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## State Takeover Laws (Re)visited: School Board Leadership as White Property

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# STATE TAKEOVER LAWS (RE)VISITED: SCHOOL BOARD LEADERSHIP AS WHITE PROPERTY

Steven L. Nelson<sup>†</sup> & Ericka Love<sup>‡</sup>

## ABSTRACT

*This Article leverages Cheryl Harris’s Whiteness as Property to better understand the state takeover of public schools in Houston, Texas. In doing so, the Article recounts the history of state takeovers of public schools and districts before highlighting how whiteness as property has been applied in research in the field of education. The Article shares the specific facts about the state takeover of public schools in the Houston Independent School District ahead of applying the four rights inherent in Harris’s Whiteness as Property. This Article argues and exhibits that whiteness as property is an appropriate framework by which to evaluate the state takeover of public schools and districts, especially the takeover of Houston Independent School District.*

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## INTRODUCTION

Many scholars have considered whiteness as property, including scholars in the field of education. Yet, none have considered how the state takeover of public schools and school districts implicate the noted Critical Race Theorist Cheryl I. Harris’s *Whiteness as Property* theory.<sup>1</sup> In this Article, we evaluate the recent takeover of Houston Independent School District (“HISD”) under Harris’s theory. Given that close to 85% of state takeovers occur in school districts that serve disproportionately Black and Brown communities and many of these school districts subjected to takeover have their popularly elected school boards dismantled and disempowered,<sup>2</sup> whiteness as property—a subtheory of Critical Race Theory—

<sup>1</sup> Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

<sup>2</sup> Domingo Morel, *The Effects of Centralized Government Authority on Black and Latino Political Empowerment*, 69 POL. RSCH. Q. 347, 348-49 (2016).

is an appropriate theory under which to analyze the takeover of HISD. Additionally, whiteness as property explains white people's (as represented by the state apparatus) continued takeover of Black and Brown school districts, which effectively preempts local authority in favor of state political goals.

This paper proceeds in four parts. The first part places the state takeover of public schools and districts in the proper context. We argue that state takeovers of public schools are part and parcel of an education reform platform that seeks—but fails—to improve schools that serve predominantly Black and Brown school districts. Additionally, we argue that state takeovers disproportionately target urban and urbanizing environments, where larger and disproportionate numbers of Black and Brown peoples reside. Part two highlights the recent coverage of whiteness as property, including education as a white property right. In this part, we highlight how whiteness as property is an appropriate framework through which to evaluate the state takeover of HISD. In part three, we apply whiteness as property to the takeover of HISD. In doing so, we apply Harris's four rights inherent to whiteness as property. Part four concludes by offering final thoughts on race, racism, and state takeovers of public schools with a particular eye towards the takeover of HISD.

#### I. STATE TAKEOVERS OF PUBLIC SCHOOLS AND DISTRICTS IN CONTEXT

Because citizens of the United States do not enjoy a fundamental right to education granted under the Federal Constitution,<sup>3</sup> individual states bear the responsibility for administering and governing public education.<sup>4</sup> Throughout history, the federal government has used the federal courts<sup>5</sup> and monetary inducements<sup>6</sup> to impact, guide, and assure that states act in an ostensibly equitable fashion. Yet, the way in which the United

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<sup>3</sup> Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1061 (2019); Neubia L. Harris, *Adequate Education: The Disregarded Fundamental Right and Resurgence of Segregation of Public Schools*, 45 MITCHELL HAMLINE L. REV. 237, 238 (2019).

<sup>4</sup> Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 310 (2013).

<sup>5</sup> For an example of how the United States government has used the federal court system to advance educational equity, see Kevin R. Johnson, *The Keyes to the Nation's Educational Future: The Latina/o Struggle for Educational Equity*, 90 DENV. U. L. REV. 1231, 1231, 1238–42 (2013).

<sup>6</sup> See generally Patrick McGuinn, *Stimulating Reform: Race to the Top, Competitive Grants and the Obama Education Agenda*, 26 EDUC. POL'Y 136 (2012) (discussing how Race to the Top Grants, which were issued on a competitive basis, contributed to significant changes in state-level education policy).

States has implemented education federalism<sup>7</sup> has produced inconsistent and inequitable legislation that has failed to achieve true equality or equity in schools.<sup>8</sup>

States (not the federal government) maintain authority over education, and education is mostly administered through locally elected school boards.<sup>9</sup> For the most part, however, local school boards have managed their schools and schooling on their own, with the exception that local school boards must observe and abide by state-level laws, policies, and procedures.<sup>10</sup> The Supreme Court recognized and relied upon the lore of local control in the landmark case *San Antonio v. Rodriguez*.<sup>11</sup>

Despite the focus on local control, states have engaged in enhanced and targeted interventions into local school board affairs over the last thirty-five years. New Jersey began the trend of seizing control of local public schools and districts in 1989, ostensibly because of academic failure but also in response to mismanagement, fiscal problems, political overreach, and corruption.<sup>12</sup> However, states generally exercised restraint when engaging in state takeovers of public schools and districts (unless a district was subject to financial distress) between 1989 and 1997.<sup>13</sup> Since 1997, purported academic distress has become a leading cause for states engaged in the takeover of public schools and districts.<sup>14</sup>

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<sup>7</sup> Robinson, *supra* note 4, at 287 (defining education federalism as “an emphasis on state and local control over education and a limited federal role” with a focus on “encourag[ing] experimentation, and promot[ing] . . . competition for excellence in education”).

<sup>8</sup> *Id.* at 287–89 (“[While educational federalism in the United States] generates some benefits, it also tolerates substantial inequitable disparities in educational opportunity both within and between states. [Ultimately, the] opportunity divide in American education continues to relegate far too many poor and minority schoolchildren to substandard educational opportunities.”).

<sup>9</sup> Shanon Taylor, *What Does the U.S. Department of Education Actually Do?*, NEVADA TODAY (Sept. 5, 2024), <https://www.unr.edu/nevada-today/news/2024/atp-us-department-of-education> [<https://perma.cc/N6TQ-MNR9>]; KORET TASK FORCE, CHOICE AND FEDERALISM: DEFINING THE FEDERAL ROLE IN EDUCATION (Hoover Inst. ed., 2012), <https://www.hoover.org/research/choice-and-federalism-defining-federal-role-education#background> [<https://perma.cc/5XSG-ZNUE>].

<sup>10</sup> Daniella Hall Sutherland, *Capacity and Control: Superintendent-School Board Relations in Locally Controlled Districts*, 59 EDUC. ADMIN. Q. 667, 669 (2023).

<sup>11</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973) (“[L]ocal control means . . . the freedom to devote more money to the education of one’s children. Equally important . . . is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs.”).

<sup>12</sup> Joseph O. Oluwole & Preston C. Green III, *State Takeover of School Districts: Race and the Equal Protection Clause*, 42 IND. L. REV. 343, 343, 382 (2009).

<sup>13</sup> *Id.* (noting the relatively low proportion of state takeovers that included academic components).

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

A. *Toward Education Reform and Educational Equity: State Takeover Policies' Dubious Roots*

The state takeover of public schools and districts is part and parcel of a greater lineage of education reform and school improvement policies that commenced in the mid-1950s. The earliest federal interventions into education law and policy happened in federal courts and addressed racial inequality and inequities in higher education.<sup>15</sup> These interventions into higher education laid the groundwork for interventions into law and policy that affected primary and secondary education. The National Defense Education Act, which was signed into law in 1958, was the first legislative intervention into educational equality and equity under the new regime of policies that targeted racial justice.<sup>16</sup>

While other laws indirectly impacted the realm of education policy, the Elementary and Secondary Education Act of 1965 (“ESEA”)<sup>17</sup> rose to become the most recognized and ambitious federal legislative intervention into education policy. As beneficial as ESEA was to the federal government’s aim of desegregating public schools,<sup>18</sup> it initiated an official ceding of power over education policy from states to the federal government.<sup>19</sup> As a component of President Johnson’s anti-poverty initiative,<sup>20</sup> the watershed legislation pursued two important goals: to increase the involvement of the federal government in education policy and to remedy

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<sup>15</sup> For higher education cases that set the stage for primary and secondary desegregation, see *Mo. ex rel. Gaines v. Can.*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950).

<sup>16</sup> Richard Ford, *Federal Intervention in Teacher Education*, 23 *AM. BEHAV. SCIENTIST* 145, 153 (1979); Andrew J. Toritto, *Finding Human Rights in Higher Education: A History of Federal Financial Aid and Discrimination in the United States*, 3 *LIFE & HISTORY* 27 (2022).

<sup>17</sup> See 20 U.S.C. § 6301 (1965).

<sup>18</sup> See generally Erica Frankenberg & Kendra Taylor, *ESEA and the Civil Rights Act: An Interbranch Approach to Furthering Desegregation*, 1 *RSF: RUSSELL SAGE FOUND. J. SOC. SCIENCES* 32 (2015) (discussing how ESEA contributed to the fight for educational equity, namely school desegregation).

<sup>19</sup> For information on the continued power struggle between state governments and the federal government as a result of ESEA, see David A. Gamson et al., *The Elementary and Secondary Education Act at Fifty: Aspirations, Effects, and Limitations*, 1 *RSF: RUSSELL SAGE FOUND. J. SOC. SCIENCES* 1, 17-18 (2015).

<sup>20</sup> Joseph P. Bishop & John H. Jackson, *Fifty Years Later: A Chance to Get ESEA Back on Track*, 23 *EDU. POL’Y ANALYSIS ARCHIVES* 1, 2 (2015); Kimberly Jenkins Robinson, *Restructuring the Elementary and Secondary Education Act’s Approach to Equity*, 103 *MINN. L. REV.* 915, 926 (2018).

substantial inequities in resource allocation, particularly for students living in poverty, through Title I funds.<sup>21</sup>

Since the inception of ESEA, there has been a series of back-and-forth political battles over power and accountability in the administration of schools between federal and state authorities. For instance, the next administration—the Nixon administration—initiated the New Federalism plan to reject and roll back the goals outlined in Johnson’s war on poverty.<sup>22</sup> Nixon’s plan reinforced state authority over programs and budget allocations in schools.<sup>23</sup> As a result, local schools became more reliant on state-provided funding.<sup>24</sup> The Reagan administration sustained and accelerated the federal government’s divestment from public schools and districts, which is believed to have contributed to decreased student academic output.<sup>25</sup> Additionally, Reagan’s administration injected distrust of the United States’ educational system(s) via the manufacturing of an academic achievement-related crisis through the release of a report entitled *A Nation at Risk: The Imperative for Education Reform*.<sup>26</sup> The report lambasted the lagging academic achievement of public schools and districts in the United States and called for restructuring the entire systems, including embracing and incorporating market-driven education reform and school improvement strategies.<sup>27</sup> Subsequent administrations increased federal involvement in education law and policy, often aiming to promote national-level standards for schools in the United States.

The federal government’s entanglements with the nation’s numerous systems of education reached an apex in 2001 with the passage of the No

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<sup>21</sup> See Michael Heise, *From No Child Left Behind to Every Student Succeeds: Back to the Future for Education Federalism*, 117 COLUM. L. REV. 1859 (2017); Helen F. Ladd, *No Child Left Behind: A Deeply Flawed Federal Policy*, 36 J. POL’Y ANALYSIS & MGMT. 461 (2017); Robinson, *supra* note 20, at 926-28. For an explanation of the importance of Title I funds, see Goodwin Liu, *Improving Title I Funding Equity Across State, Districts, and Schools*, 93 IOWA L. REV. 973, 976-77 (2007) (suggesting Title I funds, which are designed to drive education reform in service to educational equity, totaled almost \$13 billion in 2006 alone, accounting for roughly 5-10% of all school funding and roughly a third of all federal funding for primary and secondary schools over this period).

<sup>22</sup> Jacob S. Bennett & Benji Cohen, *What Have You Done for Me Lately? Educational Research and Urban Schools*, 51 EDU. & URB. SOC’Y 175 (2019).

<sup>23</sup> *Id.*

<sup>24</sup> See Domingo Morel, *Race and State in the Urban Regime*, 54 URB. AFF. REV. 490, 495 (2018).

