SEPARATE BUT FREE

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Abstract

"Separate but equal" legally sanctioned segregation in public schools until *Brown*. Ever since, separate but free has been the prevailing dogma excusing segregation. From "freedom of choice" plans that facilitated massive resistance to desegregation to current school choice plans exacerbating racial, socioeconomic, and disability segregation, proponents have venerated parental freedom as the overriding principle.

This Article contends that, in the field of public education, the dogma of separate but free has no place; separate is inherently *unfree*. As this Article uniquely clarifies, segregation deprives schoolchildren of *freedom to become* equal citizens and *freedom to learn* in democratic, integrated, and transformative settings. We must name and reclaim these positive, social, emancipatory freedoms—envisioned by the framers of state constitution education clauses, developed by early progressives, reflected in the case law, and applied in "freedom schools" and by Southern Black teachers during the Civil Rights Era.

School choice practices that sustain and intensify segregation arbitrarily deprive children of these freedoms and thus offend due process guarantees in state constitutions. Antebellum state courts were the progenitors of substantive due process, prohibiting arbitrary deprivations of vested rights and voiding class legislation that conferred special benefits or imposed unique burdens, which did not serve legitimate, public purposes. This Article is the first to propose revitalizing state due process guarantees to resist segregative school choice practices in as-applied challenges.

Amid a pandemic, legislators are advancing bills which exploit the specious rhetoric of public-school failures and angst about the modes of instruction to expand schools of choice. But parental freedom through publicly funded school choice enjoys no constitutional protection. Nor is there a legitimate public purpose for segregative practices that arbitrarily deprive children of their freedoms, confer benefits on a few and burden the rest, and subvert the state constitutional duty to educate all children democratically.

Opposition to separate but free extends beyond school choice, potentially reaching other segregative state actions that curtail educational freedoms.

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INTRODUCTION

When eleven Black teens were denied admission to a "spare-no-expense," all-White DC middle school in 1950, they took their case all the way to the Supreme Court.[1] But they had a problem: They were residents of DC, a federal district and not a state, so the Fourteenth Amendment's equal protection guarantee did not protect them.[2] Unable to challenge "separate but equal" as inherently unequal, the teens relied on the Fifth Amendment's due process guarantee,[3] contending that segregation deprived them of the freedom of an integrated education.[4]

"The basic question here is one of liberty," their attorney concluded in oral argument, "and under liberty, under the due process clause, you

1. ALISON STEWART, FIRST CLASS: THE LEGACY OF DUNBAR, AMERICA'S FIRST BLACK PUBLIC HIGH SCHOOL 162 (2013).

2. U.S. CONST. amend. XIV, § 1 ("No *State* shall . . . deny any person *within its jurisdiction* the equal protection of the laws." (emphasis added)).

3. U.S. CONST. amend. V ("No *person* shall . . . be deprived of life, liberty, or property, without due process of law." (emphasis added)).

4. STEWART, *supra* note 1, at 165.

cannot deal with it as a quantum of treatment, substantially equal. You either have liberty or you do not."[5] The Supreme Court agreed. In *Bolling v. Sharpe*[6]—decided the same day as *Brown v. Board of Education*[7]—the Court held that racial segregation in the DC public schools arbitrarily deprived the Black teens "of their liberty in violation of the Due Process Clause."[8]

Fast forward to the present: not a single White student attends that same DC middle school, whose students all identify as racial minorities.[9] The school's demographics reflect the nadir of a post-*Bolling*, distinctively American education story which has had a consistent, overarching theme: separate but free. Exercising their parental freedom, Whites fled to the DC suburbs or remained ensconced in affluent DC neighborhoods. Many Black parents, feeling trapped in poor neighborhoods and seeking an escape route for their kids, freely chose to enroll them in charter schools.[10]

Almost half of DC students now attend charter schools that are "more racially isolated" than the public schools; nearly a quarter of the charters are "hypersegregated, enrolling 99–100% of non-white students."[11] Many of these charter schools were established for the purpose of "serving minority students," are located in "highly segregated neighborhoods, to recruit and appeal to minority populations, and often do not provide transportation for students living in other parts of the district."[12] Most White families in DC suburbs and affluent DC neighborhoods meanwhile continue to enjoy the luxury of not having to make a choice, "remaining in their neighborhood[] schools and not entering the charter sector."[13]

Similar residential and school segregative patterns persist in other urban areas, though in still other parts of the country the pattern takes a decidedly different turn: "white charter school enclaves are forming."[14] Neither segregation is exclusive to charter schools. Vouchers—in all their forms—have enabled parents, through their private school selections, to

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5. *Id.* at 167.

6. 347 U.S. 497, 500 (1954).

7. 347 U.S. 483 (1954).

8. *Bolling*, 347 U.S. at 500.

9. *See* Clare Berke, *Honoring #BollingAt65*, LEARN TOGETHER LIVE TOGETHER (May 17, 2019), https://learnlivetogether.org/2019/05/17/honoring-bollingat65/ [https://perma.cc/4HDB-MHT5].

10. *See* Sam Brill, *The Law of School Catchment Areas*, 30 STAN. L. & POL'Y REV. 349, 371 (2019).

11. *Id.* at 392–93.

12. *Id.* at 393 (footnotes omitted).

13. *Id.* at 394.

14. Erika K. Wilson, *The New White Flight*, 14 DUKE J. CONST. L. & PUB. POL'Y 233, 238 (2019).

create and maintain "homogenous enclaves."[15] And it is not just segregation by race or ethnicity; school choice has also sustained or exacerbated segregation by class, language, and disability.[16] It has compounded[17] the already-crushing reality that, on balance, schools are as segregated now as they were in the 1960s, in some instances *more* segregated.[18]

Myriad political, economic, and social dynamics provoked this resegregation, but the law shares the blame. Federal constitutional law, in particular, "substantially contributed to the resegregation."[19] Supreme Court precedent has effectively encouraged courts to end, rather than achieve, desegregation.[20] It has eroded *Brown*'s holding to forbid only intentional, state-imposed, racial segregation and limited the remedial measures that courts can mandate to achieve desegregation.[21] Adding insult to injury, the Court also severely curbed *voluntary* desegregation, viewing such plans that considered race to achieve integration somehow discriminatory.[22] While the Court deems those voluntary choices suspect, it has revered the parental choices that have widened school funding disparities rendering schools "separate and *un*equal"—a cruel irony upending *Brown*.[23]

But what about *Bolling*? Chief Justice Earl Warren came close in *Bolling* to recognizing education as "a fundamental liberty guaranteed under the Due Process Clause," omitting that language only to preserve a

15. Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1359, 1390–91 (2018).

16. *See id.* at 1402; *infra* notes 300–89.

17. *See* Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1117 (2014).

18. *See* Erica Frankenberg et al., *Our Common Future: America's Segregated Schools 65 Years After Brown*, UCLA CIV. RTS. PROJECT 7, 8 (May 10, 2019), https://escholarship.org/uc/item/23j1b9nv [https://perma.cc/WT47-VB7U].

19. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1600 (2003).

20. *Id.* at 1601.

21. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 200, 208 (1973) (holding that de facto segregation did not offend the Constitution and emphasizing that de jure segregation required a "purpose or intent to segregate" (emphasis omitted)); Milliken v. Bradley, 418 U.S. 717, 744–45 (1974) (holding that the remedy for de jure segregation could not reach beyond the school district's boundaries unless plaintiff could show schools outside those boundaries collaborated in segregation).

22. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 783–87 (2007) (Kennedy, J., concurring) (explaining the heavy burden that a state would have to carry in devising a plan that considers race and satisfies strict scrutiny).

23. Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1461 (2003) (emphasis added).

unanimous decision.[24] And yet that decision now carries relatively little weight. *Bolling* has been cast aside, unfairly derided as a politically contrived decision such that few scholars, and fewer courts, give it any serious attention.[25] The exceptions have focused exclusively on *Bolling*'s potential application of federal substantive due process,[26] where the prospects for its actual application appear dim.[27]

Until now, no scholar has applied *Bolling*'s liberty-based rationale to state constitutional law. What follows is not an armchair thought experiment, however. It is a case for invoking substantive due process where it originated—in state courts—to oppose the prevailing dogma of separate but free. Borrowing lines from *Brown*, that dogma has no place in the field of public education: separate is inherently *unfree*.

This Article is the first to propose an affirmative legal theory of education as freedom to make that very case. School choice, it turns out, has not cornered the market on educational freedom. Indeed, the freedom of separate but free peddled to parents is a bill of goods, supposedly trading badges of inferiority wrought by segregation for badges of superiority through school choice. But the freedom of school choice functions as a negative right ("freedom from" something); is frequently illusory; not exercised directly by children; and sustains or intensifies segregation. The freedom proposed here functions as a positive right ("freedom to be" someone); is socially cultivated; emancipates the youth, who can exercise it throughout their lives; and demands integration.

This positive freedom was integral to the vision held by the framers of education clauses in state constitutions—a vision that was developed by early twentieth century progressives, percolated at various times in court decisions, and put to practice during the Civil Rights Era by Black teachers and children in "freedom schools" and "free schools."[28]

Education as freedom, surveyed in Part I, takes two forms: First, schoolchildren's *freedom to become* full and equal citizens, which has been an object of state education rights since their inception and enforced

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24. Jack M. Balkin, Brown v. Board of Education—*A Critical Introduction*, *in* WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 58 (Jack Balkin ed., 2001).

25. *See* David E. Bernstein, Bolling, *Equal Protection, Due Process, and* Lochner*phobia*, 93 GEO. L.J. 1253, 1253 (2005).

26. *See* Martha Minow, *"A Proper Objective": Constitutional Commitment and Educational Opportunity After* Bolling v. Sharpe *and* Parents Involved in Community Schools, 55 HOW. L.J. 575, 594–98 (2012) ("Using a due process framework could allow courts and advocates to focus productively on the liberty of each student to pursue equal educational opportunities with access to diverse student bodies."). *See generally* Bernstein, *supra* note 25 (discussing scholars' focus on the Court's use of the Due Process Clause in *Bolling*).

27. *See infra* Section II.A.

28. *See infra* Sections I.A–B.

as such primarily in school funding litigation.[29] Courts have not named it "freedom," preferring "adequacy" instead, but it underwrites their reasoning in any case. Second, schoolchildren's *freedom to learn* in democratic, integrated, and transformative settings likewise infuses the text, history, and precedent of state education rights.[30] States should, at last, reclaim this freedom that is so critical to their constitutional duty to educate democratically.

State courts can protect these educational freedoms through the substantive due process guarantees, evaluated in Part II. Federal courts cannot be counted on, as evidenced by their recent rejections of attempts to ground a federal right to education in substantive due process—a doctrine that undercuts democracy, according to an increasingly dominant federal-bench ideology.[31] Conversely, state judges have long effectuated *state* substantive due process in ways that safeguard democracy. Indeed, a century before the beginnings of the federal doctrine, state courts had already made substantive due process part of their canon.

Antebellum state courts enforced two such guarantees against (i) arbitrary deprivations of vested rights and (ii) class legislation that bestows special benefits or imposes unique burdens contrary to general law principles.[32] To be sure, these guarantees are now rarely enforced because state courts hastily followed the federal courts' lead. But they remain good law. And state due process guarantees need not require proof of discriminatory intent or limit exacting scrutiny to certain suspect classes—i.e., they need not comport with the strictures of the federal doctrine. State courts can thus retake the lead, revitalizing substantive due process guarantees to protect educational freedoms.

Scrutinizing segregative school choice practices, as shown in Part III, presents a straightforward application of due process to those freedoms. Prior facial challenges to school choice have failed because they have "claimed too much, seeking to absolutely block charters and vouchers."[33] Litigants have had more success with as applied challenges, targeting specific practices and disparities. Still, courts are likely to remain highly deferential to choice programs in the face of conflicting evidence *unless* their means cannot reasonably relate to, or achieve, legitimate ends.[34] That is, unless the state action is arbitrary and deprives schoolchildren of

29. *See infra* Section I.A.
30. *See infra* Section I.B.
31. *See infra* Part II.
32. *See infra* Section II.B.
33. Black, *supra* note 15, at 1403.
34. *See infra* note 316.

a vested liberty interest. Such is the case with segregative choice practices that are incompatible with educational freedom.[35]

Alternatively, segregative choice practices are the product of class legislation lacking sufficient antidiscrimination protections. As such, these laws permit choice practices to single out schoolchildren by race, class, and disability for benefits and burdens. Although all laws to some degree single out subjects for regulation, segregative choice practices do so impermissibly when judged from a baseline of educational freedom. Choice practices that deviate from the baseline, exceeding or maintaining the degree of segregation in comparator public schools, arbitrarily deprive children in public schools and schools of choice of the freedom to become equal citizens and to learn in democratic, integrated, and transformative settings. In that case, the remedy for segregative school choice practices is integrative school choice practices.[36]

This Article is timely. The COVID-19 pandemic has exposed and exacerbated educational deprivations and disparities that will have lasting, far-reaching ramifications. There are those who would exploit the anxieties and frustrations of this most uncertain time to pin all of society's ills on public schools. It is no coincidence that a wave of legislation expanding school choice programs has passed or is under consideration.[37] It is no hyperbole to say this could mark the beginning of the end of public education as we know it. But it is not too late to reclaim and recommit ourselves to the foundational principles of public schooling, equality, and *freedom*.

I. RECLAIMING EDUCATION AS FREEDOM

"*Freedom is like love—you share it without loss, and you realize its fullness only when you share it equally with someone else*."[38]

For as long as we have yearned for freedom, we have disagreed about what it means to be free. In philosophy, religion, law, and even science, freedom remains an "essentially contested concept."[39] No less so in

35. *See infra* Section III.A.

36. *See infra* Section III.B.

37. *See* Valerie Strauss, *The Movement to Privatize Public Schools Marches on During Coronavirus Pandemic*, WASH. POST (May 20, 2021), https://www.washingtonpost.com/education/2021/05/20/school-privatization-movement-marches-on-during-pandemic/ [https://perma.cc/5NFD-ZHWT].

38. Guy B. Johnson, *Freedom, Equality, and Segregation*, 20 REV. POL. 147, 147 (1958) (emphasis omitted).

39. W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 169 (1956) ("[T]here are concepts which are essentially contested, concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users."); ERIC FONER, THE STORY OF AMERICAN FREEDOM, at xiv (1999) (characterizing freedom as an

education.[40] There, as elsewhere, the recurring controversy is whether freedom should be understood negatively, as just the "*absence* of something (i.e., of obstacles, barriers, constraints, or interference from others)," or also positively, as "the *presence* of something (i.e., of control, self-mastery, self-determination, or self-realization)."[41]

Arguments on either side fill volumes of collected works, but they need not occupy much space here. As construed by the highest state courts, education clauses in state constitutions settle the debate for our purposes by firmly endorsing positive freedom.

Education clauses have long been recognized as repositories of affirmative or positive rights to education.[42] Rights are said to be positive

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essentially contested concept); *see also, e.g.*, Tim O'Keefe, *Ancient Theories of Freedom and Determinism*, STAN. ENCY. PHIL. (2020), https://plato.stanford.edu/archives/win2020/entries/freedom-ancient [https://perma.cc/M4LG-W6UD] (describing disagreements between philosophers about the fundamental nature of freedom); TISA WENGER, RELIGIOUS FREEDOM: THE CONTESTED HISTORY OF AN AMERICAN IDEAL 2 (2017) (describing the idiosyncratic and contradictory ways that the concept of American religious freedom has been perceived and affected perception); MICHAEL ABRAHAM, THE SCIENCE OF FREEDOM (Avi Woolf trans., 2018) (contemplating whether one must choose between science and free will).

40. *See* MAX A. HOPE, RECLAIMING FREEDOM IN EDUCATION: THEORIES AND PRACTICES OF RADICAL FREE SCHOOL EDUCATION 1 (2018) (observing, in the context of education, that "[f]reedom is a complex and contested topic"); EDUCATIONAL FREEDOM AND DEMOCRACY (Harold B. Alberty & Boyd H. Bode, eds., 1938).

41. Ian Carter, *Positive and Negative Liberty*, STAN. ENCYC. PHIL. (Oct. 15, 2019), https://plato.stanford.edu/entries/liberty-positive-negative [https://perma.cc/2R99-ZBCS]. Virtually all agree that freedom should be at least construed negatively. *Id.* Scholars have contested this distinction between positive and negative freedom, among them Gerald MacCallum, who proposed that there is only one concept of liberty that involves a Triadic relation:

> [T]hat is, a relation between *three things*: an agent, certain preventing conditions, and certain doings or becomings of the agent. Any statement about freedom or unfreedom can be translated into a statement of the above form by specifying *what* is free or unfree, *from* what it is free or unfree, and what it is free or unfree *to do or become*.

Id. Although MacCallum's critique has been influential, the positive versus negative "distinction remains an important point of reference for discussions about the meaning and value of political and social freedom." *Id.*

42. *See* McCleary v. State, 269 P.3d 227, 231 (Wash. 2012) (en banc) (reaffirming that state constitution "confers on children . . . a positive constitutional right to an amply funded education"); Lobato v. State, 218 P.3d 358, 370–71, 374 (Colo. 2009) (en banc) ("[S]tate constitutions contain the textual basis for affirmative rights."); Sheff v. O'Neill, 678 A.2d 1267, 1282–83 (Conn. 1996) (recognizing "schoolchildren's fundamental affirmative right [to education]"); *see also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999) (stating that every state constitution "provides the basis for a variety of positive claims against the government," including "the right of children to receive free public schooling"); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893–95 (1989) (listing education as one of the positive rights often included in state constitutions).

when they entitle the rightsholder to the "provision of some good or service" whereas rights are said to be negative when they entitle the rightsholder to "non-interference."[43] Because this positive-versus-negative-rights distinction largely tracks the positive-versus-negative-freedom distinction, the two are often conflated[44] even though they are conceptually different.[45] Perhaps the best way to understand the difference is to appreciate that positive rights are both necessary and sufficient to protect positive freedoms, whereas negative rights are only necessary, not sufficient.[46]

As explained below, state courts construing education clauses have justified positive rights to education as being both necessary and sufficient conditions for certain positive freedoms. The question then is not *whether* education as freedom should be construed positively (as it has been), but *which* positive educational freedoms enjoy constitutional protection?

For sure, the freedom to become full and equal citizens follows most obviously and logically from the text and precedent of education clauses, even if the courts have yet to *name it*. This freedom's evolutionary period is possibly too long for it to be valued as such, but a positive freedom it is, nonetheless. There is another, ever-present freedom with no latency, however, that yet remains dormant and unappreciated due to our collective failure to claim it, or more accurately, *reclaim it*: the freedom to learn in democratic, integrated, and transformative settings.

