

Dear Colleagues,

Thank you for reading this very early-stage draft. I would especially welcome your thoughts and comments on the ideas expressed in Section III which you will see is in skeletal form and a work in progress. I appreciate your generosity in taking the time to help me improve this draft. I look forward to meeting with you.

Best,

Erika Wilson

PUBLIC SCHOOLS AS INFRASTRUCTURE FOR ABOLITION DEMOCRACY

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ABSTRACT

Access to high-quality public schools is positioned through the lens of Equal Protection doctrine and ideology. Equal Protection doctrine and ideology, however, fail to capture the impact of Racial Path Dependence on access to high-quality schools for historically marginalized groups. It also situates the benefits of access to high-quality schools on the individual citizen, neglecting the importance of access to high-quality schools to the health of American democracy. This article reimagines a doctrinal and public policy landscape that situates access to high-quality public schools through the schema of infrastructure for American democracy, rather than Equal Protection doctrine and ideology.

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INTRODUCTION

American democracy is at a crossroads. Questions about the integrity of the electoral process, rising wealth inequality, and the reemergence of white ethnocentrism as a central political organizing principle, are at the forefront of the challenges facing American democracy.¹ Public schools play an influential role in maintaining a healthy democracy. They not only impart academics to students, but they are also an invisible pillar of the American economy,² socialize students to participate as citizens,³ and provide a much-needed social safety net.⁴ The upheaval caused by COVID-19 and the closure of public schools demonstrated their importance.⁵ Indeed, the pandemic highlighted the ways in which public schools are intimately intertwined within America's social, economic, and political fabric.⁶

¹ Elena Holodny, *The US Has Been Downgraded to a 'Flawed Democracy'*, BUS. INSIDER (Jan. 25, 2017), <https://www.businessinsider.com/economist-intelligence-unit-downgrades-united-states-to-flawed-democracy-2017-1> (downgrading America to a flawed democracy, noting governance problems and rising wealth inequality); *Statement of Concern: The Threats to American Democracy and the Need for National Voting and Election Administration Standards*, NEW AM. (June 1, 2021), <https://www.newamerica.org/political-reform/statements/statement-of-concern/> (political scientists voicing concerns regarding state legislatures making radical changes to core electoral procedures.); Larry M. Bartels, *Ethnic Antagonism Erodes Republicans' Commitment to Democracy*, 117 PROC. NAT'L ACAD. SCIS. 22752, 22753 (2020).

² See e.g., Eliza Shapiro and Patrick McGeehan, *Big New Obstacle for Economic Recovery: Child Care Crisis*, N.Y. TIMES (Sep. 15, 2021), <https://www.nytimes.com/2020/07/10/nyregion/nyc-school-daycare-reopening.html> (describing the ways in which public school closures would impact businesses and the economy).

³ See e.g., Jad Sleiman, *Some Lessons Zoom Can't Teach*, WBUR.org, <https://www.wbur.org/hereandnow/2020/09/23/lessons-zoom-cant-teach>, (Sep. 23, 2020) (highlighting the socialization functions played by schools and noting the inability to convey socialization lessons by remote education); Dana Goldstein, *Why a Pediatric Group Is Pushing to Reopen Schools This Fall*, N.Y. TIMES, (June 30, 2021), <https://www.nytimes.com/2020/06/30/us/coronavirus-schools-reopening-guidelines-aap.html> (describing socialization and social cohesion reasons beyond academics for reopening schools for in-person learning despite the physical risks posed by COVID-19).

⁴ See e.g., Karina Piser, *How Schools Became America's Social Safety Net*, THE NATION, (Feb. 19, 2021), <https://www.thenation.com/article/society/community-schools-coronavirus/> (noting the ways in which school closures due to Covid resulted in food insecurity).

⁵ See Mohamad Ihsan Ajwad and Simon Bilo, *Seen and Unseen Effects of Covid-19 School Disruptions*, BROOKINGS INSTITUTE, (May 25, 2022), <https://www.brookings.edu/articles/seen-and-unseen-effects-of-covid-19-school-disruptions/>

⁶ See e.g., relationship between the family and the state, Caitlin Millat & Melissa Murray, *Education As Childcare*, 101 N.C. L. Rev. 1463, 1494 (2023) (suggesting the pandemic facilitated a rethinking of the relationship between, public schools, the family, and the state as “public schools operate not only as centers of academic instruction but also as centers of care, community pillars that provide emotional, physical, psychological and structural support to children and families.”)

This article suggests public schools are a unique form of infrastructure for America's democracy. If correctly situated, they can play a vital role in stabilizing the American democracy. The parameters of the term infrastructure are subject to contestation.⁷ This article uses the term to mean both physical infrastructure- the tangible structures that generate positive externalities and are necessary for society to operate effectively,⁸ and social infrastructure--"the physical places and organizations that shape the way people interact."⁹

The importance of public schools to the American democracy was recognized by the Founders from the country's inception.¹⁰ However, as the American democracy was initially predicated upon principles of racial exclusion, the origins of the American public school system reflected as much.¹¹ African-Americans made education the centerpiece of the post-Reconstruction vision of citizenship in an effort to reconstruct America as a racially inclusive democracy.¹² The current system of universal free public education was developed as a result of their efforts.¹³ Within every state constitution there is now language that requires the creation of a system of free public schools.¹⁴ Case law interpreting those constitutional provisions

⁷ See e.g., Jim Tankersley and Jeanna Smialek, *Biden Plan Spurs Fight Over What 'Infrastructure' Really Means*, N.Y. TIMES, (June 24, 2021), <https://www.nytimes.com/2021/04/05/business/economy/biden-infrastructure.html> (describing the political debate over what infrastructure means).

⁸ See Brett M. Frischmann, *Infrastructure Commons*, 2005 Mich. St. L. Rev. 121, 123 (2005) (The term "infrastructure" generally conjures up the notion of physical resource systems made by humans for public consumption.).

⁹ Eric Klinenberg, *PALACES FOR THE PEOPLE: HOW SOCIAL INFRASTRUCTURE CAN HELP FIGHT INEQUALITY, POLARIZATION, AND THE DECLINE OF CIVIC LIFE* (2018).

¹⁰ See Diane Ravitch, *A Brief History of Public Education*, in *Public Education: Defending A Cornerstone Of American Democracy* 21, 22 (David C. Berliner & Carl Hermann eds., 2022).

¹¹ Derek W. Black, *SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY* 12-14 (2020) (describing the Founding Fathers' commitment to education for purposes of maintaining American democracy and the stark contradictions in excluding formerly enslaved Africans from public education).

¹² Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. U. L. REV. 1031, 1048 (2022) (arguing that formerly enslaved placed education at the forefront of their visions of citizenship, calling on the state constitutional conventions and officials to establish "a thorough system of common schools throughout the State, and indeed of the Union, for the well-being of such ensures to the advantage of all.").

¹³ Virgil A. Clift, *Educating the American Negro*, in *THE AMERICAN NEGRO REFERENCE BOOK* 360, 366 (John P. Davis ed., 1966) ("The chief contribution of the Reconstruction government was to set a precedent for the democratic right of all people to public tax-supported education."); Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. U. L. Rev. 1031, 1049 (2022) ("Both the federal and state governments responded to the freedmen's calls with decisive action that sparked an education revolution.").

¹⁴ States have varying language in their constitutions. The language utilized impacts the scope of the state's obligation to provide public education. Scott Dallman & Anusha Nath, *Education Clauses in State Constitutions Across the United States*, Federal Reserve Bank of

acknowledge the constitutive connection between public schools and a healthy democracy.¹⁵

Despite the adoption of universal public schools during Reconstruction, racially segregated, and unequal systems of schools were a staple of post-Reconstruction America.¹⁶ Public schools became the mechanism through which dominant and subordinate racial relationships were reproduced and reinforced materially and socially. They also buttressed divisions of labor that furthered racial capitalism.¹⁷ The post-Reconstruction installation of universal access to public schools missed a critical opportunity to work towards what W.E.B. DuBois coined abolition democracy. Abolition democracy is an aspirational project that signifies the ambition necessary to achieve a racially just society.¹⁸ It envisages a “constellation of democratic institutions and practices that effectuate equitable and fair conditions of collective life.”¹⁹ It is a commitment to “a conception of justice that not only attends carefully to the actual outcomes of processes that claim to administer justice, but also seeks to distribute resources and opportunities more equitably.”²⁰

The aspirational framework of abolition democracy is important because aspirations shape policy. Because of the role public schools play in contouring both the social and economic order, making quality public schools available to all on equal terms could have been the cornerstone for

Minneapolis, (Jan. 8, 2020),

<https://www.minneapolisfed.org/~media/assets/articles/2020/education-clauses-in-state-constitutions-across-the-united-states/education-clauses-in-state-constitutions-across-the-united-states.pdf?la=en>

¹⁵ See e.g., *King ex rel. Harvey-Barrow v. Beaufort Cty. Bd. of Educ.*, 364 N.C. 368, 382, 704 S.E.2d 259, 267 (2010) (noting that “the right to public education is a cornerstone of our democracy.”); *Collie v. Commissioners of Franklin Cty.*, 145 N.C. 170, 59 S.E. 44, 49 (1907) (rejecting a challenge to a taxation scheme used to support the creation of public schools reasoning that state constitution enshrined rights to public education so that “children should receive the advantages of education, so that not only should the government proceed in the exercise of its ordinary functions for their benefit and advantage, but that the people of the state should be elevated in the scale of intelligence and prepared to enjoy the true blessings of liberty and prosperity for which the compact of government was formed, and, moreover, to further advance their welfare and happiness.”).

¹⁶ Clayton Pierce, *W.E.B. Du Bois and Caste Education: Racial Capitalist Schooling From Reconstruction to Jim Crow*, AMERICAN EDUCATIONAL RESEARCH JOURNAL, vol. 54, at 43 (2017) (arguing after Emancipation public schools enforced racial caste such that “social life [was] attached to whiteness and social death [was] attached to Blackness in material ways.”).

¹⁷ This article uses the term racial capitalism as articulated by Cedric Robinson to explain the interplay between racism and capitalism in which race was socially constructed through regional, subcultural, and dialectic differences and used to create categorical social divisions that were the basis for multiple axis of subordination and used to support divisions in labor, including enslavement. See Cedric Robinson, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 27-28 (2000).

¹⁸ See W.E.B. DuBois, *Black Reconstruction, 1860-1890*, 184-185 (1929).

¹⁹ See e.g., Angela Y. Davis, *Abolition Democracy* 95–96 (2005).

²⁰ Allegra M. McCleod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1619 (2019).

post-Reconstruction democracy. A system of public schools that provides access to quality education and is racially integrated such that it allows for intergroup contact is instrumental to fulfilling the aspirational project of abolition democracy.

Yet the current legal and policy frameworks undergirding the distribution of public education are antithetical to the project of abolition democracy. Public schools are highly racially segregated, with those serving Black and brown²¹ students often providing inadequate education and functioning as an extension of the carceral state.²² Conversely, predominately white schools often boast the highest quality schools within metropolitan areas, serving as gateways to economic and social opportunity.²³ Simply put, the current state of racially segregated and unequal schools threatens the stability of American democracy.²⁴

While *Brown v. Board of Education* outlawed school segregation under the Equal Protection clause, the doctrine developed in a way that neutered its effectiveness outside of de jure segregation. Among other things, the doctrine allows time to narrow Equal Protection's meaning, decontextualizes the significance of racially identifiable schools, and imposes arduous intent requirements that don't account for the adaptive nature of discrimination.²⁵ Nonetheless, legal and normative understandings of what obligations the state has to its public school systems are posited through Equal Protection doctrine's frameworks. Stated differently, Equal Protection frameworks

²¹ The term "brown" is ambiguous and contested in its scope. *See, e.g.*, Kat Chow, *Ask Code Switch: Who Can Call Themselves 'Brown'?*, NPR (Dec. 11, 2017, 4:38 PM ET), <https://www.npr.org/2017/12/11/569983724/ask-code-switch-who-can-call-themselves-brown> [<https://perma.cc/GAG4-5WS5>]. I use the term "brown" within this Essay inclusively to mean traditionally marginalized nonwhite groups such as Latinos.

²² *See e.g.*, Helen Hershkoff, Nathan Yaffe, *Unequal Liberty and A Right to Education*, 43 N.C. Cent. L. Rev. 1, 32 (2020) (chronicling deficiencies in education received by Black and brown students and that "the public school has become ever more carceral in appearance and function."); Barbara A. Fedders, *The End of School Policing*, 109 Cal. L. Rev. 1443, 1465 (2021) (describing the connection between school desegregation and increased police presence in schools).

²³ *See generally*, Erika K. Wilson, *Monopolizing Whiteness*, 134 Harv. L. Rev. 2382 (2021).

²⁴ Erika K. Wilson, *Monopolizing Whiteness*, 134 Harv. L. Rev. 2382, 2404-2409 (2021) (segregated schools impair democracy thwarting democratic equality, diminishing training for skilled workers, and limiting the ability of schools to serve as an engine for social mobility).