<sup>25</sup> Bennett & Cohen, *supra* note 22.

<sup>26</sup> THE NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983). See generally Gary K. Clabaugh, *The Educational Legacy of Ronald Reagan*, 82 EDUC. HORIZONS 4 (2004); Sarah Garland, *Why is a Reagan-Era Report Driving Today’s Education Reform?*, HECHINGER REPORT (Aug. 17, 2014), <https://hechingerreport.org/report-1980s-driving-todays-education-reform/> [<https://perma.cc/2XZ9-TK8Y>].

<sup>27</sup> Marta P. Baltodano, *The Power Brokers of Neoliberalism: Philanthrocapitalists and Public Education*, 15 POL’Y FUT. IN EDU. 141, 144, 152 (2017).

Child Left Behind Act (“NCLB”).<sup>28</sup> In NCLB, the federal government leveraged monetary inducements to direct state education agencies to implement federally-desired policies.<sup>29</sup> Despite having received federal monies prior to NCLB, state and local education agencies retained primary control over education policymaking.<sup>30</sup> With the advent of NCLB, the Bush administration significantly reshaped funding protocols for public schools and districts, declaring that states’ Title I monies were on the line if they failed to comply with federal mandates.<sup>31</sup> These mandates included implementing policies that ensured 100% of students achieved academic proficiency in reading and math during or before the 2013-2014 school year.<sup>32</sup> Additionally, public schools and districts failing to meet this requirement, known as Adequate Yearly Progress (“AYP”), were publicly named as failing and faced harsh penalties, including closure and state takeover.<sup>33</sup> The federal government provided little additional funding and nearly no technical assistance for public schools and districts, making these lofty goals unrealistic.<sup>34</sup> Consequently, nearly half of the nation’s schools were labeled as failing under NCLB’s regulations.<sup>35</sup> To course correct this terrible congressional intervention into state affairs, the Obama administration, through Secretary of Education Arne Duncan, issued waivers to states that failed to meet NCLB’s unrealistic goals.<sup>36</sup> Still, these states had to agree to interventions that were outside of Congress’ norms and expectations, although these norms and expectations were federally supported.<sup>37</sup>

Having learned from the mistakes of NCLB, the Obama Administration took another pathway to education policy. The administration introduced the Every Student Succeeds Act (“ESSA”) in 2015, roughly

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<sup>28</sup> See Heise, *supra* note 21, at 1860-61.

<sup>29</sup> See Kristina P. Doan, *No Child Left Behind Waivers: A Lesson in Federal Flexibility or Regulatory Failure?*, 60 ADMIN. L. REV. 211, 215 (2008).

<sup>30</sup> Heise, *supra* note 21, at 1860-61.

<sup>31</sup> James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937, 942 (2004) (“The stricter accountability mechanisms, however, are reserved for schools receiving Title I funding.”). Title I schools, subject to more intense monitoring, are likely the most underfunded schools; thus, the federal government targeted the schools most in need of financial support with these requirements. *See id.*

<sup>32</sup> Laura Adler-Greene, *Every Student Succeeds Act: Are Schools Making Sure Every Student Succeeds?*, 35 TOURO L. REV. 11, 12-13 (2019); Ladd, *supra* note 21, at 461.

<sup>33</sup> Oluwole & Green, *supra* note 12, at 345.

<sup>34</sup> See generally Jennifer Imazeki & Andrew Reschovsky, *Is No Child Left Behind an Un (or Under) Funded Federal Mandate? Evidence from Texas*, 57 NAT’L TAX J. 571 (2004) (finding that the cost of complying with requirements of No Child Left Behind was disproportionate to the additional funding associated with the legislation).

<sup>35</sup> Ladd, *supra* note 21, at 465.

<sup>36</sup> See Heise, *supra* note 21, at 1870-71.

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

fourteen years after Congress' reauthorization of ESEA as NCLB.<sup>38</sup> ESSA course corrected by ceding to states much of the federal government's policy influence over education.<sup>39</sup> Still, ESSA has some of NCLB's expectations, either directly or in spirit. For instance, the law requires states to intervene in schools where academic performance is a chronic issue: particularly schools in the bottom 5% of the state or in high schools with graduation rates below 67%.<sup>40</sup> This requirement reverses some of NCLB's more prescriptive interventions while maintaining the requirement that states act when schools are struggling.

On the other hand, schools that receive Title I monies must still test 95% of their students, a nod to NCLB's requirements.<sup>41</sup> ESSA, however, overcorrects NCLB, and "[i]n some respects, the ESSA asks even less than the NCLB in regard to equity."<sup>42</sup> To that end, the federal government's ability to demand educational equity is reduced under ESSA. The federal government, through ESSA, has allowed states to gain more control with less accountability for equity.<sup>43</sup> Essentially, states are not fully required to pursue educational equity under ESSA, a self-defeating lever under ESEA. Renowned education law and policy professor, Derek Black, suggests states are unlikely to pursue educational equity on their own.<sup>44</sup> Furthermore, Kimberly Jenkins Robinson, Professor of Law and Director of the Education Rights Institute at the University of Virginia, notes that state and local governments routinely offer less than equitable educational opportunities for students from marginalized communities.<sup>45</sup> Additionally, the Obama Administration significantly empowered states to continue aggressively taking over public schools and districts with their incorporation of Race to the Top ("RTTT"), which practically required such intervention into purportedly underperforming schools.<sup>46</sup> Overall, both NCLB and ESSA have failed to meet the policy needs of students who are marginalized due to class and/or race, as both policies have

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<sup>38</sup> Robinson, *supra* note 20, at 916.

<sup>39</sup> See generally Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. 1309, 1312 (2017).

<sup>40</sup> *ESSA Factsheet*, U.S. DEP'T OF EDUC. (Nov. 28, 2016), <https://www.ed.gov/sites/ed/files/policy/elsec/leg/essa/essafactsheet170103.pdf> [<https://perma.cc/VJ6J-EBAL>].

<sup>41</sup> Adler-Greene, *supra* note 32, at 14, 21.

<sup>42</sup> Black, *supra* note 39, at 1352.

<sup>43</sup> *Id.* at 1311-12.

<sup>44</sup> See *id.* at 1356.

<sup>45</sup> Robinson, *supra* note 20, at 921-22.

<sup>46</sup> See Mary L. Mason & Sarah Reckhow, *Who Governs Now? Takeovers, Portfolios, and School District Governance* 3, 9 (The Educ. Pol'y Ctr. at Mich. State Univ., Working Paper No. 52, 2016).

incorporated strategies that set public schools and districts on a collision course with failure.<sup>47</sup>

While financial concerns have driven historic state takeovers of public schools and districts,<sup>48</sup> more recent state takeovers have cited alleged academic failure as the primary reason for state intervention.<sup>49</sup> Purportedly, states' intentions for takeover are to improve education outcomes and stabilize the school or district's financial status.<sup>50</sup> To some extent, the state takeover of public schools and districts is the result of increased reliance on state funding sources; thus, increased accountability is the impetus for state intervention in the way of state takeover.<sup>51</sup> Essentially, governors and other state leaders increased their engagement in the local administration of schools and districts as a result of public schools and districts' increased requests for state financial, physical, and human resources.<sup>52</sup> They were also responding to court decisions that were favorable to districts' appeals for more equitable funding for local schools.<sup>53</sup> State takeovers thereafter became a vehicle for introducing school choice.<sup>54</sup>

*B. Racial Relationships and Their Consequences as Takeovers Proliferate in Urban Cities*

State takeovers of public schools and districts are a primary and visible form of education reform policies and politics over the last several decades.<sup>55</sup> As previously noted, a supermajority of public schools and districts subjected to takeover serve disproportionately Black and Brown populations,<sup>56</sup> thereby demanding the attention of race scholars as well as those who focus on education policy, urban education, and the politics of education. Undoubtedly, race and power are integral components of state

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<sup>47</sup> Adler-Greene, *supra* note 32, at 22-23; Robinson, *supra* note 20, at 926-28.

<sup>48</sup> Oluwole & Green, *supra* note 12, at 343.

<sup>49</sup> See, e.g., Kenneth K. Wong & Francis X. Shen, *Measuring the Effectiveness of City and State Takeover as a School Reform Strategy*, 78 PEABODY J. EDU. 89, 89 (2003).

<sup>50</sup> Oluwole & Green, *supra* note 12, at 343.

<sup>51</sup> Kathryn A. McDermott, "Expanding the Moral Community" or "Blaming the Victim"? *The Politics of State Education Accountability Policy*, 44 AM. EDUC. RSCH. J. 77, 93-94 (2007).

<sup>52</sup> Morel, *supra* note 24, at 490-92, 509-10.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See Peter Burns, *Regime Theory, State Government, and a Takeover of Urban Education*, 25 J. URB. AFFS. 285, 288-89 (2003).

<sup>56</sup> Morel, *supra* note 2, at 348.

takeover policies and practices, creating public controversies when states make the decision to take over a locally run public school or district.<sup>57</sup>

State takeover policies and practices rose to prominence in urban education during an era when local public schools and districts increasingly demanded equitable educational resources for communities that had historically and contemporarily experienced marginalization and disenfranchisement. The 1970s and 1980s saw Black communities in urban areas sue state governments for more equitable distributions of school funding,<sup>58</sup> but the Nixon and Reagan administrations raised barriers through legislation to block or slow these movements toward equity,<sup>59</sup> which further entrenched these predominantly Black, urban school districts' dependencies on state educational funding. In response to demands for more and more equitable funding, states offered these communities increased scrutiny over their handling of state funds.<sup>60</sup>

Increased scrutiny is not the only or the worst outcome associated with state takeovers of public schools and districts. The more nefarious outcomes are tied to political disempowerment.<sup>61</sup> Research suggests state takeovers are an intentional strategy to disempower Black communities.<sup>62</sup> A previous study noted, “[i]n many cases, state takeovers of public schools result in the replacement of Black policy brokers with white policy brokers.”<sup>63</sup> Additionally, another study discussed how state takeovers of public schools destabilize Black and Brown communities.<sup>64</sup>

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<sup>57</sup> Morel, *supra* note 24, at 491, 510-12; Oluwole & Green, *supra* note 12, at 343-44; Richard O. Welsh & Sheneka M. Williams, *Incentivizing Improvement or Imposition? An Examination of the Response to the Gubernatorial School Takeover and Statewide Turnaround Districts*, 26 EDUC. POL’Y ANALYSIS ARCHIVES 1, 3 (2018).

<sup>58</sup> James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 448-49 (1999).

<sup>59</sup> See John Dayton, *When All Else Has Failed: Resolving the School Funding Problem*, BYU EDU. & L.J. 1, 4-10 (1995) (explaining that the Reagan administration tried to eliminate the U.S. Department of Education and, in fact, was not focused on educational equity); Michael P. Timpane, *Federal Aid to Schools: Its Limited Future*, 38 LAW & CONTEMP. PROBS. 493, 499 (1974) (suggesting that the Nixon administration sought to roll back the equity-pursuing support(s) of the Johnson administration, including those that targeted education policy).

<sup>60</sup> McDermott, *supra* note 51, at 93-94.

<sup>61</sup> Erika Filter, *Testing the Impact of School Takeovers*, NAT. PRESS FOUND. (May 9, 2023), <https://nationalpress.org/topic/state-takeover-school-domingo-morel/> [<https://perma.cc/E4PA-JSZQ>].

<sup>62</sup> Morel, *supra* note 24, at 491.

<sup>63</sup> See Steven L. Nelson, *Racial Subjugation by Another Name? Using the Links in the School-to-Prison Pipeline to Reassess State Takeover District Performance*, 9 GEO. J.L. & MOD. CRITICAL RACE PERSP. 1, 2 (2017).

<sup>64</sup> See Steven L. Nelson, *“They’re Destabilizing a Community of People”: State Takeovers of Public Schools and Districts as Political Regime Change*, 64 WASHBURN L.J. 221, 236-244 (2025).

