek and, Alfred A. Lindseth, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA’S PUBLIC SCHOOLS* 101-105 (2009) (noting that finding alone does not improve school quality or achievement and that “spending per pupil has almost quadrupled since 1960 (after allowing for inflation) [but]..., however, has remained largely flat.”); Sarah Gonzalez, *What Happened When One Of New Jersey's Poorest School Districts Increased Spending*, WNYC NEWS, (Apr. 24, 2016) (describing school finance reforms in New Jersey that lead to Camden, a low-income predominately Black district, spending \$23,000 dollars per student which is 2.5 times the national average, but that academic outcomes have only improved marginally).

<sup>316</sup> See e.g., Joe Craven McGinty, *To Shrink The Achievement Gap, Integrate School Districts*, WALL STREET JOURNAL, (Oct. 4, 2019), [https://www.wsj.com/articles/to-shrink-achievement-gap-integrate-school-districts-11570186801?shareToken=st388503150bf9480783f18b563d98105e&reflink=article\\_email\\_share](https://www.wsj.com/articles/to-shrink-achievement-gap-integrate-school-districts-11570186801?shareToken=st388503150bf9480783f18b563d98105e&reflink=article_email_share) (describing the ways in which racial integration in schools contributes to quality educational outcomes for all students).

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 non-whites from certain realms.<sup>317</sup> She suggests that racial cartel conduct allows whites to derive significant economic, social, and political benefits by excluding non-whites.<sup>318</sup> Professor Rothmayr further notes that like traditional cartels, racial cartels can be state-sponsored, using state laws to run cartel operations.<sup>319</sup>

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.<sup>320</sup> The enactment of the Black codes had the effect of preventing full integration of black workers into agricultural labor markets.<sup>321</sup> Another example is the white legislators from the South who collaborated with the Roosevelt administration to exclude Black and Latino domestic and agricultural workers from receiving social security benefits.<sup>322</sup>

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 non-white students, particularly Black and Latino students. Take for example the way that the Grosse Pointe school district polices its boundary line<sup>323</sup>, the methods used to advance secession in the JCSD<sup>324</sup>, or the refusal to consolidate in Spackenkill.<sup>325</sup>

It would be feasible for white island districts like Grosse Pointe, Mountain Brook, and Spackenkill to utilize 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 school choice transfer program which would allow students from

---

<sup>317</sup> See Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45, 52 (2010).

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 50-51.

<sup>320</sup> Daria Roithmayr, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGES 35 (2014)

<sup>321</sup> *Id.* at 36.

<sup>322</sup> *Id.* at 37.

<sup>323</sup> See Section II.A. 1, *supra*.

<sup>324</sup> See Section II. A. 2, *supra*.

<sup>325</sup> See Section III. A. 3, *supra*.

neighboring districts like Detroit to enroll.<sup>326</sup> 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.<sup>327</sup> Their failure to voluntarily open their borders results in school district boundary lines being used in ways that exclude non-white students, especially Black and Latino students. Whether or not that is their subjective intent is irrelevant under the essential facilities analysis. Instead, the key inquiry is the impact of their actions.

This part demonstrated what an analysis of the problem of white student racial segregation in 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 analysis, both in terms of recognizing and affording a remedy to the problem of white student segregation in island districts and the monopolization of high quality schools.

#### *B. Advantages of Essential Facilities Framework and Remedial Application*

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 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 it in a highly deferential manner unless there was compelling evidence of discriminatory intent.<sup>328</sup> Thus, demonstrating that the boundary lines were the product of discriminatory intent would in most cases be a barrier to relief.

Unlike equal protection doctrine, as antitrust scholars have noted, the essential facilities doctrine does not preclude a finding of liability in the

---

<sup>326</sup> See Section II. A., *supra*.

<sup>327</sup> See Section II.A.3, *supra*.

<sup>328</sup> See *Washington v. Davis*, 426 U.S. 229 (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).

absence of anticompetitive intent.<sup>329</sup> Instead, courts find that liability is particularly appropriate when denial of access to an essential facility is motivated by anticompetitive intent.<sup>330</sup> 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 the maintenance a monopoly in ways that harms competition.<sup>331</sup> When an essential facilities framework is applied to the problem of predominately 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 factor in the analysis.