²⁵ Elise C. Boddie, *The Contested Role of Time in Equal Protection*, 117 Colum. L. Rev. 1825, 1826 (2017) ("[c]ourts presume that discrimination is linear and static--that it is attributable to specific "bad" acts with effects that can be discerned only within discrete periods of time."); Erika K. Wilson, *The New School Segregation*, 102 Cornell L. Rev. 139, 159 (2016) (Supreme Court significantly narrowed the obligation of previously de jure school systems to provide students with a desegregated education [...] by decontextualizing the significance of race when examining the continued necessity of ongoing federal court school desegregation orders); Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. Rev. 1235, 1239 (2016) (racial discrimination *adapts* to the legal and social environment by mutating to evade prohibitions against intentional discrimination).

serve as both the floor and ceiling for states in fashioning access to universal public education. This occurs both in terms of legal doctrine analyzing the Fourteenth Amendment’s requirements and in state public policies related to the distribution of public education. It is problematic because, among other things, Equal Protection frameworks insulate Racial Path Dependence—defined as the link between “early historical events related to racial segregation and exclusion [and] modern outcomes,”²⁶ from constitutional liability or redress.

For example, Equal Protection doctrine sanctions school funding schemes and student assignment plans tied to housing --despite deeply entrenched historic racial segregation in housing.²⁷ The tie to housing leads to stark racial disparities in school funding and school quality.²⁸ As a result, school resources are inextricably tied to disparities in wealth and home ownership which are manifestations of generations of state facilitated racial discrimination in housing. Ostensibly using Equal Protection frameworks as both the floor and ceiling for their decision making, state legislatures continue to tie school funding and assignment to housing, notwithstanding the known racialized disparities it creates in access to quality schools. Some state legislatures even enact legislation that allows for criminal penalties, including incarceration, for parents who use an address other than their own in an attempt to enroll their child in a higher quality school.²⁹

Equal Protection doctrine and the policy landscape influenced by it, fails to situate high quality schools as a *collective* good, for which the state has a duty to ensure collective production and availability to all citizens on equal terms. In doing so, it neglects the mutually constitutive relationship between public schools and democracy. This article takes on the task of reimagining a doctrinal and public policy landscape that situates public schools through the schema of infrastructure for American democracy. It considers what it might look like for Equal Protection doctrine and public policy to actively root out Racial Path Dependence by positioning public schools through the lens of infrastructure. It suggests that Equal Protection doctrine and state public

²⁶ Erika K. Wilson, *White Cities, White Schools*, 123 Colum. L. Rev. 1221, 1227 (2023).

²⁷ 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).

²⁸ U.S. Government Accountability Office, *Racial Disparities in Education and the Role of Government*, (June 29, 2020), <https://www.gao.gov/blog/racial-disparities-education-and-role-government> (describing racialized differences in education quality and access).

²⁹ See e.g., LaToya Baldwin Clark, *Stealing Education*, 68 UCLA L. Rev. 566, 573–74 (2021) (analyzing state laws that criminalize enrollment in a district in which one does not reside, noting that “[p]arents purportedly “steal” an education when they falsify a nonresident child’s address to be able to benefit from a school district’s schools that are designated only for resident children. Both school district officials and community members in highly desirable school districts aggressively enforce these residential requirements by surveilling and investigating children and families suspected of providing false information.).

policies should adopt a “commons” management approach as scholars suggest is appropriate for social and public infrastructure.³⁰ The article proceeds as follows:

Part I examines the connection between public schools and democracy. It chronicles the importance of abolition democracy as a guiding framework. It also examines the missed opportunities during Reconstruction to use public schools as a bridge for building a racially inclusive democracy. Part II details how Equal Protection doctrine and state public policies governing public schools are limited by Racial Path Dependence. It highlights the ways in which they restrict access to high quality public schools in contravention of the abolition democracy framework. Part III examines public schools through the lens of infrastructure. It makes the normative case for public schools to be considered a special type of hybrid of public and social infrastructure and to be regulated accordingly. It reimagines what Equal Protection doctrine and state public policies governing public schools might look like if public schools were conceptualized as infrastructure for American democracy. Part IV concludes.

I. ABOLITION DEMOCRACY AND PUBLIC SCHOOLS

A. *Theorizing Healthy Democracy*

To understand the importance of public schools to democracy, one must first articulate a vision of democracy. The precise definition of “democracy is contestable.”³¹ At its core, democracy envisions that political sovereignty resides with the individual, and that consent of some collective of individuals is necessary to effectuate legitimate political power and rule.³² Beyond that, scholars advance competing substantive theories of democracy.³³ A complete accounting of the theories of democracy is beyond the scope of this article. The article instead articulates a vision of the ideals that undergird a salubrious

³⁰ Brett M. Frischmann, *Infrastructure Commons*, 2005 Mich. St. L. Rev. 121, 123 (2005).

³¹ Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 Cal. L. Rev. 509, 513 (1994)

³² See e.g., Albert Weale, *DEMOCRACY* 18 (2d ed. 2007) (in a democracy “important public decisions on questions of law and policy [will] depend, directly or indirectly, upon public opinion formally expressed by citizens of the community, the vast bulk of whom have equal political rights.”); David M. Estlund, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 66 (2008) (democracy is separable from voting);

³³ See e.g., Joseph A. Schumpeter, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 276 n.16 (Taylor & Francis e-Library 2003) (democracy exists so long as there is widespread political competition); Philip Pettit, *The General Will, the Common Good, and a Democracy of Standards*, in *REPUBLICANISM AND THE FUTURE OF DEMOCRACY* 13 (Yiftah Elazar & Geneviève Rousselière eds., 2019) (democracy should be defined by the practices of the country including whether they “provide for people’s individual freedom in relation to one another and for their shared freedom in relation to the state they live under.”); Iris Marion Young, *INCLUSION AND DEMOCRACY* 5 (2000) (advancing a “minimalist understanding of democracy . . . [in which] democratic politics entails a rule of law, promotion of civil and political liberties, [and] free and fair election of lawmakers.”).

democracy. The purpose of doing so is to elucidate the importance of high-quality public schools to a well-functioning democracy.

An electoral process that facilitates democratic decision-making is critical. Competitive elections, universal enfranchisement, and majoritarian rule must be hallmarks of a strong electoral process.³⁴ While majoritarian rule is important, pluralism also shapes the electoral processes.³⁵ Theories of pluralism recognize the importance of engaging and accommodating competing interests.³⁶ In a pluralistic democracy, individuals organize “to try and win over the majority through bargains and coalitions that promote familiarity with the viewpoints of others and a willingness to work with others, including those with whom one disagrees.”³⁷ The political process is thus a means of balancing power and guarding against tyranny of the majority or minority.³⁸ Pluralism is especially important in a heterogeneous society.

Political equality is also an important ideal undergirding a healthy democracy.³⁹ Jeremy Waldron suggests that genuine political equality requires citizens to have a meaningful opportunity to engage in the system of governance as equals, no matter their social station.⁴⁰ Nikolas Bowie underscores the importance of political equality, describing it as a “relational theory of equality...that views everyone as social equals who should have the same power to control community decisions as everyone else.”⁴¹

Yet achieving political equality within the context of American democracy with its history of racial exclusion presents challenges. Scholars aptly note that

³⁴ See e.g., Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 43 (2004) (“All theories of representative democracy require, at a minimum, that those who exercise power be regularly accountable through elections to those they represent; electoral accountability can exist only when effective political competition generates genuine political choices.”); Lani Guinier, *TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 105 (1994) (describing the importance of universal franchise and harms caused by voter dilution);

³⁵ For a comprehensive explanation of the importance of pluralism to the democratic process. See *Generally* Robert A. Dahl, *Democracy And Its Critics* (1989); Robert A. Dahl, *How Democratic Is The American Constitution* (2001); Robert A. Dahl, *A Preface To Democratic Theory* (1956); Robert A. Dahl, *A Preface To Economic Democracy* (1985)

³⁶ For an account of various theories of pluralism, see p Joshua Cohen, *Pluralism and Proceduralism*, 69 Chi.-Kent L. Rev. 589, 591-594 (1994).

³⁷ Lani Guinier, *More Democracy*, 1995 U. Chi. Legal F. 1, 9 (1995)

³⁸ Lani Guinier, (*e*) *Racing Democracy: The Voting Rights Cases*, 108 Harv. L. Rev. 109, 126 (1994) (pluralism ensures that “dominant group monopolizes power.”).

³⁹ Jeremy Waldron, *Political Political Theory* 7 (describing political equality as foundational to democracy.).

⁴⁰ Jeremy Waldron, *Political Political Theory* 37 (arguing to ensure political equality societies must pay attention to the “influence of wealth and other forms of social and economic power to ensure that the political equality definitive of democracy remains a reality for all.”); John Rawls, *Political Liberalism* 324 31 (1993) (“The first principle of justice should include the guarantee ... that the worth of the political liberties to all citizens, whatever their social or economic position, is approximately equal.”).

⁴¹ Nikolas Bowie, *Antidemocracy*, 135 Harv. L. Rev. 160, 167 (2021).

during the formative years of American democracy, “citizenship sat comfortably alongside ideas about natural slavery.”⁴² The institution of slavery was built on notions of racial superiority that inculcated a culture in which non-whites were seen as sub-human and holding no political or social status. Danielle Allen thus argues for political equality that encapsulates “difference without domination.”⁴³ Difference without domination intentionally casts itself as a more egalitarian principle than the Rawlsian “difference principle” of justice.⁴⁴ It calls for the primacy of political equality in any theory of justice, which it defines in relevant part as freedom from domination and egalitarian access to the instrument of government.⁴⁵ Difference without domination suggests that protecting equal basic liberties that generate egalitarian social and economic spheres is the only way to ensure political equality in a heterogeneous society with a history of racial domination. Thus, political equality within a racially heterogeneous democracy contemplates that citizens are free and equal, not subject to coercion or domination.

Finally, a healthy democracy is a deliberative democracy. A deliberative democracy is one in which political discussion about fundamentals of policy and politics appeals to reason.⁴⁶ It requires that citizens are reasoned enough to engage in debate and discussion. It also presupposes that individuals are not so burdened by material deprivation that they are unwilling or able to deliberate as equals.⁴⁷ The normative vision of democracy offered here is more than majoritarian rule. It instead envisions a healthy democracy as a dynamic process of governance and culture that both inculcates and is an expression of

⁴² Melvin L. Rogers, 'Race, Domination, and Republicanism,' in *Difference Without Domination* 60 (Danielle Allen & Rohini Somanathan eds., 2020)

⁴³ Danielle Allen, *A New Theory of Justice: Difference Without Domination*, in *Difference Without Domination* 27 (Danielle Allen & Rohini Somanathan eds., 2020)

⁴⁴ The Rawlsian difference principle suggests that (1) each person has the same infeasible claim to a fully adequate scheme of equal basic liberties; and (2) social and economic inequalities are justified only if (a) they are attached to offices and positions open to all under conditions of fair equality of opportunity, and (b) they are to the greatest benefit of the least advantaged, meaning that some lesser degree of inequality would make the least advantaged even worse off. See generally, John Rawls in *A Theory of Justice*, (Rawls 1971), and *Political Liberalism*, (Rawls 1993). According to Danielle Allen, the difference principle effectively makes political liberties (e.g., the right to vote) secondary to negative liberties (e.g., the right to be free of government interference) in ways that subverts material justice for marginalized groups. She attributes this shortcoming to Rawls' being too dependent on social homogeneity. She further emphasizes that “in conditions of demographic diversity, if not in human life generally, human moral equality requires protections for equal basic liberties that always fully encompass the political liberties.” Danielle Allen, *A New Theory of Justice: Difference Without Domination*, in *Difference Without Domination* 58 (Danielle Allen & Rohini Somanathan eds., 2020).

⁴⁵ Danielle Allen, *A New Theory of Justice: Difference Without Domination*, in *Difference Without Domination* 35 (Danielle Allen & Rohini Somanathan eds., 2020)

⁴⁶ See generally, Joshua Cohen, *Democracy and Liberty*, in *Deliberative Democracy*, (Jon Elster ed. 1998)

⁴⁷ See Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 *Cornell L. Rev.* 959, 970 (2020) (“people cannot meaningfully cooperate in the collective formation of ideas and interests if they are so deprived of primary goods that they are burdened in their basic activities or debased in their status.”).

universal equality. As the section that follows outlines, public schools play an important role in sustaining this vision of democracy.

B. The Connection between Public Schools and Healthy Democracy

The Founders believed that an educated citizenry was necessary to produce competent citizens who had the knowledge and wherewithal to maintain American democracy.⁴⁸ The Founders thought a system of publicly operated schools would be the best vehicle for melding students from a wide swath of backgrounds, inculcating shared civic virtues, and turning young persons into competent and virtuous citizens. Thus, one of the original purposes of public schools was producing citizens who could sustain American democracy. While the purposes of public schooling expanded over time to include preparing workers to advance the American economy and promoting social welfare, public schools fundamentally have remained geared towards serving American democracy.⁴⁹

What role then should public schools play in a healthy democracy? Answering the question requires a working definition of democracy. Elizabeth Anderson offers a helpful three-pronged definition that accounts for the democratic ideals discussed in Section I.A.⁵⁰ She describes democracy as 1) a membership organization with “universal and equal citizenship” for all members of the society; 2) a “government for the people, carried out by discussion among equals”; and 3) a culture that involves “free, cooperative interaction of citizens from all walks of life on terms of equality.”⁵¹

The three prongs are symbiotic: each is necessary for democracy to fully function. Public schools lay the groundwork for the prongs to work together. First, they produce a citizenry with the critical-thinking skills necessary to participate in democracy as a mode of governance.⁵² Well-educated citizens have the ability to reason and deliberate such that they can intelligently engage the electoral process. Research shows that education also increases political engagement, including voting.⁵³

48. *See, e.g.*, DAVID TYACK, *SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY* 9 (2007).