Urban areas continue to be laboratories of educational experiments, and these experiments negatively impact Black and Brown residents of cities.<sup>65</sup> There is considerable concern that states are isolating and targeting predominantly Black and Brown communities in urban areas for state takeover of their public schools and districts.<sup>66</sup> One of the authors of this Article has noted elsewhere, “[i]n the context of state takeovers of locally governed public schools and school districts, schools and school districts that are disproportionately Black experience takeover at higher rates than” public schools and districts in “white enclaves.”<sup>67</sup> Furthermore, Domingo Morel, a leading scholar on state takeovers of public schools and districts, exhibited how state takeovers of public schools and districts in historically disenfranchised communities (notably in Black and Brown neighborhoods) led to the dismantling of locally elected school boards that contributed to the erosion of Black and Latinx political empowerment and limited voting rights.<sup>68</sup> Even when public schools and districts that serve white enclaves are subjected to takeover, the residents’ access to political power is typically preserved.<sup>69</sup>

Marginalized people, who are historically (and contemporarily) adversely impacted by state takeovers of public schools and districts, are habitual opponents of such policies and practices.<sup>70</sup> The primary cause of resistance to state takeovers of public schools and districts is that state governments, mainly composed of white people, infiltrate, upset, and displace the governance structures and limit the political advancement of Black and Latinx populations.<sup>71</sup> Black and Brown communities suffer state-sanctioned political violence and flagrant violations of their civil rights when states take over and dissolve school boards and diminish the political power of Black and Brown voters, limiting these populations’

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<sup>65</sup> See e.g., Kristin L. Buras, *Race, Charter Schools, and Conscious Capitalism: On the Spatial Politics of Whiteness as Property (and Unconscionable Assault on Black New Orleans)*, 81 HARV. EDU. REV. 296, 296-98 (2011).

<sup>66</sup> See Steven L. Nelson, *Could the State Takeover of the Public Schools Create a State-Created Danger? Theorizing at the Intersection of State Takeover Districts, the School-to-Prison Pipeline, and Racial Oppression*, 27 NAT’L BLACK L.J. 1 (2018); John Hunt & Sandra Watkins, *When Democratic Interests and the Public Good Clash*, INT’L J. ORG. DIVERSITY, 2014, at 3-5.

<sup>67</sup> Nelson, *supra* note 66, at 57. For a definition of “white enclaves,” see Erica Frankenberg et al., *Fighting “Demographic Destiny”: A Legal Analysis of Attempts of the Strategies White Enclaves Might Use to Maintain School Segregation*, 24 GEORGE MASON UNIV. CIV. RTS. L.J. 39, 39-40 (2013).

<sup>68</sup> See Morel, *supra* note 24, at 497.

<sup>69</sup> See generally *id.* at 501.

<sup>70</sup> See Burns, *supra* note 55, at 289.

<sup>71</sup> *Id.* at 289, 298-99.

access to the political process.<sup>72</sup> Minoritized students comprise roughly three-quarters of students in state-run schools.<sup>73</sup> Research suggests that these students suffer state takeover due to budgetary and academic concerns, but the primary articulated emphasis of state takeovers is unsound academic performance.<sup>74</sup> Although suburbs are increasingly Black and Brown, schools and districts in urban centers continue to enroll students who are disproportionately from minoritized backgrounds and who come from lower socioeconomic positions.<sup>75</sup> Schools are social movers—builders of social capital for students and parents—in high poverty communities.<sup>76</sup> Domingo Morel notes, “[i]n the urban regime, the ‘public’ is represented by their government leaders, which presumably are given the consent to govern and represent the citizenry through democratic processes. The growing presence of state actors in local affairs complicates our understanding of the public official in the urban regime.”<sup>77</sup> For state takeovers of public schools and districts, there is a loss of local control of the political process and the politics of education.<sup>78</sup> Thus, the state takeover of public schools and districts inherently results in the loss of local control for Black and Brown residents in urban areas.

Additionally, detractors of state takeovers assert that these intrusions into local affairs disproportionately impact low-income and minority communities, disrupt voting rights and access to the political process,

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<sup>72</sup> *Id.* at 289; Beth Reinhard, *Racial Issues Cloud State Takeovers*, *EDU. WEEK* (Jan. 14, 1998), <https://www.edweek.org/leadership/racial-issues-cloud-state-takeovers/1998/01> [<https://perma.cc/NF8H-86HE>].

<sup>73</sup> See Burns, *supra* note 55, at 289. See generally Wong & Shen, *supra* note 49.

<sup>74</sup> See Buras, *supra* note 65, at 303; David Osborne, *Reinventing New Orleans’ Public Education System*, 32 *NEW ENG. J. PUB. POL’Y* 1, 1-3 (2020); James Wright et al., *The Color of Neoliberal Reform: A Critical Race Policy Analysis of School District Takeovers in Michigan*, 55 *URB. EDU.* 424, 425-30 (2020).

<sup>75</sup> Anjale D. Welton et al., *Color Conscious, Cultural Blindness: Suburban School Districts and Demographic Change*, 47 *EDUC. & URB. SOC’Y* 695, 696 (2015) (suggesting that more than half of minority students in metropolitan areas attend suburban schools); see also John R. Logan & Julia Burdick-Will, *School Segregation and Disparities in Urban, Suburban, and Rural Areas*, 674 *AM. ACAD. POL. & SOC. SCI.* 199 (2017) (exploring racial differences in schools in urban, suburban, and rural areas); Negin Ghavami, *How Racial/Ethnic Diversity in Urban Schools Shapes Intergroup Relations and Well-Being: Unpacking Intersectionality and Multiple Identities Perspectives*, 11 *FRONTIERS PSYCH.* 1 (2020) (discussing that city public schools in the U.S. are majority minority students).

<sup>76</sup> See Karen R. Wilson & Walter R. Allen, *Explaining the Educational Attainment of Young Black Adults: Critical Familial and Extra-Familial Influences*, 56 *J. NEGRO EDUC.* 64, 75 (1987); Kenneth K. Wong & Francis X. Shen, *Big City Mayors and School Governance Reform: The Case of School District Takeover*, 78 *PEABODY J. EDUC.* 5, 15 (2003).

<sup>77</sup> Morel, *supra* note 24, at 492.

<sup>78</sup> See generally Nelson, *supra* note 64 (suggesting that the state takeover of public schools is a form of political regime change, shifting the political apparatus related to the politics of education in an area from a democratic to authoritarian regime).

destroy self-governance, and should be viewed as a form of modern-day colonialism and imperialism.<sup>79</sup> Robert L. Green and Bradley Carl, experts on state takeovers of public schools, note that proposed or actual takeovers of public schools and districts have a unique and identifiable footprint: across the country, such takeovers occur in urban communities along geographic and racial lines, which continues to ignite contestations about the legality of state takeovers and the origins of comprehensive urban school reform.<sup>80</sup> In each state takeover scenario, the state—usually through the department of education—is the savior at first blush.<sup>81</sup> However, any identity as a savior is dubious at best, given the scant evidence that state takeovers of public schools and districts lead to uncontroverted gains in academic achievement or equitable educational outcomes.<sup>82</sup>

Academic performance on standardized tests has become a premier measure for school success due to the implementation of federal law, including but not limited to NCLB and ESSA.<sup>83</sup> Additionally, the Obama Administration's adoption of the RTTT expanded state authority in the realm of educational equity, allowing states to become more aggressive in their efforts to seize control of purportedly failing public schools and districts.<sup>84</sup> This phenomenon is observable in state takeovers of public schools and districts in New Orleans, Detroit, Memphis, Little Rock, and Lawrence. Accordingly, Louisiana, Michigan, Tennessee, Arkansas, and Massachusetts respectively serve as case studies for predicting the racial implications of state takeovers of public schools and districts.

While each state takeover is unique, there are several commonalities. Research suggests that ostensible academic failure and ineptitude was the impetus for states' decisions to effectuate state takeover policy.<sup>85</sup> However, a common antecedent among the aforementioned state takeover districts was having a student population that is predominantly Black and/or

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<sup>79</sup> See Buras, *supra* note 65, at 300; Morel, *supra* note 24, at 497-99.

<sup>80</sup> See Robert L. Green & Bradley R. Carl, *A Reform for Troubled Times: Takeovers of Urban Schools*, 569 ANNALS AM. POL. & SOC. SCI. ACAD. 56, 64-65 (2000).

<sup>81</sup> Filter, *supra* note 61.

<sup>82</sup> See *id.* at 66-67; Nelson, *supra* note 66, at 13.

<sup>83</sup> James Naughton, *Testocracy: The Undemocratic System of Standardized Testing in the United States*, 31 KAN. J.L. & PUB. POL'Y 263, 267-68 (2022).

<sup>84</sup> Mason & Reckhow, *supra* note 46.

<sup>85</sup> See Buras, *supra* note 65; Osborne, *supra* note 74; Wright et al., *supra* note 74.

Brown.<sup>86</sup> New Orleans,<sup>87</sup> Detroit,<sup>88</sup> Lawrence,<sup>89</sup> and Memphis<sup>90</sup> each have majority-marginalized populations. While white people comprise a plurality of Little Rock's population, they only make up approximately 46% of the population, suggesting that Little Rock's population is a majority of marginalized people.<sup>91</sup> Additionally, in each state takeover, a state educational authority seized control of a locally elected school board, removed veteran educators and popularly and locally elected school board leadership, and posed a threat to the urban cores served by the schools in the district.<sup>92</sup>

## II. WHITENESS AND EDUCATION AS PROPERTY

### A. *Interests, Expectations, and Whiteness*

Because U.S. society is built on racial subordination and subjection, white supremacy is an expectation.<sup>93</sup> Whiteness, which can operate as an identity marker, became a vested property interest through legal mechanisms.<sup>94</sup> Whiteness—by necessity—developed through the expansion of chattel slavery, because initially, racial lines were easily blurred among and within societal groups.<sup>95</sup> While enslaved Africans were distinguished from “‘unfree’ white labor,” there “was not an irrebuttable presumption that all Africans were ‘slaves’ or that slavery was the only appropriate

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<sup>86</sup> See Green & Carl, *supra* note 80, at 64.

<sup>87</sup> Black people comprise roughly 55% of New Orleans' population in 2024. *QuickFacts, New Orleans city, Louisiana*, U.S. CENSUS BUREAU (July 1, 2024), <https://www.census.gov/quickfacts/fact/table/neworleanscitylouisiana/PST045224> (on file with the CUNY Law Review).

<sup>88</sup> Black people comprise roughly 77% of Detroit's population in 2024. *QuickFacts, Detroit city, Michigan*, U.S. CENSUS BUREAU (July 1, 2024), <https://www.census.gov/quickfacts/fact/table/detroitcitymichigan/PST045224> (on file with the CUNY Law Review).

<sup>89</sup> Latinx people comprise roughly 82% of Lawrence's population in 2024. *QuickFacts, Lawrence city, Massachusetts*, U.S. CENSUS BUREAU (July 1, 2024), <https://www.census.gov/quickfacts/fact/table/lawrencecitymassachusetts/PST045224> (on file with the CUNY Law Review).

<sup>90</sup> Black people comprise roughly 63% of Memphis' population in 2024. *QuickFacts, Memphis city, Tennessee*, U.S. CENSUS BUREAU (July 1, 2024), <https://www.census.gov/quickfacts/fact/table/memphiscitytennessee/PST045224> (on file with the CUNY Law Review).

<sup>91</sup> *QuickFacts, Little Rock city, Arkansas*, U.S. CENSUS BUREAU (July 1, 2024), <https://www.census.gov/quickfacts/fact/table/littlerockcityarkansas/PST045224> (on file with the CUNY Law Review).

<sup>92</sup> See Green & Carl, *supra* note 80.

<sup>93</sup> Harris, *supra* note 1, at 1730.

<sup>94</sup> *Id.* at 1725.