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43. Leif Wenar, *Rights*, STAN. ENCYC. PHIL. (Feb. 24, 2020), https://plato.stanford.edu/entries/rights/ [https://perma.cc/7DLH-SZZ8]. As with the positive-versus-negative-freedom distinction, *see supra* note 41 and accompanying text, the positive-versus-negative-rights distinction is the subject of considerable debate about whether it has outlived its usefulness. *Id.*

44. *See* J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 508–10 (2004) (describing "positive right" as the "legal corollary" of "positive freedom").

45. *See* Frank I. Michelman, *Anti-Negativity as Form*, 21 LAW & SOC. INQUIRY 83, 84 (1996) ("As political and legal theory currently apply them to conceptions of liberty and to conceptions of rights, the oppositions of negative/positive (liberty), and of negative/affirmative (rights) certainly do mark clear and well-understood differences.").

46. *Cf. id.* at 85 ("As against the state (1) negative basic rights of autonomy, association, and communication, no less than affirmative basic health care and education rights, may be practically prerequisite to the good of positive liberty."); *see also* Richard Dagger, *Freedom and Rights*, *in* POLITICAL THEORY AND THE ECOLOGICAL CHALLENGE 203–05 (Andrew Dobson & Robyn Eckersley eds., 2006); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 336 (2006) ("[T]he social citizenship tradition assigns equal constitutional status to negative rights against government oppression and positive rights to government assistance on the ground that both are essential to liberty."); Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CALIF. L. REV. 1687, 1694 (1986) ("[A]n individual's positive freedom to pursue a goal, may depend on her having a positive right to a particular good, the possession of which is a prerequisite for the very possibility of obtaining that goal.").

A. *The Freedom to Become*

Two of the three freedoms that the Supreme Court has recognized vis-à-vis public education are inimical to public schooling, and all three are negative. The first to be recognized is not one that children can even exercise; rather, parents retain the privilege to remove their children from public school and enroll them in private school or homeschool them.[47] More generally, parents also enjoy "the privilege 'to control the education of their own,' including directing the religious education of their children."[48] This is a negative freedom from state interference that does not much advance (and arguably detracts from) the public mission of public education.

The second negative freedom consists of a set of First Amendment privileges and immunities held by schoolchildren, recognized in cases like *West Virginia State Board of Education v. Barnette*[49] and *Tinker v. Des Moines Independent Community School Board*.[50] "*Barnette* concerns which varieties of speech schools may not compel, and *Tinker* concerns which varieties of speech schools must permit."[51] There is a similar dynamic for religious freedom, which prohibits its establishment[52] but otherwise guarantees its free exercise in school settings.[53]

The third negative freedom, more inimical to public education than the first, was pronounced by a 5–4 Court in *San Antonio Independent School District v. Rodriguez*,[54] which refused to recognize a federal right to education under the Equal Protection Clause.[55] The majority rejected any asserted right to equal or more equitable education funding in poor districts partly to maintain "local control" of education such that wealthy districts could enjoy "the *freedom* to devote more money to the education of one's children."[56]

State courts construing education clauses have converted the Supreme Court's expressions of negative freedom into enforceable positive freedoms. That conversion came by way of a rebuke to *Rodriguez*.

In recognition of *state* constitutional rights to education, several state courts first expected equal school funding, and instead came to embrace

47. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

48. Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 930 (2016) (footnote omitted) (quoting Meyer v. Nebraska, 262 U.S. 390, 401 (1923)).

49. 319 U.S. 624, 642 (1943).

50. 393 U.S. 503, 506 (1969).

51. Aaron Saiger, *Deconstitutionalizing Dewey*, 13 FIU L. REV. 765, 782 (2019).

52. *See* Engel v. Vitale, 370 U.S. 421, 430 (1962).

53. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222–23 (1963).

54. 411 U.S. 1 (1973).

55. *See id.* at 35.

56. *Id.* at 49 (emphasis added).

the fairness of equitable funding.[57] Eventually, a majority of state courts also insisted on adequate funding—that is, enough to provide all children access to educational standards and outcomes mandated by their state constitutions.[58] Education clauses in particular—employing adjectives such as "suitable," "uniform," "thorough," or "efficient," or some combination thereof—denote a certain quality of education as necessary to be constitutionally adequate.[59] Effectuating these clauses gave birth to the positive freedom to become: "when tasked to justify adequacy as the qualitative standard that the state has to meet to discharge its duty, courts repeatedly [endorsed] the notion that education fortifies children's positive liberties."[60]

This notion is unmistakable in certain state constitutions which explicitly acknowledge education as "essential to the preservation of the rights and liberties of the people."[61] It is an inescapable inference in other explicit provisions, recognizing the essentiality of education to a "free," "good," or "republican form," of government "by the people."[62] The inference is also unavoidable from the history, structure, and implication of education clauses, even absent such explicit terms. In that vein, the New Jersey Supreme Court put it succinctly: "[The education clause's] purpose was to impose on the legislature a duty of providing for a thorough and efficient system of free schools, capable of affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship."[63]

That education is indispensable to preparing, enabling, or cultivating children to become "capable," "equipped," have the "capacity," to "participate" or "function" as citizens and productive members of society appears in virtually all significant state high court decisions interpreting

57. *See* Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 225–40 (2017).

58. *Id.*

59. *See* Regina R. Umpstead, *Determining Adequacy: How Courts Are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007 BYU EDUC. & L.J. 281, 291 (noting considerable variation in the language of education clauses but observing that "courts have held that whenever a state is required to establish and maintain a public education system, regardless of the particular language used to describe it, it must meet basic quality standards").

60. Weishart, *supra* note 58, at 235.

61. CAL. CONST. art. IX, § 1; ME. CONST. art. VIII, pt. 1, § 1; MO. CONST. art. IX, § 1(a); TEX. CONST. art. VII, § 1; *see* MASS. CONST. pt. 2, ch. V, § II; R.I. CONST. art. XII, § 1.

62. *See* ARK. CONST. art. XIV, § 1; IDAHO CONST. art. IX, § 1; IND. CONST. art. VIII, § 1; MICH. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; N.H. CONST. pt. 2, art. LXXXIII; N.C. CONST. art. IX, § 1; N.D. CONST. art. VIII, § 1; S.D. CONST. art. VIII, § 1; VA. CONST. art. 1, § 15.

63. Robinson v. Cahill, 355 A.2d 129, 173 (N.J. 1976) (citing Landis v. Ashworth, 31 A. 1017, 1018 (N.J. 1895)).

state education clauses, often coextensive with state equality guarantees.[64]

64. *See, e.g.*, Davis v. State, 804 N.W.2d 618, 627 (S.D. 2011) ("The constitutional language and intent of the framers guarantee the children of South Dakota a constitutional right to an education that provides them with the opportunity to prepare for their future roles as citizens, participants in the political system, and competitors both economically and intellectually." (emphasis omitted)); Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 253 (Conn. 2010) ("[W]e conclude that article eighth, § 1, entitles Connecticut public school students to an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions . . . ."); Vincent v. Voight, 614 N.W.2d 388, 415 (Wis. 2000) ("An equal opportunity for a sound basic education is one that will equip students for their roles as citizens and enable them to succeed economically and personally."); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1358–59 (N.H. 1997) ("[E]ven a minimalist view of educational adequacy recognizes the role of education in preparing citizens to participate in the exercise of voting and first amendment rights."); DeRolph v. State, 677 N.E.2d 733, 736 (Ohio 1997) ("[W]hen our forefathers convened to write our state Constitution, they carried within them a deep-seated belief that liberty and individual opportunity could be preserved only by educating Ohio's citizens."); Brigham v. State, 692 A.2d 384, 393 (Vt. 1997) ("[The Education Clause] expressed and incorporated 'that part of republican theory which holds education essential to self-government and which recognizes government as the source of the perpetuation of the attributes of citizenship.'" (quoting Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 97–98 (1989))); Campbell Cnty. Sch. Dist. v. State, 907 P.2d 1238, 1259 (Wyo. 1995) ("[W]e can conclude the framers intended the education article as a mandate to the state legislature to provide an education system of a character which provides Wyoming students with a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually."); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995) ("[E]ducation should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 812 (Ariz. 1994) (noting drafters of education clause believed "a free society could not exist without educated participants"); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1195 (Kan. 1994) ("Education is the greatest vehicle available to the state to prepare our children to be the neighbors, parents, leaders, workers, taxpayers, citizens, voters, and patriots of tomorrow."); McDuffy v. Sec'y of Exec. Off. of Educ., 615 N.E.2d 516, 548 (Mass. 1993) (recognizing education is "fundamentally" designed "to prepare [children] to participate as free citizens of a free State to meet the needs and interests of a republican government"); Skeen v. State, 505 N.W.2d 299, 310 (Minn. 1993) (noting "object" of education provisions was to ensure all children "may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic" (quoting Bd. of Educ. v. Moore, 17 Minn. 412, 416 (1871))); Abbott v. Burke, 575 A.2d 359, 403 (N.J. 1990) ("A thorough and efficient education requires such level of education as will enable all students to function as citizens and workers in the same society . . . ."); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) (listing the seven end products of an "efficient" system of education, including a "sufficient knowledge of economic, social, and political systems to enable the student to make informed choices"); DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983) ("Education becomes the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights."); Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982) ("We recognize unequivocally that public education plays a vital role in our free society. It can

The precise language varies but the idea is the same: Education empowers children with positive freedoms. It does not merely create opportunities to become full and equal citizens, it equips children with the capabilities to function as such. That is the hallmark of a positive sense of freedom, the presence of something—in this case, capabilities—that enables or enhances self-determination and self-realization.[65]

Several state courts have taken it upon themselves to articulate the capabilities or capacities that a constitutionally adequate education should cultivate.[66] Granted, they have not described those capacities or capabilities as freedoms. "In truth, courts did not need to risk invoking 'any fancy philosophical or newfangled positive liberty,'"[67] which might thrust them "beyond the reassuringly familiar terrain of negative rights," because it was already politically expedient to favor adequacy as "synonymous . . . with educational quality."[68]

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be a major factor in an individual's chances for economic and social success as well as a unique influence on a child's development as a good citizen and on his future participation in political and community life." (citing cases)); McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981) ("[I]t is clear that even a 'minimum' education 'must provide each child with an opportunity to acquire the basic minimum skills necessary for the enjoyment of the rights of speech and of full participation in the political process.'" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973))); State v. Shaver, 294 N.W.2d 883, 897 (N.D. 1980) ("The State of North Dakota has a recognized and conceded interest in assuring the sufficient education of the children of the residents of the state to enable them to be viable citizens in the community." (emphasis omitted)); Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979) (defining a "thorough and efficient" education as one which "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically"); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978) ("[T]he State's constitutional duty . . . embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the market place of ideas."); Serrano v. Priest, 487 P.2d 1241, 1256 (Cal. 1971) ("[E]ducation is a unique influence on a child's development as a citizen and his participation in political and community life."); McNair v. Sch. Dist. No. 1, 288 P. 188, 190 (Mont. 1930) ("[I]t is clear that the solemn mandate of the Constitution is not discharged by the mere training of the mind; mentality without physical well-being does not make for good citizenship–the good citizen, the man or woman who is of the greatest value to the state, is the one whose every faculty is developed and alert.").

65. *See supra* text accompanying note 41.

66. Among the most frequently cited are the seven capacities articulated by the Kentucky Supreme Court in *Rose v. Council for Better Education Inc*., 790 S.W.2d 186, 212 (Ky. 1989), which other state courts have adopted. *See* Gannon v. State, 319 P.3d 1196, 1236 (Kan. 2014) (per curiam); *McDuffy*, 615 N.E.2d at 554; Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997). Still other state courts have articulated their own list of capabilities. *See, e.g*., Abbeville Cnty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999); Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979).

67. Weishart, *supra* note 58, at 235 (quoting Jeremy Waldron, *Community and Property—For Those Who Have Neither*, 10 THEORETICAL INQUIRIES L. 161, 180 (2009)).

68. *Id.* at 234–35.

It cannot be credibly disputed, however, that children's positive freedoms underwrite those qualitative standards. Why else would we be concerned about educational quality? Instrumentally valued, a child's education is for naught if it does not enhance her positive freedoms. Intrinsically valued, a freedom-enhancing education is surely to be preferred over a freedom-neutralizing one.

But there is another explanation for why courts failed to perceive, or properly name, what was the logical end of their reasoning: The freedom to become is an evolving freedom with at least an eighteen-year evolutionary period.[69] It is easy to overlook or disregard what cannot be exercised at once. States have, after all, justified their *parens patriae* authority over children in numerous policies, including compulsory school attendance laws, based on the view that children are not fully autonomous agents.[70]

But a burgeoning freedom warrants no less constitutional protection—if it is to become a fully fledged one. That is the import of the negative freedom first recognized in *Barnette*, prohibiting schools from compelling certain speech because "they are educating the young for citizenship."[71] For that reason, the Court said children's "Constitutional freedoms," though evolving, deserved "scrupulous protection" lest compelled speech "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[72]

In Justice Robert H. Jackson's characteristic eloquence, the Court then alluded to the expectation that this negative freedom would be tested in a more economically and socially integrated society:

> These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints . . . . We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls.[73]

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69. *See* Madoka Saito, *Amartya Sen's Capability Approach to Education: A Critical Exploration*, 37 J. PHIL. EDUC. 17, 25 (2003).

70. *See* Weishart, *supra* note 48, at 928 (citing Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2106–12 (2011)).

71. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

72. *Id.*

73. *Id.* at 639–40; *see* Nomi Maya Stolzenberg, *A Book of Laughter and Forgetting: Kalman's "Strange Career" and the Marketing of Civic Republicanism*, 111 HARV. L. REV. 1025, 1069 (1998) (reviewing LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996)) (characterizing Justice Jackson's eloquence as "rejecting the classical liberal vision of limited

Rather than withering away, however, this negative freedom has coevolved alongside a blossoming positive freedom. That freedom has been nourished in the rich soil of state education clauses where one finds a constitutional duty to educate democratically—to democratize schoolchildren to meet the demands of citizenship.[74]

The Supreme Court laid part of the groundwork for that duty in *Brown*, recognizing "the importance of education to our democratic society [as] the very foundation of good citizenship."[75] The Court later reiterated that "education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[76] Time and again, the Court has emphasized this obligation—that "public education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves . . . as indispensable to the practice of self-government in the community and the nation."[77]

State courts are in accord: "[A]ll of the highest state courts to have considered the matter—'100 percent of the courts'—have recognized that the 'primary purpose or a primary purpose' of public education is to democratize schoolchildren, to prepare them for 'capable citizenship.'"[78] These courts have likewise recognized that this primary purpose of public education can only be effectuated by imposing a duty on the state to educate democratically.[79]

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government and an unregulated market, and in embracing a more complex vision, in which individual rights paradoxically depend upon strong government and social integration" (emphasis omitted)).

74. *See* Joshua E. Weishart, *Democratizing Education Rights*, 29 WM. & MARY BILL RTS. J. 1, 42–43 (2020) (explaining that duty to educate democratically animates from text, history, and precedents of state constitution education clauses).

75. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

76. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

77. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (alteration in original) (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (William Beard ed., 1968)); *see also* Plyler v. Doe, 457 U.S. 202, 221 (1982) ("We have 'recognized the public schools as a most vital civic institution for the preservation of a democratic system of government.'" (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring))).

78. Weishart, *supra* note 74, at 50 (quoting MICHAEL A. REBELL, FLUNKING DEMOCRACY: SCHOOLS, COURTS, AND CIVIC PARTICIPATION 57 (2018)).

79. *See, e.g.*, Campbell Cnty. Sch. Dist. v. State, 907 P.2d 1238, 1259 (Wyo. 1995) ("[W]e can conclude the framers intended the education article as a mandate to the state legislature to provide an education system of a character which provides Wyoming students with a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually."); Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1380 (N.H. 1993) ("[T]he framers and general populace [understood] the language contained in [the education clause] to impose a duty on the State to support the public schools and ensure an educated citizenry . . . ."); McDuffy v. Sec'y of Exec. Off. of Educ., 615

That duty cannot be discharged by noninterference; it requires government's direct intervention. The government is thereby licensed, not to indoctrinate, but to liberate schoolchildren by developing their positive freedoms.[80]

At bottom, education-clause precedent contrasts *Rodriguez*'s negative "freedom to devote more money to the education of *one's* children" with a state duty to devote more money to the education of *all* children, to enhance their positive freedoms.[81] Likewise, *Barnette*'s negative freedom from school interference can be juxtaposed with the education clause precedent of a positive freedom for school intervention, both respecting democratic education. Those contrasts provide a sharper focus of a state-endorsed positive freedom to become full, effective, and equal citizens.

B. *The Freedom to Learn*

Four score and six years before *Brown*, the Iowa Supreme Court became the first high court in the nation to outlaw school segregation.[82] Grammar School No. 2 in Muscatine, Iowa denied admission to Susan Clark, a twelve-year-old Black girl, on the grounds that "public sentiment [was] opposed to the intermingling of white and colored children in the same schools, and the best interests of both races require them to be educated in separate schools."[83] The court squarely rejected those grounds as unlawful.[84] Hailed as an early and courageous victory for racial equality,[85] the decision was also a prelude to a democratic, integrated, transformative freedom to learn.

1. Democratic

The "principle of equal rights to all" was the stated basis for the *Clark* decision.[86] But the Iowa constitution's equality provision was just one of

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N.E.2d 516, 524 (Mass. 1993) ("The immediate purpose of the establishment of the duty . . . [and its] ultimate end is the preservation of rights and liberties.").

80. *Cf.* THE JEFFERSONIAN CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON 276 (John P. Foley ed., 1900) ("[O]f all the views of this law [for public education] none is more important, none more legitimate, than that of rendering the people the safe, as they are the ultimate guardians of their own liberty."); Gert Biesta & Carl Anders Säfström, *A Manifesto for Education*, 9 POL'Y FUTURES EDUC. 540, 540 (2011) ("[E]ducational freedom is not about the absence of authority but about authority that carries an orientation towards freedom with it.").

81. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49 (1973) (emphasis added).

82. *See* Clark v. Bd. of Dirs., 24 Iowa 266, 277 (1868).

83. *Id.* at 268.

84. *See id.* at 276.

85. *See* Russell E. Lovell, II, *Shine on, You Bright Radical Star:* Clark v. Board of School Directors *(of Muscatine)-the Iowa Supreme Court's Civil Rights Exceptionalism*, 67 DRAKE L. REV. 175, 177 (2019).