49. *See, e.g.*, Justin R. Long, *Democratic Education and Local School Governance*, 50 WILLAMETTE L. REV. 401, 405-13 (2014) (describing the primary purposes of public education and noting the democracy-enhancing role of each purpose).

50. ELIZABETH ANDERSON, *THE IMPERATIVE INTEGRATION* 89 (2010).

51. *Id.*

52. *See* BLACK, *supra* note ____, at 54-57 (describing the Founders’ understanding of the importance of cultivating an educated citizenry capable of participating in self-governance).

⁵³ Ahearn, C.E., Brand, J.E. & Zhou, X. How, and For Whom, Does Higher Education Increase Voting?. 64 *Res High Educ* 574 (2023) (finding access to higher education even without degree participation increases civic engagement and voting).

Second, they plant the seeds for universal and equal citizenship. Universal and equal citizenship is both a cultural norm and a legal status. It requires social relations that allow for non-domination, meaning the ability to exercise autonomy over one's life, a meaningful opportunity to occupy positions of prominence, and not be permanently relegated to a servile or inferior class.⁵⁴ Public schools facilitate this by providing citizens with the skills needed to obtain financial means, political wherewithal, and practical abilities. These skills give citizens the autonomy to "lead the kind of life [they] ha[ve] reason to value,"⁵⁵ which enables them to live as equal members of the democracy and effectuate democracy as a membership organization.⁵⁶

Finally, public schools inculcate democracy as a culture. They do so in two important ways. First, through their design. Public schools were designed to inculcate democracy as a culture by enabling citizens to engage in collective self-rule through local control and governance of schools.⁵⁷ Public schools are thus governed by publicly elected officials at both the state and local levels.⁵⁸ This governance structure allows for broad-based citizen participation, representation, and deliberation.⁵⁹

Second, public schools' further democracy as a culture by accommodating the intricacies of America's heterogeneous society. They engage in a delicate balance between fostering assimilation and promoting tolerance amongst a heterogeneous group of citizens. For example, in *Meyers v. Nebraska*, the Court deemed unconstitutional a statute that made it a crime for a teacher to teach any language other than English.⁶⁰ In *Plyer v. Doe*, the Court struck down a statute that would deny education to undocumented students, reasoning that "by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority."⁶¹ Both cases illustrate public schools protecting the interests of a minority group. In doing so, they, normalize

⁵⁴ See e.g., Anderson, *supra* note ____

⁵⁵ AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 87 (1999).

⁵⁶ See BLACK, *supra* note ____, at 91 (describing the importance of education to formerly enslaved Africans because it would allow them to "control their own lives on a daily basis—politically, economically, and practically"—to live as equal citizens rather than subordinates).

⁵⁷ DAVID TYACK, *SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY* at 165-66 (2007) (describing the origins and continued commitment to a system of locally controlled and governed common schools); JOHANN N. NEEM, *DEMOCRACY'S SCHOOLS: THE RISE OF PUBLIC EDUCATION IN AMERICA 2* (2017) ("committed to self-rule, American citizens wanted public schools that were funded by local taxes, overseen by locally elected trustees, and closely tied to the community they serve.").

⁵⁸ See generally MICHAEL W. KIRST, *Turning Points: A History of American School Governance, in WHO'S IN CHARGE HERE?* 14 (Noel Epstein ed., 2004) (discussing the role of public officials in school governance); Julie A. Reuben, *Patriotic Purposes: Public Schools and the Education of Citizens*, in *THE PUBLIC SCHOOLS 1* (Susan Fuhrman & Marvin Lazerson eds., 2005) (same).

⁵⁹ Local control of schools has been appropriately criticized for its ability to allow a small group of citizens to co-op control at the expense of the majority. This however is arguably more a function of low-voter turnout rather than design.

⁶⁰ 262 U.S. 390 (1923).

⁶¹ *Plyer v. Doe*, 457 U.S. 202, 222 (1982).

having citizens from a diverse array of backgrounds in public schools, which facilitates the intergroup contact necessary to cultivate trust, empathy, and community amongst diverse citizens.⁶²

In modern times, the connection between public schools and a healthy democracy is well documented. Public education is the foundation of labor productivity and citizen socialization in a racially diverse democracy.⁶³ Researchers recognize that raising the quality of education for historically excluded groups boosts productivity for the country as a whole.⁶⁴ They also recognize the importance of having students attend racially integrated schools. Students who attend racially integrated schools are less prone to racial prejudice and stereotyping and have higher rates of civil engagement as adults.⁶⁵

Despite the importance of an educated citizenry to the health of American democracy, race and class have always contoured access to public schools. During the antebellum period, education was withheld from large segments of the population.⁶⁶ Regional distinctions were noteworthy. Several Northern states adopted centralized systems of free common schools.⁶⁷ Yet Black students were outright excluded or relegated to racially segregated and unequal

62. See 2 CHARLES SUMNER, *Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts*, in THE WORKS OF CHARLES SUMNER 327, 372 (BOSTON, LEE & SHEPARD 1870) (“[S]chool[s] derive[] strength from the unity and solidarity of all classes beneath its roof. . . . Prejudice is the child of ignorance. It is sure to prevail, where people do not know each other. Society and intercourse. . . remove antipathies, promote mutual adaptation and conciliation, and establish relations of reciprocal regard.”); Illinois *ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (describing public schools as a “symbol of our democracy and the most pervasive means for promoting our common destiny”).

⁶³ While private school options are available, the majority of students within the United States attend public schools. See National Center for Education Statistics, Public and Private School Comparison, <https://nces.ed.gov/fastfacts/display.asp?id=55#:~:text=Overall%2C%2053.9%20million%20K%E2%80%9312,were%20enrolled%20in%20public%20schools>. (Overall, 53.9 million K–12 students were enrolled in public and private schools in fall 2019. Of these students, 9 percent were enrolled in private schools, and the remaining 91 percent were enrolled in public schools.).

⁶⁴ Hsieh, Chang-Tai, Erik Hurst, Charles I. Jones, and Peter J. Klenow, *The Allocation of Talent and U.S. Growth*, 87 *Econometrica*, vol. 5, 1439-1474 (2019) (finding that 40 percent of per capita GDP growth from the period of 1960 to 2010 can be accounted for by women and Black men entering into highly skilled occupations.).

⁶⁵ Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 *J. Pers. Soc. Psych.* 751, 766 (2006); Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiracial Prejudice*, 20 *Int'l J. Intercultural Rels.* 1, 12-14 (1996); Rebecca Jacobsen et al., *Diverse Schools in a Democratic Society: New Ways of Understanding How School Demographics Affect Civic and Political Learning*, 49 *Am. Educ. Rsch. J.* 812, 819 (2012).

⁶⁶ Kaestle, Carl. *Pillars of the Republic: Common Schools and American Society, 1780-1860*, 4 (1983) (within the colonial system of education “in all areas, women, blacks, Native Americans, and poor whites were to differing degrees excluded from the culture of the printed English word.”).

⁶⁷ Kaestle, Carl. *Pillars of the Republic: Common Schools and American Society, 1780-1860*, 10-12 (1983).

schools.⁶⁸ Due to the Southern plantation economy and chattel slavery, most southern states vigorously resisted investment in education for non-white residents.⁶⁹ All but one southern state made it unlawful to educate enslaved Africans.⁷⁰ Others made it a criminal offense punishable with jail time to teach any Black person --free or enslaved -- to read.⁷¹

Both the Northern and Southern approach towards providing education supported the social, political, and economic goals of maintaining a racially exclusionary democracy. The racially exclusionary approach toward the provision of public education created “a large exploitable population of economic *and* socially vulnerable workers while also [facilitating] the exclusion of [Blacks] (and non-Whites generally) from full social and political participation” in the American democracy.⁷² Education was supposed to serve as an “ideological and practical anchor for democracy.”⁷³ Yet substantive limits placed on access to education contoured by race (and class) created a faulty infrastructure that infected America’s democracy from the beginning. As the following section explains, the Reconstruction period offered a missed opportunity to change course and create a system of public schools that could support a racially inclusive democracy.

C. Abolition Democracy and the Missed Possibilities of Reconstruction

Some scholars recognize that the Reconstruction period was centered on a repudiation of American slavery and a desire to change course.⁷⁴ Critical to changing course, however, was an ideological vision for reconstituting

⁶⁸ See Davidson M. Douglass, *Jim Crow Moves North: The Battle Over Northern School Segregation, 1865-1954* at 13 (2005) (“many northern school authorities were overtly hostile to educational aspirations of black and mulatto children, and either excluded them from common schools altogether or relegated them to separate and inferior schools.”).

⁶⁹ See e.g., Bruce W. Eelman, *An Educated and Intelligent People Cannot Be Enslaved, The Struggle for Common Schools in Antebellum Spartanburg, South Carolina Author*, *History of Education Quarterly*, 255 (Summer, 2004) (describing Southern resistance to education by the plantation aristocrats, noting that they wielded a great deal of legislative power and “regarded education as a privilege of the wealthy and left the fate of common schools to the voluntary spirit of local communities.”)

⁷⁰ See e.g., Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863-77* at 246 (noting that all states except Tennessee made it unlawful to educate enslaved Africans).

⁷¹ See e.g., A. Leon Higginbotham, Jr., *The “Law Only As an Enemy”: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 *N.C. L. Rev.* 969, 1020 (1992) (describing Virginia’s prohibition against literacy for all Black people, noting the prosecution and jailing of Margaret Douglass for opening a school for free Black children.); *United States v. Rhodes*, 27 *F. Cas.* 785, 793 (C.C.D. Ky. 1866) (discussing a Louisiana law that prohibited teaching enslaved Africans how to read or write, with violations punishable by imprisonment or death).

⁷² Pierce, *supra* note ____ at 34.

⁷³ Derek W. Black, *Schoolhouse Burning: Public Education and the Assault on American Democracy*, at 65 (2020).

⁷⁴ See e.g., Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 *Harv. L. Rev.* 1348, 1353–54 (1994) (arguing Reconstruction amendment were written as a disavowal of slavery.).

democracy. W.E.B. DuBois used the term abolition democracy to refer to such a vision of transforming America into a racially just democracy.⁷⁵ He argued that abolition democracy required the formal dismantling of chattel slavery, and more importantly, the construction of new institutions, practices, and social relations that would allow Black people to live as equal members of society.

Scholars drawing upon DuBois' work contend that abolition democracy required reconstructing the structures, practices, and institutions that subordinate Black people. Angela Davis for example suggests:

In order to achieve the *comprehensive* abolition of slavery—after the institution was rendered illegal and black people were released from their chains—new institutions should have been created to incorporate black people into the social order. [...] Slavery could not be truly abolished until people were provided with the economic means for their subsistence. They also needed access to educational institutions and needed to claim voting and other political rights....⁷⁶

To that end, Allegra McCloud argues that abolition democracy consists of both a negative project of deconstructing systems marred by enslavement and a positive project of rebuilding new ones untethered from the ideologies undergirding enslavement.⁷⁷ Such a project thus necessitates jettisoning America's material and ideological commitments to racial capitalism.

Moreover, abolition democracy also necessitates what Peggy Davis Cooper calls "responsive constitutionalism." Davis suggests, "[T]he Reconstruction Amendments responded to slavery--not only in the sense that they were intended to address the harms done to enslaved people, but..... in the sense that they were intended to universalize human freedom and define human freedom in contrast to slavery."⁷⁸ Thus, responsive constitutionalism entails a reading of the Fourteenth Amendment, and other reconstruction amendments, in a manner that centers human dignity, rejecting an interpretation that would create slavery afterlives.⁷⁹ Its' call for deconstructing ideologies associated with enslavement, is consistent with DuBois' vision of abolition democracy.

⁷⁵ See W.E.B. DuBois, *Black Reconstruction in America, 1860-1880*, 184-186 (1935).

⁷⁶ Angela Davis, *Abolition Democracy* 95-96 (2005)

⁷⁷ Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 *Harv. L. Rev.* 1613, 1617 (2019)

⁷⁸ Peggy Cooper Davis, *Responsive Constitutionalism and the Idea of Dignity*, 11 *U. Pa. J. Const. L.* 1373 (2009).

⁷⁹ I use the term slavery afterlife to mean "the skewed life chances, limited access to health and education, premature death, incarceration, and impoverishment" connected to enslavement's "racial calculus and...political arithmetic" that continues to negatively impact Black life. Saidaya v. Hartman, *Lose Your Mother: A Journey Along the Atlantic Slave Route* 6 (2007).

This aspirational vision of abolition democracy could have been critical to moving American democracy away from its racially exclusionary roots. The development of the public school system in particular could have played a fundamental role in making that shift. After Emancipation, formerly enslaved Africans recognized the indeterminate connection between education and substantive democratic citizenship.⁸⁰ They fought to establish a universal system of free public schools.⁸¹ The Freedman’s Bureau also rooted its work in securing education for the formerly enslaved.⁸² Their efforts gave shape to the system of universal public schools that exists today.

Yet Southerners, particularly the politically powerful plantation oligarchs, resisted the provision of universal education to Black people. Through acts of violence⁸³ and cooptation,⁸⁴ they impeded Black access to education that would enable them to participate in the American democracy on equal terms.⁸⁵ Outside of the south, states in the north, Midwest, and west also opposed providing education to Black (and nonwhite) people on equal terms.⁸⁶ Indiana for example, feared that providing universal education to Black people would encourage Black migration from the south.⁸⁷ As a compromise, they passed, legislation that required Black students to be educated on a segregated basis.⁸⁸

The resistance to providing universal education on equal terms to all was predicated upon maintaining a racial and social order that allowed for the continued exploitation of Black labor and the reification of a social order in which Black and some other non-white people were inferior rather than equal

⁸⁰ Id. at 18 (noting that formerly enslaved fought vigorously for education so that they could have the franchise, avoid signing unconscionable labor contracts, and most critically, to place distance between their past state of physical bondage.).