<sup>95</sup> *Id.* at 1716-17.

status for them.”<sup>96</sup> It was not until the mid-1600s that the targeted status of captured Africans as chattel slaves became law.<sup>97</sup>

Herein lies one of the many reasons Harris coined the phrase “whiteness as property” to demonstrate how white skin and whiteness functioned and function as a property interest. She argues that former definitions of property focused on value while contemporary notions of property focus on “function and the social relations” inherent in possessing property.<sup>98</sup> She articulated four rights that comprised whiteness as property.<sup>99</sup> We define the right to disposition to suggest that white people can dispose of their whiteness as they please (although Harris defines the right to disposition to assess the alienability or lack thereof of white skin).<sup>100</sup> The right to use and enjoyment suggests that white people can trigger whiteness to convert from an identity marker (passive) to accessing white privilege and supremacy (active).<sup>101</sup> Reputational and status property suggests whiteness is invaluable and is tied to white racial identity.<sup>102</sup> The absolute right to exclude is noted as not a unifying white identity but rather the right to exclude others from whiteness and its benefits.<sup>103</sup>

### B. *White Interests & Racial Oppression*

Whiteness is grounded in the active pursuit of white people’s interests, which prioritize domination of peoples of color.<sup>104</sup> This manifests as the “creation of institutional norms framed by the white supremacist social structure and its related normalized systems of practices.”<sup>105</sup> Harris’s whiteness as property highlights how whiteness operates to keep white people in economic domination while ensuring Black people (and other peoples of color) are in economic subjugation.<sup>106</sup> To that end, U.S. society has granted white people certain protections because of their white

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1718.

<sup>98</sup> *Id.* at 1728.

<sup>99</sup> *Id.* at 1728.

<sup>100</sup> *See id.* at 1731-34.

<sup>101</sup> *Id.* at 1734.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1736-37.

<sup>104</sup> *See* Ricky Lee Allen & Daniel D. Liou, *Managing Whiteness: The Call for Educational Leadership to Breach the Contractual Expectations of White Supremacy*, 54 URB. EDUC. 677, 678-79 (2019).

<sup>105</sup> *Id.* at 679.

<sup>106</sup> *See* Richard A. Orozco, ‘It is Certainly Strange . . .’: *Attacks on Ethnic Studies and Whiteness as Property*, 26 J. EDUC. POL’Y 819, 821 (2011).

skin.<sup>107</sup> Because whiteness is held as a property right, white people are allowed to maintain psychic comfort in addition to accumulating physical property,<sup>108</sup> primarily through dispossessing communities of color. It follows, then, that whiteness itself is a commodity that leads to the accumulation of other commodities, rights, expectations, and property.<sup>109</sup> White skin through white supremacy is a tangled web that guarantees white people control society, even in a purportedly post-racial society.<sup>110</sup> Moreover, white skin ensures that white people enjoy an elevated status in society as relative to Black and Brown peoples.<sup>111</sup>

White supremacy is baked into our school systems; it is inherent in our schools, curricula, and pedagogy, as well as the society where these facets of education operate.<sup>112</sup> Notably, the Black Codes prevented Black people from being educated, among other things.<sup>113</sup> Even when Black peoples can engage in the educational process, the process is biased. For instance, white people's rights of disposition encourage and reward the pursuit of white norms and dispense discipline and sanctions for deviance from white norms.<sup>114</sup>

Likewise, as whiteness itself is property because it bestows tangible benefits on its owner,<sup>115</sup> Black and Brown peoples may behave differently in positions of power. They may participate in the white supremacist activity of social closure. Social closure refers to the process wherein one group "monopolizes" opportunities by shutting off marginalized groups' access to those same opportunities.<sup>116</sup> In social closure, the group that is excluded is the end result of that group being constructed as *other*.<sup>117</sup> Social closure occurs when states take over public schools and districts and place white people in charge of educational policy and the politics of education while simultaneously deconstructing or disempowering the

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<sup>107</sup> Rachel Snyder, *The Right to Define: Analyzing Whiteness as a Form of Property in Washington State Bilingual Education Law*, 19 LANGUAGE POL'Y 31, 37 (2020).

<sup>108</sup> Sharon I. Radd & Tanetha Jamay Grosland, *Desirabilizing Whiteness: A Discursive Practice in Social Justice Leadership that Entrenches White Supremacy*, 54 URB. EDUC. 656, 668-69 (2019).

<sup>109</sup> *Id.* at 668.

<sup>110</sup> Allen & Liou, *supra* note 104, at 678.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Harris, *supra* note 1, at 1718.

<sup>114</sup> Vidya Shah & Diana Grimaldos, *Lies, Denials, and Cover-Ups: The Pervasiveness of Whiteness in School District Relations with Black and Racialized Parents*, 59 URB. EDUC. 1774, 1777, 1797 (2024).

<sup>115</sup> Enrique Alemán, Jr., *LatCrit Educational Leadership and Advocacy: Struggling Over Whiteness as Property in Texas School Finance*, 42 EQUITY & EXCELLENCE EDUC. 183, 196 (2009).

<sup>116</sup> Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2383, 2390 (2021).

<sup>117</sup> *Id.*

locally elected, predominantly people of color school board.<sup>118</sup> Ultimately, “overt exclusion occurs by excluding othered groups from participating in the deliberation and decision-making process[es].”<sup>119</sup>

C. *Whiteness as Property, Expectation Interests, and Racial Identity*

Whiteness as property identifies how white people have come to rely on “ideological assumptions and dispositions, privileges, and expectations” associated with the white racial identity to harness and use power to maintain white supremacy.<sup>120</sup> Not only does whiteness exist as a property right, it must be persistently and consistently acknowledged, affirmed, and given legitimacy, as well as provided protection from encroachment.<sup>121</sup> White people can and do have the expectation that U.S. society’s ways of being will place a higher value on the white racial status.<sup>122</sup> There is an expectation interest in ensuring white people’s actions and interests remain prioritized and protected.<sup>123</sup> A fundamental belief resulting from whiteness as property is that white people will have unchecked and unchallenged privilege that is legally protected.<sup>124</sup> Additionally, expectation interests and the right to absolutely exclude both structures and restricts the types of claims that can be made, especially in the public domain.<sup>125</sup>

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<sup>118</sup> Georgia Jensen, *The Troubling Trend of State Takeovers of Public Schools*, INEQUALITY.ORG (Aug. 6, 2024), <https://inequality.org/article/the-troubling-trend-of-state-takeovers-of-public-schools/> [https://perma.cc/PW5E-WMXT].

<sup>119</sup> Charity P. Scott & Nicole Rodriguez Leach, *Philanthropy as Whiteness: Toward Racially Just Philanthropic Practices*, 43 EQUAL., DIVERSITY, & INCLUSION 516, 520 (2024) (emphasis omitted).

<sup>120</sup> See Jamel K. Donnor, *Education as the Property of Whites: African Americans’ Continued Quest for Good Schools*, in HANDBOOK OF CRITICAL RACE THEORY IN EDUCATION 195 (Marvin Lynn & Adrienne Dixson eds., 2013).

<sup>121</sup> Jamel K. Donnor, *White Fear, White Flight, the Rules of Racial Standing and Whiteness as Property: Why Two Critical Race Theory Constructs are Better Than One*, 35 EDUC. POL’Y 259, 265 (2021).

<sup>122</sup> Thandeka Chapman et al., *A Necessary Pairing: Using Academic Outcomes and Critical Consciousness to Dismantle Curriculum as the Property of Whiteness in K-12 Ethnic Studies*, 53 EQUITY & EXCELLENCE IN EDUC. 569, 571 (2020).

<sup>123</sup> Robert Arsen, *A Market for Civil Rights: Whiteness as Property, Colorblindness, and the Rhetoric of School Choice*, 109 Q.J. SPEECH 276, 280-81 (2023).

<sup>124</sup> *Id.* at 277.

<sup>125</sup> *Id.* at 280; *infra* Section IV.D.

D. *White Supremacy & Racial Subordination*

The “subordination of people[s] of color” is concomitant with white supremacy.<sup>126</sup>

There are tangible benefits to being white.<sup>127</sup> To possess whiteness or its functions is an immense privilege in U.S. society.<sup>128</sup> This is because whiteness is both identity-based and a property interest.<sup>129</sup> It is both a set of experiences (passive) and a deployable resource (active).<sup>130</sup> Of course, whiteness and white people are distinct and separate concepts, but the two are connected as they often operate in tandem.<sup>131</sup> To some extent, the possession of whiteness itself is strictly tied to having white skin.<sup>132</sup> Whiteness is also in constant flux as whiteness as property allows white people to expand and contract the confines of whiteness to accommodate their individual and collective needs, interests, and prerogatives.<sup>133</sup> This phenomenon allows races outside of the white race to participate in and embrace whiteness, although whiteness benefits white people almost exclusively.<sup>134</sup> It follows that when immigrants enter the United States, their embrace of whiteness is often an embrace of anti-blackness rather than an embrace of white supremacy,<sup>135</sup> although the two are inextricably linked.<sup>136</sup> Whiteness as property effectively guarantees an afterlife of slavery where white privilege and white supremacy reign.<sup>137</sup>

When considering whiteness as property, the right to absolutely exclude has been wielded to ensure communities of color are specifically

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<sup>126</sup> Eamon P. Joyce, *Whiteness (and other ness(es)) as Property Revisited: A Response to Derrick Bell and a Vision for Multicultural Coalitions and Legalisms*, 6 J.L. & SOC. CHANGE 1, 16 (2002).

<sup>127</sup> Radd & Grosland, *supra* note 108, at 667.

<sup>128</sup> Christopher B. Crowley et al., *Licensing Whiteness: Property, Privilege, and (Re)centering the Politics of Race Within Neoliberalism*, INT’L J. QUALITATIVE STUD. 1, 9 (2024).

<sup>129</sup> Subini Ancy Annamma, *Whiteness as Property: Innocence and Ability in Teacher Education*, 47 URB. REV. 293, 308 (2015).

<sup>130</sup> *Id.*

<sup>131</sup> Zeus Leonardo, *The War on Schools: NCLB, Nation Creation, and the Educational Construction of Whiteness*, 10 RACE, ETHNICITY, & EDUC. 261, 272 (2007).

<sup>132</sup> See Karen Howard, *Whiteness as Property in Music Education: Considering the Acceptance of Hamilton: An American Musical*, 9 WHITENESS EDUC. 105, 108 (2024).

<sup>133</sup> See Leonardo, *supra* note 131, at 263.

<sup>134</sup> See *id.* at 272.

<sup>135</sup> Dan Battey, *Access to Mathematics: A Possessive Investment in Whiteness*, 43 CURRICULUM INQUIRY 332, 337 (2013).

<sup>136</sup> See generally John B. Diamond & Louis M. Gomez, *Disrupting White Supremacy and Anti-Black Racism in Educational Organizations*, EDUC. RESEARCHER ONLINEFIRST (Mar. 29, 2023), <https://journals.sagepub.com/doi/epub/10.3102/0013189X231161054> (on file with the CUNY Law Review).

<sup>137</sup> See Ujju Aggarwal, *The Ideological Architecture of Whiteness as Property in Educational Policy*, 30 EDUC. POL’Y 128, 131 (2016).

excluded from certain entitlements.<sup>138</sup> There is a certain realism when considering whiteness as property. While many of the ideologies, norms, and values of whiteness are figments of the imagination, they have a tangible impact that materially shifts the experiences of Black and Brown students.<sup>139</sup> For example, the association of blackness and criminal activity creates an irrational fear among white educators that Black appearance—on its own—will jeopardize Black students' chances of success.<sup>140</sup> Likewise, white people can turn racial justice on its head, positioning themselves as victims.<sup>141</sup> This suggests that civil rights may be equally distributed, but the protection of civil rights is uneven.<sup>142</sup> Ultimately, whiteness as property creates a sense of zero-sumness in the relationships between people and between people and things.<sup>143</sup> This zero-sumness leads to continued racial subjugation and the maintenance of white supremacy and white supremacist culture.