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.<sup>332</sup> The racial composition of districts is largely the result of individual choices by residents in where they live. The Supreme Court held that racial disparities in schools that are the result of individual citizen residential choices cannot be linked to the state and are therefore beyond the Court's remedial purview.<sup>333</sup> 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 essentiality test allows one to focus instead on

---

<sup>329</sup> See e.g., Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 450 (2002) ("U.S. court opinions also suggest that, while not required to establish antitrust liability under the essential facilities doctrine, liability is particularly appropriate when the denial of access is motivated by an anticompetitive animus . . ."); Frank X. Schoen, *Exclusionary Conduct After Trinko*, 80 N.Y.U. L. REV. 1625, 1649 (Nov. 2005) ("A reading that takes from Trinko 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.").

<sup>330</sup> See e.g., *Aspen Skiing*, 472 U.S. at 603 (finding the defendant liable under an essential facilities theory when the defendant changed its business practices with the intent of excluding competition); *Sunshine Cellular v. Vanguard Cellular Sys., Inc.*, 810 F. Supp. 486, 497 (S.D.N.Y. 1992) (finding that "[a monopolist] may not refuse to deal with [its competitor] if its refusal is motivated by anticompetitive animus."); *The Apartment Source of Pennsylvania, L.P. v. Philadelphia Newspapers, Inc.*, No. CIV. A. 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"); *Byars v. Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir. 1979) (the 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.").

<sup>331</sup> See 15 U.S.C. § 2 (2019); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

<sup>332</sup> 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).

<sup>333</sup> See *Bd. of Educ. of Oklahoma City Pub. Sch., Indep. Sch. Dist. No. 89, Oklahoma Cty., Okl. v. Dowell*, 498 U.S. 237, 253 (1991).

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 essential facilities framework’s 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 only harmful when it occurs because of explicit state action in creating segregated schools.<sup>334</sup> It also situates the harms of such state sponsored racial segregation as intangible psychological harms rather than concrete economic, political, and social harms.<sup>335</sup>

Equal protection doctrine also decontextualizes the significance of race and ignores the salience of schools being racially identifiable as predominately white. Race to the Supreme Court is seen as “neutral, apolitical descriptions, reflecting merely ‘skin color’.., completely unrelated to ability, disadvantage, or moral culpability.”<sup>336</sup> The Supreme Court’s conceptualization of race in this manner ignores the network effects of whiteness that enable predominately white school districts to monopolize high quality schools. An essential facilities framework can account for the network effects of whiteness that enables monopolization through its focus on the larger resultant harms that monopolization causes to the competitive process- or in the case of public schools 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.<sup>337</sup> In the context of the white island districts, that would look like requiring rather than permitting school district consolidation in the case 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 exists in the borders between Detroit and Grosse Point. It might also look like prohibiting municipal secessions in JCSD.

---

<sup>334</sup> See Section I.C. *supra*.

<sup>335</sup> See Section II.B *supra*.

<sup>336</sup> Neil Gotunda, *A Critique of Our Constitution Is Color-Blind*, 44 STAN L. REV. 1, 4 (1991).

<sup>337</sup> Lipsky, Jr. & Sidak, *supra* note 242.

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 intra school social closure that results in white students monopolizing the best educational opportunities.<sup>338</sup> Embracing principles such as de-tracking and providing high-level curriculum to all students within a school would be an essential component of fulfilling any mandatory access remedy.<sup>339</sup>

### *C. The Limitations and Critiques of an Essential Facilities Framework and Responses*

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

The first limitation is its practical application. One might first object 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 response to this limitation is that it holds value in showing the ways in which the laws surrounding school district boundary lines facilitate monopolistic conduct that leads to educational opportunity hoarding. There is value in being able to acknowledge and conceptualize the ways in which the law is facilitating monopolistic conduct.