⁸¹ James D. Anderson, *The Education of Blacks in the South, 1860-1935*, at 16 (1988) (“former slaves were the first among native southerners to depart from the planters’ ideology of education and society and to campaign for universal, state-supported public education.”).

⁸² Derek W. Black, *Schoolhouse Burning: Public Education and the Assault on American Democracy*, 119-122 (2020) (describing the importance and scope of work done by the Freedman’s Bureau related to education.).

⁸³ See C.W. Tebeau, *Some Aspects of Planter-Freedman Relations, 1865-1880*, 21 J. Negro Hist. 2, 139 (1939) (planters burned down Freedom Bureau schools or social ostracizing the teachers who were brought in to educate the formerly enslaved.).

⁸⁴ Helen Hershkoff, Nathan Yaffe, *Unequal Liberty and A Right to Education*, 43 N.C. Cent. L. Rev. 1, 22-23 (2020) (describing efforts by a plantation owner to establish schools on plantations so that the schools could be used as a “tool of confinement and maintenance of class stratification by fixing the laborers to the soil...resulting in vast ultimate benefit to the landlord.”).

⁸⁵ Id. at 24 (“limiting the educational opportunity of Black children controlled not only their later access to higher wage jobs, property acquisition, and geographic mobility, but also to the franchise.”).

⁸⁶ See e.g., Douglass, *supra* note ____, at 65-68 (describing opposition to providing education to Black and nonwhites in Kansas, Illinois, California, Nevada and Colorado.).

⁸⁷ Id.

⁸⁸ Id. at 66.

citizens.⁸⁹ It was a complete rejection of the frames offered by abolition democracy. Southern plantation oligarchs and northern philanthropists ultimately reached compromises that furthered racial capitalism. For example, they provided Black people in the south with an “industrial education,” geared towards supporting agricultural and other manual labor deemed vital for the American economy.⁹⁰ An education beyond that was seen as disruptive to the economic and social order.⁹¹ Poor whites were given better education, albeit still minimal, than the formerly enslaved to mollify their place within the social and economic order.⁹² Ultimately throughout the country, “[u]niversal education was provided—“within limits—as an instrument for subordinating and exploiting Black persons for their labor, rather than for achieving their equal liberty.”⁹³

Alternative paths existed that could have laid the foundation for a system of public education consistent with abolition-democracy. The Reconstruction Acts of 1867 outlined the terms upon which the former Confederate states could be readmitted to the union.⁹⁴ Critically, it required them to, among other things, establish republican forms of government and to ratify the Fourteenth Amendment to the U.S. Constitution.⁹⁵ The Fourteenth Amendment extended citizenship to all persons born or naturalized in the United States.⁹⁶ Scholars compellingly argue that the grant of citizenship tethered to the Fourteenth Amendment implicitly guaranteed a right to education.⁹⁷ Derek Black argues that the Fourteenth Amendment guaranteed citizenship, and citizenship required education.⁹⁸ He further argues that the “combination of the Fourteenth Amendment's citizenship guarantee, state constitutions' education clauses, and the Fifteenth Amendment's voting rights-

⁸⁹ See Pierce, *supra* note ___, 36s-37s (describing the way in which segregated and unequal schools shaped the labor market and social relations in ways that further racial capitalism and white supremacy.).

⁹⁰ Anderson, *supra* note ___, at 91-93 (describing the southern and northern agreement on industrial training for Black people.).

⁹¹ *Id.* at 97 (noting sentiments by Virginian politicians that “whites should cease to support free schools for the blacks” because “the schools tended to make some negroes idle and vicious” and “others able to compete with the whites.”).

⁹² See generally Lawrence A. Cremin, *American Education: The National Experience 1783-1876*, at 148-63 (1980) (contrasting the history of public education in New York and Massachusetts with that in Virginia); see also Cong. Globe, 40th Cong., 1st Sess. 167 (1867) (statement of Sen. Sumner) (emphasizing illiteracy rates were four times higher in the South).

⁹³ Hershkoff et al, *supra* note ___ at 23.

⁹⁴ Reconstruction Act of 1867, ch. 153, § 5, 14 Stat. 428, 429

⁹⁵ *Id.*

⁹⁶ U.S. Const. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

⁹⁷ Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 Stan. L. Rev. 735, 766 (2018) (“A close look at the conjunction of the Fourteenth Amendment's ratification and Southern states' readmission to the Union reveals that education is included within the right of citizenship.”); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 369 (2006) (embedded within the Fourteenth's amendment's guarantee of citizenship was a right to education.).

⁹⁸ Black, *supra* note ___ at 741.

-which provided democratic protection for full citizenship--would have made an additional explicit federal education amendment superfluous or more trouble than it was worth.”⁹⁹

Yet this analysis understates the ways in which enslavement enconced racial caste and capitalism, not just in the south, but throughout the entire country. New forms of democracy untethered from racial caste and racial capitalism needed not to just be rebuilt in the south; but nationwide. Eugenic ideas of Black people as impure, debased, and unfit to be similarly situated to white people were prevalent nationwide.¹⁰⁰ Outside of the south, Black people were considered unassimilable and unworthy of full participation in democratic society.¹⁰¹ The desire for a menial labor class that reinforced a social order premised on white supremacy was ubiquitous.¹⁰² Given the racial history nationwide, the failure to create an express right to education that unequivocally precluded racial distinctions was bound to create a frayed and unequal public-school infrastructure.

During debates on the Reconstruction Act of 1867, Senator Charles Sumner introduced legislation that would have required states to open a system of public schools available to all and without racial distinction as a condition for readmission.¹⁰³ Yet the proposed amendment failed by a single vote.¹⁰⁴ Similarly, a provision in the proposed 1875 Civil Rights Act prohibited the exclusion of black students from schools, but it was removed prior to passage.¹⁰⁵ Both are examples of missed federal legislative opportunities to unabashedly center race in the critical question of what America’s system of public schools would look like post-civil war. Explicitly race-conscious legislation might have been taken as a repudiation of the racial segregation prevalent in northern schools during the antebellum period.¹⁰⁶ It

⁹⁹ Id. at 775.

¹⁰⁰ Douglass, *supra* note__ at 125 (“the migration of southern blacks during the late nineteenth and early twentieth centuries accompanied a rise in racist ideology across the country grounded in white supremacy...in the North, many whites also began to embrace white supremacists views that dismissed blacks as inferior and unfit for full participation in white civilization.”).

¹⁰¹ Id. at 32 (describing the antiblack sentiment outside of the south noting that whites did not “consider blacks worthy of assimilation or participation in the governing process so as to warrant inclusion in the community school system.”).

¹⁰² [add citation]

¹⁰³ See CONG. GLOBE, 40th Cong., 1st Sess. 166 (1867) (statement of Sen. Sumner).

¹⁰⁴ Id. at 70.

¹⁰⁵ George Rutherglen, *Civil Rights In The Shadow Of Slavery: The Constitution, Common Law, And The Civil Rights Act Of 1866, At 88-90* (2012). The Civil Rights Act of 1875 remained in effect without the provision until it was struck down in 1883 on the grounds that the Constitution did not extend to private businesses. See *Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁰⁶ See e.g., *Roberts v. Boston*, 59 Mass. (5 Cush.) 198 (1850) (upholding racially segregated schools noting “[i]t is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law.”); [add additional case]

would have been a step in the direction of adopting an abolition democracy framework.

Given the ways in which racial segregation in schools played out in the north pre-civil war, it was apparent separation had the effect of providing nonwhite children with a lesser education and conferring a stigma upon them.¹⁰⁷ At a minimum, explicit race conscious legislation would have conveyed an important expressive message of what equality meant, possibly laying the groundwork for an interpretation of the Equal Protection clause that examined the expressive content of a law and requiring the state to treat each person with equal concern.¹⁰⁸

Instead, the rejection of such race-conscious legislation tempered the transformative possibilities of the post-Reconstruction system of public schools. The racial segregation that was commonplace in northern public schools, became the norm nationwide. The Fourteenth Amendment proved futile in litigation challenging such segregation.¹⁰⁹ A few courts precluded racial segregation when it meant that Black children would be totally deprived of education.¹¹⁰ Some courts acknowledged that segregation violated the spirit but not letter of the Fourteenth Amendment.¹¹¹ Yet most refused to acknowledge “the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority,”¹¹² such that they could not participate in the American democracy as equals.

Returning to Elizabeth Anderson’s three-pronged definition of democracy, racially segregated schools inherently confer unequal material and social

¹⁰⁷¹⁰⁷ Douglass, *supra* note ___ 44-45 (describing segregated Black schools as housed in buildings in poor physical condition, poorly paid teachers, and curriculum more rudimentary than that offered in white schools.)

¹⁰⁸ See Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 Minn. L. Rev. 1 (2000) (arguing that for an interpretation of Equal Protection that examines how a law fits within the landscape of norms and practices more generally or the “social meaning” of the law).

¹⁰⁹ See e.g., *King v. Gallagher* 93 N.Y. 438, 450 (1883) (upholding state law mandating segregated schools reasoning “[a] natural distinction exists between these races which was not created neither can it be abrogated by law, and legislation which recognizes this distinction and provides for the peculiar wants or conditions of the particular race can in no just sense be called a discrimination against such race or an abridgment of its civil rights.”); *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 211 (1871) (rejecting challenge to state law segregated public schools reasoning under the Fourteenth Amendment “equality of rights does not involve the necessity of educating white and colored persons in the same school.”); *Ward v. Flood*, 48 Cal. 36, 37 (1874) (finding that although both white and black students in California have a right to attend public schools, they may be separated into separate schools)

¹¹⁰ See *cf* *Cory v. Carter*, 48 Ind. 327, 341 (1874)

¹¹¹ See e.g., *State v. Duffy*, 7 Nev. 342, 346 (1872) (“While it may be, and probably is, opposed to the spirit of the [Constitution], still it is not obnoxious to their letter; and as no judicial action is more dangerous than that most tempting and seductive practice of reading between the written lines.”)

¹¹² Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 427 (1960).

benefits.¹¹³ As such, they impede schools' ability to facilitate the universal and equal citizenship required for democracy as a membership organization. They also limit interaction among citizens in ways that are antithetical to establishing democracy as a culture. Finally, they preclude all citizens from gaining the skills they need to become fully informed voters and to realistically exercise their right to franchise. As the next section details, modern Equal Protection doctrine and state public policy influenced by it, facilitates the normalization of racially segregated and unequal schools in ways that threaten the health and stability of the American democracy.

II. THE LIMITS OF MODERN EQUAL PROTECTION DOCTRINE AND STATE PUBLIC POLICIES

A. *Racial Path Dependence*

After Reconstruction, in direct contravention of abolition democracy, institutions were transformed in ways that created slavery afterlives. The system of public schools is no exception.¹¹⁴ Constitutional doctrine and public policies related to the provision of public education are the primary culprit. *Brown* and its progeny outlawed de jure school segregation as a violation of the Equal Protection clause. But the doctrine progressed in ways that made the Equal Protection clause ineffective in addressing school segregation beyond de jure segregation.¹¹⁵ Critically, the footprint of the Equal Protection doctrine impacts both the legal and normative understandings of what obligation the state has to its public-school systems. The doctrine, however, is infected by path dependence when it comes to America's history of racial subordination.

Borrowing from Path Dependence Theory, this article uses the term path dependence to mean a process wherein early historical events can impact the path of subsequent conditions for a long period of time.¹¹⁶ It specifically describes "historical sequences where contingent events set into motion institutional patterns that have deterministic outcomes."¹¹⁷ A historic event is path dependent if one can trace a particular outcome to the historical event, and demonstrate that the outcome could not be explained by other factors or events.¹¹⁸ Some path dependent historical sequences are self-reinforcing and

¹¹³ Rucker C. Johnson, *Children of the Dream Why School Integration Works* ____ (2019) (describing the material costs racially segregated schools).

¹¹⁴ See e.g., Hershkoff, *supra* note ____, at 20 ("public schools for Black, Brown, and poor children have transformed into extensions of the carceral state and become instruments for maintaining and reproducing racial capitalism.").

¹¹⁵ See Bodie, *supra* note ____; Wilson, *supra* note ____.

¹¹⁶ See generally Stan J. Liebowitz & Stephen H. Margolis, *Path Dependence, Lock-In, and History*, 11 *J.L. Econ & Org.* 205 (1995); James Mahoney, 29 *Path Dependence in Historical Sociology, Theory and Society* 4 (Aug., 2000).

¹¹⁷ Mahoney, *supra* note 116, at 507.

¹¹⁸ *Id.* at 507–508.

exhibit increasing returns.¹¹⁹ Plainly stated this means that a historical event leads to the formation of an “institutional pattern – [that]- delivers increasing benefits with its continued adoption, and ... over time it becomes more and more difficult to transform the pattern or select previously available options, even if these alternative options would have been more ‘efficient.’”¹²⁰ Other scholars have applied Path Dependence Theory to racial segregation.¹²¹ This article extends the analysis by suggesting that what it calls Racial Path Dependence impacts public schools because of the way in which housing and schools are inextricably tied together. Yet as described in the section that follows, Equal Protection doctrine immunizes Racial Path Dependence from constitutional scrutiny or liability.