86. *Clark*, 24 Iowa at 269.

two sources for the court's reasoning. The other, an education clause, provided for "the education of *all the youths of the State*, through a system of *common schools*."[87] The court explained that permitting segregation would not only do violence to the principle of equality, it would also sabotage the mission of common schools: "[The] policy of the government to organize into one harmonious *people,* with a common country and stimulated with the common purpose to perpetuate and spread our free institutions for the development, elevation and happiness of *mankind.*"[88]

Segregation thus subverted the "sovereign will" of Iowans who had ratified the common schools mission in the education clause.[89] Significantly, segregation also deprived children of the "right" or "privileges and benefits of our common schools."[90] The notion that children had a right or privilege to common schooling was not new. Common schools architect Horace Mann advocated for this "absolute right . . . to an education"[91] and the corresponding "correlative duty of every government to see that the means of that education are provided for all."[92] Mann, in fact, headed a commission appointed by the Iowa General Assembly just prior to the adoption of two education clauses.[93] The commission "declared that every youth was entitled to an education . . . [through the] provision of common schools."[94]

By the time of the *Clark* decision in 1868, the common schools movement had swept most of the nation, overcoming stiff opposition.[95] The victors, common schools proponents, led the drafting of education clauses in state constitutions.[96] "By 1868, thirty-six out of thirty-seven states, or ninety-seven percent, included constitutional provisions obligating state governments to provide public education to all

87. *Id.* at 271 (emphasis added).

88. *Id.* at 276.

89. *Id.*

90. *Id.*; *see also* Edward Mansfield, *Clark and Citizenship*, 67 DRAKE L. REV. 247, 249 (2019) ("Citizenship means we go to school together.").

91. HORACE MANN, COMMONWEALTH OF MASS. BOARD OF EDUC., TENTH ANNUAL REPORT OF THE BOARD OF EDUCATION, H. No. 1, at 112 (1847) (emphasis omitted).

92. LAWRENCE A. CREMIN, THE AMERICAN COMMON SCHOOL: AN HISTORIC CONCEPTION 77 (1951) (quoting MANN, *supra* note 91, at 112).

93. *See* King v. State, 818 N.W.2d 1, 55–56 (Iowa 2012) (Appel, J., dissenting).

94. *Id.* at 55.

95. *See* LAWRENCE A. CREMIN, THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876–1957, at 13 (1968); MICHAEL A. REBELL, FLUNKING DEMOCRACY: SCHOOLS, COURTS, AND CIVIC PARTICIPATION 52 (2018) ("Next to abolition, the battle to establish common schools constituted the most contentious political issue of the nineteenth century.").

96. *See* REBELL, *supra* note 95, at 55; CREMIN, *supra* note 92, at 138; Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 96–97 (1989).

students."[97] Indeed, following the Civil War, several state constitutions in the newly readmitted states mandated "that public schools be open to all—a direct repudiation of the idea that schools would be segregated."[98]

Universal education was not the sole objective.[99] The common school movement was largely successful because of another objective: the democratization of schoolchildren.[100] The people began to see the public school as a "democratizing institution," "entrusted with a responsibility on which depended the perpetuation and progress of the society."[101] This responsibility for common schools was reiterated in several state constitutional conventions.[102]

"The meaning of the term 'common school' was so clear" during some of these conventions that "its definition hardly merited serious discussion."[103] That is because its "meaning had been etched in the public mind" by common schools proponents who used the term "to refer specifically to a non-sectarian, publicly funded school where children of all classes and backgrounds would be educated *together*."[104]

> It would be common, not as a school for the common people . . . but rather as a school common to all people. It would be open to all and supported by tax funds. It would be for rich and poor alike, the equal of any private institution. And, by receiving children of all creeds, classes and backgrounds, . . . it would kindle a spirit of amity and mutual respect that the conflicts of adult life could never destroy.[105]

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97. Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 124 (2013).

98. Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1092 & nn.242–43 (2019) (footnote omitted).

99. Friedman & Solow, *supra* note 97, at 123–24 (describing goals of common schools movement); Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV. 909, 933–34 (2007) (same).

100. *See* Weishart, *supra* note 74, at 50–52.

101. CREMIN, *supra* note 92, at 48.

102. *See, e.g.*, Molly O'Brien & Amanda Woodrum, *The Constitutional Common School*, 51 CLEV. ST. L. REV. 581, 598–99 (2004); Richard D. Kahlenberg, *Socioeconomic School Integration Through Public School Choice: A Progressive Alternative to Vouchers*, 45 HOW. L.J. 247, 276 (2002). *But see* Saiger, *supra* note 99, at 932–33 ("'Common schooling,' however, named a multifaceted political program and described a set of complex institutions . . . . [Thus,] it is difficult to know which aspects of the common school concept various framers meant to constitutionalize . . . ." (quoting O'Brien & Woodrum, *supra*, at 587)).

103. O'Brien & Woodrum, *supra* note 102, at 587.

104. *Id.* at 587–88 (emphasis added).

105. LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783–1876, at 138 (1980); *see also* JOEL SPRING, THE AMERICAN SCHOOL: FROM THE PURITANS TO NO CHILD LEFT BEHIND 79 (7th ed. 2008) (noting that the impetus behind the common school movement was to provide "children from a variety of religious, social-class, and ethnic

Common schooling thus "signified a school experience common to all children."[106] That shared experience, proponents believed, would "forge a social bond by providing common moral and political understandings to otherwise different individuals and groups."[107] This "common core of values" would, in turn, help form a "political community" built on "mutual understanding."[108] Common schooling would thus "tamp down the effects of the diversity of origins and of families, counteract the potential for tribalism, and create a unifying influence."[109] The common school was, in short, necessary for the common good.[110]

The cruel irony is that some, though not all, common school proponents consciously excluded or failed to consider certain children—for example, African Americans, women, the disabled—in their vision of commonality.[111] And the ugly truth is that the common schools

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backgrounds" with a common education such that "there would be a decline in hostility and friction among social groups"); DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954, at 195, 199–200 (1987) (discussing early protest movements which "shared an integrationist dream of equal access to public schools as one of the mainstream institutions of American civic, economic, and social life").

106. IRA KATZNELSON & MARGARET WEIR, SCHOOLING FOR ALL: CLASS, RACE, AND THE DECLINE OF THE DEMOCRATIC IDEAL 208 (1985); *see* State *ex rel.* Ohio Cong. of Parents & Tchrs. v. State Bd. of Educ., 857 N.E.2d 1148, 1157 (Ohio 2006) ("The common-school movement . . . held the basic ideology that all citizens should have 'a common foundation of literacy, morality, and patriotism, regardless of their origins . . . .'" (quoting OHIO REV. CODE ANN. art. VI, § 2 ed. cmt. (West 2004))).

107. DAVID C. PARIS, IDEOLOGY AND EDUCATIONAL REFORM: THEMES AND THEORIES IN PUBLIC EDUCATION 62 (1995); *see* DAVID TYACK & ELISABETH HANSOT, LEARNING TOGETHER: A HISTORY OF COEDUCATION IN AMERICAN SCHOOLS 89 (1990); Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 458 (1973) ("Mann . . . envisioned the common school . . . as the instrument for creating a new sense of community and a new common value system shared by all Americans in which diversity might flourish.").

108. Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 174 (1996); Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 422 (2000) ("Publicly supported common schools were seen as the best way of promoting popular enlightenment and ties of mutual understanding and cooperation across the bounds of class, ethnicity, and religion.").

109. Saiger, *supra* note 51, at 791; *see also* David F. Labaree, *Public Goods, Private Goods: The American Struggle over Educational Goals*, 34 AM. EDUC. RSCH. J. 39, 45 (1997) (noting common school founders believed this would provide "a common culture and a sense of shared membership in the community").

110. *See* O'Brien & Woodrum, *supra* note 102, at 601.

111. *See* Molly Townes O'Brien, Brown *on the Ground: A Journey of Faith in Schooling*, 35 U. TOL. L. REV. 813, 825 (2004); TYACK ET AL., *supra* note 105, at 195, 200, 202; Roberts v. City of Boston, 5 Cush. 198 (Mass. 1849) (arguably first separate-but-equal decision, upholding racially segregated schools to the extent they are equal notwithstanding the right to common schooling); This made the Iowa Supreme Court decision in *Clark* all the more commendable. *See* Lovell, *supra* note 85, at 184.

movement was partly driven by bigoted, anti-Catholic tropes and divisive "nativist sentiments."[112] That worldview was tragically wrong, even for the time, and, of course, hypocritical. But, in their purest, unvarnished-by-flawed-humans form, the ideals of the common schools movement were "egalitarian and progressive."[113] The "imperative to inculcate in children a shared set of values needed to foster social harmony—including tolerance, openness to social diversity, equality of concern, mutual understanding and respect, and civility—those virtues"[114] have gone by many names, though seldom by "freedom."

And yet, early defenders viewed common schools as "safeguards of human freedom."[115] Their reasoning suggests an understanding of freedom to learn in the democratic sense: inclusive, open to all, participatory, and for the common good.[116]

2. Integrated

This notion of common schooling open *to all* and serving the *common good* was espoused by state constitution convention delegates who viewed such a democratic education as essential to maintaining a republican form of government.[117] Our commitment to that ideal was immediately put to the test following the Civil War.[118] And we failed.

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112. *See* Friedman & Solow, *supra* note 97, at 122; *see* Donahoe v. Richards, 38 Me. 379, 413 (1854) (justifying common schooling "open to the children of the rich and the poor" as necessary for "assimilation" and upholding expulsion of Roman Catholic student objecting to literacy instruction making use of Protestant King James Bible).

113. Friedman & Solow, *supra* note 97, at 123.

114. *See* Sacha M. Coupet, *Valuing All Identities Beyond the Schoolhouse Gate: The Case for Inclusivity as a Civic Virtue in K-12*, 27 MICH. J. GENDER & L. 1, 16 n.49 (2020).

115. 11 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1850, at 1892 (1850) ("Sir, if there is any cause that should call to its aid the universal sympathies and unflinching support of this people, it is the cause of common schools. We should cherish it as one of the strongest safeguards of human freedom . . . ."); *see also* Cushing v. Inhabitants of Newburyport, 51 Mass. (10 Met.) 508, 516 (1845) (concluding laws requiring support for public schools for general education were mandatory partially because "the encouragement of learning . . . tends to the promotion of religion and good morals, and the security of civil and religious liberty"); Paynter v. State, 797 N.E.2d 1225, 1241 (N.Y. 2003) (quoting New York Governor DeWitt Clinton's Address to the Legislature in 1826: "I consider the system of our common schools as the palladium of our freedom . . . .").

116. *See* Bd. of Pub. Educ. of First Sch. Dist. v. Ransley, 58 A. 122, 123 (Pa. 1904) ("What was first a constitutional requirement, that the Legislature should establish schools for the education of the poor 'gratis,' in time became a universal demand for free education for all classes, and for years, to thousands of the children of the rich as well as the poor . . . ."); State *ex rel.* Weiss v. Dist. Bd. of Sch. Dist. No. 8, 44 N.W. 967, 981 (Wis. 1890) ("[T]he common schools are free to all alike, to all nationalities, to all sects of religion, to all ranks of society, and to all complexions.").

117. Black, *supra* note 98, at 1067, 1083–84, 1090–94.

118. *See id.* at 1094–95, 1099–1100.

The children of former slaves, while freed from their physical bondage, remained oppressed by segregated schooling—a social bondage that inhibited the freedom of all children, White and Black alike, to learn.[119]

Among the earliest expressions of a socially integrated freedom to learn was one penned by the "Great Dissenter" of *Plessy v. Ferguson*,[120] Justice John Marshall Harlan, in a noted dissent to school segregation in *Berea College v. Kentucky*.[121] The majority in *Berea College* concluded that the state could enforce segregation even in a private, racially integrated college without offending the Fourteenth Amendment's Due Process Clause.[122] For Justice Harlan, who believed that the Amendment's citizenship guarantee meant "membership in a 'political community'" which "promised freedom,"[123] the decision was inapposite:

> [I]n the eye of the law the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and *receive instruction* not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law.[124]

Justice Harlan's discernment of learning as a freedom was shared by his contemporary—John Dewey, the most renowned progressive

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119. *See* David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 AM. J. EDUC. 236, 239, 247 (1986). For a full accounting of the notion of common schooling open to all as a "necessary component of freedom and citizenship, which the government sought to guarantee in the immediate aftermath of slavery," see Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 N.W. L. REV. 1, 7, 9–23 (forthcoming 2022).

120. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

121. *See* 211 U.S. 45, 68 (1908) (Harlan, J., dissenting), *abrogated by Brown*, 347 U.S. 483.

122. *Id.* at 57–58 (majority opinion).

123. *See* Goodwin Liu, *The First Justice Harlan*, 96 CALIF. L. REV. 1383, 1390 (2008) (quoting The Civil Rights Cases, 109 U.S. 3, 46 (1883) (Harlan, J., dissenting)).

124. *Berea Coll.*, 211 U.S. at 68 (Harlan, J., dissenting) (emphasis added). Despite his vigorous, principled dissent, Justice Harlan observed that the case presented "no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at the public expense." *Id.* at 69. Moreover, it should be noted that Justice Harlan "authored the Court's opinion three years later in *Cumming v. Richmond County Board of Education*, upholding a Georgia school district's refusal to provide a high school for black children even as it provided one for white children." Liu, *supra* note 123, at 1385–86 (citing other opinions that "besmirched his Plessy dissent"). As Matthew Patrick Shaw helpfully explained to me, we could understand the juxtaposition between *Berea* and *Cumming* by "leaning heavily into the *Lochnerian* roots of Justice Harlan's 'freedom' jurisprudence. One could say that in *Cumming* Harlan declined to obligate the state (or county) to action where in *Berea* he objected to the state interfering with a private institution's freedom to teach and student's individual choices to learn what that institution offered to teach." For a more thorough exposition of *Cumming*, see Matthew Patrick Shaw, *The Public Right to Education*, 89 U. CHI. L. REV. (forthcoming 2022) (on file with author).

educator and American philosopher of his time.[125] Dewey regarded freedom in its fullest sense as positive, social, and emancipatory.[126] "The freedom of an agent who is merely released from direct external obstructions," that is, who merely exercises negative freedom, "is formal and empty."[127] That such a hollow notion should exhaust our understanding of freedom"—irrespective of differences in education, in command of capital, and the control of the social environment which is furnished by the institution of property—is a pure absurdity."[128]

Freedom owes no allegiance to such isolated individualism, the notion of the individual "as something given, complete in itself, and of liberty as a ready-made possession of the individual, only needing the removal of external restrictions in order to manifest itself."[129] On the contrary, because the human condition is socially contingent, the practice of freedom can "take place only in rich and manifold association with others."[130] That entails "mutual adaptation, communication, cooperation, and a coordination of interests and actions."[131] The exercise of freedom is thus an "act of political living where we never lose sight of society and the individual in their coextensive interdependence."[132]

Because freedom is relational, it should also be emancipatory: "Liberty in the concrete signifies release from the impact of particular oppressive forces; emancipation from something once taken as a normal part of human life but now experienced as bondage."[133] Thus, consistent

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125. *See generally* JOHN BALDACCHINO, JOHN DEWEY: LIBERTY AND THE PEDAGOGY OF DISPOSITION (Paul Gibbs ed., 2014) (discussing John Dewey's work as a claim to people's potential found in experience, imagination, and a disposition toward liberty); ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY (1991) (examining John Dewey's experimentation with progressive education and focus on the nation's schools).

126. *See* BALDACCHINO, *supra* note 125, at 18; WESTBROOK, *supra* note 125, at 165, 188; Matthew Festenstein, *Dewey's Political Philosophy*, STAN. ENCYCL. PHIL. ARCHIVE 2, 6 (Winter 2019 ed. 2018), https://plato.stanford.edu/archives/win2019/entries/dewey-political/ [https://perma.cc/3JM9-VBPA].

127. JOHN DEWEY & JAMES H. TUFTS, ETHICS 438 (1909).

128. JOHN DEWEY, ON EXPERIENCE, NATURE, AND FREEDOM 271 (Richard J. Bernstein ed., 1960).

129. John Dewey, *The Future of Liberalism*, 32 J. PHIL. 225, 226 (1935).

130. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY 177, 183, 191 (Melvin L. Rogers ed., 2016).

131. Jennifer Bleazby, *Autonomy, Democratic Community, and Citizenship in Philosophy for Children: Dewey and Philosophy for Children's Rejection of the Individual/Community Dualism*, 26 ANALYTICAL TEACHING 30, 39 (2006).

132. BALDACCHINO, *supra* note 125, at 19; *see also* WESTBROOK, *supra* note 125, at 165, 188 (discussing positive and negative freedom); Festenstein, *supra* note 126, at 6 (same).

133. JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 48 (1935) (emphasis omitted); *see also* ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 103 (2010) ("To cast off relations of domination is to live as a free person. The quest for freedom is the quest for a mode of relating to others in which no one is dominated, in which each adult meets every other adult member of society eye to eye, as an equal.").

with his conception of freedom as positive and social, Dewey observed: "No man and no mind were ever emancipated merely by being left alone."[134]

Quite the reverse, Dewey insisted that schooling had to occur "in an educational environment in which intelligence can be socialized through participation in co-operative deliberation, shared enquiries and collective decision-making."[135] Dewey was critical of a system of education that "neglects th[e] fundamental principle of the school as a form of community life."[136]

By replicating a democratic community of equals in the classroom, schools could be the incubators of democracy and citadels of freedom. So organized "to promote the kind of social intelligence which is the prerequisite to individual freedom and growth. . . . [A] democratic school is a common school providing a broad social community to which children of different race, class, gender and religion can belong."[137]

For Dewey, "the breaking down of those barriers of class, race," etc., could only be achieved through "more numerous and more varied points of contact," through "greater diversity," which would "secure a liberation of powers."[138] In his view,

> Intolerance, abuse . . . because of differences of race, color, wealth or degree of culture are treason to the democratic way of life. For everything which bars *freedom* and fullness of communication sets up barriers that divide human beings into sets and cliques, into antagonistic sects and factions, and thereby undermines the democratic way of life. Merely legal guarantees of the civil liberties of free belief, free expression, free assembly are of little avail if in daily life *freedom of communication, the give and take of ideas, facts, experiences*, is choked by mutual suspicion, by abuse, by fear and hatred.[139]

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134. DEWEY, *supra* note 130, at 191.

135. WILFRED CARR & ANTHONY HARTNETT, EDUCATION AND THE STRUGGLE FOR DEMOCRACY: THE POLITICS OF EDUCATIONAL IDEAS 63 (1996).

