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CREATING THE URBAN EDUCATIONAL DESERT THROUGH SCHOOL CLOSURES AND DIGNITY TAKING

MATTHEW PATRICK SHAW*

I. INTRODUCTION

In the United States, urban public schools are closing at an outstanding pace. In 2013, Chicago Public Schools (CPS) alone closed forty-nine public schools.¹ Urban public school districts like CPS justify closures by citing district-wide population declines and within-district demographic shifts among the school-aged population.² Districts argue that closures are necessary to save millions of dollars caused by operating “underutilized” schools.³ Recovered funds, districts maintain, can be allocated to support improvements in instruction and student supports.⁴ Thus, the argument goes, school closures are mutually beneficial to districts in pursuit of more efficient management, students who would receive better instruction, and taxpaying voters who do not need to approve of spending referenda to fund these efforts.⁵

For their part, school-closure opponents charge that the “underutilization” and “underperformance” narratives are merely superficially neutral justifications to deprive vulnerable children of color access to educational opportunities.⁶ As is the case with many educational rights arguments, opponents’ claims cannot both be argued with due process and equal protection rhetoric.⁷ The most commonly articulated equal protection claim

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1. *Swan v. Bd. of Educ. of City of Chi.*, No. 13-C-3623, 2013 WL 4401439, at *2 (N.D. Ill. Aug. 15, 2013); Vontrese Deeds & Mary Pattillo, *Organizational “Failure” and Institutional Pluralism: A Case Study of an Urban School Closure*, 50 URB. EDUC. 474, 479 (2015).

2. *See, e.g., Swan*, 2013 WL 4401439, at *2; *A.A. v. Raymond*, No. 2:13-CV-01167-KJM-EFB, 2013 WL 3816565, at *20 (E.D. Cal. July 22, 2013); *Smith v. Henderson*, 944 F. Supp. 2d 89, 93 (D.D.C. 2013).

3. *Raymond*, 2013 WL 3816565, at *8.

4. *See id.* at *14.

5. *See id.*

6. Eve L. Ewing, *Shattered Schools in the Black Metropolis: Race, History, and Discourse on Chicago’s South Side 47–49* (May 16, 2016) (unpublished doctoral dissertation, Harvard Graduate School of Education) (on file with Digital Access to Scholarship at Harvard).

7. *E.g., Plyler v. Doe*, 457 U.S. 202, 210–13 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1278, 1281 (1973).

has opponents alleging that school closures disproportionately impact African-American and Latinx⁸ students living in higher poverty neighborhoods. Communities' concerns appear supported by the facts on the ground: the majority of schools closed—and the majority of students affected by school closures across the U.S.—are predominantly low-income African-American and Latinx.⁹ In Chicago, for example, *all* of the forty-nine schools CPS closed in 2013 served mostly low-income students of color.¹⁰ In a year when African-Americans were forty percent of CPS students, they were *eighty-eight percent* of students affected by school closures.¹¹ Less well-established, but frequently asserted, are claims that districts *intentionally* target students of color and the schools they serve for closure.¹²

Despite these claims, opponents have been unable to stop districts from closing schools.¹³ I argue that opponents' failure to stop school closures is linked to two related phenomena. First, when evaluating these cases, federal courts have identified the access to educational opportunities question as a due-process property interest rather than one of equal protection, as school-closure opponents' arguments might suggest. Second, because property interests are rooted in state laws, federal courts construe the scope of federal-law interventions in this arena narrowly, which frustrates opponents' more expansive understanding of their interests in school property. I explore these competing educational property interests in Part II of this article.

Having shown how legal and community-based concepts of school property are at fundamental odds with each other;¹⁴ in Part III, I use a critical discourse analysis (CDA) of the school-closure hearings for William H. King (King) Elementary School as a case study to show how this incongruence becomes most apparent and consequential during the school-closure process. I uncover meaningful differences in the approaches districts and community members use to assert their property interests in schools slated for closure. Relatedly, I find meaningful disagreements among stakeholders in what metrics should matter when evaluating the school's capacity or performance; differences in logical style and the logics themselves; reliance

8. "Latinx" is an English-language gender-neutral alternative to the terms "Latina" and "Latino," which originate from the more grammatically gendered Spanish language.

9. Deeds & Pattillo, *supra* note 1, at 489 n.1.

10. Swan v. Bd. of Educ. of City of Chi., No. 13-C-3623, 2013 WL 4401439, at *4 (N.D. Ill. Aug. 15, 2013).

11. Ewing, *supra* note 6.

12. A.A. v. Raymond, No. 2:13-CV-01167-KJM-EFB, 2013 WL 3816565, at *8 (E.D. Cal. July 22, 2013).

13. *Id.* at *24.