B. *Racial Path Dependence and Equal Protection Doctrine*

State facilitated racial segregation in housing is a historic event that continues to impact modern racially disparate outcomes across an array of domains, but particularly schools. Past practices such as racially restrictive covenants,¹²² Federal Housing Authority (“FHA”) loan discrimination,¹²³ and redlining¹²⁴ are examples of state facilitated housing segregation that create

¹¹⁹ Id. at 508.

¹²⁰ Id.

¹²¹ See e.g. Daria Roithmayr, *Reproducing Racism: How Everyday Choices Lock in White Advantage* (2014) [hereinafter Roithmayr, *Reproducing Racism*]; Daria Roithmayr, *Barriers to Entry: A Market Lock-in Model of Discrimination*, 86 Va. L. Rev. 727, 742 (2000) (“Borrowed in part from evolutionary theory, path dependence suggests that even small historical events, particularly those that occur early in the formation of an industry, can have unexpectedly long-lasting effects on market outcome.”); Daria Roithmayr, *Locked in Inequality: The Persistence of Discrimination*, 9 Mich. J. Race & L. 31, 41 (2003) (existing racial disparities can be traced in very specific ways to earlier discriminatory events, when one group has manipulated the law and other social institutions to gain an unfair advantage over another... [and], in the presence of certain dynamic forces, racial disparities can become self-reinforcing and ultimately locked into institutional structures and relationships, even in the absence of continuing intentional discrimination.”); Daria Roithmayr, *Locked in Segregation*, 12 Va. J. Soc. Pol’y & L. 197, 213 (2004) (arguing residential segregation is path dependent and can be traced back to enslavement of Africans and Jim Crow.).

¹²² 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.”).

¹²³ 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).

¹²⁴ 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).

path dependent effects in schools today. Modern exclusionary zoning practices also exacerbate the effects of the prior state facilitated housing segregation and, in that sense, contribute to path dependence.¹²⁵ The path dependence works as follows:

Students (for the most part) are assigned to schools based on where they live¹²⁶ and schools funded primarily through local property taxes.¹²⁷ Remnants of state facilitated housing segregation continue to impact both residential housing patterns and tax bases today, causing students to be segregated between school districts,¹²⁸ and funding gaps between predominately white and nonwhite districts.¹²⁹ State funding formulas are insufficient to close the funding gaps.¹³⁰ Although the Supreme Court's decision in *Brown* dismantled state sponsored school segregation, Fourteenth Amendment doctrine evolved to insulate Racial Path Dependence from constitutional scrutiny. The Court's opinion in *San Antonio v. Rodriguez*, is instructive.

In *Rodriguez*, Mexican-American plaintiffs from the Edgewood Independent School District ("EISD") claimed that Texas' system of financing public schools through local property taxes violated the Fourteenth Amendment.¹³¹ The EISD contained a low-wealth property tax base and as a result was able to raise and spend substantially less per pupil than its neighboring districts.¹³² Prior to the filing of the case, students staged a walk out to bring attention to inadequate resources and a lack of certified

¹²⁵ Audrey G. McFarlane & Randall K. Johnson, *Cities, Inclusion and Exactions*, 102 Iowa L. Rev. 2145, 2155 (2017) (describing the interplay between exclusionary zoning practices and past state sponsored segregation).

¹²⁶ Douglas S. Massey, Still the Linchpin: Segregation and Stratification in the USA, 12 RACE & SOC. PROBS. 1, 5 (2020).

¹²⁷ Wilson, Monopolizing Whiteness, supra note ____

¹²⁸ Bruce D. Baker, et al., Segregation and School Funding: How Housing Discrimination Reproduces Unequal Opportunity, The Albert Shanker Institute, 4 (April 2022) (finding that "the vast majority of neighborhoods that received lower (C or D) HOLC grades between 1935-40 are today located in school districts serving larger shares of Black and Hispanic students.").

¹²⁹ Ivy Morgan & Ary Amerikaner, *Funding Gaps: An Analysis of School Funding Equity Across the U.S. and Within Each State*, The Educ. Tr. 4 (Feb. 2018) (schools serving predominantly students of color receive nearly \$2,000 less per student than schools serving predominantly white schools); Baker et al., supra note ____ 2 (examining interdistrict school funding patterns and finding "spending for the typical white student is about \$3,000 per pupil above estimated adequate levels, whereas spending is roughly \$3,000 below adequate for the average Black student and just over \$2,000 below adequate for the typical Hispanic student.").

¹³⁰ Derek W. Black, *Localism, Pretext, and the Color of School Dollars*, 107 Minn. L. Rev. 1415, 1426 (2023) (noting states leave local districts to finance substantial portions of the cost of education themselves and that only two states take full--or nearly full-- responsibility for funding education and alleviate local communities from any significant funding burden.).

¹³¹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973)

¹³² *Id.* at 53

teachers.¹³³ The plaintiffs in *Rodriguez* contended that the school financing formula violated the Fourteenth Amendment because it resulted in students in EISD receiving a lower quality of education than students residing in districts with more accessible wealth.¹³⁴ The Court rejected plaintiffs' claims. It found that the school financing scheme did not implicate a suspect-classification for purposes of Equal Protection review or a fundamental right for purposes of substantive due process review.¹³⁵ As such, it applied rational basis review to the school financing scheme and found that local control was a legitimate state interest to which the funding scheme was rationally related, and that local control necessarily meant "the freedom to devote more money to the education of one's children."¹³⁶

The Court's analysis, however, failed to acknowledge two important things. First, in the substantive due process analysis, the Court suggested some "identifiable quantum of education," might be constitutionally protected as necessary to enjoy the right to speech and to vote.¹³⁷ Yet it ultimately found "no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved," since there was no absolute deprivation of education.¹³⁸ Substantive due process analysis has typically considered whether the right is "deeply rooted in this Nation's history and tradition."¹³⁹ In other education cases implicating fundamental rights analysis, the Court has examined history and tradition.¹⁴⁰ Yet the analysis in *Rodriguez* was devoid of any nuanced historical analysis connecting both the pre-and post-Fourteenth amendment landscape to the very concept of democracy.¹⁴¹ As a result, the Court short-changed the historical connection between access to substantive education and democracy.

Second, the Equal Protection analysis belied the connection between EISD's low-wealth tax base and race. Many residents' decision to live in the EISD district was not a matter of unfettered choice. For many, the 'choice'

¹³³ See Shepard Price, *The little man has lost again': How a San Antonio lawsuit set back American education 50 years ago*, *San Antonio Express News* (Mar. 21, 2023), <https://www.expressnews.com/news/education/article/san-antonio-isd-rodriguez-50-17838148.php>

¹³⁴ 411 U.S. at 23.

¹³⁵ The Court denied that there was an identifiable class of poor people against whom the plan discriminated, but determined even if there was, "the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Id.* at 24.

¹³⁶ *Id.* at 50

¹³⁷ *Id.* at 36.

¹³⁸ *Id.* at 37.

¹³⁹ *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977)

¹⁴⁰ See e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (upholding parental rights to control children where the "history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.").

¹⁴¹ For a comprehensive review of the connection between the right to an education and pre-and post-Fourteenth amendment history, see Derek W. Black, *The Fundamental Right to Education*, 94 *Notre Dame L. Rev.* 1059, 1061-1085 (2019)

was informed by a cycle of state facilitated racial segregation and exclusion in housing. Indeed, the geographic area encompassing EISD was coded red on the Homeowners Loan Corporations (“HOLC”) map; Latinos who had money to purchase elsewhere were denied and forced into Edgewood; public housing was concentrated in the area; and the area was denied critical health and sanitation infrastructure, causing disease and slum like conditions that deterred businesses from locating in the area.¹⁴² To improve its lot, EISD attempted to consolidate with a neighboring district, but their request was refused.¹⁴³

These housing conditions were imposed upon Edgewood because it was intentionally crafted as the only area in which Latinos could reside. Geography was used as an instrument of racial subordination. Yet the Court in *Rodriguez* refused to recognize the racialization of geography and instead engaged in an analysis that suggested the geography itself was race-neutral, when it was not.¹⁴⁴ Racialized disadvantage of the geographic area encompassing EISD is entrenched to this day.¹⁴⁵ Nationwide, housing that is tainted by racial discrimination is a path dependent event that creates modern racial disparities in school funding.¹⁴⁶

The Fourteenth Amendment Equal Protection doctrine does not reach such racial disadvantage, because it refuses to recognize the connection between state facilitated housing segregation and schools. It instead suggests that the poverty of the tax base consisting of a predominately Black or brown community is an independent rather than co-dependent variable of race. Put another way, it suggests that the area just happens to be predominately Black or brown, and poor, but does not connect the two in a causal chain.¹⁴⁷ Even when courts are willing to acknowledge that a history of racial exclusion taints local tax-based school funding schemes, they decline to find an Equal Protection violation, reasoning that the history is too attenuated from modern conditions or that there is no current intent to discriminate.¹⁴⁸

¹⁴² Matt Worthington, How San Antonio Segregated Its Schools, Echoes, (Nov. 2017), <https://hebfdn.org/echoes/san-antonio-segregated-schools/>.

¹⁴³ Id.

¹⁴⁴ *Rodriguez*, 411 U.S. 1 at 56-60.

¹⁴⁵ Worthington, supra note ____.

¹⁴⁶ Bruce D. Baker, et al., Segregation and School Funding: How Housing Discrimination Reproduces Unequal Opportunity, The Albert Shanker Institute, ____ (April 2022)

¹⁴⁷ See e.g., *Thomas Cnty. Branch of N.A.A.C.P. v. City of Thomasville Sch. Dist.*, 299 F. Supp. 2d 1340, 1368 (M.D. Ga. 2004) (“While the record in this case establishes that many poor black children in Thomasville, Georgia are not receiving what this Court would consider an adequate education, the record is clear that Defendant has not engaged in intentional discrimination based upon race.”)

¹⁴⁸ See e.g., *LL v. Alabama*, 739 F.3d 1273, 1287 (11th Cir. 2014) (rejecting plaintiffs claim that school funding scheme was embedded into the state constitution in 1901 specifically to keep black people from exercising local control over education reasoning the modern adoption was for financial reasons, not racially discriminatory ones.); *Montoy v. State*, 278 Kan. 769, 120 P.3d 306, 308, supplemented, 279 Kan. 817, 112 P.3d 923 (2005) (add citation).

Similar deficiencies are found in Equal Protection cases challenging racial segregation in school assignment. In *Milliken v. Bradley*, plaintiffs presented compelling evidence that state and local officials intentionally racially segregated schools in Detroit.¹⁴⁹ They also showed that Detroit was nearly all Black so the only remedy to desegregate schools was to order an interdistrict desegregation plan that included neighboring predominately white suburban districts.¹⁵⁰ The court declined reasoning:

[t]he notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.¹⁵¹

In addition to overstating the historic import of local control, the Court ignored the racially discriminatory history of housing that led to Detroit being predominantly Black. Indeed, several of the suburbs outside of Detroit were government facilitated whites-only municipalities.¹⁵² Racially exclusionary housing was again a historic path dependent event which the Court in *Milliken* excluded from scrutiny under the guise of localism. Federal courts in modern cases involving Equal Protection challenges to racially segregated schools have done the same.¹⁵³ Often these courts find that past practices of housing discrimination are either too attenuated from today's housing patterns to be actionable- or that the housing patterns were the result of individual choice, with no consideration of how race informs choices.¹⁵⁴

In sum, the Court's failure in *Rodriguez* to find that education is a fundamental right left Equal Protection as the primary method of challenging unequal access to education under the federal constitution.¹⁵⁵ Yet Fourteenth

¹⁴⁹ *Milliken v. Bradley*, 418 U.S. 717, ___ (1974)

¹⁵⁰ *Milliken v. Bradley*, 418 U.S. 717, ___ (1974)

¹⁵¹ *Milliken v. Bradley*, 418 U.S. 717, 741-742 (1974)

¹⁵² Erika K. Wilson, *White Cities, White Schools*, 123 Colum. L. Rev. 1221, 1228 (2023)

¹⁵³ See Charles E. Daye et al., *Housing and Community Development* 595-600 (3d ed. 1999) (describing judicial responses to relationship between housing conditions and educational opportunity)..

¹⁵⁴ See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) ("The Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race."); *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) ("Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.")

¹⁵⁵ Modern federal substantive due process challenges to unequal access to education typically fail based on *Rodriguez*. See e.g., *A.C. by Waithe v. McKee*, 23 F.4th 37, 43 (1st Cir. 2022) (rejecting plaintiffs claim that Fourteenth Amendment due process clause protects the

Amendment Equal Protection doctrine embraces localism and the passage of time as absolving past discrimination, while treating the racial inequalities caused by them as if they are “an incidental and unavoidable side effect,”¹⁵⁶ rather than the main point. As a result, Equal Protection doctrine fails to further the responsive constitutionalism envisioned by abolition democracy. As the next section demonstrates, the Equal Protection frameworks also influence state public policies in ways that further Racial Path Dependence and create inequalities in access to high-quality public schools.

C. Racial Path Dependence and Equal Protection Ideology

Like Equal Protection doctrine, state public policies fervently embrace localism, particularly in school assignment. This Article refers to state public policies that advance localism as being rooted in and protected by “Equal Protection ideology.” A key example is bona fide residency laws requiring a student to demonstrate that they reside within the boundaries of a school district to enroll in a public school.¹⁵⁷ Gregory Weiher's boundary line recruitment theory is useful in understanding why such laws are tainted by Racial Path Dependence.