Further, while the framework may not be literally applied by a court to find a violation of the essential facilities doctrine, it might offer a court a mechanism to consider engaging in a more expansive interpretation of the

---

<sup>338</sup> Schools that are racially and socioeconomically integrated may face issues related to discriminatory access to curriculum and racially disparate discipline, issues known as second-generation segregation, that are beyond the scope of this article. See 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 as well.

<sup>339</sup> 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.").

boundaries of the equal protection clause. More importantly, 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, this analysis is particularly helpful in illustrating the salience of boundary lines and the distributional consequences of how the lines are drawn.

A second limitation is 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 the predominately 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. However, while it is true that there are no overt mechanisms that stop students of color from obtaining access to the predominately white island districts, the reality is that few students of color do gain access, thereby allowing for the monopolization effects.

A broader critique of the analogy is that the school selection process is a complicated one. As such, the comparison of whites as a collective to monopolists unfairly essentializes whites. Such a comparison the critique might continue, does not appropriately grapple with the nuance involved in why parents make the choices that they do in where they choose to live and where they choose 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 monopolization, not whites as individuals.

Another critique of the analogy is that it does not address the intra school disparities that students of color face even when they obtain access to racially integrated ostensibly high-quality schools. The dominate public education paradigm is flawed in many ways for students of color.<sup>340</sup> Indeed, even when students of color, particularly Black students, have access to high-quality predominately white schools, many have disparate educational experiences and outcomes in comparison to white students.<sup>341</sup>

---

<sup>340</sup> See generally, John B. Diamond, *Still Separate and Unequal: Examining Race, Opportunity, and School Achievement in "Integrated" Suburbs*, *The Journal of Negro Education*, Vol. 75, No. 3 at 494 (2006) (finding that “even in ostensibly integrated suburbs, Black and White students navigate a racialized educational terrain that provides cumulative advantages for Whites and disadvantages for Blacks.”).

<sup>341</sup> See e.g., Justin Murphy & George Silvarole, *Fewer AP classes, suspended more often: Black students still face racism in suburbs*, USA TODAY (Feb. 4, 2019) <https://www.usatoday.com/story/news/education/2019/02/04/black-history-month->

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.<sup>342</sup> 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.<sup>343</sup> Thus, the application of an essential facilities framework can advance opportunities for students of color within the public education paradigm as it currently exists, though acknowledging the flaws that exist for students of color within the current system, and continuing to work to address those flaws.

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.<sup>344</sup> Yet the purpose of adopting market-based language in this context is solely for purposes of considering how different kinds of legal frameworks might do a better job of actually disseminating public education as if it is a public good that benefits all of society rather than a private good for individual consumption. Given the erosion of the strength of rights-based frameworks like equal protection, it is critical to be expansive in looking at new frameworks through which to assess the problem of racial segregation in schools.

## V. 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. Using examples from three predominately white school districts, it provided an account of how laws surrounding

---

[february-schools-ap-racism-civil-rights/2748790002/](https://www.febbruary-schools-ap-racism-civil-rights/2748790002/) (describing the experience of students of color in a high achieving school district in Rochester, NY, noting that “the problem is not only a matter of academics and discipline. Students of color reported feeling alienated, over scrutinized and underestimated.”); Diamond, *supra* note 341 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”).

<sup>342</sup> Diamond, *supra* note 340, at 495 (“Black students in integrated, affluent suburbs often outperform Black students in urban schools and less affluent suburbs.”).

<sup>343</sup> See e.g., Johnson, *supra* note 28, at 136 (describing substantial gains in closing race based achievement gaps when black students attended desegregated schools).

<sup>344</sup> See Wilson, *supra* note 64 (describing the harms of conceptualizing public education as a private good).

school district boundary lines facilitate race-neutral forms of social closure. Owing to the historical and modern alignment of whiteness with power and resources, it argued that social closure leads to predominately 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 the 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 has on American democratic norms. Instead, equal protection doctrine with its stringent subjective 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 facilitate monopolization of high-quality schools without legal scrutiny.

The Article therefore turned to a framework used to regulate monopolization for guidance. It demonstrated how principles from antitrust law – namely the essential facilities doctrine - if extrapolated to the public-school context is 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 provides 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 white student segregation and monopolization of high-quality schools.