14. See Deeds & Pattillo, *supra* note 1.

upon different sources and types of evidence; and ultimate disagreements in who should determine whether a school should close. Education philosopher Jacob Fay's adaptation of Nancy Fraser's language of "abnormal justice" might help to explain this phenomenon as one pitting formal justice processes against community perceptions of "maldistribution," "misrepresentation," and "misrecognition."¹⁵

In Part IV, I offer property scholar Bernadette Atuahene's conception of a "dignity taking"¹⁶ to understand *how* the 2013 CPS school-closure process effected abnormal justice on affected communities.¹⁷ First, I show how Illinois law gives CPS unregulated authority to set the terms of and conduct school-closure hearings without input from affected communities, a form of "misrecognition." Second, I show how this legally authorized apparatus sets the stage for CPS to "misrepresent" community property interests in their schools through dismissive behavior toward both community members and independent hearing officers; a phenomenon that would extend Atuahene's concept of "infantilization" beyond individuals to encompass group-level harms. Finally, I show how the guarantee of impunity allows CPS to act in ways that deprives school communities of access to their schools, a "maldistribution" that takes not only property and dignity, but leads to "community destruction." I conclude in Part V with implications for procedural and substantive law, as well as a charge.

Understanding how formalized school-closure processes might effect a dignity taking might go a way toward understanding how cumulative perceived injustice¹⁸ converges with the actual abandonment of entire communities by educational systems¹⁹ to create the "educational desert"—an absence of available, safe, opportunity-yielding educational options. A common reason why cases seeking to enjoin school closures fail is lack of evidence of direct harm.²⁰ As retrospective evidence of harm emerges,²¹ mapping the transformation of former schools in predominantly African-

15. Jacob Z. Fay, *School Closure and Abnormal Justice* 1, 19–21 (Nov. 11, 2015) (citing Nancy Fraser, *Abnormal Justice*, 34 *CRITICAL INQUIRY* 393, 416 (2008)) (unpublished doctoral dissertation, Harvard Graduate School of Education) (on file with Digital Access to Scholarship at Harvard).

16. BERNADETTE ATUAHENE, *WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM* 31–32, 43 (2014); Bernadette Atuahene, *The Importance of Conversation in Transitional Justice: A Study of Land Restitution in South Africa*, 39 *LAW & SOC. INQUIRY* 902, 911 (2014).

17. See Ewing, *supra* note 6 (for a sociological examination of CPS school closures in Bronzeville neighborhoods in Chicago's South Side).

18. Fay, *supra* note 15, at 3.

19. Ewing, *supra* note 6.

20. *E.g.*, *Smith v. Henderson*, 944 F. Supp. 2d 89, 95–96 (D.D.C. 2013).

21. *E.g.*, MARISA DE LA TORRE ET AL., *UCHICAGO CCSR, SCHOOL CLOSINGS IN CHICAGO: UNDERSTANDING FAMILIES' CHOICES AND CONSTRAINTS FOR NEW SCHOOL ENROLLMENT* (2015).

American and Latinx neighborhoods into educational deserts will be important for both remedying the instant effects on affected students and communities and discouraging courts from allowing similar harms to affect different student and community groups for lack of conclusive evidence. Rather than accepting “institutional mourning,” which sociologist of education Eve Ewing introduces as a way to understand how students, families, and communities affected by school closures cope with and attempt to move on from adverse school actions,²² this paper calls for and contributes to scholarship which empowers communities to save their valuable educational institutions.

II. EDUCATIONAL PROPERTY INTERESTS

A. Legally-Recognized Interests

Education offers a unique opportunity to explore school closures as a dignity taking. As a preliminary matter, there is not yet a federally recognized right to education in the United States.²³ However, each state guarantees an adequate public education to elementary- and secondary-school-age students through its own constitutions and laws.²⁴ By grounding the expectation of a public K–12 education in these laws, the state has given each school-aged child a “legitimate entitlement” to education.²⁵ Though the

22. Ewing, *supra* note 6, at 150–51.

23. See *Papasan v. Allain*, 478 U.S. 265, 285 (1986) (“As [*San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)] and [*Plyler v. Doe*, 457 U.S. 202 (1982)] indicate, this [Supreme] Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.”).

24. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 573 (1975) (looking to Ohio law to determine whether a claimant has a “legitimate claim of entitlement to a public education”); *Plyler*, 457 U.S. at 223 (Fourteenth Amendment equal protection guarantees that a state which has chosen to provide a public education must do so for all resident children); see also ALA. CONST., art. XIV, § 256; ALASKA CONST., art. VII, § 1; ARIZ. CONST., art. XI, § 1; ARK. CONST., art. XIV, § 1; CAL. CONST., art. IX, § 1; COLO. CONST., art. IX, § 2; CONN. CONST., art. VIII, § 1; DEL. CONST., art. X, § 1; FLA. CONST., art. IX, § 1; GA. CONST., art. VIII, § 1, ¶ (1); HAW. CONST., art. X, § 1; IDAHO CONST., art. IX, § 1; ILL. CONST., art. X, § 1; IND. CONST., art. VIII, § 1; IOWA CONST., art. IX 2d, § 3; KAN. CONST., art. VI, § 1; KY. CONST., § 183; LA. CONST., art. VIII, § 1; ME. CONST., art. VIII, PART 1, § 1; MD. CONST., art. VIII § 1; MASS. CONST., pt. 2, ch. V, § 2; MICH. CONST., art. VIII, § 2; MINN. CONST., art. XIII, § 1; MISS. CONST., art. VIII, § 201; MO. CONST., art. IX § 1, cl. a; MONT. CONST., art. X, § 1; NEB. CONST., art. VII, § 1; NEV. CONST., art. XI, § 2; N.H. CONST., pt. 2, art. 83; N.J. CONST., art. VIII, § 4, ¶ (1); N.M. CONST., art. XII, § 1; N.Y. CONST., art. XI, § 1; N.C. CONST., art. IX, § 2; N.D. CONST., art. VIII, § 1; OHIO CONST., art. VI § 3; OKLA. CONST., art. XIII, § 1; ORE. CONST., art. VIII, § 3; PA. CONST., art. III, § 14; R.I. CONST., art. XII, § 1; S.C. CONST., art. XI, § 3; S.D. CONST., art. VIII, § 1; TENN. CONST., art. XI, § 12; TEX. CONST., art. VII, § 1; UTAH CONST., art. X, § 1; VT. CONST., ch. II, § 68; VA. CONST., art. VIII, § 1; WASH. CONST., art. IX, § 1; W. VA. CONST., art. XII, § 1; WIS. CONST., art. X, § 3; WYO. CONST., art. VII, § 1.

25. Cf. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577–78 (1972) (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

scope of this entitlement differs from state to state,²⁶ the federal courts commonly understand each state to have promised each school-aged-resident child “the right to participate in the entire educational process,”²⁷ up to and including successfully obtaining a high-school diploma.²⁸ Having created this entitlement, the states have each created a property interest which none can diminish or deprive a child of without providing adequate notice and hearing opportunities per the Due Process Clause of the Fourteenth Amendment.²⁹ School actions that potentially threaten a deprivation of public-education access require due process. These include student discipline,³⁰ re-assignment,³¹ and expulsion.³²

Mindful that the *states* have created the educational property interest,³³ federal courts understand their role merely as enforcing procedural notice-and-hearing requirements and not as creating new substantive rights to educational opportunities.³⁴ The importance in federal jurisprudence of the seminal case, *Goss v. Lopez*, thus, is not its establishment of out-of-school suspension as more than a *de minimis* interruption of a student’s opportunity to receive an education.³⁵ Rather, its importance is in establishing “unfair or mistaken exclusion from the [broadly conceptualized] educational process”³⁶ as the sole condition that triggers federal due-process

26. Compare, e.g., GA. CONST., art. VIII, § 1, ¶ 1 (“Public education for the citizens *prior to the college or postsecondary level* shall be free and shall be provided for by taxation.”) (emphasis added), with NEB. CONST., art. VII, § 1 (“The Legislature shall provide for the free instruction in the common schools of this state of all *persons between the ages of five and twenty-one years.*”) (emphasis added), and N.J. CONST., art. VIII, § 4, ¶ (1) (“The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the *children in the State between the ages of five and eighteen years.*”) (emphasis added).

27. *Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 968 (8th Cir. 2015) (quoting *Mazevski v. Horseheads Cent. Sch. Dist.*, 950 F. Supp. 69, 72 (W.D.N.Y. 1997)).

28. E.g., *Debra P. v. Turlington*, 654 F.2d 1079, 1079 (5th Cir. 1981) (establishing that Florida law creates a property right in the expectation of a high-school diploma for students who comply with established requirements and required courses of study).