136. JOHN DEWEY, MY PEDAGOGIC CREED (1897), *reprinted in* 5 THE EARLY WORKS OF JOHN DEWEY 88 (Jo Ann Boydston & Fredson Bowers eds., 1972).

137. CARR & HARNETT, *supra* note 135, at 63; *see* Yudof, *supra* note 107, at 458 ("[I]f an integrated society is the desired end, the schools were the most logical as well as the most traditional place to begin the process of integration.").

138. JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 87 (First Free Press Paperback ed., 1966) (1916).

139. JOHN DEWEY, CREATIVE DEMOCRACY–THE TASK BEFORE US (1939), *reprinted in* 14 THE LATER WORKS OF JOHN DEWEY 227–28 (Jo Ann Boydston & Patricia Baysinger eds., 1988) (emphasis added); *see* Elizabeth Anderson, *The Epistemology of Democracy*, 3 EPISTEME: J. SOC. EPISTEMOLOGY 8, 13 (2006) (explaining that Dewey's approach "represents the epistemic powers of all three constitutive features of democracy: diversity, discussion, and dynamism").

These are not the ramblings of an early twentieth century philosopher. The Supreme Court has said as much: "When that [school] environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community."[140] Justice Marshall perhaps expressed the point best, that "unless our children begin to learn together, there is little hope that our people will ever learn to live together."[141]

Some state high courts have echoed this belief that "education serves as a 'unifying social force' . . . promoting cohesion based upon democratic values" by "bring[ing] together members of different racial and cultural groups . . . [to] help them to live together 'in harmony and mutual respect.'"[142] As one court explained, "it is not enough that the 3 R's are being taught. . . . children must learn to respect and live with one another in multi-racial and multi-cultural communities . . . ."[143] Such "goals of teaching tolerance and cooperation among the races, of molding values free of racial prejudice . . . are integral to the mission of public schools."[144]

In sum, an integrated school environment is integral to the freedom to learn of all students, the advantaged and disadvantaged alike; all stand to be free, if all are educated together.

3. Transformative

Still to this day, Dewey's continuing influence on American education can hardly be overstated.[145] Even his critics are quick to concede that his

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140. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472–73 (1982).

141. Milliken v. Bradley, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

142. Hartzell v. Connell, 679 P.2d 35, 41 (Cal. 1984) (first quoting Serrano v. Priest, 487 P.2d 1241, 1258 (Cal. 1971); and then quoting *Washington*, 458 U.S. at 473); *see also In re* Hatfield Twp. Indep. Sch. Dist., 2 Walk. 169, 174 (Pa. 1885) ("It is one of the most beneficent purposes of our general system of popular education that all classes and conditions of society, irrespective of the considerations referred to, shall be taught in the same schools. The tendency and effect of such a system is to obliterate, or at least to solidify and strengthen, the seams which must otherwise permeate our civil and social affairs, to assimilate our varied population, and to cultivate that tolerance and equality which is the distinguishing characteristic of the government under which we live."); Sheff v. O'Neill, 678 A.2d 1267, 1285 (Conn. 1996) ("If children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society." (quoting Jenkins v. Twp. of Morris Sch. Dist., 279 A.2d 619, 627 (N.J. 1971))).

143. Booker v. Bd. of Educ., 212 A.2d 1, 6 (N.J. 1965).

144. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 72 P.3d 151, 162 (Wash. 2003).

145. *See generally* C. GREGG JORGENSEN, DISCOVERING JOHN DEWEY IN THE TWENTY-FIRST CENTURY: DIALOGUES ON THE PRESENT AND FUTURE OF EDUCATION (2017) (highlighting fourteen

"impact on American education is incalculable."[146] Dewey's evolving perceptions of the urgency of racial justice positioned his philosophy as one of "the intellectual rationale[s] in the battle against segregation and discrimination."[147] There were, of course, many other intellectual giants behind the Civil Rights Movement. In an article entitled *The Freedom to Learn*, the distinguished African American educator and activist W. E. B. Du Bois boldly proclaimed:

> Of all the civil rights for which the world has struggled and fought for five thousand years, the right to learn is undoubtedly the most fundamental . . . . The freedom to learn . . . has been bought by bitter sacrifice. And whatever we may think of the curtailment of other civil rights, we should fight to the last ditch to keep open the right to learn . . . . Freedom always entails danger. Complete freedom never exists. But of all the freedoms of which we think, the freedom to learn is in the long run the least dangerous and the one that should be curtailed last.[148]

Du Bois "was the foremost advocate for directing African American critical intelligence toward the solution of social problems."[149] Both Du Bois and his contemporary Dewey considered social reform part of the agenda for progressive or liberal education.[150] That is, they saw the power of education as a transformative process and as an institution in society.[151]

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different scholars' views on how John Dewey's scholarship is still significant in the field of democratic education).

146. HENRY T. EDMONDSON III, JOHN DEWEY AND THE DECLINE OF AMERICAN EDUCATION 8 (2014).

147. Charles F. Howlett & Audrey Cohan, *John Dewey and His Evolving Perceptions of Race Issues in American Democracy*, 17 TEACHING SOC. STUD. 16, 21 (2017); *see* Virgil A. Clift, *Does the Dewey Philosophy Have Implications for Desegregating the Schools?*, 29 J. NEGRO EDUC. 145, 153 (1960); John L. Rury & Suzanne Rice, *Dewey on Civil Rights, Testing, Interest, and Discipline: Democracy and Education in Perspective*, 16 J. GILDED AGE & PROGRESSIVE ERA 488, 490–93 (2017).

148. W.E.B. Du Bois, *The Freedom to Learn*, 2 MIDWEST J. 9, 10–11 (1949), http://www.aspresolver.com/aspresolver.asp?BLTC;S9607 [https://perma.cc/FQ78-XU4P].

149. Keith Gilyard, *John Dewey, W.E.B. Du Bois, and a Rhetoric of Education*, *in* TRAINED CAPACITIES: JOHN DEWEY, RHETORIC, AND DEMOCRATIC PRACTICE 125 (Brian Jackson & Gregory Clark eds., 2014).

150. *Id.* at 128–29; *see also* CARR & HARNETT, *supra* note 135, at 63–64 (discussing Dewey's belief that a more democratic society could result only through the promotion and growth of cooperation and social intelligence in schools).

151. *See* DEWEY, *supra* note 138, at 92 ("[W]e are doubtless far from realizing the potential efficacy of education as a constructive agency of improving society, from realizing that it represents not only a development of children and youth but also of the future society of which they will be the constituents."); NOAH DE LISSOVOY ET AL., TOWARD A NEW COMMON SCHOOL MOVEMENT 65 (Routledge 2016) (2014) ("The educational theories of John Dewey, W. E. B. Du Bois . . . [among] others have long insisted on the centrality of public schools and classrooms as sites of democratic social transformation.").

Dewey held that "schools should strive to educate with social change in view by producing individuals . . . equipped with desires and abilities to assist in transforming it."[152] Du Bois's writings likewise conveyed "a nearly evangelical faith in education and its transformative power," harkening the "positions advanced by Dewey" and others "to create the conditions that promoted social democracy."[153]

Among the earliest progressives to put these words into action were Black educators in segregated schools, who embraced "pedagogies of protest," contested White supremacy, and prepared student activists for the Civil Rights Movement.[154] Many of these Black teachers earned their "degrees during a time when progressive . . . ideas were especially influential" and "used Dewey's democratic ideas to liberate" their students.[155] "Dewey's democratic vision was popular among leading black educators because it supported a more activist interpretation of the African American uplift philosophy."[156]

African American educators emphasized "democratic living" and "critical thinking" for "problem solving situations," all the while seeking to instill pride in Black children "and at the same time conscious of themselves as Americans."[157] They also supported and helped organize student activism before and after *Brown*, from student-led strikes to boycotts.[158] A central theme was "the freedom pledge: 'in order to have freedom, we have to fight for it.'"[159] The demand for freedom, after all,

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152. JOHN DEWEY, PROGRESSIVE EDUCATION AND THE SCIENCE OF EDUCATION (1939), *reprinted in* 3 THE LATER WORKS OF JOHN DEWEY 262 (Jo Ann Boydston & Patricia Baysinger eds., 1984).

153. MICHAEL W. APPLE, CAN EDUCATION CHANGE SOCIETY? 77 (2013).

154. *See* Scott Baker, *Pedagogies of Protest: African American Teachers and the History of the Civil Rights Movement, 1940–1963*, 113 TCHRS. COLL. REC. 2777, 2779–80 (2011).

155. *Id.* at 2785–86.

156. *Id.* at 2787–88.

157. *Id.* at 2788 (first quoting Adam Fairclough, *Being in the Field of Education and Also Being Negro Seems Tragic: Black Teachers in the Jim Crow South*, 87 J. AM. HIST. 65, 84 (2000); then quoting a 1942 Burke High School yearbook; and then quoting Aaron Brown, *An Evaluation of the Accredited Secondary Schools for Negroes in the South*, 13 J. NEGRO EDUC. 488, 491 (1944)).

158. *See id.* at 2791–98.

159. *See id.* at 2789 (quoting the January 1948 edition of Parvenue, a student-run newspaper from Burke High School (on file with the Avery Research Center at College of Charleston)); *see also* JON. N. HALE, THE FREEDOM SCHOOLS: STUDENT ACTIVISTS IN THE MISSISSIPPI CIVIL RIGHTS MOVEMENT 26 (2016) ("What remained constant throughout the history of African American education is the fact that the schoolhouse represented an institution, an ideology, and a collective space through which to achieve full political, economic, and social rights."); Vanessa Siddle Walker, *Valued Segregated Schools for African American Children in the South, 1935-1969: A Review of Common Themes and Characteristics*, 70 Rev. Educ. Res. 253, 276 (2000) ("In their world, there was a clear 'enemy'—racism. As such, the [segregated] schools operated with a well-defined purpose for African American uplift that was shared by teachers, principal, and

motivated the Civil Rights Movement, no less so than the demand for equality.[160] Indeed, it was our collective failure to deliver on the promise of equality that perhaps forced the pivot to liberty.

Freedom then reverberated to spirited applause in Dr. King's "I Have a Dream" speech in 1963.[161] The following summer, "Freedom Summer" 1964, freedom was the organizing principle of more than forty Mississippi "Freedom Schools" for Black children.[162] These schools instilled guarded hope not only in the possibility of negative freedom from oppression, but the benefits of positive "freedom to think, to grow, to decide."[163] To that end, Freedom School teachers "implemented a new form of pedagogy and curriculum" that stressed "citizenship" and "embraced dialogue, critical thinking, and hands-on activity that transformed local civil rights protests into educative spaces."[164]

The immediate objective of the Freedom Schools was not just to integrate White schools but to develop schools "organized to work on the society to change it."[165] It was to provide a radical example of schooling that would challenge, not perpetuate, "the social, political, and economic status quo."[166] That meant conceiving "education for liberation" as "education for social change" as well.[167] "As such the Freedom Schools were one of the first historical instances of 'critical pedagogy,' a theory of education based on resistance and education for social change."[168]

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community members. All the training and modeling by teachers and principal were aimed at helping themselves and their students overcome that enemy.").

160. *See generally* CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE (1995) (noting that organizers in the Civil Rights Movement relied on symbols and songs of the rural Black South to represent how freedom was at the heart of their message); VINCENT HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA (1981) (arguing that the Civil Rights Movement was the "[B]lack movement toward freedom," accompanied with the "search and struggle for justice, equality, and self-determination in the United States").

161. Heard on Talk of the Nation, *'I Have A Dream' Speech, In Its Entirety*, NPR (Jan. 18, 2010), https://www.npr.org/2010/01/18/122701268/i-have-a-dream-speech-in-its-ntirety [https://perma.cc/VZL2-G5CD].

162. *See* William Sturkey, *"I Want to Become a Part of History": Freedom Summer, Freedom Schools, and the* Freedom News, 95 J. AFR. AM. HIST. 348, 355 (2010); HALE, *supra* note 159, at 34 ("The term 'Freedom Schools' harkens back to the 'Freedmen's schools' of the Reconstruction era and, indeed, drew upon the same concepts of education for liberation.").

163. Daniel Perlstein, *Teaching Freedom: SNCC and the Creation of the Mississippi Freedom Schools*, 30 HIST. EDUC. Q. 297, 303 (1990) (internal quotation marks omitted).

164. HALE, *supra* note 159, at 109–10.

165. *Id.* at 173.

166. *Id.* at 3.

167. *Id.* at 34.

168. *Id.* at 211.

Although the Freedom Schools were short-lived, they served as a model for the "free schools movement" in the 1960s and 1970s.[169] The first school by that name, "The Free School," began in autumn 1963, after Prince Edward County in Virginia chose to close, rather than desegregate, its public schools in the wake of *Brown*.[170] Operating as a direct refutation of "segregationists' claims about what Blacks and Whites could and could not do together," the Free School was integrated and, like the Freedom Schools, emphasized critical thinking, democratic processes, and citizenship.[171]

Hundreds of free schools were eventually established,[172] and, although they had their "pedagogical differences," many were committed to a "loosely defined, evolving curriculum that focused on the issues of the day, including race, civil rights, Vietnam, and women's liberation."[173] That is, like the Freedom Schools, many of these free schools were committed to educating for social change. This was especially true for the group of free schools attended by poor and/or Black youth.[174] That group of free, community schools—unlike the White, middle- and upper-class free schools—were more inclined to conceive the "free" in free schools as denoting liberation through social change than as "do-your-own-thing."[175]

Several leading free school advocates believed that social change could be achieved only outside the public education system.[176] And yet, "the free schools disappeared as quickly as they emerged," with advocates learning firsthand just how difficult it was to operate outside the system with "inadequate resources and a lack of outside support."[177] Some regard this as the significance of the free schools movement—that even as it laid the foundation for school choice alternatives, the movement demonstrated those alternatives might only succeed if publicly subsidized and supported.[178] They suggest progressives should embrace those alternatives for their potential to affect the kind of social freedom

169. *See* James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1299–1300 (2005).

170. *See* CANDACE EPPS-ROBERTSON, RESISTING BROWN: RACE, LITERACY, AND CITIZENSHIP IN THE HEART OF VIRGINIA 13 (2018) (ebook).

171. *Id.* at 13–14. *See also id.* at 71–94.

172. ALLEN GRAUBARD, ALTERNATIVE EDUCATION: THE FREE SCHOOL MOVEMENT IN THE UNITED STATES 4 (1972).

173. Forman, *supra* note 169, at 1301.

174. *See* Robert D. Barr, *Whatever Happened to the Free School Movement?*, 54 PHI DELTA KAPPAN 454, 455 (1973).

175. *Id.*

176. Forman, *supra* note 169, at 1302–03.

177. *Id.* at 1304.

178. *See id.* at 1304–05.

and change that defined the mission of free schools and could now distinguish charter and voucher plans.[179]

The better lesson from the free schools movement, however, is that democracy-enhancing freedom and social change do not come about through separation, whether that separation makes possible a conservative or progressive enclave. We simply cannot hope to secure a freedom to learn for all schoolchildren by separating them.

And yet integration alone is no panacea. Du Bois himself believed that integrated schools "with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk" could be just as "bad" as segregated schools.[180] As he would later reflect, "I was fighting segregation but simultaneously advocating such segregation as would prepare my people for the struggle they were making."[181] In that persistent struggle, school choice exercised and controlled by Black Americans could be viewed as a matter of "forced self-determination" for a "quality education."[182]

But much depends on the objectives of that education.[183] If those objectives concern only academic performance and attainment aimed predominantly toward credentialing and economic mobility, then we can expect the debate to continue about whether integration is strictly

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179. *Id.* at 1313–19.

180. W.E.B. Du Bois, *Does the Negro need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935).

181. W.E.B. DU BOIS, THE AUTOBIOGRAPHY OF W. E. B. DU BOIS: A SOLILOQUY ON VIEWING MY LIFE FROM THE LAST DECADE OF ITS FIRST CENTURY 297 (1968).

182. John Hale, *The African American Roots of Betsy DeVos's Education Platform*, THE ATLANTIC (Jan. 18, 2017).

183. *See generally* David F. Labaree, *Public Goods, Private Goods: The American Struggle over Educational Goals*, 34 AM. EDUC. RES. J. 39 (1997) (examining three competing goals of education: democratic equality, social efficiency, and social mobility).

> Labaree notes that the tension between these conflicting goals fuels conflicts over the role of schools and the goals of reform movements. The democratic equality goal represents the view of the citizen and focuses on the need for schools to prepare children for equal participation in the political process. The social efficiency goal represents the perspective of the taxpayers and employers and focuses on preparation of children to become productive workers. The social mobility goal represents the viewpoint of the educational consumer and sees education as "a private good designed to prepare individuals for successful social competition for the more desirable market roles." Labaree notes that the third goal has come to dominate, and "[a]s a result, public education has increasingly come to be perceived as a private good that is harnessed to the pursuit of personal advantage."

Susan L. DeJarnatt, *The Myths of School Choice: Reflections on the Two-Income Trap*, 4 RUTGERS J.L. & PUB. POL'Y 94 n.23 (2006) (citations omitted).

necessary.[184] If, instead, the objectives were to include and prioritize democratic equality and a socially conscious democratic education, then surely integration is essential for transformative learning. Transformative in the sense that it "transforms problematic frames of reference—sets of fixed assumptions and expectations (habits of mind, meaning perspectives, mindsets)—to make [children] more inclusive, discriminating, open, reflective, and emotionally able to change."[185]

No doubt transformative learning for democratic and social equality requires more than integration; it demands real opportunities for inclusive and safe classrooms, a culturally responsive curriculum, positive developmental relationships, and social-emotional learning support systems.[186] And those components are in relatively short supply in most segregated school settings. The bottom-line point being, however, that the mission of education cannot just be informational, it must be transformational to orient children in freedom and toward social change.

Admittedly, state high courts have not used terms such as "transformative" in describing the public school settings necessary to protect that freedom to learn. But even *Rodriguez* acknowledged "that the grave significance of education both to the individual and to our society' cannot be doubted."[187] Moreover, the notion that education should be transformative to improve society is reflected directly in certain state education clauses.[188] It is most pronounced in Louisiana's education

184. *See, e.g.*, Timothy M. Diette, et al., *Does the Negro Need Separate Schools? A Retrospective Analysis of the Racial Composition of Schools and Black Adult Academic and Economic Success*, 1 RUSSELL SAGE FOUND. J. SOC. SCIENCES 166, 167–68 (Feb. 2021) (acknowledging "conventional wisdom has it that attending school with white peers benefits black students on a wide array of fronts, including their academic outcomes" but discussing "evidence at odds with the common view that educational attainment for blacks increases monotonically with the percentage of their high school peers who are white").