According to Weiher, boundary lines are interactive, serving political, economic, and social functions.¹⁵⁸ The interaction between the political, economic, and social functions gives meaning to the area encompassed between the boundary lines. The boundaries clarify the place's “social and economic identity,”¹⁵⁹ providing critical information that helps people sort between boundary lines according to their preferences.

When boundary lines encapsulate a geographic area that has a history of state sponsored segregation, and in which nonwhites were excluded through law and violence, those spaces can become racialized. The racialization of space is “the process by which residential location and community are carried and placed on racial identity.”¹⁶⁰ Racialization of a geographic space means that racial identity and geography can become symbiotic. An area can

right to “a civics education that prepares them to participate effectively in these important aspects of public life (e.g., voting or other civic participation).” Equal Protection challenges have limited but greater success. See e.g., *Stout by Stout v. Jefferson Cnty. Bd. of Educ.*, 882 F.3d 988, 991 (11th Cir. 2018) (finding proposed school district secession violated the Fourteenth Amendment Equal Protection clause).

¹⁵⁶ Derek W. Black, *Localism, Pretext, and the Color of School Dollars*, 107 *Minn. L. Rev.* 1415, 1433 (2023)

¹⁵⁷ LaToya Baldwin Clark, *Stealing Education*, 68 *UCLA L. Rev.* 566, 590 (2021) (Thirty-three states, plus the District of Columbia, explicitly allow school districts to privilege students who have bonafide residence within their borders.).

¹⁵⁸ Gregory R. Weiher, *The Fractured Metropolis: Political Fragmentation and Metropolitan Segregation* 33-35 (1991).

¹⁵⁹ Gregory R. Weiher, *The Fractured Metropolis: Political Fragmentation and Metropolitan Segregation* 35 (1991).

¹⁶⁰ John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing A Stone of Hope from A Mountain of Despair"*, 143 *U. Pa. L. Rev.* 1233, 1235 (1995)

acquire a reputation for being associated with a particular race.¹⁶¹ Such a geographic area bounded by boundary lines can thus serve as a heuristic for racial identity, belonging or lack thereof, and influence modern migration patterns.

Boundary lines that encapsulate racialized spaces are particularly influential in the context of public schools. People with high wealth, income, and/or social capital, often select homes based on the quality of the school district.¹⁶² As Gregory Weiher posits regarding residential sorting around boundary lines, some residents are "choice-makers" while others are "choice-takers."¹⁶³ The choice-takers are those who face barriers of exclusion.¹⁶⁴ They take choices that are imposed upon them by other actors and institutional arrangements such as lack of resources, wealth, or lack of belonging.¹⁶⁵ Choice-makers, usually white and affluent, however, are relatively free to make their own choices.¹⁶⁶ Moreover, research suggests that for some choice-makers, the quality of the school district is not measured by test scores or other academic indicia, but instead the race and class of the student body can contour perceptions of school quality.¹⁶⁷ When school district boundary lines encapsulate racialized spaces, the boundary lines may capture predominately white and affluent persons only. Conversely, the boundary lines may capture predominately nonwhite and low-income persons. In either instance, the boundary lines provide critical information that can lead to sorting that is ostensibly race-neutral and impacts school districts.

For example, if a geographic area has a history of state sponsored segregation that created an all-white area, the sorting dynamics associated with boundary lines may perpetuate it remaining a predominately white area. Thus, the modern-day geography is influenced by Racial Path Dependence. A school district that tracks the same boundary lines is likely to take on the same demographics. Because some choice-makers associate school quality

¹⁶¹ See e.g., Ronald Wheeler, *About Microaggressions*, 108 Law Libr. J. 321, 323 (2016) (describing Black people's avoidance of Dearborn, Michigan, because of its history of hostility to Black people and citing one nearby resident's experiences of their father's harassment by the Dearborn police and fear for his children's safety if the children even rode their bikes into Dearborn);

¹⁶² Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 Harv. Educ. Rev. 177, 182-83 (2002);

¹⁶³ Gregory R. Weiher, *Public Policy and Patterns of Residential Segregation*, *The Western Political Quarterly* 42, no. 4 669 (1989)

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Holme, *supra* note ____ at 180 (describing how social networks and social status ideologies led "parents to conclude that the schools serving the highest-status or White and high-income clientele were the best, and the schools serving low-income students and students of color were the worst."); Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 Geo. J. on Poverty L. & Pol'y 1, 5 (2008) (summarizing empirical research suggesting parents use race as a heuristic when they are making school choices, in contrast to their stated values of academic standards and teacher quality.").

with the demographics of the student body, the school district may acquire a positive reputational interest that continues to reinforce the same race related sorting dynamics. Indeed, the ostensibly race neutral reputation of a school system is often used as a race-neutral proxy for racial steering in home buying.¹⁶⁸ The net result is a cycle of racially circumscribed housing with higher tax bases, creating patterns of racially segregated schools that have access to more funding to obtain the educational inputs that create high quality schools.

Equal Protection ideology in state public policies like bona fide residence laws therefore not only entrenches Racial Path Dependence, it also turns access to education in high quality districts into a “property right.” Many states have laws that make providing a false address in order to gain access to a higher quality public school district a crime.¹⁶⁹ School districts concoct elaborate schemes to “catch” perpetrators. For example, they hire private detectives to follow those suspected of being unlawful residents, establish hotlines for people to call and report suspected unlawful residents, and even utilize surveillance software.¹⁷⁰ States jail and fine individuals for gaining access to a public school in a district in which they do not reside, reasoning that their use of the public school infringes upon local taxpayers who pay property taxes to live in the district.¹⁷¹ The states are in essence creating a property right in public education and using the criminal justice system to negatively enforce those rights.¹⁷² Owing to the Racial Path Dependence that leads to higher quality schools being situated in predominately white districts, the majority of people prosecuted for stealing an education are nonwhite.¹⁷³ States not only normalize Racial Path Dependence, they criminalize attempts to circumvent geography as a race-neutral proxy race.

Consistent with moving towards the aspirational project of abolition democracy, the normative and legal basis for providing public schools must

¹⁶⁸ See e.g., Kendra Yoshinaga, Race, School Ratings And Real Estate: A 'Legal Gray Area,' NPR (Oct. 16, 2016), <https://www.npr.org/sections/ed/2016/10/10/495944682/race-school-ratings-and-real-estate-a-legal-gray-area>

¹⁶⁹ See e.g., 105 Ill. Comp. Stat. Ann. 5/10-20.12b (2017) (“A person who knowingly or wilfully presents to any school district any false information regarding the residency of a pupil for the purpose of enabling that pupil to attend any school in that district without the payment of a nonresident tuition charge shall be guilty of a Class C misdemeanor.”).

¹⁷⁰ See Avi Wolfman-Arent, The money shot: How school districts find and prove residency fraud, PBS, (May 2, 2018), <https://whyy.org/segments/the-money-shot-how-school-districts-find-and-prove-residency-fraud/>.

¹⁷¹ Alia Wong, Using a different address for school placement can be a crime. Is school choice a solution?, USA Today, (Aug. 8. 2023), <https://www.usatoday.com/story/news/education/2023/08/08/address-sharing-school-placement-can-be-crime/70515010007/> (“[t]he crime, some argue, is not only misleading school districts but also using resources funded by a tax base a family isn't a part of.”).

¹⁷² LaToya Baldwin Clark, *Education As Property*, 105 Va. L. Rev. 397, 408 (2019) (“stealing education” is the belief that “education” is *property*.”).

¹⁷³ See e.g.,

be reimagined. Rights-based approaches to advancing the universal access to public education grounded in Equal Protection doctrine that began during Reconstruction provided meaningful boundaries that prevented Black (and nonwhite) persons from being completely excluded; while also serving as a declaration that the state owed some responsibility to them.¹⁷⁴

However, rights-based approaches are limited because race consistently mediates rights. Racial Path Dependence blunts the effectiveness of rights, particularly rights rooted in Equal Protection doctrine and ideology. It also leads to education being situated as property. This results in a reconfiguration of the long standing racial and social order, not the deconstruction and reconstruction called for by abolition democracy.

Yet our normative imagination and sense of legal obligation about such an arrangement is confined to its constitutionality. Because facially race neutral arrangements that structure access to high quality schools along the lines of racialized geography do not violate the constitution, and state public policy relies upon them as well, they persist. New legal and normative frames for situating public schools import to American democracy and for evaluating the constitutionality of laws that govern access to public schools are necessary.

III. INFRASTRUCTURE THEORY AND PUBLIC SCHOOLS

This section moves beyond a rights-based approach to public education grounded in Equal Protection doctrine and ideology. Using Brett Frischmann's Theory of Infrastructure and Commons Management, it considers alternative framing upon which to position universal access to public education. It argues that law and policy should situate public schools as an infrastructure resource and upon which access should be assured on an open, nondiscriminatory basis.

A. Demand-Side Theory of Infrastructure Resource Management

Infrastructure is generally understood to consist of resources that have some components of non-rivalry and non-excludability, and consequently, will be undersupplied in the absence of government intervention.¹⁷⁵

¹⁷⁴ See e.g., Patricia J. Williams, *The Alchemy of Race and Rights*, 153 (1991) ("For blacks ... the attainment of rights signifies the respectful behavior, the collective responsibility, properly owed by a society to one of its own."); *Plyler v. Doe*, 457 U.S. 202, 213 (1982) ("[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.").

¹⁷⁵ See e.g., K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 *Cardozo L. Rev.* 1621, 1641–42 (2018) (Conventionally public goods and infrastructure are understood in economic terms: as goods that are non-rival and non-excludable, such that market participants will tend to under-supply these goods).

Infrastructure is also generally understood to generate positive externalities that benefits society as a whole.¹⁷⁶ In light of the non-rivalry and non-excludability components of infrastructure, questions arise about how such resources should (or should not) be managed. Much of the scholarly analysis of infrastructure resources focuses primarily on supply-side considerations related to market failures in production rather than societal demand and value added by such resources.¹⁷⁷ Put another way, much of the scholarly analysis centers around the question of whether or not the private market will supply the resource in sufficient quantities, neglecting important considerations regarding societal value and demand for the resources.¹⁷⁸

Professor Brett Frischmann offers a helpful demand-side model of infrastructure resources that focuses on “how value is created and realized by individuals who obtain access to infrastructure resources.”¹⁷⁹ Such a model is particularly appropriate for fully appreciating how best to manage public schools if they are conceptualized as infrastructure. As it stands now, laws and policies surrounding public schools increasingly facilitate a myopic understanding of public education as a form of individual property,¹⁸⁰ with minimal regard for the infrastructure role public schools play in terms of benefiting American democracy. To fully appreciate how best to manage public schools if they are conceptualized as an infrastructure resource, it is worth examining public schools through the lens of Professor Frischmann’s demand-side model of infrastructure resource management.

Professor Frischmann’s model examines three criteria. First, it considers whether the infrastructure resource is rivalrous or shareable. It assesses whether the resource is capable of being “accessed and used by multiple

given the lack of financial incentives to invest.); Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 Minn. L. Rev. 917, 940 (2005) (it is generally accepted that the market will fail in one way or another to efficiently provide society with infrastructure and that there is some role for government intervention);

¹⁷⁶ Frischmann, *supra* note ___ at 919.

¹⁷⁷ See e.g., Frischmann *supra* note ___ at 929–30 (arguing “[too often, analysts classify an infrastructure resource as a public good, network good, or natural monopoly, acknowledge that it is well understood that markets may fail to efficiently supply such goods, and then proceed to analyze the form of institutional intervention by the government to correct the failure, typically assuming that the degree of intervention should be minimal. Market failure for infrastructure, however, is more complex than these classifications suggest. To understand and grapple with the additional demand-side complexity, it is necessary to reconceptualize infrastructure

¹⁷⁸ *Id.* at 931 (“[w]hen economists and other observers focus on supply-side issues with respect to infrastructure resources, they fail to account for many critical demand-side considerations. Consequently, there is an incomplete evaluation of true social demand for infrastructure resources.”).

¹⁷⁹ Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 Minn. L. Rev. 917, 939 (2005)

¹⁸⁰ See Section II.C *infra*.

users at the same time.”¹⁸¹ Second, it considers whether “the value derived from the [infrastructure] resources results from productive use rather than consumption.”¹⁸² Professor Frischmann analogizes this second criteria to the resource being an enabling platform upon which others can build.¹⁸³ Critically this means that the value of the infrastructure resource is realized by the downstream uses of the resource rather than the immediate utilization of the resource.

Third, the model considers whether the “[t]he [infrastructure] resource is used as an input into a wide range of goods and services, including private goods, public goods, and/or non-market goods.”¹⁸⁴ A good is considered a private good when it is rivalrous in consumption, meaning consumption by one individual prohibits another individual from consuming it.¹⁸⁵ Clothes are a classic example of a private good.

There are two types of public goods—pure and impure public goods. A public good is pure if its consumption is nonrivalrous, meaning that it can be consumed by one person without negatively impacting another person.¹⁸⁶ Fresh air or national defense are examples of pure public goods. A good is considered an impure public good when consumption by one person can, depending upon the context, have a negative effect on another person.¹⁸⁷ A crowded road or recreational park is an example of an impure public good. Finally, nonmarket goods are goods “that are neither provided nor demanded through the market mechanism,” despite their value.¹⁸⁸ Instead, they are provided through other “provisional mechanisms, including government, community, family, and individuals.”¹⁸⁹ Public education can be an example of a nonmarket good and a public good—either pure or impure, depending upon how it is distributed.¹⁹⁰

¹⁸¹ Frischmann, *supra* ___ at 942.