29. More accurately, when a state has decided to provide a public education system and required children to attend—and each state has done so, it has created an entitlement to education and cannot withdraw that entitlement without due process of law. See, e.g., *Goss*, 419 U.S. at 573–74 (holding that because Ohio created free education for residents between the ages of five and twenty-one the state created a property interest that a student may enforce through the Due Process Clause).

30. Cf. *Laney v. Farley*, 501 F.3d 577, 581 (6th Cir. 2007) (a one-day in-school suspension did not trigger the same due-process-protected interest as the out-of-school suspension at issue in *Goss*).

31. Cf. *Zamora v. Pomeroy*, 639 F.2d 662, 670 (10th Cir. 1981) (assignment to an alternative school in and of itself is not deprivation of education).

32. *Wood v. Strickland*, 420 U.S. 308, 308–09 (1975), *rev’d on other grounds*, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (students were entitled to due process before being expelled for using and possessing intoxicating beverages on school grounds).

33. Cf. *Bishop v. Wood*, 426 U.S. 341, 344 (1976) (state law defines property interests).

34. See, e.g., *Palmer v. Merluzzi*, 868 F.2d 90, 96 (3d Cir. 1989).

35. *Goss v. Lopez*, 419 U.S. 565, 573–76 (1975).

36. *Id.* at 577, 579.

inquiry.³⁷ Courts have consistently declined to extend *Goss* to recognizing a federally protected property interest in any of the educational components or parts that make up this process.³⁸ As a result, there is no federally protected right to receiving access to particular curriculum,³⁹ be included in a particular class,⁴⁰ or participate in extra-curricular athletics⁴¹ or activities.⁴²

1. Interests in Attending a Specific School

There is also no protected right to attend a specific school.⁴³ Generally, a student does not have an interest either in being admitted to⁴⁴ or opposing a transfer from a school.⁴⁵ Because no state law gives a student “an absolute right to” a particular school, the federal courts understand any expectation in attending such a school to be “unilateral” and, therefore, unenforceable through the U.S. Constitution.⁴⁶

Stevenson v. Blytheville School District #5, showcases this principle most effectively among recent cases. In *Stevenson*, the Eighth Circuit evaluated a student’s expectation of school choice under the Arkansas Public School Choice Act (APSCA).⁴⁷ APSCA established a program which allowed students in one district to attend school in a non-resident district. The statute, however, did not guarantee transfers. Rather, it allowed: (1) districts subject to federal desegregation orders to exempt themselves; and (2) receiving districts discretion to accept an application.⁴⁸ Because of these district opt-out procedures, the Court of Appeals found that APSCA did not create an entitlement to attend school in a particular district.⁴⁹ Without this

37. *Albach v. Odle*, 531 F.2d 983, 985 (10th Cir. 1976) (citing *Goss*, 419 U.S. at 576).

38. *Id.* at 985.

39. *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25, 27 (5th Cir. 1997) (citing *Arundar v. DeKalb Cty. Sch. Dist.*, 620 F.2d 493 (5th Cir.1980)).

40. *Seamons v. Snow*, 84 F.3d 1226, 1234–35 (10th Cir. 1996).

41. *See Mitchell v. La. High Sch. Athletic Ass’n*, 430 F.2d 1155, 1155 (5th Cir. 1970); *Albach*, 531 F.2d at 985.

42. *See, e.g., Mazevski v. Horseheads Cent. Sch. Dist.*, 950 F. Supp. 69, 72. (W.D.N.Y. 1997).

43. *Doe v. Bagan*, 41 F.3d 571, 576 (10th Cir. 1994).

44. *Cf. Selman v. Harvard Med. Sch.*, 494 F. Supp. 603, 619 (S.D.N.Y.), *aff’d*, 636 F.2d 1204 (2d Cir. 1980).

45. *Bagan*, 41 F.3d at 576; *Swindle v. Livingston Parish Sch. Bd.*, 655 F.3d 386, 394 (5th Cir. 2011).

46. *See generally Bagan*, 41 F.3d 571; *Seamons v. Snow*, 84 F.3d 1226, 1234 (10th Cir. 1996); *Selman*, 494 F. Supp. at 619.

47. *Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 958 (8th Cir. 2015) (citing ARK. CODE ANN. §§ 6-18-1901 to -1908 (2015)).

48. *Id.* at 958 (citing *Teague v. Cooper*, 720 F.3d 973, 975 (8th Cir. 2013), and ARK. CODE ANN. § 6-18-1906(b)).