185. Jack Mezirow, *Transformative Learning as Discourse*, 1 J. TRANSFORMATIVE EDUC. 58, 58 (2003); *see also* Du Bois, *supra* note 180, at 335 ("Other things being equal, the mixed [or integrated] school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex.").

186. *See* LEARNING POLICY INSTITUTE & TURNAROUND FOR CHILDREN, DESIGN PRINCIPLES FOR SCHOOLS: PUTTING THE SCIENCE OF LEARNING AND DEVELOPMENT INTO ACTION viii (June 2021), https://learningpolicyinstitute.org/sites/default/files/product-files/SoLD_Design_Principles_REPORT.pdf [https://perma.cc/WEV3-XK3W].

187. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (quoting Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 283 (W.D. Tex. 1971)).

188. *See, e.g.*, CAL. CONST. art. IX, § 1 (obligating the state legislature to "encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement"); IND. CONST. art. VIII, § 1 (similar); IOWA CONST. art. IX, 2nd, § 1 (similar); NEV. CONST. art. XI, § 1 (similar); W. VA. CONST. art. XII, § 12 (similar); MASS. CONST. pt. 2, ch. V, § II (encouraging education "to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people");

clause: "The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential."[189]

State high courts have likewise emphasized that public education should cultivate "the minds, bodies and social morality of its charges,"[190] equip children with "sufficient knowledge of economic, social, and political systems" and "sufficient understanding" about "issues that affect [their] community, state, and nation"[191] such that they might "contribute to the well-being and progress of our society"[192] and their "state."[193]

As the New Hampshire Supreme Court explained, "public school students [must be] fully integrated into the world around them," and given "broad exposure to the social, economic, scientific, technological, and political realities of today's society" so that they can "compete, contribute, and flourish."[194] Finally, state courts have also recognized that public education must evolve to meet the changing needs and demands of society.[195]

Though perhaps lost in translation, the above sources of law surely confirm the intended, if not expected, transformative nature of public education.

The most pressing question is whether we will, at last, name and reclaim these neglected freedoms—the freedom to become equal citizens and the freedom to learn in democratic, integrated, and transformative settings. Because freedom, as much as if not more than equality, anchors and justifies the right to education substantively.

N.D. CONST. art. VIII, § 1 ("A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools . . . ."); N.H. CONST. pt. 2, art. LXXXIII (similar).

189. LA. CONST. art. VIII, pmbl.

190. Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979).

191. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).

192. Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 287 (Conn. 2010) (Schaller, J., concurring).

193. DeRolph v. State, 677 N.E.2d 733, 736 (Ohio 1997).

194. Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997).

195. *See* Joshua E. Weishart, *Rethinking Constitutionality in Education Rights Cases*, 72 ARK. L. REV. 491, 509 nn.98–99 (2019) (citing cases).

II. REVITALIZING STATE SUBSTANTIVE DUE PROCESS

Substantive due process is the dark-horse judicial doctrine capable of protecting education as freedom. "There is no concept in American law that is more elusive or more controversial than substantive due process."[196] It seems least clear when it is most mesmerizing—like trying to decipher a déjà vu that is fleeting and erratic, yet at once so intense and foundational in its familiarity. "The Meming of Substantive Due Process" as an "oxymoron" has continued since "the 1980s when legal conservatives (and some liberals) began to lampoon it as a textual anomaly."[197] The criticism grew harsher still, with the doctrine being "denounced as incoherent babble on par with 'green pastel redness.'"[198]

All of this piling on has ironically engendered strange-bedfellow defenses of substantive due process—from originalists based on the doctrine's lineage and original meaning[199] and others based on the rule-of-law principles for which it stands.[200] Still, it is fair to say that substantive due process remains a much "maligned constitutional doctrine."[201] It is also fair to say, however, that much of that maligning has been directed at federal, not state, substantive due process guarantees. Indeed, scholars have paid comparatively little attention to those state due process guarantees which could be deftly employed to protect educational freedoms to become and to learn—more so than the federal doctrine.

A. *The Federal Path Is Not Vital*

The trouble is not with the federal doctrine itself, but with a judicial ideology loath to adhere to the precedent. Scholars have persuasively demonstrated how faithful applications of substantive due process precedent could underpin an affirmative, liberty-based right to

196. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).

197. Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 253, 255 (2016).

198. Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1603–04 (2019) (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980)).

199. *See id.* (citing Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 588, 595–96 (2009)).

200. *See* Greene, *supra* note 197, at 255, 288–89; Matthew R. Grothouse, *Implicit in the Concept of Ordered Liberty: How* Obergefell v. Hodges *Illuminates the Modern Substantive Due Process Debate*, 49 J. MARSHALL L. REV. 1021, 1023–24 (2016); Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 285–86 (2012).

201. *See* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 588 (2009).

education.[202] Other scholars have proposed fusing substantive due process with equal protection, à la *Obergefell v. Hodges*,[203] to underpin such a right.[204] But none of these arguments have carried the day in federal court—at least not until *Gary B. v. Whitmer*.[205]

In 2016, Detroit public school students sued Michigan state officials in federal court, contending that their schools were so deficient as to deprive them of a basic minimum education, one that could, at a minimum, impart literacy.[206] Informally dubbed the "right to literacy" or "right to read" case,[207] plaintiffs asserted claims under the Fourteenth Amendment's Due Process and Equal Protection Clauses.[208] The district court dismissed their complaint on the merits and plaintiffs appealed.[209]

Regarding their due process claims, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit considered two arguments. First, plaintiffs argued that the conditions of their schools were so abysmal that they were virtually providing no education at all, and thus, the state could not justifiably restrict their liberty through compulsory attendance.[210] As the court's majority opinion observed, this was "a 'negative rights' argument" predicated on the students' "freedom of movement and freedom from state custody."[211]

Although the court acknowledged that the "legal theory behind this claim appear[ed] to have strong support in the law . . . tracing back to the Magna Carta," the court affirmed its dismissal, concluding the complaint

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202. *See, e.g.*, Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 Nw. U. L. REV. 550, 579–96 (1992); Black, *supra* note 98, at 1078; Matthew A. Brunell, Note, *What* Lawrence *Brought for "Show and Tell": The Non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343, 345 (2005); Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467, 468 (2014); Friedman & Solow, *supra* note 97, at 96, 121–32; Lauren Nicole Gillespie, Note, *The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education*, 95 CORNELL L. REV. 989, 1016 (2010); Note, *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323, 1327 (2007); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 823–28 (1985).

203. 576 U.S. 644 (2015).

204. *See* Weishart, *supra* note 48, at 973–76; Kristi L. Bowman, *The Failure of Education Federalism*, 51 U. MICH. J.L. REFORM 1, 4–5 (2017); Alexis M. Piazza, *The Right to Education After* Obergefell, 43 HARBINGER 62, 71 (2019).

205. 957 F.3d 616 (6th Cir.), *vacated*, Gary B. v. Whitmer, 958 F.3d 1216 (6th Cir. 2020) (en banc).

206. *Id.* at 621.

207. Bowman, *supra* note 204, at 4.

208. *Gary B.*, 957 F.3d at 621.

209. *Id.*

210. *Id.* at 638.

211. *Id.* (quoting Brief of Appellants at 36–43, *Gary B.*, 957 F.3d 616 (Nos. 18-1855/18-1871)).

failed to give adequate notice of the theory and, as pleaded, also failed to state a plausible claim for relief.[212] Plaintiffs had alleged insufficient facts to convince the court that the deprivation of their freedoms outweighed the state's compelling interests in compulsory school attendance, "whatever education, however negligible, they are receiving."[213]

Second, plaintiffs sought recognition of a fundamental right to a basic minimum education, arguing that access to literacy was so foundational to their democratic citizenship that it was "implicit in the concept of ordered liberty."[214] The court observed that plaintiffs were seeking recognition of an "affirmative," or "positive right" to education on this claim.[215] Contrary to conventional wisdom, the court concluded that due process precedent "does not foreclose recognizing [such a] right."[216] Indeed, the panel majority proceeded to do just that.

The court began its analysis by observing that existing Supreme Court precedent recognizes that due process guarantees already include positive freedoms, "not merely freedom from bodily restraint" but "freedom in all of its dimensions," including, significantly, the freedom "to acquire useful knowledge," that is, the freedom to learn, as well as the freedom to become "citizens [who can] participate effectively and intelligently in our open political system."[217] The court then explained that "a foundational level of literacy—provided through public education—has an extensive historical legacy," one that is "deeply rooted in our history and tradition, even under an originalist view," and is otherwise "so central to our political and social system as to be 'implicit in the concept of ordered liberty.'"[218] The court also noted that, post-*Obergefell*, a federal right to education could be supported by the convergence of equal protection and substantive due process.[219]

It was a momentous decision—framed in part on notions of educational freedom—that validated the judgment of scholars who had long advocated for this outcome.[220] It was also short lived. Plaintiffs settled with state officials who committed to supporting legislation to fund literacy programs and interventions in Detroit public schools.[221] An

212. *Id.*

213. *Id.* at 640–42.

214. *Id.* at 642 (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).

215. *Id.* at 656–59.

216. *Id.* at 659.

217. *Id.* at 643–44, 647, 652 (first quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923); then quoting Obergefell v. Hodges, 576 U.S. 644, 664 (2015); then quoting *Meyer*, 262 U.S. at 399; and then quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).

218. *Id.* at 642, 649 (quoting *Glucksberg*, 521 U.S. at 720–21).

219. *Id.* at 656 n.16.

220. *See supra* notes 202–04 and accompanying text.

221. *See* Kimberly Jenkins Robinson, *Designing the Legal Architecture to Protect Education as a Civil Right*, 96 IND. L.J. 51, 76 (2020).

en banc Sixth Circuit then vacated the 2–1 panel decision and voted to rehear the case,[222] but that hearing did not occur because the settlement had mooted the issues on appeal.[223] As a result, the decision is no longer binding precedent.

Plaintiffs were undoubtedly motivated to settle in part due to an anticipated unfavorable decision on the merits by the en banc Sixth Circuit. The dissenting opinion perchance previews the reasoning of that would-be en banc opinion.[224] It is replete with all the standard polemics lodged against recognition of federal rights grounded in substantive due process and the right to education in particular:

1. The Constitution is a charter of negative, not positive, rights, and that construction has persisted in the Supreme Court's substantive-due-process decisions.[225]

2. Judges should exercise restraint, not unbridled discretion, when asked to recognize new rights, particularly when the Supreme Court has declined to do so,[226] lest substantive due process become an open-ended conduit through which judges can enact their own ideologies and policy preferences.[227]

3. Recognition of a right to education would upset the traditional balance of federalism and separation of powers, permitting unelected federal judges to intrude on and micromanage the education policy-making decisions traditionally reserved to state and local authorities, which might then stymie innovation and create a one-size-fits-all, national education program.[228]

4. Recognition of a right to education would provoke a slippery slope, compelling courts to recognize constitutional rights to food, shelter, and health care as essential to functioning as an equal citizen in a democratic society.[229]

In short, recognition of "new" fundamental rights through substantive due process is antidemocratic and exceeds the judicial function. Whatever the merits of these objections, they undeniably hold sway with a swath of federal judges, especially conservative-leaning judges. Perceived as the most moderate of the six conservatives on the current Supreme Court, Chief Justice John G. Roberts Jr. voiced many of these same objections in his dissent in *Obergefell*.[230] The notion that judges of this mindset will

222. Gary B. v. Whitmer, 958 F.3d 1216 (6th Cir. 2020) (en banc), *vacating Gary B.*, 957 F.3d 616.

223. Robinson, *supra* note 221, at 76.

224. *Gary B.*, 957 F.3d at 662 (Murphy, J., dissenting).

225. *Id.* at 663, 666–68.

226. *Id.* at 665, 671–72.

227. *Id.* at 665, 670.

228. *Id.* at 670–71.

229. *Id.* at 667.

230. Obergefell v. Hodges, 576 U.S. 644, 694–706 (2015) (Roberts, C.J., dissenting).

abruptly change their perspective—so foundational to their judicial ideology and dispositions—to recognize a federal right to education grounded in substantive due process should be indulged, if at all, with great suspicion.[231]

For the foreseeable future, *Gary B.* is likely to remain an anomaly. Just a couple of years before it, a Connecticut district court squarely rejected the argument that substantive due process afforded plaintiff-schoolchildren a "fundamental right to a minimally adequate education."[232] And just months after *Gary B.*, a Rhode Island district court concluded that civics education for "capable citizenship" is neither "deeply rooted in [our] Nation's history and tradition," nor "implicit in the concept of ordered liberty."[233]

Respecting substantive due process, it is far time we turn our attention to the possibilities in state courts which "are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."[234] State constitutions hold the potential to protect rights particularly where the Supreme Court has said "none exist" under federal law, and also where, as here, "success at the federal level is unlikely."[235]

B. *Reflecting Backward, State Doctrine Points the Way Forward*

State courts were the first to effectuate substantive due process guarantees. Those guarantees originated from the declarations of rights that states enshrined in their new state constitutions, most of which "included a law-of-the-land provision placing limits upon government interference with life, liberty and property."[236] Courts at the time, and ever since, have considered these law-of-the-land provisions

231. *Cf.* Eloise Pasachoff, *Doctrine, Politics, and the Limits of a Federal Right to Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 84, 93–98 (Kimberly Jenkins Robinson ed., 2019) (explaining limitations that preclude judicial recognition of a federal right to education).

232. Martinez v. Malloy, 350 F. Supp. 3d 74, 90–91 (D. Conn. 2018).

233. A.C. v. Raimondo, 494 F. Supp. 3d 170, 193–94 (D.R.I. 2020) (alteration in original) (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).

234. Arizona v. Evans, 514 U.S. 1, 8 (1995).

235. *See* Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1699, 1703 (2010). *But see* Neal Devins, *State Constitutionalism in the Age of Party Polarization*, 71 RUTGERS U.L. REV. 1129, 1132–33, 1140 (2019) (expressing doubt that "there will be a renaissance of state constitutionalism in the age of party polarization" but acknowledging that "state constitutional provisions providing for positive rights . . . have no analog in the Federal Constitution and cannot be lockstepped; they must be given effect through state court interpretations").

236. Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 973 (1990).

"synonymous with due process."[237] Although law of the land and due process had no "fixed and precise content," and their meanings likely "varied with context and circumstance," courts have understood them "as embracing the same subject matter."[238]

That subject matter, according to historical evidence dating back to at least 1791, "had substantive as well as procedural content."[239] But that conclusion can be reached without mining the evidence—without parsing the sparsely recorded statements of state convention delegates or analyzing colonial periodicals—because state courts actually effectuated "substantive interpretations of due process before the Civil War."[240] During this antebellum period, "the understanding of due process developed more fully in the state courts because they heard a larger number of cases which raised the issue."[241] Federal courts, conversely, were not yet empowered with statutory authority to decide claims arising under the U.S. Constitution or laws of the United States.[242] Among the substantive interpretations developed in state courts were two due process guarantees against (i) arbitrary deprivations and (ii) class legislation.[243]

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237. James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 328 (1999) ("In its initial interpretation of the due process clause of the Fifth Amendment, the Supreme Court declared that '[t]he words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in *Magna Carta*.' Numerous state decisions, as well as leading commentators such as James Kent, expressed the same view." (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1855))); Barnett & Bernick, *supra* note 198, at 1607 ("Thanks in significant part to Lord Edward Coke's commentaries, the phrases 'law of the land' and 'due process of law' became synonymous."); *see, e.g.*, Commonwealth v. Lyons, 492 N.E.2d 1142, 1144 (Mass. 1986) ("The phrase 'law of the land' . . . refers, in language found in Magna Charta, to the concept of due process of law."); Commonwealth v. Devlin, 333 A.2d 888, 891 (Pa. 1975) ("It has been a long-standing tenet of Pennsylvania jurisprudence that 'the law of the land' in Article I, Section 9 is synonymous with 'due process of law.'"); Harbison v. Knoxville Iron Co., 53 S.W. 955, 957 (Tenn. 1899) ("What, then, is 'due process of law,' or 'the law of the land'? The two phrases have exactly the same import, and that which is entitled to recognition as the one is to be recognized as the other also.").

238. Riggs, *supra* note 236, at 992.

239. *Id.* at 999; *see also* Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 317 (1988) ("A substantial number of states . . . also imbued their respective due process clauses with a substantive content.").

240. James W. Ely, Jr., *Reflections on* Buchanan v. Warley, *Property Rights, and Race*, 51 VAND. L. REV. 953, 967–68 (1998). "By the time of the Fourteenth Amendment's ratification in 1868, courts in at least twenty of the thirty-seven then-existing states had endorsed some version of substantive due process in connection with interpreting either due process, law-of-the-land, or similar provisions in their own constitutions or the Fifth Amendment Due Process Clause." Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 469 (2010).

241. *See* Ely, *supra* note 237, at 327.

242. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 11 (2021) ("No provision granted federal question jurisdiction until 1875.").

243. *See* Ely, *supra* note 237, at 336.

1. Antebellum Substantive Due Process

Even before state courts were constituted as such, the colonists had contended that due process or the law of the land incorporated "a residual guarantee of substantive liberty against arbitrary actions of government, including (especially) those of the state legislatures."[244] Shortly after those legislatures were brought into existence, state courts interpreted those provisions as substantive bulwarks against arbitrary exercises of legislative power, particularly those resulting in deprivations of property[245] but also deprivation of liberties "to pursue a calling" that made acquisition of property possible.[246] In such decisions, "judges invoked inherent limits on legislative means and ends."[247]

Pre-Civil-War antebellum courts reinforced due process restraints against arbitrary deprivations with yet "another substantive limit on legislative power—that due process mandated general, not special, laws."[248] Daniel Webster's exposition of this general law limitation was influential:

> By the law of the land is most clearly intended the general law . . . . The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Every thing which

244. Gedicks, *supra* note 201, at 640.

245. *See* Ely, *supra* note 237, at 330–36; *see also* Barnett & Bernick, *supra* note 201, at 1614–19; Williams, *supra* note 240, at 476; Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 548 (2011); Charles Grove Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617, 643 (1915–1916) ("[S]tate courts . . . held that the design of the government, particularly of the due process clause, was 'to exclude arbitrary power from every branch of the government.'" (citing cases)); Jeffrey M. Shaman, *On the 100th Anniversary of* Lochner v. New York, 72 TENN. L. REV. 455, 482–84 (2005) ("As the 1800s progressed, more courts took the position that law of the land or due process clauses prohibited legislation that arbitrarily divested individuals of property rights.").