¹⁸² *Id.* at 957.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 956.

¹⁸⁵ Dennis Epple & Richard E. Ramono, *Public Provision of Private Goods*, 104 J. Pol. Econ. 57 (1996).

¹⁸⁶ Randall G. Holcombe, *A Theory of the Theory of Public Goods*, 10 Rev. Austrian Econ. 1, 1-2 (1997).

¹⁸⁷ Holcombe, *supra* note ___ at 19.

¹⁸⁸ Frischmann, *supra* note ___ at 965.

¹⁸⁹ *Id.*

¹⁹⁰ Longstanding trends of injecting market principles such as deregulation and competition into the public school sphere cause scholars to question whether public education as currently situated is a nonmarket good. See e.g., Lesly Barrett et al., *The Marketization of Education: Public Schools for Private Ends*, 33 Anthropology & Education Quarterly, Vol. 5 (2023). Nonetheless, this article in advancing the aspirational project of abolition democracy, situates public education outside the context of neoliberalism and the marketization of education, and therefore labels public education as a nonmarket good.

Professor Frischmann theorizes that the nature of the goods (private, public, or nonmarket) produced downstream by the infrastructure resource impacts the social value of the infrastructure resource and the way in which the infrastructure should be managed. Thus, to determine the best way to manage an infrastructure resource, Professor Frischmann's demand-side model classifies infrastructure resources into three categories based on the downstream product it produces: (1) commercial, (2) public and (3) social infrastructure.¹⁹¹

Commercial infrastructure produces private goods downstream.¹⁹² Because commercial infrastructure produces private goods, "output producers should fully appreciate the benefits of the outputs (via sales to consumers) and thus accurately manifest demand for the required inputs in upstream markets."¹⁹³ Thus, Professor Frischmann argues that commercial infrastructure resources should be managed in a way that promotes competition such that producers are competing to produce and supply private goods to consumers.¹⁹⁴ Simply put, he theorizes that a competitive market approach to managing commercial infrastructure is appropriate for commercial infrastructure resources.

In contrast, public infrastructure produces public goods (pure and impure) downstream while social infrastructure produces nonmarket goods downstream.¹⁹⁵ Critically, Professor Frischmann notes the timing of the value derived from public goods and nonmarket goods are different. For public goods, the societal value of the downstream goods tends to be realized upon consumption of the good (e.g., the value of fresh air is realized at the time of inhaling it). Yet the production of public goods has the opportunity to generate positive externalities outside of the consumption, if the appropriate conditions of access are granted.¹⁹⁶ For nonmarket goods, the value of the downstream goods tends to be realized not through direct consumption, but through "social interdependencies...that increase social welfare."¹⁹⁷ Put another way, those who consume a nonmarket good directly may benefit, but others who do not consume it benefit as well via the ways in

¹⁹¹ *Id.* at 959.

¹⁹² *Id.* at 960-961 (using manufacturing processes as an example of commercial infrastructure and noting that manufacturing processes "such as die casting, milling, and the assembly line process, are nonrival inputs into the production of a wide variety of private manufactured goods.").

¹⁹³ *Id.* at 962.

¹⁹⁴ *Id.* (arguing that "[c]ompetition is the linchpin in [commercial infrastructure] because the public's consumptive demands can be best assessed and satisfied by competitive markets.).

¹⁹⁵ *Id.* at 967.

¹⁹⁶ *Id.* at 966.

¹⁹⁷ *Id.* at 967.

which a nonmarket good might improve the material conditions of society as a whole.¹⁹⁸

Though the timing of the value generated by public and non-market goods is different, in both cases, it is difficult to accurately measure the true social value of the infrastructure resource because of the unseen beneficiaries.¹⁹⁹ Indeed, for public and social infrastructure, the downstream value generated by the public and nonmarket goods they generate leads to significant positive externalities for incidental beneficiaries. The positive externalities will not necessarily be appreciated by the same competitive markets approach that would work for commercial infrastructure. For example, a competitive markets approach to managing fresh air that limits access to only paying customers, would not appreciate the residual environmental impacts of fresh air that impact all persons, not just paying customers. Thus, a competitive markets approach that limits access to public or nonmarket goods to paying customers would diminish the overall value of the positive externalities that could be wrought by such infrastructure.

Professor Frischmann therefore argues for “commons management” of both public and social infrastructure. He reasons that:

Infrastructure users that produce public goods and nonmarket goods suffer valuation problems because they generally do not fully measure or appreciate the (potential) benefits of the outputs they produce and consequently do not accurately represent actual social demand for the infrastructure resource. Instead, for public and social infrastructure, “demand [generated by competitive output markets will] tend[] to reflect the *individual benefits* realized by a particular user and *not take into account positive externalities*.”²⁰⁰ (emphasis added).

He argues that the social costs or losses of restricting access to public or social infrastructure can be substantial. Open access on the other hand “eliminates the need to rely on either the market or the government to “pick winners” or users worthy of access.”²⁰¹ Instead, open access allows one to maximize the downstream uses and positive externalities typically associated with public and social infrastructure that produces public and nonmarket

¹⁹⁸ As discussed *infra* in Section III.C. *infra*, public education is a quintessential example of a nonmarket good that directly benefits both the individual(s) who consumes it, but also improve the material conditions of society as a whole.

¹⁹⁹ Frischmann, *supra.*, at 958 (noting “[t]he information problems associated with assessing demand for an infrastructure resource and valuing its social benefits plague both suppliers and consumers of that resource where consumers are using the infrastructure as an input into the production of public goods or nonmarket goods.”).

²⁰⁰ *Id.* at 968.

²⁰¹ *Id.* at 978.

goods. Open access may look different and require various tradeoffs depending upon the exact social or public infrastructure at issue.²⁰² As described in the section that follows, high-quality public schools when analyzed through the lens of Professor Frischmann’s demand-side model of infrastructure, conceptually fit the description of both public and social infrastructure.

B. Applying Demand-Side Theory of Infrastructure to High-Quality Public Schools

The American Society of Civil Engineers (“ASCE”) delineates seventeen categories of resources, including public schools, as infrastructure.²⁰³ This section suggests that it is not public schools generally, but high-quality public schools that are vital pieces of infrastructure for a healthy American democracy. What constitutes a high-quality school is difficult to quantify. This Article uses the term “high-quality schools” to mean schools that have highly qualified teachers, rigorous curricular offerings, well-maintained physical facilities, and high levels of student achievement.²⁰⁴ Each of these measures is recognized as an important component in assessing the quality of education offered by schools to students.

Access to high quality schools is especially essential to engendering access to literacy skills. The access component is important. Access speaks to an opportunity, rather than a guaranteed outcome. As many factors outside the control of the state may undoubtedly influence the actual educational outcome,²⁰⁵ the state can and should exercise control over what it can, which

²⁰² See Section III *infra*.

²⁰³ See American Society of Civil Engineers, *2021 Infrastructure Report Card*, <https://infrastructurereportcard.org/infrastructure-categories/> (listing grades for seventeen categories of infrastructure and noting that “our infrastructure is a system of systems and more connected than ever before.”).

²⁰⁴ See, e.g., Marisa Cannata Et Al., *The Nat’l Ctr. On Scaling Up Effective Schs., Reaching For Rigor: Identifying Practices Of Effective High Schools* 45-49 (2013), <https://files.eric.ed.gov/fulltext/ED561267.pdf> [<https://perma.cc/HTU6-4YGH>] (defining a rigorous curriculum as one that “[is] intellectually challenging, covers broad and deep content, and prepares students for college and careers,” *id.* at 45, and noting the connection between such a curriculum and high-value schools); Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, Educ. Pol’y Analysis Archives, January 1, 2000, at 1, 1 (describing the importance of highly qualified teachers and summarizing findings from a fifty-state survey that showed a correlation between highly qualified teachers and student outcomes); Mark Schneider, *Nat’l Clearinghouse For Educ. Facilities, Do School Facilities Affect Academic Outcomes?* 16 (2002), <https://files.eric.ed.gov/fulltext/ED470979.pdf> [<https://perma.cc/W4HK-J2QM>] (summarizing research findings and noting that “school facilities affect [student] learning”).

²⁰⁵ Schools are only one component of student learning. Familial and other social factors such as poverty may also play a role. See e.g., Misty Lacour and Laura D. Tissington, *Educational Research and Reviews* Vol. 6 (7), pp. 522-527, July 2011 (poverty directly affects academic achievement due to the lack of resources available for student success. Low achievement is closely correlated with lack of resources). Nonetheless, at a minimum this

is access. Having literate citizens is in turn critical to having a well-functioning democracy.²⁰⁶ Democracies that offer public education systems that are highly differentiated in quality struggle to engender the breadth and depth of literacy amongst citizens necessary to maintain healthy democracies.²⁰⁷ As such, this Article focuses on high quality schools as an engine for producing literate citizens.²⁰⁸

Applying Professor Frischmann’s three criteria demand-side model of infrastructure makes clear the need to situate, not just public schools, but high-quality public schools as infrastructure. For example, the first criterion of Professor Frischmann’s demand-side model asks whether the infrastructure resource is rivalrous or shareable. Public schools are partially rivalrous and shareable.²⁰⁹ Geographic residence requirements and high housing costs lead to high-quality public schools being rivalrous’ because policies are used to delineate and limit access to high-quality public schools.²¹⁰ Yet high-quality public schools can be as nonrivalrous and shareable as the rules the state puts in place to delineate access.

The second criterion of Professor Frischmann’s model considers the nature of the intermediate good produced by the infrastructure resource, namely whether the value derived from the resources results from productive use rather than consumption. The primary intermediate good generated by access to high-quality public schools is access to high quality educational outcomes. While some individuals may gain immediate personal satisfaction from receiving access to a high-quality public school, the collective value of increased access to high-quality schools accrues after the consumption of the education. Its value comes from downstream uses rather than the immediate individual consumption of the education. For example, recent research shows that attending higher-quality well-funded schools reduces adult arrest rates.²¹¹ People who have access to quality education also have better

article suggests that the state has an obligation to provide access to high-quality public schooling that offers students the opportunity to acquire 21st century literacy skills. Notwithstanding familial and other social factors that may ultimately influence the outcome.

²⁰⁶ See José Morais, *Literacy and democracy, Language, Cognition and Neuroscience* (2017).

²⁰⁷ *Id.*

²⁰⁸ For a working definition of literate citizens, see Section III.C., *infra*.

²⁰⁹ See William A. Fischel, *Making the Grade: The Economic Evolution of American School Districts*, at 219-20, (2009) (suggesting that the notion public schools are “rival is evident from the continuing concern about class size. Bigger classes (more student consumers) do detract, at plausible margins, from the education of others.”)

²¹⁰ Wilson, *supra* note ___ at 40.

²¹¹ E. Jason Baron, Joshua M. Hyman, and Brittany N. Vasquez, *Public School Funding, School Quality, and Adult Crime*, NBER Working Paper No. 29855, (March 2022) (students

physical health outcomes and reduce strain on the healthcare system.²¹² Access to higher quality schools also increases the likelihood of individuals voting.²¹³ Each of these things benefits American democracy collectively.

Finally, Frischmann’s model considers whether the resource produced by the infrastructure is used as an input into a wide range of goods and services. High quality schools produce resources such as functional literacy. The connection between access to functional literacy and a healthy democracy is well documented.²¹⁴ The knowledge based economy and technological information age requires that American citizens have not just access to basic literacy—but twenty-first century functional literacy. Twenty-first century functional literacy includes a broad array of skills including cultural competencies, digital competencies, and the ability to read, write, solve problems, and cope with quantitative information.²¹⁵ It also requires the ability to comprehend, compose, reflect, and critique.²¹⁶ Access to twenty-first century functional literacy quality may ultimately provide students with high quality educational outcomes which includes 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.”²¹⁷ All of these things are also essential to the health of American democracy.

Yet in many ways, high-quality public schools are increasingly regulated as if they are commercial infrastructure that has private goods as its downstream usage. The section that follows examines the ways in which current Equal Protection doctrine and the ideology that flows from it, normatively and as a matter of law results in high quality public schools being managed as if they were commercial infrastructure, negating the collective benefits of high-quality schools to the American democracy.

exposed to additional funding during elementary school were substantially less likely to be arrested in adulthood.)

²¹² Zajacova A, Lawrence EM, *The Relationship Between Education and Health: Reducing Disparities Through a Contextual Approach*, Annu. Rev. Public Health, (2018)

²¹³ Sarah Cohodes James J. Feigenbaum, Why Does Education Increase Voting? Evidence From Boston’s Charter Schools, National Bureau of Economic Research Working Paper 29308 (March 2023).

²¹⁴ See e.g., Claudia Goldin, *A Brief History of Education in the United States 1* (Nat’l Bureau of Econ. Research, Historical Working Paper No. 119, 1999) (“formal education, especially basic literacy, is essential for a well-functioning democracy, and enhances citizenship and community.”)

²¹⁵ See generally, Jodi Pilgrim and Edla E. Martinez, Defining Literacy in the 21st Century: A Guide To terminology and Skills, *Texas Journal of Literacy Education*, 60 (2013);

²¹⁶ Id.