*E. Governmental Institutions, Race, and Whiteness as Property*

Governmental institutions—courts, schools, etc.—are instrumental in upholding whiteness as a protected property interest.<sup>144</sup> These institutions create, reproduce, and reify “a unique set of explicit and tacit rules, expectations, and practices” associated with accessing and deploying resources.<sup>145</sup> For instance, the Transatlantic Slave Trade and subsequent related antiblack policies led to a legacy of unequal property ownership and rights to ownership between Black and white people.<sup>146</sup> These unequal property rights persist through the prerogatives of governmental institutions. Whiteness as property is not just an explanation of property values. Historically, whiteness as property has received legitimacy through both extrajudicial and judicial actions that attacked peoples of color while protecting white peoples.<sup>147</sup> Courts often ensure that white people are the

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<sup>138</sup> Buras, *supra* note 65, at 304.

<sup>139</sup> Snyder, *supra* note 107, at 37.

<sup>140</sup> Christopher Rogers, *Don't Touch My Hair: How Hegemony Operates Through Dress Codes to Reproduce Whiteness in Schools*, 19 DU BOIS REV. 175, 178 (2022).

<sup>141</sup> For a treatise on ideas like reverse racism, where white people are positioned as innocent victims, see Robert S. Chang, *Reverse Racism: Affirmative Action, the Family, and the Dream that is America*, 23 HASTINGS CONST. L.Q. 1115 (1995).

<sup>142</sup> Aggarwal, *supra* note 137, at 145.

<sup>143</sup> See Arsen, *supra* note 123, at 279.

<sup>144</sup> See generally Donnor, *supra* note 120.

<sup>145</sup> *Id.*

<sup>146</sup> Kathryn E. Wiley et al., *In-School Suspension Through the Lens of Whiteness as Property: Exploring a School District's Role in Maintaining Educational Inequality*, 34 J. SCH. LEADERSHIP 210, 215-16 (2024).

<sup>147</sup> Ancy Annamma, *supra* note 129, at 297-98.

historic and contemporary beneficiaries of antiblack racism.<sup>148</sup> Whiteness as property explains how efforts to accommodate non-white citizens are seen as an encroachment on white society.<sup>149</sup> Governmental institutions and bodies are indispensable mechanisms for meting out and (re)arranging societal values.<sup>150</sup>

F. *Education & Whiteness as Property*

Law can and does transition whiteness from a normalized identity to a protected and vested legal interest and entitlement.<sup>151</sup> Whiteness as property mobilizes the legal and educational systems to normalize the U.S. white experience.<sup>152</sup> The law has entrenched and ensconced whiteness and white supremacy into the fabric of society.<sup>153</sup> This is expected, as whiteness as property suggests not only control of property interests, but also suggests control of procedural mechanisms.<sup>154</sup>

In education, civil rights protections that combat white supremacy are temporary in nature and fail to acknowledge that white people must cede their race-granted privilege to achieve true equality in a pluralistic society.<sup>155</sup> School desegregation cases (e.g., *Brown v. Board of Education*, *Milliken v. Bradley*, and *Parents Involved in Community Schools v. Seattle School District No. 1*) are examples of the use of the Supreme Court to protect white interests.<sup>156</sup> Similarly, *Students for Fair Admission v. Harvard* is an example of how the federal courts uphold whiteness as property.<sup>157</sup> Even programs meant for civil rights can privilege whiteness in a way that treats giftedness and programs for gifted students and

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<sup>148</sup> Donnor, *supra* note 121, at 270.

<sup>149</sup> Donnor, *supra* note 120, at 202.

<sup>150</sup> Donnor, *supra* note 121, at 266.

<sup>151</sup> See, e.g., Orozco, *supra* note 106, at 828 (highlighting the May 2010 Prohibited Courses Law in Arizona which outlawed courses that (1) “promote resentment” of people of a specific race or class, (2) are for a racial or ethnic group, (3) do not treat students as individuals but promote “ethnic solidarity,” or (4) that are designed primarily for pupils of a particular ethnic group or that advocate for ethnic solidarity instead of the treatment of pupils as individuals).

<sup>152</sup> See *id.* at 828-29.

<sup>153</sup> Joyce, *supra* note 126, at 16.

<sup>154</sup> Radd & Grosland, *supra* note 108, at 668.

<sup>155</sup> Donnor, *supra* note 120, at 201.

<sup>156</sup> Arsen, *supra* note 123, at 283.

<sup>157</sup> *Students for Fair Admission v. Harvard*, 600 U.S. 181, 197 n.1, 222 n.7 (2023) (ending affirmative action except for military schools and suggesting, in oral arguments, that Black people were the problem with Asian American students not gaining admission into elite institutions of higher education when the original argument focused on affirmative action for white students).

academic talent as the property of white people.<sup>158</sup> This, too, is to be expected as literature suggests that white people can launch a whitelash—reclaiming any policy gains Black, and Indigenous People of Color make—at a time of racial divergence.<sup>159</sup> This is evidence that there is a clear property interest in whiteness and white supremacy.

### G. *Whiteness as a License*

Whiteness operates as a license that people seek. The licensing of whiteness contributes to the permanence of racism.<sup>160</sup> Whiteness is a license—beyond a privilege—as the state may and does approve or sanction the very institutional norms that uphold whiteness as a property interest.<sup>161</sup> Licensing whiteness results in both reinforcing the ontological existence of whiteness as property and the violent exclusion from privilege for communities of color.<sup>162</sup> Yet, the desiring of whiteness forces policies that seek to make whiteness the standard and white people the standard-bearers in education.<sup>163</sup> It allows discursive practices which prioritize access to whiteness and white people in the name of equality in education.<sup>164</sup> This phenomenon can produce educational policies that shift away from serving marginalized communities to serving *all* communities. However, shifts in policies that move from serving marginalized populations to all populations can be seen as triggering the rights to use and enjoyment, one of the four rights that are part and parcel of whiteness as property.

### H. *Education as White Property*

Per legal scholar LaToya Baldwin Clark, education, like whiteness, is a protected property interest.<sup>165</sup> To that extent, whiteness and its functions have limited Black peoples' access to education in the United States.<sup>166</sup> In other words, educational opportunities are one of the many

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<sup>158</sup> Annegret Staiger, *Whiteness as Giftedness: Racial Formation at an Urban High School*, 51 SOC. PROBS. 161, 178 (2004).

<sup>159</sup> See generally Dana N. Thompson Dorsey & Terah T. Venzant Chambers, *Growing C-D-R (Cedar): Working the Intersections of Interest Convergence and Whiteness as Property in the Affirmative Action Legal Debate*, 17 RACE ETHNICITY & EDU. 56 (2014).

<sup>160</sup> Crowley et al., *supra* note 128, at 12.

<sup>161</sup> *Id.* at 9.

<sup>162</sup> *Id.* at 12.

<sup>163</sup> Radd & Grosland, *supra* note 108, at 658.

<sup>164</sup> *Id.* at 661.

<sup>165</sup> See generally LaToya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397, 397-403 (2019) (discussing how less wealthy Black and Brown parents face criminal and civil penalties for “stealing” education from more affluent districts than the districts in which they are domiciled).

<sup>166</sup> Donnor, *supra* note 120, at 195.

expectations of whiteness, especially when accounting for the U.S.' actions of privileging white people's access to schools and education while restricting and criminalizing Black peoples' access to the same.<sup>167</sup> A number of scholars have evaluated public education as the right of white people, showing how it functions to reinforce racial hierarchy. For instance, social studies curriculums can be theorized as white property in that they further racist ideals.<sup>168</sup> Likewise, access to Science, Technology, Engineering, Arts, and Math schools has been theorized as white property and has been noted as a way that Black peoples are dispossessed of their neighborhood schools to make room for whiteness and white people.<sup>169</sup> Finally, access to high-level math courses may be theorized as a white property interest with tangible outcomes for students of color.<sup>170</sup> Notably, nearly every child must attend school,<sup>171</sup> so it is predictable that schools would be and are the sites of infliction of whiteness onto Black and Brown peoples.

White supremacy and the property interest in whiteness allow white people to control the terms by which education reform occurs.<sup>172</sup> For instance, the decision in *Brown v. Board of Education*,<sup>173</sup> one of the earliest education reforms to impact Black communities in the United States, was decided on incorrect grounds, focusing on psychological harm rather than the unequal distribution of resources.<sup>174</sup> The end result of the *Brown* decision was an implementation of desegregation that is based on the premise that students of color will only replicate problematic behaviors and mindsets if they are around each other.<sup>175</sup> Ultimately, the decision in *Brown* left room to pathologize Black peoples and Blackness while limiting the impact of the case's watershed opinion.<sup>176</sup>

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<sup>167</sup> Jason D. Salisbury, *Creating Diverging Opportunities in Spite of Equity Work: Educational Opportunity and Whiteness as Property*, 6 WHITENESS & EDUC. 200, 202 (2021).

<sup>168</sup> See generally Patricia S. McClure, *The Silent Schooling of Whiteness in Social Studies Content Standards*, 8 WHITENESS & EDUC. 39 (2023) (analyzing how social studies education in the US promotes white supremacy and property rights through the use of whiteness language).

<sup>169</sup> See Erika C. Bullock, *Only STEM Can Save Us? Examining Race, Place, and STEM Education as Property*, 53 EDUC. STUD. 628 (2017).

<sup>170</sup> See generally Battey, *supra* note 135, at 332 (arguing that mathematics education conforms to dominant racial dynamics in the US that unfairly benefit white people).

<sup>171</sup> See generally Augustina Reyes, *Compulsory School Attendance: The New American Crime*, EDUC. SCIENCES, Mar. 2020, at 1, 6 (discussing the development of compulsory attendance laws in the United States and noting that every state had such laws by 1918).

<sup>172</sup> Allen & Liou, *supra* note 104, at 691.

<sup>173</sup> 347 U.S. 483 (1954) (leveraging social science data to find that segregation caused psychological harm to Black children).

<sup>174</sup> Aggarwal, *supra* note 137, at 133-34.

<sup>175</sup> *Id.* at 136.

<sup>176</sup> *Id.* at 134.

In addition to whiteness as property being linked to *Brown*, whiteness as property in education is linked to school finance. Whoever has access to the most valuable property can better fund their local schools.<sup>177</sup> Likewise, the criminalization of children of color through the school-to-prison pipeline further cements whiteness and education as property, as whiteness—unlike blackness—has been linked to innocence.<sup>178</sup> School choice is another education reform wherein whiteness as property shows up. Choice aids in the maintenance of racism in the United States.<sup>179</sup> It creates individual, private accountability where there should be a guaranteed civil right.<sup>180</sup> Similarly, education reform policies focus on outcomes (achievement) rather than on inputs (uneven distribution of resources).<sup>181</sup> Thus, there is not a focus on how we reached the point at which we stand. Rather, the focus of education reform is on remedying blackness.<sup>182</sup> We assert that any education reform policy that endeavors to impose testing based on standards not arising from the local community on schools without supporting students to reach those expectations is a form of white supremacy in action. Moreover, we suggest that in classrooms, teachers' inability to effectuate equitable treatment of students and to provide curricula that are culturally relevant, responsive, sustaining, and revitalizing and that value students' intellectual capabilities is an enactment of educational violence. To that end, standardized tests are a form of white property interests that aid in the upkeep of white supremacy.<sup>183</sup> Overall, whiteness as property undergirds contemporary education reform policies.

### I. *Whiteness as Property in Education*

In keeping with our modification of Harris's articulation of whiteness as property, white people, particularly students, teachers, and parents, have the rights of disposition, allowing them to dispose and alter the use of their property interests at their leisure. For instance, white skin—while inalienable—can be shifted between a passive identity and active choice to employ white privilege, a nod to the right to use and enjoyment.<sup>184</sup> Additionally, the right to use and enjoyment assumes that white people have a right to use and enjoy things Black and Brown people do not. Without regard for actual relationships to property, the right to reputational and status property suggests that educators can and do create and

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<sup>177</sup> Annamma, *supra* note 129, at 298.

<sup>178</sup> *Id.*

<sup>179</sup> *See id.* at 130, 139.

<sup>180</sup> *Id.* at 130.

<sup>181</sup> *See id.* at 140.

<sup>182</sup> *See id.*

<sup>183</sup> Allen & Liou, *supra* note 104, at 691.