246. *See* James W. Ely, Jr., *"To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 929 (2006).

247. *Cf.* Barnett & Bernick, *supra* note 201, at 1626. Ilan Wurman contends that many of the scholars cited herein, e.g., Barnett & Bernick, Ely, Gedicks, Williams, misconstrue the antebellum cases and that there was not any substantive due process doctrine under state constitutions. *See* Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 816–18 (2020). On this question, the authorities demonstrating the development of substantive due process and related general law principles in state courts have the better argument, in my view.

248. Ely, *supra* note 237, at 336 ("According to Blackstone, a law was 'something permanent, uniform, and universal.' It followed that particular legislation aimed at individuals or small groups was suspect because such laws were not general in application."); *see* Melissa L. Saunders, *Equal Protection, Class Legislation and Colorblindness*, 96 MICH. L. REV. 245, 255 (1997).

> may pass under the form of an enactment, is not, therefore, to be considered the law of the land.[249]

Also influential were the general law decisions of the Tennessee Supreme Court, construing its law of the land provision as intended "to protect minorities from the wrongful action of majorities"[250] by imposing a demand that "a general and public law, operat[e] equally upon every member of the community."[251] By 1860, more than a dozen state courts "embraced some version of the general law reading, often citing either Daniel Webster's [exposition] or the general law decisions of the Tennessee Supreme Court."[252] Antebellum state courts believed "partial" or "special" laws, so-called class or special legislation, "represented a perversion of the state's proper role in society" and also "threatened true republican government and with it, personal liberty."[253]

Meanwhile, state legislatures were spending much of their sessions passing special laws, "affecting individuals, corporations, and localities, leaving little time and energy to attend to matters affecting the state as a whole."[254] Special legislation thus "compromised the democratic system" creating "a perfect vehicle for political favoritism, if not outright corruption."[255] So, "the majority of states included some form of an explicit mandate of general legislation and a prohibition against private bills or specific legislation in their nineteenth century constitutions."[256]

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249. Trustees of Dartmouth Coll. v. Woodward 17 U.S. (4 Wheat.) 518, 581 (1819).

250. Budd v. State, 22 Tenn. (3 Hum.) 483, 491 (1842).

251. Jones's Heirs v. Perry, 18 Tenn. (1 Yer.) 59, 71 (1836).

252. Williams, *supra* note 240, at 463–64 (citation omitted); *see* V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 964 (2009) ("Relying on 'law of the land' clauses in their state constitutions, state courts developed doctrinal rules striking down laws that were not 'general and public' and that did not 'operat[e] equally on every individual in the community.'" (alteration in original) (quoting Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599, 605 (1831))); Ely, *supra* note 237, at 336–38.

253. Saunders, *supra* note 248, at 254, 289 n.198 ("Members of the Reconstruction Congresses consistently used the term 'class legislation' to refer to legislation that antebellum state courts had called partial or special laws."); *see also* Jeffrey Rosen, *Class Legislation, Public Choice, and the Structural Constitution*, 21 HARV. J. L. & PUB. POL'Y 181, 182–83 (1997) ("Jacksonian judges and treatise writers pointed to state due process, equal protection, and special legislation clauses to argue that states were not free to pass 'special' laws, or 'class legislation,' but had to legislate in the 'public interest,' or 'for the purpose of benefiting the polity as a whole.'" (quoting HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 33–45 (1993))).

254. Constance Van Kley, Comment, *Article V, Section 12 of the Montana Constitution: Restoring Meaning to a Forgotten Provision*, 79 MONT. L. REV. 115, 120 (2018) (citing Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 276–77 (2004)).

255. *Id.* (citation omitted).

256. Maggie Blackhawk, *Equity Outside the Courts*, 120 COLUM. L. REV. 2037, 2096 (2020); *see* Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 297 (2004).

These state constitutional prohibitions amplified the substantive due process guarantee of generality previously articulated by antebellum state courts.[257]

A comprehensive survey of late nineteenth century decisions regarding these general law provisions showed that judges would "uphold legislation that . . . advanced the well-being of the community as a whole or promoted a true 'public purpose,' [but] strike down legislation that . . . was designed to advance the special or partial interests of particular groups or classes."[258]

Scholars have attributed similar meanings to this general law due process guarantee, suggesting that it demands "impartiality,"[259] "neutrality of the state, equality of individuals, and the public purpose of law."[260] They have thus drawn obvious parallels with equal protection principles, suggesting that generality reflects "an 'embedded egalitarianism'" which rejects "simultaneously the excesses of majorities and minorities by prophylactically aligning their interests in the legislative process."[261] Others have emphasized that general law due process "was rooted in the philosophy of civic republicanism, according to which government action must promote public purposes, rather than private or special interests."[262]

Fundamentally, then, general law principles were meant to "advance the public good" by curbing class legislation that "singles out . . . for no legitimate reason, or uses irrelevant distinctions as an excuse for treating people differently, [and therefore] intrudes on the principles of lawfulness because it exercises government power in an arbitrary way . . . in an irregular manner not justified by an overarching public purpose."[263]

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257. *See* Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625, 688 (2014) ("They affirmed their commitment to the value of legislative generality both by articulating a theoretical defense of this value and by enshrining protections against abusive special legislation in their state constitutions."); Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 52 (2014) ("State courts first used [class-legislation] tests to implement 'law of the land' and due-process principles, before special-legislation provisions were adopted."); *see also* Saunders, *supra* note 248, at 258 ("In states whose constitutions were less explicit, the courts displayed considerable ingenuity in finding a constitutional basis for the prohibition against partial or special laws.").

258. HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 10, 102–04 (1993); *see* Saunders, *supra* note 248, at 261; Williams, *supra* note 240, at 425.

259. Williams, *supra* note 240, at 425, 497.

260. Shaman, *supra* note 245, at 484.

261. Nourse & Maguire, *supra* note 252, at 965.

262. Shaman, *supra* note 245, at 486.

263. Sandefur, *supra* note 200, at 307–09 (citations omitted).

2. Guaranteed by Contemporary Standards

History records that late-nineteenth- and early-twentieth-century state courts "more aggressively invalidated laws as class legislation" than did federal courts,[264] particularly the Supreme Court, which "adopted a much more forgiving version of the class-legislation doctrine."[265] Confronted by the legislative demands of the Great Depression later in the twentieth century, "courts rapidly began their retreat from meaningful application of the special law clauses" that a majority of states adopted in their constitutions.[266] Claims against class legislation likewise prevailed less frequently, even in state courts, which continued to invoke but limited the general law principle.[267] Essentially, just as federal courts relaxed "the means-ends-fit requirements of the federal equal protection clause," thereby weakening that doctrine, "state courts for unimaginative reasons of their own followed the federal lead."[268] Still, claims against class legislation continued in state courts and were more likely to succeed "when a strong liberty interest was at stake" because "liberty provided a baseline from which deviation suggested abuse of legislative power."[269]

If named and reclaimed, educational freedoms to become and to learn can likewise supply a baseline from which comparisons can be made.[270] Deviations from that baseline could trigger "a warning sign" that the political process has singled out a group for favored or disfavored treatment.[271] Indeed, deviations from weightier interests—such as educational freedoms that are essential to democracy—would boost the signal that a group was improperly excluded from "something that should be shared" by all.[272]

A claim against class legislation asserting strong liberty interests to educational freedoms is productive for the following reasons: (i) it

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264. David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 18–19 (2003). *But see* Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 729 (2012) ("But the effects of these decisions fell far from the populist and progressive impetuses that motivated the adoption of special laws clauses.").

265. David E. Bernstein, *Class Legislation, Fundamental Rights, and the Origins of Lochner and Liberty of Contract*, 26 GEO. MASON L. REV. 1023, 1030 (2019).

266. Long, *supra* note 264, at 732.

267. *See* Nourse & Maguire, *supra* note 252, at 982–93.

268. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 131 (2018).

269. *See* Nourse & Maguire, *supra* note 252, at 983.

270. *Cf.* Weishart, *supra* note 48, at 975 (contending that importing "substantive [due process] standards could alleviate some of the manageability concerns by providing a 'baseline of [educational] adequacy' from which the vertical equity required by equal protection can be measured and adjusted").

271. Nourse & Maguire, *supra* note 252, at 983.

272. *Id.* at 984.

"scrutinizes laws that establish hierarchies among groups," and thus, promotes anti-subordination; (ii) "the analysis not only considers actual . . . burdens but also asks whether those burdens are justified by a public purpose;" and (iii) it "shifts the debate away from the notion of an equality law limited to some special sets of persons," that is, the recognized suspect classifications.[273]

There should be no question that state courts are empowered to render such judgments. State constitutional law guarantees due process of law.[274] Substantive due process guarantees against arbitrary deprivations and class legislation remain good law.[275] "The guarantee of substantive due process," the New Jersey Supreme Court explains, "requires that a statute reasonably relate to a legitimate legislative purpose and not impose arbitrary or discriminatory burdens on a class of individuals," or else it "arbitrarily deprives a person of a liberty interest," and therefore is unconstitutional.[276]

Modern claims against class or special legislation are now largely governed by those separate, state constitutional provisions prohibiting

273. *Id.* at 1003.

274. *See* Steven Gow Calabresi et al., *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in A Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV. 49, 100–02 (2018) (observing that, as of "2018, thirty-seven states use a 'due process of law' provision, seventeen states use a 'due course of law' provision, and sixteen states use a 'law of the land' provision, though it is worth noting that there is significant overlap, such that many states use more than one formulation in their state constitutions" (footnotes omitted)).

275. *See, e.g.*, State v. Sedler, 473 P.3d 406, 412 (Mont. 2020) ("Substantive due process bars arbitrary governmental actions regardless of the procedures used to implement them and serves as a check on oppressive governmental action."); Johnson v. Kan. Dep't of Revenue, 472 P.3d 92, 104 (Kan. 2020) ("Substantive due process has been described as protection from arbitrary government action. It protects fundamental liberty interests against government encroachment." (citation omitted)); J.M. v. Hobbs, 849 N.W.2d 480, 492 (Neb. 2014) ("It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special legislation were enacted."); People v. Canister, 110 P.3d 380, 382 (Colo. 2005) ("The prohibition against special legislation was enacted, in part, 'for the purpose of preventing class legislation—that is, legislation that applies to some classes but not to others without a reasonable basis for distinguishing between them.'"); Big Sky Excavating, Inc. v. Ill. Bell Tel. Co., 840 N.E.2d 1174, 1184 (Ill. 2005) ("The special legislation clause . . . forbids legislative classifications that are arbitrary."); Willis v. Mullett, 561 S.E.2d 705, 709 (Va. 2002) ("[Legislation] complies with substantive due process requirements 'if [it] has a reasonable relation to a proper purpose and is not arbitrary or discriminatory.'" (quoting Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 509 S.E.2d 307, 318 (Va. 1999))); *Ex parte* Melof, 735 So. 2d 1172, 1201 (Ala. 1999) ("Due process and equal-protection guarantees both prohibit 'class legislation arbitrarily discriminatory against some and favoring others in like circumstances.'" (quoting City of Birmingham v. Piggly Wiggly Ala. Distrib. Co., 638 So. 2d 759, 762 (Ala. 1994))).

276. *In re* Interest of C.K., 182 A.3d 917, 933 (N.J. 2018).

such legislation, and not squarely by due process doctrine.[277] But, again, those separate, constitutional prohibitions are derivative, stemming directly from the antebellum interpretations of substantive due process guarantees reflecting general law principles.[278]

Adhering to those general law principles is easier said than done: claims against class legislation present a notoriously difficult line-drawing problem because "all law singles out."[279] For instance: "When is a law a benefit to one class instead of a burden on the class's mirror image? When is a law directed in favor of a mere subset of the 'truly' relevant class, and when is the law properly directed at the entirety of the class?"[280]

Little wonder, then, that "state high courts interpret special laws prohibitions with extraordinary self-restraint."[281] Most state courts, in lockstep with federal equal protection doctrine, thus apply "highly deferential standards of ordinary federal rational-basis review," with little to no bite.[282] The few outlier courts that "have developed genuinely non-federal jurisprudence . . . have failed to define special laws in a consistently coherent or logical way."[283] As a result, "state courts have tended to construe state constitutional bans on special legislation narrowly, permitting state legislatures to enact special laws with a great deal of discretion despite these restrictions."[284]

3. Fundamentally Distinct: Education as Freedom

Yet weakened state constitutional prohibitions against special or class legislation would not pose an obstacle to the enforcement of freedoms to become and to learn. First and foremost because such freedoms should be considered coextensive with state constitutional rights to education. "The highest courts of fifteen states have previously recognized the right to education as a fundamental constitutional right . . . ."[285] Only a handful

277. "State constitutional prohibitions on 'special' laws currently appear, in various forms, in the vast majority of state constitutions." Long, *supra* note 264, at 721 & n.6 (citing forty-six state constitutional provisions).

278. *See id.* at 722; *see, e.g.*, Town of Secaucus v. Hudson Cnty Bd. of Tax., 628 A.2d 288, 294 (N.J. 1993) ("From a constitutional standpoint, a law is regarded as special legislation 'when, by force of an inherent limitation, it arbitrarily separates some persons, places or things from others upon which, but for such limitation, it would operate. The test of the special law is the appropriateness of its provisions to the objects that it excludes.'" (quoting Town of Morristown v. Woman's Club of Morristown, 592 A.2d 216, 225 (N.J. 1991) (Clifford, J., dissenting))).

279. *See* Nourse & Maguire, *supra* note 252, at 1004.

280. Long, *supra* note 264, at 737.

281. *Id.* at 734.

282. *Id.* at 736.

283. *Id.* at 737; *see also* Blackhawk, *supra* note 256, at 2099 ("[A]ll the more so now that the purpose of the prohibitions has been lost to recent memory.").

284. Zoldan, *supra* note 257, at 635 n.30.

285. Weishart, *supra* note 48, at 933 n.107 (citing cases).

of state high courts have decided that, although the right is important, it is not fundamental.[286] That conclusion, however, did not stop New York's highest court from ruling in favor of plaintiffs asserting the right to education, even applying rational basis review.[287] The remaining majority of state high courts are undecided on the fundamental right question but, due to the right's importance, they have struck down laws as unconstitutional applying only rational basis review.[288]

It would be, therefore, a mistake to read too much into the few courts that have deemed the right nonfundamental or that have applied rational basis review. In truth, state courts no longer feel compelled to follow federal fundamental rights doctrine in adjudicating the right to education and most have abandoned tiered scrutiny altogether.[289] Courts have made these doctrinal moves to account for the affirmative or positive nature of the right to education "that compels, rather than restrains, state action."[290] Their improvisation has been to fall back to a "means-ends test," which differs from the federal doctrine in that it scrutinizes legislative ends while deferring to legislative means; some courts also require a reasonable degree of fit between the means and ends.[291]

We could expect state courts to ratchet up their ends and fit scrutiny if the positive right to education were made coextensive with substantive due process guarantees of general laws to protect positive educational freedoms. This would evoke another artifact of "the antebellum period: the vested rights doctrine."[292] That doctrine, which also derived from substantive due process interpretations, was "used to invalidate laws deemed to interfere with certain fundamental rights of liberty or property without adequate justification (or 'arbitrarily')."[293] Its logic explains the reason state courts continue to apply more exacting scrutiny to substantive due process claims implicating more weighty or fundamental liberty interests.

The line-drawing problem will remain but would be less troublesome with a firm baseline of educational freedoms to become and to learn—even more so paired with state equality guarantees.[294] And, as explained in the next Part, using those freedoms to draw a line against segregative choice policies should not be especially difficult.

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286. *See* Weishart, *supra* note 58, at 244–57 (collecting cases in Tables A, B, and C).

287. *See id.* at 252–55 tbl.C (citing Campaign for Fiscal Equity, Inc. v. State (CFE II), 801 N.E.2d 326 (N.Y. 2003)).

288. *See id.* at 247 tbls.B–C.

289. *See id.*

290. *See id.* at 255–59.

291. *See id.* at 259–66.

292. Saunders, *supra* note 248, at 262–63.

293. *Id.* at 263; *see* Williams, *supra* note 240, at 425.

294. *See* Nourse & Maguire, *supra* note 252, at 1004–05 (noting "the union of [liberty and equality] claims may be stronger constitutionally than their parts").

III. RESISTING THE TYRANNY OF CHOICE

Choice is the font of freedom. It is widely assumed, therefore, that more choice equals more freedom. But an abundance of choice can inhibit freedom, or at least diminish the gratification of being free.[295] Choices are not free, they come with search and opportunity costs.[296] More choices increase search costs—the time and effort it takes to acquire and compare information about the options, which "makes choosing more laborious."[297] More choices also increase opportunity costs—by raising expectations that there is "the best option," resulting in "lingering doubt" and "regret" no matter which option is chosen.[298] Maximizers, those "who always want to maximize the outcomes of their choice," are especially prone to internalizing these search and opportunity costs and are therefore less satisfied with their decisions and experience lower well-being.[299]

"School choice resonates," nonetheless.[300] It holds a "seductive" force, promising the best option for all, while also appealing to notions of individual and religious freedom, free market competition, and cultural identity.[301] The allure of choice nevertheless betrays "deep conflicts over religion, race, immigration, national identity, and even the meaning and content of 'school choices.'"[302] Indeed, it too often obscures an intolerant, bitter reality.

Part of that reality is that school choice tends to sustain, entrench, or intensify segregation.[303] That is true of segregation by race or ethnicity,[304]

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295. *See* Arne Roets et al., *The Tyranny of Choice: A Cross-Cultural Investigation of Maximizing-Satisfacing Effects on Well-Being*, 7 JUDGMENT & DECISION MAKING 689, 700 (2012).

296. *See id.* at 690.

297. *Id.* at 689.

298. *Id.* at 689–90.

299. *Id.* at 690.

300. *See* Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 817 (2011).

301. *See id.* at 817–18.

302. *Id.* at 816.

303. *See id.* at 836–40.