²¹⁷ Erika K. Wilson, *Monopolizing Whiteness*, 134 Harv. L. Rev. 2382, 2422 (2021)

C. Equal Protection Doctrine and Ideology: Infrastructure Mismanagement

While a free primary and secondary public education is made available in all fifty states, school quality varies dramatically across schools.²¹⁸ To be sure, public education in America contains markers that allow for horizontal differentiation between schools.²¹⁹ 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.²²⁰ School funding (or lack thereof) plays a significant role in the creation of horizontal differentiation between schools.²²¹

Horizontal differentiation is most pronounced between school districts. High quality and lower quality schools are often separated by school district boundary lines that track municipal boundary lines. The boundary lines are influenced by Racial Path Dependence, but still afforded legal authority and deference that makes them immune to constitutional challenge.²²² The boundary lines allow for the cordoning off of economic resources needed to create high quality schools, rather than allowing them to be more equitably distributed. The boundary lines also allow for the partitioning of students by race and class. Indeed, when affluent white students cluster together in public schools, it creates school-based economies of agglomeration that allow them to hoard the resources needed to create high quality schools.²²³ Their clustering also disadvantages neighboring predominantly non-white low-income districts, due to racialized boundary sorting dynamics.²²⁴

²¹⁸ 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).

²¹⁹ See Jeremy Fiel, *Closure, Status Competition, and School Segregation*, 121 American Journal of Sociology 129–10 (2015); Stacy Hawkins, *Race-Conscious Admissions Plans: An Antidote to Educational Opportunity Hoarding?* 43 J.C. & U.L. 151, 159 (2018) (“[a]lthough we have long provided a universal system of K-12 public education, these educational opportunities are not all created equally.”).

²²⁰ 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).

²²¹ See generally, E J Barron, *School Spending and Student Outcomes: Evidence from Revenue Limit Elections in Wisconsin*, American Economic Journal: Economic Policy vol. 14 no. 1 (2022).

²²² See Section II.C., supra.

²²³ Erika K. Wilson, *Monopolizing Whiteness*, 134 Harv. L. Rev. 2382, 2385 (2021) (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.).

²²⁴ See, e.g., Ann Owens, *Income Segregation Between School Districts and Inequality in Students' Achievement*, 91 Socio. Educ. 1, 18 (2018) (“Children from advantaged families accumulate

Horizontal differentiation in school quality between school districts is situated as a desirable if not necessary inter-jurisdictional competition for residents theorized about by Charles Tiebout.²²⁵ The Supreme Court's reasoning in *San Antonio v. Rodriguez* underscores Equal Protection doctrine's embrace of Tieboutian logic. The Court notes:

[e]ach locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy *competition for educational excellence*.²²⁶ (emphasis added).

School differentiation plays a critical component in the inter-jurisdictional competition. Residents often choose where they want to live based on the quality of the schools in the locality.²²⁷ 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.²²⁸ A home located in a school district considered to have high quality schools has its value increased by upwards of twenty percent.²²⁹ Conversely, a home located in a school district with schools that are considered low-quality will see a decrease in property value.²³⁰ Thus, the tether between home prices and school quality means that when parents are buying homes they are also essentially buying access to

additional resources in segregated places because their families can access the most advantaged contexts [S]egregation has trade-offs - it may benefit advantaged families and harm disadvantaged families." (citation omitted)).

²²⁵ See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

²²⁶ *Rodriguez*, 411 U.S. at 50.

²²⁷ 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/real-estate/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).

²²⁸ 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 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).

²²⁹ Fischel, *supra* note 228 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.).

²³⁰ 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).

schools. This distinctive feature makes public education in America a “quasi-private good,” subject to the principles of semi-rivalrousness and exclusiveness.²³¹

Through its’ embrace of localism in student assignment and school funding, Equal Protection doctrine and ideology adopts the Tieboutian logic that turns high quality public schools into quasi-private goods. In doing so, it allows high quality schools to be regulated as if they were commercial infrastructure and allows market competition to dictate access. The market competition takes place serendipitously through the housing market. Yet Racial Path Dependence warps the housing market such that it is not an unrestrained market. Even when explicit racial barriers to housing are removed, racial income and wealth gaps perpetuate Racial Path Dependence. Similarly white accumulated wealth provides a substantial advantage in securing housing in high quality school districts.

Nonetheless, Equal protection doctrine insulates Racial Path Dependence from constitutional scrutiny by finding that the connection between past housing discrimination and modern patterns of interdistrict school segregation is too attenuated. It also does so by requiring arduous proof of intent to discriminate; however Racial Path Dependence creates reinforcing mechanisms of exclusion that do not require subjective intent to discriminate. Finally, Equal Protection ideology vigorously protects market mechanisms by adopting and enforcing bona fide residency laws through criminal penalties. The final section examines what it would look like for Equal Protection doctrine and ideology to regulate public schools as if they are public and social infrastructure for American democracy.

D. *Reimagining Public Schools through the Lens of Public and Social Infrastructure for Democracy*

This part uses the elements of Brett Frischmann’s model of infrastructure to consider how Equal Protection doctrine and ideology could be reimagined to support high-quality schools as infrastructure for American democracy. A key component of Frischmann’s model involves examining the social demand for an infrastructure resource. Critically, the social demand for high-quality public schools is undervalued by Equal Protection doctrine and ideology. The problem is not with Equal Protection doctrine per se, rather

²³¹ 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).

with the ideology undergirding it. Equal Protection doctrine and ideology measure demand through the Tieboutian frame of residential choice and schools being used as a tool in an inter-jurisdictional competition for residents. This leads to Equal Protection doctrine and ideology having an incomplete valuation of demand. Their valuation is an imperfect measurement of the “choice-makers,” demands.²³² It neglects the “choice-takers” demand.²³³ In doing so it fails to adequately capture the social demand of the community as a whole.

The inadequate measure of demand valuation results in Equal Protection doctrine and ideology managing high-quality schools as if they are commercial infrastructure. It situates demand at the individual level of the choice-makers, absorbing the benefits those choice-makers receive from the ability to hoard the educational inputs that create high-quality schools. Thus, a first step in repositioning high-quality public schools as public and social infrastructure is for Equal Protection doctrine and ideology to reject the Tieboutian frame that measures demand through the local control inter-jurisdictional competition frame. A better framing would be to measure demand through the lens of the costs to American democracy as a whole of particular distinctions. Thus, in *Rodriguez* instead of considering the benefits of local control to the “choice-makers” within the inter-jurisdictional competition, it would consider the costs to the choice-takers and how those costs are ultimately absorbed by society as a whole in ways that negatively impact American democracy.

For example, the record in *Rodriguez* demonstrated that the locally controlled system of finances led to substantial disparities in access to the educational inputs needed to create high quality schools.²³⁴ The Court might thus frame the analysis from the vantage point of the costs of depriving the students in the property poor districts of resources needed to create high quality schools. Being locked out of high-quality schools increases the likelihood that a citizen will have lower literacy levels, drop out of high school, and even commit crime.²³⁵ All of these possibilities negatively impact American democracy and exact costs on society as a whole.

If the Tieboutian frame is rejected, the next step is to reposition high quality schools as a less rivalrous resource. The analysis here acknowledges

²³² See Section II.C., *supra*.

²³³ See Section II.C., *supra*.

²³⁴ *Rodriguez*, 411 U.S. at 85 (Justice Marshall’s dissent highlighted that during the 1968-1969 school year 100% of the teachers in the property-rich Alamo Heights School District had college degrees while only 80.02% of the teachers had college degrees in the property poor Edgewood Independent School District did. Similarly, 47% of the teachers in the Edgewood District were on emergency teaching permits, whereas only 11% of the teachers in Alamo Heights were on such permits.).

²³⁵ See e.g., Maynard BR, Salas-Wright CP, Vaughn MG, High school dropouts in emerging adulthood: substance use, mental health problems, and crime, *Journal of Community Ment Health* vol. 3 (April 2015);

that the issue of rivalry may still exist in a relational since. Some form of constraints may exist such as physical capacity of a building or a limited number of teachers may make high quality schools subject to some forms of rivalry. However, funding inequities make high quality schools more rivalrous than optimally necessary. Substantive outcome-based inequities often result from locally based funding disparities between schools.²³⁶ Funding is particularly relevant in creating horizontal differentiation because it impacts the ability to obtain critical educational inputs, such as teachers, curricula, and facilities, necessary to create high quality schools. Similarly, student assignment policies also create horizontal differentiation that makes high quality schools both rivalrous and scarce.²³⁷ Locally based student assignment policies create schools that are segregated by race and class. Such schools deprive students of valuable educational inputs such as peer-peer learning necessary to create high quality schools.²³⁸ Consequently, the ideology and doctrine that embraces localism make high quality schools rivalrous. Shifting away from localism and instead supported broad based geographic funding and student assignment plans would go a long way in lessening the rivalrousness of high-quality schools.²³⁹

Next, Equal Protection doctrine and ideology must recognize that the value of high-quality schools comes from production not consumption. This would therefore look like championing open access policies and rejecting policies that situate attendance at high quality schools as private property. For example, this might entail eliminating bona fide residence laws that contain criminal penalties,²⁴⁰ redistricting school district boundary lines so that no settled property expectations develop around them,²⁴¹ or eliminating boundaries altogether.

The infrastructure framework with its' focus on the demand side value of public education to the collective is a better lens through which to analyze claims that unequal school conditions violate the Fourteenth Amendment. It would work as follows:

²³⁶ See Section II supra.

²³⁷ Wilson, *Monopolizing Whiteness*, supra note ____

²³⁸ Derek W. Black, *Middle-Income Peers As Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. Rev. 373, 409 (2012) (Middle-income students themselves are thus an educational resource...[t]he quality of a student's educational experience can be as dependent on his peers as it is on his teachers, the quality of his school building, or the substance of his curriculum.);

²³⁹ Adopting regionalism instead of localism is an example of a broad based geographic structuring mechanism that could reduce the rivalrousness of high quality schools. See e.g., Erika K. Wilson, *Toward A Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. Rev. 1416 (2014).

²⁴⁰ See Section II.C., supra.

²⁴¹ See Aaron J. Saiger, *The School District Boundary Problem*, 42 Urb. Law. 495, 495–96 (2010) (School district boundaries redistricting should seek to dissolve within-district accretions of wealth and poverty.)

First, unequal school conditions are often contoured by race and class. Race and class-contoured denial of access to high-quality schools limits the constellation of skills – both tangible and social- that citizens need to have “universal and equal citizenship,” and political equality. Yet equal protection doctrine doesn’t allow for a correction. Class is not a suspect category triggering heightened review. Race is immunized from constitutional scrutiny because the racial disparities are often the result of racial path dependence rather than subjective intent to discriminate. Localist school finance and assignment policies are accepted as a legitimate state interest that justifies perpetuating the disparities. The infrastructure framework buttresses arguments to negate localism as a legitimate state interest if the harm of localist policies is situated as a harm to American democracy collectively. It thus provides a normative basis upon which to argue against localist policies being a legitimate state interest. It is a framework that should be advanced to unearth the harms of localism in a rational basis review rather than accepting it as a legitimate state interest.

Second, the infrastructure framework also offers a bridge to a heightened review for localist policies under the Fourteenth Amendment. Recent Supreme Court precedent opens the door for a convergence of substantive due process and Equal Protection analysis under the Fourteenth Amendment. In *Obergefell v. Hodges*, the Court noted:

The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.²⁴²

The infrastructure framework with its focus on demand side value helps us to conceptualize under the substantive due process clause the possibility of an implicit liberty right in access to high-quality schools. It does so by drawing attention to the historic value of access to high-quality schools to the nation and to the individual. It also does so by demonstrating how the denial of access lessens opportunities for citizens to obtain the tangible and social skills needed to obtain universal and equal citizenship.

Put another way, because the value of access to high quality schools is so deeply intertwined with the ability to effectively participate in American democracy, anything that impinges on that should be subject to heightened constitutional review. When the denial of access occurs along the lines of race (and class), it infringes upon both a liberty interest and an ability to

²⁴² 576 U.S. 644 (2015).

obtain equal protection under the law. Courts have recognized as much.²⁴³ Such an analysis is particularly appropriate since the Fourteenth Amendment itself was arguably a repudiation of slavery in both the physical form and the subverting of human dignity.²⁴⁴ The infrastructure framework's focus on demand-side value offers a promising path for engaging in responsive constitutionalism when interpreting the Fourteenth Amendment.

Finally, given the very real limitations of rights-based approaches to education, the infrastructure framework might be used as an organizing tool to push for legislation at the state and federal level that guarantees access to high-quality schools.

IV. CONCLUSION

High-quality public schools are vital infrastructure for American democracy. Yet universal access to public schools is posited through the rights-based lens of Equal Protection doctrine and ideology. This article therefore makes the normative case to position universal access to public schools through the lens of infrastructure instead, in order to maximize citizen access to high-quality schools and strengthen the American democracy.

²⁴³ See e.g., *Gary B. v. Whitmer*, 957 F.3d 616, 655–56 (6th Cir.), *reh'g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir. 2020) (students and families of students without access to literacy—is especially vulnerable and faces a built-in disadvantage at seeking political recourse... [a] lack of literacy what prevents them from obtaining a basic minimal education through the normal political process. This double bind provides increased justification for heightened judicial scrutiny and the recognition of the right as fundamental).

²⁴⁴ See Peggy Cooper Davis, *Responsive Constitutionalism and the Idea of Dignity*, 11 U. Pa. J. Const. L. 1374 (2009) (“Because the reconstructed United States Constitution is responsive to slavery, it might be interpreted to encompass an anti-slavery understanding of human dignity and the respect that human beings require in light of their basic dignity.”).