<sup>184</sup> *See* Salisbury, *supra* note 167, at 215.

alter reputations by the way they treat peoples of color.<sup>185</sup> Likewise, white people also have reputation and status property through various inroads. For example, white students have status property, which entitles them to access to quality educational experiences compared to their Black and Brown counterparts. The rights to use and enjoyment “correlate quality of property to the quality of schooling experiences.”<sup>186</sup> Finally, the absolute right to exclude is leveraged in multiple ways that lead to the push out, shut out, and snatch out of Black and Brown stakeholders in schools.<sup>187</sup> When white people change the structure and processes of school governance, overt exclusion occurs.<sup>188</sup> While there are some examples of formal exclusions from schools and schooling, there are countless examples of informal exclusions through clandestine mechanisms that undergird efforts to shunt communities of color.<sup>189</sup> These examples suggest that whiteness as property does apply to education.

### III. THE TAKEOVER OF HOUSTON INDEPENDENT SCHOOL DISTRICT

#### A. *Houston Under the Microscope: Racial Discrimination & Social and Educational Outcomes*

Houston, Texas, like many other cities in the United States, has a lineage of racial discrimination that impacts various social indicators, including economic opportunities.<sup>190</sup> Harris County (which houses Houston) saw the gap in economic outcomes move toward a more just distribution; however, the household income gap between white and Black households is 96% (down from 101%).<sup>191</sup> The same measure is 60% (down from 83%) between white and Hispanic families.<sup>192</sup> Another wage disparity measure tracks the earnings ratio for different racial groups compared to white people’s earnings.<sup>193</sup> In the context of wage-earning disparities, Black people in Harris County earn 62% (up from 52%) of white people’s earnings.<sup>194</sup> Hispanic people in Harris County earn 55% (up from 41%) of white people’s earnings.<sup>195</sup>

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<sup>185</sup> Shah & Grimaldos, *supra* note 114, at 1799.

<sup>186</sup> *Id.* at 1798.

<sup>187</sup> *Id.* at 1800.

<sup>188</sup> Scott & Rodriguez Leach, *supra* note 119, at 520, 524.

<sup>189</sup> Buras, *supra* note 65, at 300.

<sup>190</sup> *Income & Inequality in Houston*, UNDERSTANDING HOUS., <https://www.understandinghouston.org/topic/economic-opportunity/income-equality> [https://perma.cc/EZK3-86W4] (last visited Apr. 11, 2025).

<sup>191</sup> *Id.*

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

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

<sup>194</sup> *Id.*

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

These gaps in economic outcomes are directly related to gaps in social mobility. In Harris County, the poverty rate is 16%, and despite this rate being a decrease over the previous decade, the number of people in poverty in Harris County has ballooned, with more than three-quarters of a million people living below the poverty line in the county.<sup>196</sup> These numbers are not evenly distributed by race: more than 21% of Black people in Harris County live in poverty.<sup>197</sup> More than 20% of Hispanic people in Harris County live in poverty.<sup>198</sup> Roughly 7% of white people in Harris County live in poverty.<sup>199</sup> Overall, roughly one in every four children in Harris County lives in poverty.<sup>200</sup> Roughly 9% of all young people in Harris County are “opportunity youth,” or youth between sixteen and twenty-four years of age who are neither pursuing education nor the workforce,<sup>201</sup> suggesting a generational trend in the county’s poverty cycle.

Just as racial discrimination impacts economic opportunities in Houston, it impacts educational opportunities. Overall, in a snapshot taken in 2021, roughly 75% of Black students in Harris County public schools did not read at grade level during the third grade.<sup>202</sup> The numbers are similar for Hispanic students.<sup>203</sup> Almost 60% of all white students could read at grade level in third grade.<sup>204</sup> Just about 20% of Black students and just about 28% of Hispanic students were at grade level for math (eighth grade) in Harris County; roughly 58% of white students in Harris County were at grade level for math in eighth grade.<sup>205</sup> Also, while approximately 86% of Black and Hispanic students graduate from high school in Harris County, they trail the graduation rate (92%) of white students in the county.<sup>206</sup> Finally, high school dropout rates in Harris County are disparate by race: 9% of Black students and 8% of Hispanic students drop out of high school.<sup>207</sup> Only 4.5% of white students in Harris County drop out of high school.<sup>208</sup> These disparate academic outcomes by race are a telltale

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<sup>196</sup> *Poverty and Economic Mobility in Houston*, UNDERSTANDING HOUS., [https://www.understandinghouston.org/topic/economic-opportunity/poverty-economic-mobility#social\\_mobility](https://www.understandinghouston.org/topic/economic-opportunity/poverty-economic-mobility#social_mobility) [<https://perma.cc/P88F-R69F>] (last visited May 18, 2025).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

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

<sup>202</sup> *Academic Outcomes*, UNDERSTANDING HOUS., <https://www.understandinghouston.org/topic/education/academic-outcomes#overview> [<https://perma.cc/EFF2-QA2P>] (last visited May 18, 2025).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

sign of the impact of race and racism on the educational experiences of Black and Latinx students, families, and communities in Houston, Texas.

Financial stress and institutional and structural limitations, namely racism, may impact the likelihood of a state takeover of municipal affairs, including school districts.<sup>209</sup> As noted above, there are substantial economic and educational impacts stemming from racism and injustice. These impacts and injustices create and are created by conditions that are ripe for economic and educational stratification and disparities. This cycle of stratification and disparity results from the state takeover of public schools. What is indispensable in this equation is the impact of social indicators on other social indicators. For instance, economic stratification and disparities in metropolitan areas decrease tax revenue.<sup>210</sup> When tax revenue is reduced, school funding is reduced.<sup>211</sup> When school funding is reduced, academic programming and outcomes are affected. Thereby, opportunities for meaningful employment in high-salaried positions are decreased. This contributes to, intensifies, and reproduces economic stratification.

### B. *State Takeovers in Texas: A Brief History*

The state of Texas' takeover of HISD is not its first foray into seizing control of local school districts.<sup>212</sup> In fact, the state of Texas has taken over at least fifteen school districts over time.<sup>213</sup> In keeping with national trends, all but one of the fifteen school districts subjected to state takeover are predominantly Black, predominantly Latinx, or a combination thereof.<sup>214</sup> The state's takeover of North Forest Independent School District, a school district that is predominantly Black and Brown, appears to have started in 2008.<sup>215</sup> Ultimately, the state dismantled North Forest Independent School District, merging it with HISD.<sup>216</sup>

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<sup>209</sup> Sara Hughes et al., *Municipal Takeovers: Examining State Discretion and Local Impacts in Michigan*, 53 STATE & LOC. GOV'T. REV. 223, 223-24 (2021).

<sup>210</sup> Linda Loubert, *Discrimination in Education Financing*, 32 REV. BLACK POL. ECON. 17, 19 (2004).

<sup>211</sup> *Id.*

<sup>212</sup> Hannah Dellinger, *With an HISD State Takeover Looming, Here's How the TEA Has Taken Over Other Texas School Districts*, HOUS. CHRON. (Mar. 7, 2023, 2:47 PM), <https://www.houstonchronicle.com/news/houston-texas/education/article/tea-takeover-state-hisd-houston-school-district-17818226.php> (on file with the CUNY Law Review).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> Morgan Smith, *North Forest Lives on, But So Do Its Struggles*, TEX. TRIB. (Apr. 6, 2012, 6:00 AM), <https://www.texastribune.org/2012/04/06/texas-school-district-lives-so-do-its-struggles/> [<https://perma.cc/9AZX-VG92>].

<sup>216</sup> *Id.*

In somewhat of a rarity, the state of Texas has taken over school districts in a variety of geographic classifications. For instance, the state has taken over school districts with fewer than 100 students (presumably rural) and larger school districts, such as El Paso Independent School District with 50,000 students (presumably urban).<sup>217</sup> The state's takeover of HISD stands, however, in stark contrast to the state's other takeovers. For instance, HISD enrolls over 180,000 students, far eclipsing the likes of El Paso Independent School District.<sup>218</sup> Additionally, previous takeovers focused on financial mismanagement, fraud on state tests, and local governance issues.<sup>219</sup> While the state found HISD to have governance issues, the state primarily targeted HISD for its failure to remedy poor performance at one high school, Wheatley High School.<sup>220</sup>

Since 2019, the state of Texas was poised to take over public schools in Houston.<sup>221</sup> Texas' takeover of HISD arose from several alleged misdeeds combined with academic failure at Wheatley High School.<sup>222</sup> Wheatley High School had for seven years experienced academic failure according to the state of Texas.<sup>223</sup> Academic failure was not the only reason the state of Texas intervened in HISD. In addition to academic failure, the state found "alleged misconduct among previous school board trustees."<sup>224</sup> Specifically, the state found HISD to have violated the Texas Open Meeting Act, misled state investigators, and improperly interfered with vendor contracts.<sup>225</sup> Still, the state's takeover of HISD was poorly timed. HISD had improved its academic standing with the state, and only one school at the time was considered to be failing according to the state's own records.<sup>226</sup>

The state of Texas was bound to intervene in HISD. For decades HISD has experienced inequity in funding, underfunding, and unrealistic

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<sup>217</sup> Dellinger, *supra* note 212.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

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

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Maria Mendez, *What Happens When Texas Takes Over a School District Like Houston ISD*, TEX. TRIB. (Mar. 16, 2023, 3:00 PM), <https://www.texastribune.org/2023/03/16/tea-hisd-takeover-texas-houston-schools/> [<https://perma.cc/N5NA-BFKT>].

<sup>225</sup> Dellinger, *supra* note 212.

<sup>226</sup> *Id.* (noting that Wheatley High School earned a passing grade in the year of the takeover); see Rebecca Carballo, *What a State Takeover of Houston ISD Means for Parents and Students: 7 Things to Know*, HOUS. CHRON. (Mar. 15, 2023, 6:38 PM), <https://www.houstonchronicle.com/news/houston-texas/education/article/hisd-state-takeover-texas-education-agency-17813272.php> (on file with the CUNY Law Review).

expectations given the funding situation.<sup>227</sup> The district's underfunding comes on top of the district serving a predominantly low-income student population. Indeed, HISD serves a student population in which 80% of students are low-income.<sup>228</sup> What resources the district did maintain were significantly depleted due to legal defense against the state's takeover of public schools in Houston.<sup>229</sup>

While we must wait to see the outcomes of the HISD takeover, previous takeovers of local public schools and districts in Texas have mixed results. For instance, the state takeover of the North Forest Independent School District in 2008 resulted in lost jobs in the community.<sup>230</sup> Beaumont Independent School District stands in contrast to North Forest Independent School District, having lost control of its schools in 2014 and having had local control reestablished in 2019.<sup>231</sup> Still, success stories—whether controversial or not—are the exception to the rule rather than the rule itself. Thus, the state's takeover of HISD is risky and places the district into an uncertain future.

There are already signs that the takeover of HISD is going to produce problematic outcomes. Various constituencies have expressed concern through various mechanisms. For instance, parents and locals have expressed fear that a loss of local control will result in a decrease in their involvement in decision-making at the district level.<sup>232</sup> Furthermore, there is broad concern that the district will become less responsive to the needs of the community because there is less political accountability for education policymakers and leaders.<sup>233</sup> In keeping with the general trend in state takeovers, the elected school board was replaced with a single white male education policy broker who is not accountable to the general public.<sup>234</sup>

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<sup>227</sup> Edward McKinley, *Houston Lawmakers Decry HISD Takeover, Warn Other Districts They Could be Next*, HOUS. CHRON. (Mar. 15, 2023, 6:03 PM), <https://www.houstonchronicle.com/politics/texas/article/houston-lawmakers-decry-hisd-takeover-warn-17840947.php> (on file with the CUNY Law Review).

<sup>228</sup> Dellinger, *supra* note 212.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Carballo, *supra* note 226.

<sup>232</sup> See Brian Lopez, *Parents Share Their Outrage During First Public Meeting Over Houston ISD Takeover*, TEX. TRIB. (Mar. 21, 2023, 9:00 PM), <https://www.texastribune.org/2023/03/21/houston-isd-tea-takeover-meeting/> [<https://perma.cc/UGX2-WP64>] (noting community members did not have a voice at the first meeting to discuss the HISD takeover).