304. *See* Chase M. Billingham & Matthew O. Hunt, *School Racial Composition and Parental Choice: New Evidence on the Preferences of White Parents in the United States*, 89 Soc. Educ. 99, 111–12 (2016); ERICA FRANKENBERG ET AL., CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 9–11 (2010), https://escholarship.org/uc/item/4r07q8kg [https://perma.cc/AL68-GTLB]; James, *supra* note 17, at 1114–17; Julian Vasquez Heilig et al., *Choice Without Inclusion?: Comparing the Intensity of Racial Segregation in Charters and Public Schools at the Local, State and National Levels*, 9 EDUC. SCI. 1, 2–4 (2019).

disability,[305] language,[306] and class,[307] or intersecting disadvantages.[308] It is also true of "indirect school choice," that is, self-segregation through residential choices, as well as "direct school choice" through charter schools and vouchers.[309] In either case, the privileged are better positioned to absorb or leverage the search and opportunity costs—to successfully navigate the system "with high levels of information, social connections, and money"—whereas lower-income families "find themselves with fewer choices."[310]

Direct school choice can thus contribute to school segregation even in racially diverse neighborhoods.[311] School segregation likewise persists in urban areas that have instituted "controlled choice," which, within the constraints of law, requires "levels of racial and ethnic or socioeconomic concentrations within particular schools."[312] Yet another cruel irony of school choice: some "admissions and management policies" enable charter schools to effectively "choose their students, rather than families choosing their schools."[313]

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305. *See* Amanda S. Sen, *Limited Choices: How the School-Choice Paradigm Subverts Equal Education for Students with Disabilities*, 78 MD. L. REV. 470, 492–98 (2019).

306. Black, *supra* note 15, at 1384–85 (citing MARK WEBER & JULIA SASS RUBIN, NEW JERSEY CHARTER SCHOOLS: A DATA-DRIVEN VIEW, PART I 18 (2014); then citing Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 N.C. L. REV. 655, 711 (2012); and then citing FAMILIES FOR EXCELLENT SCHS., THE NEGLECT OF NYC'S ENGLISH LANGUAGE LEARNER AND SPECIAL NEEDS STUDENTS 3 [https://perma.cc/7SDP-R54K]).

307. DAVID R. GARCIA, SCHOOL CHOICE 160 (2018); Halley Potter, *Do Private School Vouchers Pose a Threat to Integration?*, CENTURY FOUND. 10–11 (2017), https://tcf.org/content/report/private-school-vouchers-pose-threat-integration/?agreed=1 [https://perma.cc/VW2X-TPC5]; Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 GEO. J. ON POVERTY L. & POL'Y 1, 18, 32–33 (2008).

308. *See* Wendy Parker, *From the Failure of Desegregation to the Failure of Choice*, 40 WASH. U. J.L. & POL'Y 117, 136 (2012) (noting "charter schools hyper-segregated by race/ethnicity were also overwhelmingly economically poor in student enrollment").

309. *See* Wilson, *supra* note 14, at 241–42, 254–59; *see, e.g.*, Erica Frankenberg, *The Impact and Limits of Implementing Brown: Reflections from Sixty-Five Years of School Segregation and Desegregation in Alabama's Largest School District*, 11 ALA. C.R. & C.L.L. REV. 33, 106 n.515 (2019) ("The consensus of researchers is that charter schools have segregating effect."); Black, *supra* note 15, at 1401–02; Billingham & Hunt, *supra* note 304, at 101; Ann Owens, *Inequality in Children's Contexts: Income Segregation of Households with and Without Children*, 81 AM. SOCIO. REV. 549, 565–66 (2016).

310. *See* Sen, *supra* note 305, at 504.

311. *See* CLARA HEMPHILL ET AL., NEW SCH. CTR. FOR N.Y.C. AFFS., SEGREGATED SCHOOLS IN INTEGRATED NEIGHBORHOODS: THE CITY'S SCHOOLS ARE EVEN MORE DIVIDED THAN OUR HOUSING 2 (2016), https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/57336ad87da24f10a9e2e710/1462987481246/Segregated+Schools+In+Integrated+Neighborhoods.pdf [https://perma.cc/ZJ8B-TFFA].

312. Brill, *supra* note 10, at 390.

313. Julian Vasquez Heilig et al., *Separate and Unequal? The Problematic Segregation of Special Populations in Charter Schools Relative to Traditional Public Schools*, 27 STAN. L.& POL'Y REV. 251, 285 (2016).

Setting aside concerns about the illusions of school choice, its segregative effects portends to give with one hand (parents' negative freedoms) and take away with another (children's positive freedoms). But these freedoms do not simply offset—children's positive freedoms warrant constitutional protection, parents' negative freedoms do not. "To be sure, parents retain the privilege under the U.S. Constitution to decide whether their children will receive a public or private education and, in a more general sense, the privilege 'to control the education of their own,' including directing the religious education of their children."[314] And these liberty interests are "among the 'oldest' substantive due process rights" recognized by the Supreme Court.[315]

But parents enjoy no constitutionally protected privilege to control which publicly funded school (public or private) their children attend. "There is no constitutional right to attend a school of one's choice."[316] Parents have "no constitutional right" to have their children "attend charter schools," for instance.[317]

	Positive or Negative?	Constitutionally protected?
Children's educational freedoms to become and to learn	Positive	Yes
Parental freedom to select a publicly subsidized school of their choice	Negative	No

In the constitutional order, therefore, children's positive freedoms take priority over parental claims for negative, school-choice freedom. Turning then to the constitutionality of school choice practices, those that have segregative effects offend state substantive due process guarantees if the segregative practices *either* (i) arbitrarily deprive schoolchildren of freedoms to become and to learn *or* (ii) specially burden or benefit a class without a legitimate public purpose.

314. Weishart, *supra* note 48, at 930 (footnotes omitted) (quoting Meyer v. Nebraska, 262 U.S. 390, 401 (1923)).

315. Kimberly West-Faulcon, *Liberty to Subordinate*?, 99 IOWA L. REV. BULL. 153, 161 (2014) (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)).

316. Wessmann v. Gittens, 160 F.3d 790, 830 (1st Cir. 1998); *accord* Broussard v. Hous. Indep. Sch. Dist., 395 F.2d 817, 821 (5th Cir. 1968) ("[W]e reiterate that 'a schoolchild has no inalienable right to choose his school . . . .'"); Citizens for Better Educ. v. Goose Creek Consol. Indep. Sch. Dist., 719 S.W.2d 350, 353 (Tex. App. 1986) ("Students have no constitutional right to attend a particular school."); Mason v. Thetford Sch. Bd., 457 A.2d 647, 649 (Vt. 1983) ("[W]e note that there is no constitutional right to be reimbursed by a public school district to attend a school chosen by a parent.").

317. Doe v. Sec'y of Educ., 95 N.E.3d 241, 257 (Mass. 2018).

Before evaluating those arguments, it is worth noting at the outset that the following analysis proceeds on an assumption that segregative school choice practices constitute state action. Although not bound to impose a state action requirement when interpreting state constitutional provisions, most state courts have insisted on state action for due process violations.[318] Yet there is considerable state court variation concerning the standards for state action with courts deviating from the federal doctrine to reach some private and quasi-private actors.[319] Because the segregative school choice practices scrutinized here pertain to student admission and assignment practices that are ultimately sanctioned and regulated by legislatures and such matters implicate students' state education rights, it is reasonable to suppose that they are sufficiently entangled with, or directly involve state action to meet the requirement.[320]

A. *Segregative Practices Arbitrarily Deprive Educational Freedoms*

It is settled: "Segregation in public education is not reasonably related to any proper governmental objective, and thus . . . constitutes an arbitrary deprivation of [schoolchildren's] liberty . . . ."[321] As a general proposition, school segregation constitutes an *arbitrary* deprivation because characteristics such as race and class are morally, functionally, and legally irrelevant to whether a child should have access to equal educational opportunities.[322] Yet, as a matter of constitutional law, this does not end the matter. The constitutionality of segregative school choice practices that trigger substantive due process analysis will depend on whether such practices withstand judicial scrutiny.

It is, alas, not safe to presume that segregative school-choice practices would be subject to heightened scrutiny, even in the more than a dozen

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318. *See* John Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819, 853–54 (1990).

319. *See id.* at 822–23.

320. *See* Wilson, *supra* note 14, at 275–77 (acknowledging "debate whether the state action doctrine applies to charter schools" but suggesting there is "stronger argument that charter schools are state actors given the extent of state regulation of charters as it pertains to student-related practices, particularly student assignment policies"); *see also* Preston C. Green III, Julie F. Mead, & Suzanne E. Eckes, *Covenants to Discriminate: How the Anti-LGBT Policies of Participating Voucher Schools Might Violate the State Action Doctrine*, 19 U.N.H. L. REV. 162 (2021) (evaluating "constitutional challenges that students could make to invalidate the anti-LGBT admissions policies of participating voucher schools under the state action doctrine").

321. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

322. *See* Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 487 (2014) (explaining that such characteristics are beyond a child's control and, when used to exclude, it is both irrational, because the characteristics are immaterial, and immoral because it permits others to make projections of moral superiority by claiming children with those characteristics are inferior).

states where education is a fundamental right.[323] Indeed, several state court decisions "did not apply strict scrutiny even when the right to education was deemed fundamental."[324] As previously explained, this "mismatch" reflects the "incompatib[ility]" of conventional strict scrutiny analysis, which is calibrated for negative rights enforcement (that is, to restrain state action), with the right to education which demands "positive claim-right enforcement" (that is, to compel state action).[325]

The safer bet, therefore, is to presume that a deferential, means–ends standard of review would apply,[326] such as rational basis review.[327] That is, the touchstone of the analysis would be whether the segregative effects of school choice reasonably relate to, or are reasonably calculated to achieve a legitimate, public purpose. If courts were to undertake that analysis, as they do in adjudicating claims under the right to education, then we could expect substantial deference to legislative means, somewhat closer scrutiny of legislative ends, plus a demand for a reasonable degree of fit between the means and the ends.[328]

If past is prologue, courts would indeed defer to legislative means as they have in rejecting challenges to school choice practices. "In doing so,

323. *See, e.g.*, Yim v. City of Seattle, 451 P.3d 694, 697–98 (Wash. 2019) ("'State interference with a fundamental right is subject to strict scrutiny,' which 'requires that the infringement is narrowly tailored to serve a compelling state interest.'" (quoting Amunrud v. Bd. of Appeals, 143 P.3d 571, 576 (Wash. 2006) (en banc))); State v. Holloway, 916 N.W.2d 338, 344 (Minn. 2018) ("Substantive due process analysis 'depends on whether the statute implicates a fundamental right.' If a fundamental right is implicated, we apply strict-scrutiny review, and will only find a statute constitutional if it 'advance[s] a compelling state interest' and is 'narrowly tailored to further that interest.'" (alteration in original) (citation omitted) (first quoting State v. Bernard, 859 N.W.2d 762, 773 (Minn. 2015); then quoting SooHoo v. Johnson, 731 N.W.2d 815, 821 (Minn. 2007))).

324. Weishart, *supra* note 58, at 257 n.205 (citing cases).

325. *Id.* at 256–57.

326. *See, e.g.*, *Yim*, 451 P.3d at 697 ("In a substantive due process claim, courts scrutinize the challenged law according to 'a means-ends test' to determine if 'a regulation of private property is effective in achieving some legitimate public purpose.'" (quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005))).

327. *See, e.g.*, Dep't of Transp., Bureau of Driver Licensing v. Middaugh, 244 A.3d 426, 434 (Pa. 2021) (comparing federal means–ends due process analysis as "in essence, the rational-basis standard prevailing under the rubric of substantive due process"); Fletcher Props., Inc. v. City of Minneapolis, 931 N.W.2d 410, 420 (Minn. Ct. App. 2019) ("For a law to be upheld against a substantive-due-process claim, the rational-basis test requires: '(1) that the act serve to promote a public purpose, (2) that the act not be an unreasonable, arbitrary or capricious interference with a private interest, and (3) that the means chosen bear a rational relation to the public purpose sought to be served.'" (quoting Boutin v. LaFleur, 591 N.W.2d 711, 718 (Minn. 1999))).

328. *See supra* note 288 and accompanying text.

they have permitted the political process, rather than courts, to sort out the best way to develop and manage choice programs."[329]

As for the legislative ends, proponents will defend school choice practices as advancing both educational adequacy and equity which are not only legitimate but constitutionally mandated ends. Again, if the adjudication of the right to education is any indication, courts would be inclined to accept the purported public purposes of school choice practices; "ends scrutiny has not been used to 'smoke out' illicit motives or improper purposes."[330] And, in fact, courts have rejected previous facial challenges that have called into question the "public" purposes of school choice programs.[331]

Although state courts have not closely scrutinized the motives or intentions behind purported legislative ends in education rights cases, they "have been primarily concerned with 'the end product'"—that is, whether "the state action achieves or is reasonably likely to achieve the constitutionally prescribed end."[332] This "ends-to-fit" review insists that legislative means be at least "reasonably calculated to achieve" the ends.[333] Scholars have thus proposed as applied challenges to school choice practices that not only fail to reasonably achieve the ends of educational adequacy and equity, but undercut those very ends.[334] Evidence of such failure or subversion might be particularly strong at the local, rather than statewide, level.[335]

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329. Black, *supra* note 15, at 1415; *see, e.g.*, Doe v. Sec'y of Educ, 95 N.E.3d 241, 259 (Mass. 2018) ("Where a statute does not use a suspect classification or burden a fundamental right, is supported by a rational basis, and does not otherwise violate the Constitution, advocates may not turn to the courts merely because they are unsatisfied with the results of the political process.").

330. *See* Weishart, *supra* note 58, at 261.

331. *See* Black, *supra* note 15, at 1409–10; *see, e.g.*, Hart v. State, 774 S.E.2d 281, 292 (N.C. 2015) (concluding "appropriations made by the General Assembly for the [voucher program] were for a public purpose under" the state's constitution). *See generally* Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 FORDHAM URB. L.J. 703, 737 (2015); Preston C. Green III et al., *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L.J. 303, 332 (2013).

332. *See* Weishart, *supra* note 58, at 263–65.

333. *See id.*

334. *See, e.g.*, Black, *supra* note 15, at 1425–30 ("The conceptually and factually more direct challenge to choice programs is that they impede the delivery of constitutionally required public education opportunities."); Mead, *supra* note 331, at 742 ("[T]he effect of a voucher program over time may provide evidence that it subverts, rather than serves an appropriate public purpose, and it may suggest that 'applied' rather than 'facial' challenges to voucher programs may better litigate the programs' constitutionality according to state constitutional education mandates.").

335. *See* Black, *supra* note 15, at 1363 ("From the perspective of the local urban district, the effects range from existential threats to serious impediments to equal and adequate education.").

This sound legal strategy scored a promising early victory in *Cruz-Guzman v. State*,[336] in which the state supreme court allowed a case to proceed to trial which challenges charter school exemptions from desegregation requirements as violative of the state constitution's education, equal protection, and due process clauses.[337] In a footnote responding to the dissent's argument, the court observed: "It is self-evident that a segregated system of public schools" is inadequate and inequitable under the education clause.[338] After nearly six years of litigation, the legislature is finally set to consider legislation that could potentially settle *Cruz-Guzman*.[339]

Not to diminish the significance of this victory, but there is a more direct and dispositive argument to be made: If courts were to name and reclaim educational freedoms to become and to learn, then it would be virtually impossible for segregative school choice practices to reasonably relate to, or be reasonably calculated to achieve, legitimate public purposes.

For sure, proponents can still come to court armed with social science research that schools of choice advance educational adequacy and equity as much as public schools.[340] And their opponents can surely present contradictory research.[341] Faced with such conflicting evidence, courts will be inclined to defer, as they typically do, to legislative facts and education policymakers.[342] As a result, segregative school choice practices are likely to withstand judicial scrutiny or, at the very least, limit the scope and magnitude of any remedy.

Choice proponents cannot adduce evidence, however, that segregative school choice practices advance schoolchildren's freedoms to become equal citizens or to learn in democratic, integrated, and transformative settings. No further inference from conflicting social science research is required: Segregation is the antithesis of those educational freedoms.

The mere act of enrolling a child in a publicly subsidized school of one's choice, though a measure of parental freedom, does not necessarily exercise or enrich children's educational freedoms to become and to learn. Schools of choice can cultivate capabilities necessary for

336. 916 N.W.2d 1 (Minn. 2018).

337. *See id.* at 6–12.

338. *Id.* at 10 n.6.

339. *See* Josh Verges, *MN Legislature to Act on Cruz-Guzman Lawsuit over School Segregation*, PIONEER PRESS (Jan. 22, 2021, 5:13 PM), https://www.twincities.com/2021/01/22/mn-legislature-to-act-on-cruz-guzman-lawsuit-over-school-segregation/ [https://perma.cc/5N4V-75EK].

340. *See* Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J.L. & PUB. POL'Y 346, 397 (2018) (previewing social science research that school choice proponents could rely on).

341. *See id.* at 395 n.356 (citing research).

342. *See id.* at 348–50, 368, 375, 381–82.

responsible and productive citizenship, but not *equal* citizenship—without the social integration achievable in diverse settings.[343] School choice programs that make those diverse settings possible could encourage and sustain freedoms to become and to learn, if only partially.[344]

But such integrative schools of choice are not the subject of this Article, which instead scrutinizes publicly subsidized, *segregative* school choice practices that make democratic, integrated, and transformative settings impossible. There can be no legitimate public purpose for such practices bearing the state's imprimatur.

Harkening back to Du Bois, skeptics as ideologically divergent as Derrick Bell and Clarence Thomas discount the overriding importance of integrated schooling, arguing that well-resourced majority-minority schools can be better educationally and socially for racial and ethnic minority students because they encounter fewer forms of racism and discrimination, have more supportive teachers, and culturally affirming curriculum and sense of community.[345] Proponents of single-sex

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343. *See* ANDERSON, *supra* note 133, at 111 ("To realize democracy on all of these levels requires comprehensive integration of significant social groups in civil society and the state."), 116, 123–34 (explaining that social integration necessary for equal citizenship is achievable only in settings that foster "intergroup cooperation on terms of equality…whereby members of disadvantaged groups bring relevant considerations to the attention of agents who would otherwise be ignorant of them, and accountability, whereby agents respond to the presence of diverse others by expanding the circle of justification to address them as well as in-group members").

344. Witness the example of poet laureate, Amanda Gorman, author of the acclaimed "The Hill We Climb" inauguration poem, who attended a diverse school of choice. *See* Jay Matthews, *Amanda Gorman's Private School: A Mix of Rich, Poor, Arts and Social Action*, WASH. POST (May 22, 2021), https://www.washingtonpost.com/local/education/new-roads-school-amanda-gorman/2021/05/21/36d9dd48-b98c-11eb-a5fe-bb49dc89a248_story.html [https://perma.cc/JFL5-2R33]. One is still left to wonder, however, whether all integrated schools of choice could advance freedoms to learn in democratic and transformative settings; much would depend on the mission and pedagogy of such schools, among other features.