<sup>233</sup> Rebecca Hennes et al., *Everything to Know About the Unprecedented HISD State Takeover and the School District's Future*, HOUS. CHRON. (Mar. 15, 2023, 5:17 PM), <https://www.houstonchronicle.com/news/houston-texas/education/article/hisd-state-takeover-houston-live-updates-17839142.php> (on file with the CUNY Law Review).

<sup>234</sup> Carballo, *supra* note 226 (suggesting Texas Education Commissioner, Michael Morath, would seize control of HISD's operations, appointing the next superintendent); see also Megan Menchaca, *TEA Commissioner Mike Morath to Hold Closed-Door Meeting with*

To this end, the American Civil Liberties Union filed a complaint with the United States Department of Justice alleging the takeover of HISD violated section 2 of the Voting Rights Act of 1965 and the Fourteenth and Fifteenth Amendments to the Constitution.<sup>235</sup> On a similar note, the district has seen a “revolving door of substitute teachers”<sup>236</sup> and a mass firing<sup>237</sup> and resignation of teachers and leaders,<sup>238</sup> suggesting a lack of support for this form of intervention from educators. Finally, the state takeover administration took over HISD following talks of massive cuts to the school district’s budget in an effort to right-size the district, following a reduction in student population.<sup>239</sup> A pending financial bond proposal has faced significant political pushback as a result of the recent takeover.<sup>240</sup> As always, race is a focus of the state takeover of HISD. In addition to being the eighth-largest school district in the nation, HISD has

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*Houston ISD District Advisory Committee*, HOUS. CHRON. (July 24, 2024), <https://www.houstonchronicle.com/news/houston-texas/education/article/tea-mike-morath-hisd-visit-19593672.php> (on file with the CUNY Law Review) (including a photo of Michael Morath, who appears to be white).

<sup>235</sup> Brian Lopez, *Civil Rights Organizations File Federal Complaint Against Texas’ Takeover of Houston ISD*, TEX. TRIB. (Mar. 31, 2023, 12:00 PM), <https://www.texastribune.org/2023/03/31/texas-houston-isd-takeover-complaint/> [<https://perma.cc/F9TR-9JMC>]; see email from ACLU Foundation of Texas, American Civil Liberties Union Foundation et al., to Chris Herren, Chief, Voting Rights Section, Civil Rights Division, U.S. Dep’t of Just. (Mar. 31, 2023), [https://www.aclutx.org/sites/default/files/aclutx\\_complaint\\_-\\_texas\\_education\\_agency\\_redacted.pdf](https://www.aclutx.org/sites/default/files/aclutx_complaint_-_texas_education_agency_redacted.pdf) [<https://perma.cc/XCX4-MQ3A>].

<sup>236</sup> Kristina Samuels, *HISD Teacher: State Takeover is Hurting my Students - Opinion*, HOUS. CHRON. (Apr. 7, 2024), <https://www.houstonchronicle.com/opinion/outlook/article/hisd-teacher-takeover-sharpstown-19387948.php> (on file with the CUNY Law Review).

<sup>237</sup> Menchaca, *supra* note 235.

<sup>238</sup> Adam Zuvanich, *Ousted Houston ISD Principals Speak Out, Saying Forced Resignations Were Unwarranted*, HOUS. PUB. MEDIA (May 24, 2024, 6:00 AM), <https://www.houstonpublicmedia.org/articles/news/education-news/hisd/2024/05/24/488492/ousted-houston-isd-principals-speak-out-saying-forced-resignations-were-unwarranted/> [<https://perma.cc/AHS2-YV76>].

<sup>239</sup> Anna Bauman, *HISD School Board Talks Budget Cuts as State Takeover Looms*, HOUS. CHRON. (Mar. 23, 2023, 7:13 PM), <https://www.houstonchronicle.com/news/houston-texas/education/article/hisd-budget-workshop-financial-plan-17854533.php> (on file with the CUNY Law Review) (noting HISD has lost 26,000 students in roughly six years, creating an expected \$280 million budget shortfall).

<sup>240</sup> Adam Zuvanich, *Houston-Area Democrats and Republicans Oppose Houston ISD Bond in Rare Show of Solidarity*, HOUS. PUB. MEDIA (Oct. 10, 2024, 5:04 PM), <https://www.houstonpublicmedia.org/articles/news/education-news/hisd/2024/10/10/502651/houston-area-democrats-and-republicans-oppose-houston-isd-bond-in-rare-show-of-solidarity/> [<https://perma.cc/BW9J-E8S3>] (discussing Houston’s Democratic and Republican opposition to a new \$4.4 billion bond because of a disconnect with the appointed school leadership in HISD).

a predominantly Black and Brown population.<sup>241</sup> Not surprisingly, the state has decided to dissolve the local school board, instead of supporting the school board through other interventions.<sup>242</sup> As previous research has noted, states are more likely to disempower and dismantle the local school board when taking over a district that is predominantly Black and Brown.<sup>243</sup> Texas' takeover of HISD is like other takeovers in the state: roughly 93% of all takeovers in the state of Texas target predominantly Black and Brown districts.<sup>244</sup> In each of these districts, the state found itself stripping Black and Brown residents of their right to vote in school board elections and to partake in the politics of education. Somewhat shockingly, because the state of Texas graded HISD as a B-rated district,<sup>245</sup> the state seized control of HISD for the struggles of one school, which is the victim of white flight and intentional efforts to maintain segregated living spaces following the Supreme Court's requirement to desegregate public schools.<sup>246</sup>

#### IV. THE TAKEOVER OF HOUSTON INDEPENDENT SCHOOL DISTRICT UNDER WHITENESS AS PROPERTY

##### A. *The Rights to Disposition*

The right to disposition assumes that white people can dispose of whiteness and white property at their will. In the case of the HISD takeover, white people were allowed to dispose of schools, school governance, and school policy and leadership without earnest regard to the experiences

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<sup>241</sup> Dellinger, *supra* note 212 (discussing that HISD is roughly 62% Hispanic and 22% Black, meaning Black and Latinx students comprise roughly 4 out of every 5 students in HISD).

<sup>242</sup> Carballo, *supra* note 226 (explaining Texas' plan to replace the nine-member school board with a board of managers).

<sup>243</sup> Morel, *The Effects of Centralized Government Authority on Black and Latino Political Empowerment*, 69 POL. RSCH. Q. 347, 348-49 (2016).

<sup>244</sup> Dellinger, *supra* note 212.

<sup>245</sup> Asher Lehrer-Small & Danya Pérez, *America's Biggest Education Experiment is Happening in Houston. Could it Change U.S. Schools?* TEX. TRIB. (July 3, 2024, 4:00 PM), <https://www.texastribune.org/2024/07/03/houston-isd-takeover-schools/> [<https://perma.cc/KXU7-43JK>] (highlighting that HISD earned a B rating on Texas' A-F rating system, but that Wheatley High School received an F rating for a seventh consecutive year).

<sup>246</sup> Dominic Anthony Walsh, *Considering Race, Class, and Power in Texas Education Agency's Takeover of Houston Independent School District*, HOUS. PUB. MEDIA (Mar. 15, 2023, 12:00 PM), <https://www.houstonpublicmedia.org/articles/education/2023/03/15/446229/considering-race-class-and-power-in-texas-education-agencys-takeover-of-houston-independent-school-district/> [<https://perma.cc/2AZM-AEGV>] (discussing the fact that Houston, like Atlanta, planned to disrupt integrated communities through school siting decisions to foster ghettos for Black residents).

of Black and Brown communities.<sup>247</sup> Based on school accountability scores, which are based primarily on standardized test scores in most states,<sup>248</sup> the state of Texas—represented by white people and at the behest of whiteness—took over the schools in HISD, which serves a disproportionately Black and Brown student population.<sup>249</sup> Yet, test scores are gameable, and scales related to test scores are frequently altered *after* students complete the test.<sup>250</sup> These alterations to the scales related to test scores allow white people to label Black and Brown school districts as low-performing and white school districts as elite.<sup>251</sup> This labeling occurs without investigating or considering the context in which schools operate.<sup>252</sup> For instance, those who advocate for the reduction of the achievement gap often discuss the achievement gap between Black and Brown students and their white counterparts, but those same people fail to investigate the achievement gap in relation to the wealth gap, which is more likely than the socioeconomic gap to address the achievement gap.<sup>253</sup> To that end, white people are allowed to dispose of schools, schooling, and school governance and leadership at their will and without critically engaging the context in which schools and schooling operate.

### B. *The Rights to Use and Enjoyment*

The right to use and enjoyment, in the context of the HISD takeover, suggests white people have a right to use their political voice and enjoy school board leadership. In previous research, one of the authors of this Article has found that Black and Brown school boards may suffer state takeover at the point when they switch from being predominantly white to predominantly Black.<sup>254</sup> While this is not the case for HISD, there is

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<sup>247</sup> See generally Lopez, *supra* note 232 (noting community members did not have a voice at the first meeting to discuss the HISD takeover).

<sup>248</sup> Lihshing Wang et al., *Controversies of Standardized Assessment in School Accountability Reform: A Critical Synthesis of Multidisciplinary Research Evidence*, 19 APPLIED MEASUREMENT EDUC. 305, 317 (2006).

<sup>249</sup> For up-to-date demographics regarding HISD, see *School Districts: Houston ISD*, TEX. TRIB. <https://schools.texastribune.org/districts/houston-isd/> [<https://perma.cc/25VN-UTEF>] (last visited May 18, 2025) (suggesting that Black and Latinx students comprise roughly 84% of the district's population).

<sup>250</sup> See generally Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 41 (2000) (suggesting that standardized assessments have been manipulated in Texas).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> Donald Easton-Brooks & Alan Davis, *Wealth, Traditional Socioeconomic Indicators, and the Achievement Debt*, J. NEGRO EDUC. 530, 538 (2007).

<sup>254</sup> Aaren N. Cassidy & Steven L. Nelson, *Understanding Arkansas' State Takeover of the Little Rock School District as Antiblackness: A Dialectical Relational Approach*, 22 J.L. SOC'Y 167, 196 (2022).

evidence that warrants the claim that white people in Texas, broadly, sought to disrupt Black and Brown leadership in HISD (and in other school districts). Notably, 93% of state takeovers in Texas occur in Black and/or Brown school districts.<sup>255</sup>

As noted elsewhere in this Article, state takeovers of public schools in Texas (and elsewhere) end with a predominantly Black and/or Brown school board being dismantled, disempowered, and replaced with a singular white policymaker.<sup>256</sup> Moreover, Black and Brown students and families lose their voice in state takeovers, including in the HISD takeover, and residents within the school district boundaries lose their right to vote for their education policymakers.<sup>257</sup> This is something that does not frequently happen to school districts that serve white enclaves.<sup>258</sup> Thus, there is evidence that white people are allowed to enjoy the politics of education and school board leadership, but Black and Brown peoples are not afforded the same rights to use and enjoyment.

### C. *Reputational and Status Property*

As mentioned previously, white people have reputation and status property that is evident in the state takeover of public schools and districts. For instance, white school board members have presumed higher reputation and status than do school board members from marginalized communities. The evidence supporting this statement includes the fact that states are less likely to target white school boards for takeover.<sup>259</sup> Additionally, when states take over white school boards, the state is less likely to disempower and set aside the popularly elected school board.<sup>260</sup> Finally, there are reports that Black and Brown school boards feel targeted for state takeover.<sup>261</sup>

The state takeover of HISD (and other districts in Texas) follows the trends found in academic scholarship. For instance, 93% of districts subjected to takeover in Texas are predominantly Black and/or Brown.<sup>262</sup> Additionally, the predominantly Black and Brown school board in HISD was

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<sup>255</sup> Dellinger, *supra* note 212.

<sup>256</sup> Nelson, *supra* note 63, at 12-13 (considering the role of the displacement of Black political leadership with white political leadership in state takeover districts and arguing that such displacements are part and parcel of an effort to decrease Black political empowerment); Morel, *supra* note 243, at 349.