345. *See* DERRICK BELL, SILENT COVENANT: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 24–25, 196 (2004) (contending that *Brown*'s integration strategy failed and improving the quality of education in Black schools would have been more effective); *id.* at 241–48 (discussing motivations and experiences of Black independent schools); Derrick Bell, *Racism As the Ultimate Deception (Fn1)*, 86 N.C. L. REV. 621, 630 (2008) ("[B]etter schooling, not integrated schools, was what the black parents we represented needed and wanted."); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 761 (2007) (Thomas, J., concurring) ("[I]t is far from apparent that coerced racial mixing has any educational benefits, much less that integration is necessary to black achievement."); Martha Minow, *Brown v. Board in the World: How the Global Turn Matters for School Reform, Human Rights, and Legal Knowledge*, 50 SAN DIEGO L. REV. 1, 25 (2013) ("Justice Thomas has also emphasized that because of their 'distinctive histories and traditions,' majority-minority schools can function as the center and symbol of African-American communities while offering children examples of independent black leadership and success.").

schooling and programming have likewise extolled their purported educational and social benefits for both males and females.[346]

There is substantial evidence to the contrary, that integration is educationally and socially beneficial to *all* children.[347] But we can set this debate aside because segregative school choice practices cannot serve legitimate public purposes even if they can improve educational outcomes equitably, among the neediest or most disadvantaged students. Improving educational outcomes equitably is indisputably a worthy public purpose. Yet it matters how public purposes are achieved, the means as well as the ends.

Segregative school choice practices, subsidized by public funds, are illegitimate means because they are antidemocratic. And the ends do not otherwise justify the means because the means subvert the "core purpose of public education to democratize schoolchildren."[348] State constitutions impose a duty to educate, not just adequately and equitably, but democratically.[349] Segregative school choice practices breach this duty by denying children equal educational freedom.

Children's freedoms to become equal citizens are thwarted in segregated schools that mark them as unequal—no matter how "equal" or superior the facilities[350]—whether they are Black or White.[351] The "sense of separateness and difference" that some children cannot "be a

346. *See* J. Shaw Vanze, *The Constitutionality of Single-Sex Public Education in Pennsylvania Elementary and Secondary Schools*, 12 U. PA. J. CONST. L. 1479, 1485 (2010) ("They contend that girls feel self-conscious in coeducational classes, but in single-sex environments they have more leadership opportunities, receive more attention from teachers, and participate more fully in class. They also argue that single-sex education has benefits for boys because boys in single-sex classes do not feel pressure to act tough but instead can focus on their studies and collaborate with their peers."); Nicholas Benham, et al., *Single-Sex Education*, 20 GEO. J. GENDER & L. 509, 530–36 (2019) (discussing standard arguments for and against single-sex schools).

347. *See* Weishart, *supra* note 340 (collecting research); Jennifer Ayscue, Erica Frankenberg, & Genevieve Siegel-Hawley, *The Complementary Benefits of Racial and Socioeconomic Diversity in Schools*, The National Coalition on School Diversity, Research Brief No. 10 (2017), https://files.eric.ed.gov/fulltext/ED603698.pdf [https://perma.cc/55WZ-7ZRQ]; Jack Schneider, Peter Piazza, Rachel S. White, and Ashley Carey, *Student Experience Outcomes in Racially Integrated Schools: Looking Beyond Test Scores in Six Districts*, EDUC. & URBAN SOC'Y 2, 12, 20–21 (2021), https://journals.sagepub.com/doi/10.1177/00131245211004569 [https://perma.cc/K5A4-6Y3D].

348. *See* Weishart, *supra* note 74, at 39–40 (citing primary and secondary authorities).

349. *See id.* at 42–52 (examining text, history, precedents that have formulated duty to educate democratically).

350. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

351. *See* Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2405–06 (2021) (noting "social science research" that documents harms of racial segregation to White students which, in turn, "undercut public education's democratic-equality function").

part of the same community or share the same values,"[352] deprives them of the opportunity to cultivate their capacities, to cultivate their positive freedom, and to function as equal citizens. "From a relational point of view, social inequality and lack of freedom are one and the same," that is, "to be unfree is to be subject to the arbitrary will of another . . . the state of subordination, of inequality."[353]

That was the joint holding of *Bolling* and *Brown*, and it was a central holding of the *Clark* decision nearly a century before: segregated schools preclude not just freedom to become equal citizens but freedom to learn in the democratic settings envisioned for common schools—inclusive, open to all, and participatory.[354] Segregative school choice practices instead "promote competition, individualism, and subordination."[355] Needless to say, segregated schooling extinguishes the freedom to learn in integrated and transformative settings as well.[356]

If segregative school choice practices deprive children of equal educational freedoms, then they cannot possibly relate to legitimate public purposes and therefore constitute arbitrary state actions in violation of state substantive due process guarantees.[357] Echoing the words of an abolitionist, being deprived of "the right to learn," of education as freedom, simply cannot be called "due process of law."[358]

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352. John A. Powell & Stephen Menendian, *Little Rock and the Legacy of* Dred Scott, 52 ST. LOUIS U. L.J. 1153, 1185 (2008).

353. ANDERSON, *supra* note 133, at 103 (footnote omitted).

354. *See supra* notes 82–83 and accompanying text.

355. *See* James, *supra* note 17, at 1119; Saiger, *supra* note 51, at 790 ("Charter schools are precisely the opposite of common schools. The banner of common schools is commonality: All students, regardless of background, were to be schooled together and in the same way. The creed of charter schools is consumerism: because students want and require different things, there should be different institutions than can meet those multifarious needs."); Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 447 (2013) ("Based on their track record thus far, charters and vouchers, on the whole, are not operating in furtherance of the public good. Rather than promote the public good, they tend to promote the individual good and operate in ways that actively undermine the public good.").

356. *See* John A. Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 792 (1996) ("Through association we learn to consider the effect of our actions upon others. We no longer can act in isolation once we know each other. Conversely, anyone or anything we do not associate with appears suspect from an isolated perspective." (footnote omitted)).

357. *See* Jackson v. Pasadena City Sch. Dist., 382 P.2d 878, 880–81 (Cal. 1963) (holding that racial segregation denied schoolchildren "due process of law" given "the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis . . . the ability to learn and exchange views with other students" (first citing Brown v. Bd. of Educ., 347 U.S. 483, 493–95 (1954); then citing Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954))).

358. *See* WRITINGS AND SPEECHES OF ALVAN STEWART, ON SLAVERY 331–32 (Luther Rawson Marsh ed., 1860).

B. *Segregative Practices Offend General Law Principles*

Few courts have considered whether school choice programs or practices constitute impermissible special laws or class legislation. Perhaps the Supreme Court's decision in *Zelman v. Simmons-Harris*,[359] upholding a voucher program under the U.S. Constitution, explains why.[360] Some have construed *Zelman* to imply that vouchers "do not constitute class legislation because they are general welfare benefits available to all residents, and they do not single out a class of people for unique benefits or burdens."[361]

But *Zelman*'s holding does not sweep so broadly, it settled only that vouchers do not violate the Establishment Clause.[362] And even if such a broad construction were permitted, it would not preclude a state court from construing state constitutional guarantees to provide greater protection for educational freedoms to become and to learn.[363]

State constitutional prohibitions against special laws or class legislation surely void segregative school choice practices. At first blush, some school choice programs give the appearance of generality. For instance, most state laws require charter schools to be tuition free, open to all, and if enrollment is limited, to follow a "first-come, first-served" admissions policy or use a lottery.[364] Despite this, charters, on the whole, "educate a disproportionate number of poor, low-performing, and African-American students."[365] Similarly, most, but not all, public voucher programs take "a targeted approach, conditioning eligibility on the basis of income, prior attendance at a low-performing school, or some other measure of educational disadvantage."[366]

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359. 536 U.S. 639 (2002).

360. *Id.* at 662–63.

361. Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1032 (2013).

362. *Zelman*, 536 U.S. at 649 ("Three times we have confronted *Establishment Clause* challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges." (emphasis added)).

363. Arizona v. Evans, 514 U.S. 1, 8 (1995).

364. *See* Parker, *supra* note 308, at 125.

365. James E. Ryan, *Charter Schools and Public Education*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 393, 399 (2008); *see* Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J.L. & POL'Y 189, 212–13 (2016). *But see* Heilig et al., *supra* note 313, at 278 ("Our analysis, which looked at high-need student enrollment in charter schools relative to non-charter public schools at three unit of analysis (state, district, and local), illustrates that the claims by many charter school providers that they are serving disadvantaged students at comparable rates equal to or greater than public schools is misleading when examined spatially.").

366. Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 813 (2005); *see* Wilson, *supra* note 365, at 211 n.109; Michael Heise,

School choice programs can thus withstand any facial challenge as class legislation either because they apply generally or because they are, in practice if not deliberately, directed towards disadvantaged groups, who are protected most relevantly by state constitutional rights to equity-driven measures to mitigate educational disparities.[367]

But not all equity is created equal. Equitable measures that segregate are inherently unequal. That is, after all, the lesson of *Brown*. Moreover, any purported public purpose of school choice practices must be aligned with the state constitutional duty to educate democratically.[368] An as applied challenge, probing beneath any surface-level generality or equity, could expose whether selective choice practices constitute impermissible class legislation that lacks a legitimate public purpose.

There are several such practices that maintain or exacerbate segregation by race or ethnicity, class, language, and disability:

- Charter schools can be strategic "about school location that serve to either restrict access to undesired students or expand reach to desired populations."[369]

- Charter schools cap their enrollment and are "under no obligation to expand or make alternative arrangements for additional students, not even for needy students who live next door to the charter."[370]

- Charter schools "adopt curriculum and codes of conduct that are far more rigorous than the traditional public schools and then exclude students who cannot meet these expectations."[371]

- Charter schools "advertise and promote their school to prospective applicants," and in so doing, "encourage some prospective applicants to apply and remain unknown to others."[372]

- Charter schools "through their curricular focus, transportation policies, receptivity to student needs, and capacity to serve students with special needs," likewise "discourage and encourage certain demographic

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From No Child Left Behind to Every Student Succeeds: Back to A Future for Education Federalism, 117 COLUM. L. REV. 1859, 1886 (2017).

367. *See* Weishart, *supra* note 340, at 366–67.

368. *See supra* note 74 and accompanying text.

369. Wagma Mommandi & Kevin Welner, *Shaping Charter Enrollment and Access in* CHOOSING CHARTERS: BETTER SCHOOLS OR MORE SEGREGATION? 65 (Iris C. Rotberg & Joshua L. Glazer, eds. 2018).

370. Black, *supra* note 15, at 1383.

371. *Id.*

372. *Id.* at 1384

groups.[373] For instance, "gentrifie[d] families who tend to have more time, resources, and cultural capital to navigate the lottery process are more likely to apply and gain admission to the better charter schools."[374]

- Charter schools in some states may consider neighborhood preferences as part of the admission process, which "allows for the creation of predominantly white charter school enclaves that satisfy the aggregate white preference for predominately white schools."[375]

- Charter schools can engage in the "practice of selectively dissuading families during the enrollment stage," place certain conditions on enrollment, e.g., admissions-testing or requiring parents to volunteer, which may likewise dissuade families to enroll, or achieve the same effect through onerous "charter school application documents."[376]

- Charter schools can also control the student population even after students are admitted, by "encouraging already enrolled students deemed to be a poor fit to consider different school options," warning certain enrolled students that they will be held back a grade if they remain enrolled, "restricting new enrollment to only certain grade levels," imposing "costs, dues, and fees that amount to an informal tuition," or engage in exclusionary "forms of harsh discipline that have the effect of pushing out students whose behavior does not align with school philosophy."[377]

- Voucher programs allow private schools "to discriminate against students in the enrollment process (particularly in regard to religion), restrict student speech, punish students harshly, deny students basic due process, and refuse to provide special education services."[378]

- Voucher programs are subject to the whims of private schools which "can choose their students, including on grounds that would be illegal in public schools."[379]

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373. *Id.*; Will Stancil, *Charter Schools and School Desegregation Law*, 44 MITCHELL HAMLINE L. REV. 455, 473 (2018) ("There is evidence that a substantial subset of charter schools is not only segregated and segregative, but is also engaged in racial targeting . . . actively pursuing policies with the aim and effect of creating racially segregated student bodies.").

374. Erika K. Wilson, *Gentrification and Urban Public School Reforms: The Interest Divergence Dilemma*, 118 W. VA. L. REV. 677, 713 (2015).

375. Wilson, *supra* note 14, at 270.

376. Mommandi & Welner, *supra* note 369, at 65–66.

377. *Id.* at 67.

378. Black, *supra* note 15, at 1390.

379. *Id.* at 1391.

Such practices, sustaining and intensifying segregation, including within-school segregation, overlay an already stratified system of educational benefits and burdens that work to the advantage of school choice recipients and the disadvantage of all other students.[380] Charter schools, for instance, "have seen a rate of per-pupil funding growth that far outstrips public schools;" are not required to "collect the same data as public schools;" and generally reap the benefits of less oversight and accountability, including exemptions from teacher certification, compensation, and evaluation requirements imposed on public schools.[381] Voucher programs likewise enjoy funding and flexibility advantages.[382]

Publicly subsidized school choice undeniably singles out certain classes for special benefits and unique burdens. But the question again is whether this form of singling out is permissible and where to draw that line. Preferencing school choice programs to the detriment of public schools likely violates state constitutional rights to education.[383] To make that showing in an as-applied challenge, plaintiffs must establish "that choice programs are actually causing or are connected to inadequate or inequitable educational opportunities in particular schools."[384] Far less is required to show that segregative school choice practices contravene general law principles to constitute impermissible class legislation.

Courts should draw that line using a baseline of educational freedom. School choice practices that exceed or maintain the degree of segregation in comparator public schools impermissibly single out schoolchildren by arbitrarily depriving them of freedom to become equal citizens and to learn in democratic, integrated, and transformative settings, thereby subverting the state duty to educate democratically. New metrics for measuring segregation can aid such comparisons.[385] A public school control group or comparator is necessary because the state cannot circumvent equal protection guarantees or general law principles simply by funneling public funds to quasi-public or nonpublic actors who are otherwise permitted to adopt segregative choice practices.[386]

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380. *Id.* at 1400.

381. *Id.* at 1373–82.

382. *Id.* at 1385–90.

383. *Id.* at 1417 ("Public education's special constitutional standing offers strong support for the principle that states are prohibited from preferencing alternatives to the public education system.").

384. *Id.* at 1416.

385. *See generally* MARK FOSSETT, NEW METHODS FOR MEASURING AND ANALYZING SEGREGATION (2017) (setting forth a new "difference-of-group-means" framework for segregation measurement); Heilig et al., *supra* note 304.

386. *Cf.* Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 330 (2010) (noting that

State courts have taken similar approaches to claims of arbitrary discrimination in the context of class legislation, essentially merging due process and equal protection.[387] Segregative school choice practices that deviate from the baseline are unconstitutional, either because they violate state constitutional prohibitions against special or class legislation or because they violate substantive due process guarantees directly. That was the judgment of the Nevada Supreme Court when it struck down segregated schools a century and a half ago:

> Can there be any doubt but the subject of education . . . and the question as to what children shall or shall not be admitted to the privileges afforded by them, are matters of general interest? No question can be suggested in which the entire people of the state are more generally concerned. It is confined to no class, race, or locality. All who pay taxes at all contribute to the establishment and support of the schools, . . . [and] all are interested in the enjoyment of the advantages which they afford. This is a subject, then, which most clearly calls for general legislation and none other. In that the law in question denies the privilege to one class of citizens to have their children educated at these schools, it is special, and is so far void.[388]

To the extent that this constitutional infirmity can be cured, the remedy for *segregative* school choice practices is *integrative* school choice practices: controlled choice, inter-district schools of choice, universal enrollment, strategic recruitment, or weighted lotteries.[389]

CONCLUSION

If separate but free is inherently unfree, then conceivably all manner of school segregation should be prohibited. Morally speaking, that

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"Congress is prohibited from acting antithetical to, or inconsistent with, equal protection" through "the expenditure of federal funds" to private actors who may freely discriminate); Metro. Gov't v. Tenn. Dep't of Educ., 2020 WL 5807636, at *5, *8 (Tenn. Ct. App. Sept. 29, 2020) (holding the voucher law unconstitutional as violative of prohibition against special law and noting that legislature's plenary authority "relate[d] to public schools, not private ones" (emphasis omitted) (footnote omitted)).

387. *See, e.g.*, Wash. Nat'l Ins. Co. v. Bd. of Rev. of N.J. Unemployment. Comp. Comm'n, 64 A.2d 443, 447 (N.J. 1949) ("While the due process and equal protection guaranties are not coterminous in their spheres of protection, equality of right is fundamental in both. Each forbids class legislation arbitrarily discriminatory against some and favoring others in like circumstances.").

388. State v. Duffy, 7 Nev. 342, 354–55 (1872).

389. *See* U.S. DEP'T OF EDUC., IMPROVING OUTCOMES FOR ALL STUDENTS: STRATEGIES AND CONSIDERATIONS TO INCREASE STUDENT DIVERSITY 10–17 (2017), https://www2.ed.gov/about/offices/list/oese/oss/technicalassistance/finaldiversitybriefjanuary2017.pdf [https://perma.cc/F5DH-T2CX].

statement is beyond credible dispute. Legally speaking, regrettably yet predictably, it depends. Unlike federal equal protection doctrine, state substantive due process guarantees are not limited to the traditional suspect classes, yet they are still mostly bound by the state action doctrine.

Our understanding of all the ways that state and quasi-state action have perpetuated segregation continues to take shape, however, informed by recent comprehensive analysis.[390] To the extent that such actions have resulted in school segregative practices that encroach on educational freedoms to become and to learn, then they too should be prohibited.

All this time what has been missing in the fight against segregation is a robust theory of education as freedom. Eleven Black teens intrepidly laid the groundwork for that theory more than sixty years ago.[391] This Article has attempted to develop it into a full-fledged, affirmative theory leveraging state constitutional law. No matter how morally or legally persuasive, however, a theory it will remain unless and until it is put to the test.

390. *See generally* NOLIWE ROOKS, CUTTING SCHOOL: THE PRIVATIZATION, SEGREGATION, AND THE END OF PUBLIC EDUCATION (2020) (analyzing racism, segregation, poverty, the history of Black education, and their relationship to the current movement to privatize public education); JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES (2018) (exploring how local governments generate race and class segregation); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2018) (arguing that segregation in America is the byproduct of explicit government policies at the local, state, and federal levels); CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869–1973 (2018) (arguing that tax policy and taxpayer identity were built on the foundations of White supremacy and intertwined with ideas of whiteness).

391. *See supra* note 1 and accompanying text.