<sup>257</sup> Nelson, *supra* note 63, at 12-13; Lopez, *supra* note 232.

<sup>258</sup> Lopez, *supra* note 232. For a definition of “white enclaves,” see Frankenberg et al., *supra* note 67, at 39-40.

<sup>259</sup> See DOMINGO MOREL, TAKEOVER: RACE, EDUCATION, AND AMERICAN DEMOCRACY 11 (2017).

<sup>260</sup> *See id.*

<sup>261</sup> *See generally id.* at 128.

<sup>262</sup> Dellinger, *supra* note 212.

disempowered and shunted, in favor of the appointment of a singular white male policy broker.<sup>263</sup> Thus, there is evidence to support the notion that Black and Brown school board members and school districts that serve a disproportionate number of Black and Brown students and families maintain a lower reputation and status than do white school board members and school districts that serve white enclaves.

Additionally, reputational and status property assumes white students and families are more likely to enjoy higher quality schools and schooling. In other words, state takeover of public schools and districts that do not account for the histories related to educational quality—based in school finance—that led to takeover are problematic.<sup>264</sup> In the case of HISD, there was little discussion or consideration of the financial crisis the district found itself in over time or as the takeover was taking place.<sup>265</sup> Additionally, there was little consideration of the fact that over 80% of students in HISD come from lower socioeconomic backgrounds.<sup>266</sup> Thus, there is evidence to support the claim that white people, who enjoy generally higher socioeconomic statuses and therefore enjoy schools and schooling experiences that are better financed (since schools are funded through property taxes),<sup>267</sup> have access to better quality schools and schooling experiences as compared to their counterparts from marginalized communities.<sup>268</sup>

#### D. *The Absolute Right to Exclude*

Absolute exclusion occurs when white people shift the governance structure of primary and secondary schools in an effort to limit Black and Brown peoples' access to the politics of education. Furthermore, the

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<sup>263</sup> Alejandro Serrano & Brian Lopez, *Texas Education Agency picks Mike Miles for Houston ISD Superintendent as State Takeover Begins*, TEX. TRIB. (June 1, 2023, 3:00 PM), <https://www.texastribune.org/2023/06/01/tea-houston-isd-takeover-superintendent/> [<https://perma.cc/33DW-JGYC>].

<sup>264</sup> Notably, states have taken note of the financial despair of some districts subjected to state takeover. See McDermott, *supra* note 51, at 93-94. But states do not typically leverage this knowledge to support districts—aside from taking over the district.

<sup>265</sup> McKinley, *supra* note 228.

<sup>266</sup> Dellinger, *supra* note 212.

<sup>267</sup> Douglas B. Downey et al., *The Distribution of School Quality: Do Schools Serving Mostly White and High-SES Children Produce the Most Learning?*, 92 SOCIO. EDUC. 388, 388 (2019) (discussing how residential segregation, disparate disciplinary practices, and tax-funding contribute to white students becoming isolated in schools with peers of higher socioeconomic status and how this arrangement benefits white students).

<sup>268</sup> Stephen J. Caldas & Carl Bankston, *Effect of School Population Socioeconomic Status on Individual Academic Achievement*, 90 J. EDUC. RSCH. 269, 275 (1997) (“[A]ttending school with classmates who come from higher SES backgrounds does tend to positively raise one’s own academic achievement, independent of one’s own SES background, race, and other factors.”).

prevailing trend of state takeovers of public schools and districts has been to decimate the locally elected school board and its political power in favor of an appointed white male policy broker.<sup>269</sup> The takeover of HISD fits within this trend. The Texas Education Agency, under the leadership of Mike Morath (seemingly a white man) removed the locally elected, predominantly Black and Brown school board of HISD and appointed Mike Miles (a nonwhite man), to control the affairs of the school district,<sup>270</sup> which has a population that is more than 80% students of color.<sup>271</sup> Moreover, there is evidence that community members have expressed notable concern that their collective and individual political voices are not likely to receive adequate or appropriate attention from the appointed education policy body in HISD.<sup>272</sup> Likewise, students, educators, and parents in the school district that serves a population of students and families from disproportionately Black and Brown backgrounds have attempted to resist the takeover of HISD, but this resistance has been to no avail.<sup>273</sup> In this way, white people via state takeover of public schools in HISD have effectuated the absolute right to exclude Black and Brown peoples from the politics of education in HISD.

Extant interpretations of federal law and the Constitution protect white people's absolute right to exclude Black and Brown peoples from the politics of education. For instance, the Voting Rights Act of 1965 and the Equal Protection Clause of the Fourteenth Amendment both fail to provide adequate protection or a cause of action to prevent the takeover of public schools and districts.<sup>274</sup> Notably, the American Civil Liberties

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<sup>269</sup> Nelson, *supra* note 63, at 12-13.

<sup>270</sup> Serrano & Lopez, *supra* note 263; Menchaca, *supra* note 234 (including a photo or Michael Morath, who appears to be white); Megan Menchaca, 'Pretty spectacular: TEA Commissioner Praises Houston ISD's NES Model in Latest Visit to Schools', HOUS. CHRON. (May 14, 2025), <https://www.houstonchronicle.com/news/houston-texas/education/hisd/article/hisd-mike-morath-school-visit-20298888.php> (on file with the CUNY Law Review) (including a photo of Mike Miles, who does not appear to be white); Nadra Nittle, *Houston Public Schools Have a Diverse, Nearly All-Women School Board. A State Takeover Would Oust Them from Office*, 19<sup>TH</sup> (Apr. 11, 2023), <https://19thnews.org/2023/04/houston-public-schools-state-takeover-school-board/> [<https://perma.cc/NT9E-ZEMV>] (highlighting that the superintendent at the time was Black, that seven trustees were Black or Latino, and that eight trustees were women).

<sup>271</sup> For up-to-date demographics regarding HISD, see TEX. TRIB., *supra* note 249.

<sup>272</sup> See *supra* note 247 and accompanying text.

<sup>273</sup> Rebecca Carballo & Anna Bauman, *TEA Takes Over Houston ISD Despite Community Outrage, Academic Gains*, HOUS. CHRON. (Mar. 15, 2023), <https://www.houstonchronicle.com/news/houston-texas/education/article/houston-tea-takeover-hisd-17821731.php> (on file with the CUNY Law Review).

<sup>274</sup> See Steven L. Nelson & Heather N. Bennett, *Are Black Parents Locked out of Challenging Disproportionately Low Charter School Board Representation? Assessing the Role of the Federal Courts in Building a House of Cards*, 12 DUKE J. CONST. L. & PUB. POL'Y 193 (2016).

Union and other civil rights organizations have filed a a complaint with the Department of Justice requesting that they investigate the state takeover of HISD as a potential violation of the Voting Rights Act and the U.S. Constituion.<sup>275</sup> However, previous research suggests the plaintiffs will not prevail in the unlikely event that the Department of Justice pursues their case.

Following the Court's decision in *Shelby County v. Holder*, section 5 of the Voting Rights Act of 1965 (which fell when section 4 of the Voting Rights Act of 1965 was invalidated) is no longer enforceable.<sup>276</sup> Therefore, plaintiffs will need to rely on section 2 of the Voting Rights Act of 1965, which is less powerful than section 5 of the Voting Rights Act.<sup>277</sup> Moreover, the current Supreme Court should not be trusted with a civil rights case based in the Voting Rights Act of 1965, arguably the most effective civil rights legislation to date. Additionally, the Equal Protection Clause of the Fourteenth Amendment does not provide protection from state takeovers of public schools and districts, even when there is an argument that the takeover is grounded in fairly specific race and racism.<sup>278</sup> In one case, the Supreme Court failed to find intentional discrimination, even when the use of a racial epithet accompanied the takeover of a governing board.<sup>279</sup> Thus, the complaint to the Department of Justice, which argues federal law and the Constitution prohibit the racialized state takeover of public schools and districts,<sup>280</sup> does not actually provide an adequate legal rationale to stop the takeover of public schools in HISD. Ultimately, this means the takeover of HISD, which effectuates the absolute right to exclude, will continue notwithstanding the provision of a lawsuit brought by the Department of Justice.

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<sup>275</sup> E-mail from ACLU Found. of Texas et al. to Chris Herrn, Chief, Voting Section, C.R. Div., U.S. Dep't of Just. (Mar. 31, 2023) [hereinafter *ACLU Complaint*], [https://www.aclutx.org/sites/default/files/aclutx\\_complaint\\_-\\_texas\\_education\\_agency\\_redacted.pdf](https://www.aclutx.org/sites/default/files/aclutx_complaint_-_texas_education_agency_redacted.pdf) [<https://perma.cc/855H-FJAC>]; *ACLU of Texas and Partners File Federal Complaint over State Takeover of Houston Independent School District*, ACLU TEX. (Mar. 31, 2023), <https://www.aclutx.org/en/press-releases/aclu-texas-and-partners-file-federal-complaint-over-state-takeover-houston> [<https://perma.cc/6B99-RJNW>].

<sup>276</sup> 570 U.S. 529, 556-57 (2013).

<sup>277</sup> Nelson & Bennett, *supra* note 274 (articulating how Black parents in New Orleans needed to rely on section 2 of the Voting Rights Act of 1965 following the dismantling of section 5 of the same, especially as related to the state takeover, and subsequent charter school takeover, of New Orleans's public schools).

<sup>278</sup> See Nelson & Bennett, *supra* note 274, at 184-93.

<sup>279</sup> See *id.* at 189 (citing *James v. Wallace*, 533 F.2d 963 (5<sup>th</sup> Cir. 1976)).

<sup>280</sup> See *ACLU Complaint*, *supra* note 275.

## CONCLUSION

The whiteness and education as property theses highlight how whiteness and white supremacy operate to sustain the racial subjugation of Black and Brown communities. Harris's whiteness as property connects contemporary property rights and efforts toward the accumulation of property to the United States' history of chattel slavery, and Baldwin Clark's education as property suggests that education—at the systems level and individually—are the property of whiteness and belong to white people. These theses have profound and important intersections with the state takeover of public schools and districts. While public schools should be the property of communities, predominantly white states have exhibited how they can seize control of those schools and the schooling process to shift the curricula, experiences, and knowledge bases toward whiteness and white supremacy. Thus, whiteness as property is implicated through the reality that Black and Brown communities can never truly own their schools and the schooling process. Education as property is implicated through the same reality in addition to the reality that the schooling process is antiblack, and antiblackness is inherently accompanied by white supremacy. Therefore, whiteness and education as property as theses explain how the state takeover of public schools and districts is a racist project.

As noted previously, extant interpretations of federal law and the Constitution fail to protect Black and Brown communities subjected to state takeovers of public schools and districts. Combined with the notion of school board leadership as white property, failure to protect these communities from state takeover is tantamount to the establishment and maintenance of race and racism in the implementation of education policy. To this end, school board leadership as white property suggests a lineage of racialized attacks on Black and Brown peoples' involvement in the politics of education, education law, and education policy. This lineage is created and sustained through the persistent and consistent attack on these communities exercising the electoral franchise *and* the right to be treated equally under the law. Additionally, these attacks install white people in a superior position relative to their Black and Brown counterparts on school boards, in schools, and within communities—discrete and broad. It is here that this Article proffers state takeovers of public schools and districts as a political assault on Black and Brown communities and a power grab in favor of white communities.

In the context of Texas' takeover of HISD, race and racism are prominent themes. Despite HISD's struggles, the district is only under takeover because of its demographics. The state of Texas deemed HISD a B-rated school district, and the only high school that was failing at the notice of

takeover had improved its performance to a passing performance. Moreover, the district fits with national and state trends. Nationally, 85% of school districts subjected to state takeover are predominantly Black and/or Brown. Within Texas, 93% of schools subjected to state takeover are predominantly Black and/or Brown. HISD is more than 80% Black and Brown, and the district is roughly 80% low-income. In other words, the state of Texas' takeover of HISD is predictable due to the district's demographic composition more than it is based on the district's alleged performance. Here, again, this Article asserts that Texas' takeover of HISD is part and parcel the project to maintain racial subjugation *and* white supremacy.