49. *Id.* at 968–69.

entitlement, the *Stevenson* plaintiffs did not have a property interest which required due-process protection, and their case failed.⁵⁰

However, when a transfer might lead to a student being provided a “substantially inferior” education such that it might “amount to an expulsion from the educational system,” due process property interests might be implicated.⁵¹ The parent cases on which this legal claim is predicated all involve discipline-related transfers from a traditional school to an alternative school.⁵² That is, when student conduct is found to warrant a possible transfer—or even in-school suspension—the courts have required some attention be paid to “the extent to which [a] student [would be] deprived of instruction or the opportunity to learn.”⁵³

2. Interests in Preventing School Closures

A natural analog might find courts requiring districts to pay a similar degree of attention to possible educational deprivations when evaluating the effects on students of non-discipline-related transfers caused by administrative school closings. This seems consistent with federal courts’ general understanding that while “[c]losing a neighborhood school is not, by itself, an actionable harm,” a defensible suggestion that a school closure might somehow harm students’ academic performance in the process could be actionable.⁵⁴ However, the trend has been to summarily accept district claims without much engagement with either parents and students’ claims or evidence which might evaluate the competing claims.⁵⁵ In one case, the Third Circuit declined even to engage in due-process analysis though evidence supported parents’ allegations that a district failed to comply with

50. *Id.*

51. *See Zamora v. Pomeroy*, 639 F.2d 662, 670 (10th Cir. 1981) (the Tenth Circuit suggesting it might have considered more seriously the educational deprivation claims of a plaintiff opposing reassignment to an alternative school had there been evidence that the alternative school to which he was reassigned was “so inferior to amount to an expulsion from the educational system”).

52. *Cf. id.*; *Buchanan v. City of Bolivar, Tenn.*, 99 F.3d 1352, 1360 (6th Cir. 1996); *C.B. v. Driscoll*, 82 F.3d 383, 389 n.5 (11th Cir. 1996); *Doe v. Bagan*, 41 F.3d 571, 576 (10th Cir. 1994).

53. *Laney v. Farley*, 501 F.3d 577, 582 (6th Cir. 2007) (quoting *Cole v. Newton Special Mun. Separate Sch. Dist.*, 676 F. Supp. 749, 751–52 (S.D. Miss. 1987), *aff’d*, 853 F.2d 924 (5th Cir. 1988)).

54. *Swan v. Bd. of Educ. of City of Chi.*, No. 13-C-3623, 2013 WL 4401439, at *21 (N.D. Ill. Aug. 15, 2013) (citing *Smith v. Henderson*, 944 F. Supp. 2d 89, 89 (D.D.C. 2013)) (The courts understand the injury caused by school closure to “seems slight given”—or perhaps *if*—“their children . . . are moving to better performing . . . schools.”).

55. *E.g., Henderson*, 944 F. Supp. 2d at 107. “At the outset, the Court doubts that forcibly transferring a student from one public school to another constitutes a denial of a ‘facility, service, program, or benefit’ . . . Under the [redistricting] Plan, the District will continue to provide the student with a public education, and there is no reason to think that such education will be inferior to the one she currently receives.” *Id. But see Swan*, 2013 WL 4401439, at *21 (analyzing two studies provided by plaintiffs’ expert indicating no long-term impact of school closures on affected students’ academic achievement).

Pennsylvania statutory provisions on notice and hearings for school closures. The Circuit's rationale: there is no legally-protected property interest in a physical school building.⁵⁶

Given this, school district reliance on the concept of "underutilization" to justify school closures is not sufficient to justify a plaintiff's claim of disparate-impact discrimination,⁵⁷ neither when evidence shows that the district is aware of race or other demographic factors when making enrollment and closure decisions⁵⁸ nor when actual utilization numbers do not support district claims. This is because, as a general matter, Title VII-style⁵⁹ disparate-impact claims, which predicate a finding of unlawful discrimination by looking at how facially neutral governmental laws and practices adversely affect members and groups of protected classes, are not available to evaluate educational decisions, which are reviewed under Title VI.⁶⁰ As a result, unlike in government contracts and employment—even of educators,⁶¹ where one might cite to statistical disparities in an action's impact between members of different racial groups as *prima facie* evidence of discrimination,⁶² a similarly disparately impactful educational decision affecting students cannot be easily challenged under Title VI.⁶³

B. Community-Based Notions of Schools as Property

As the consistency and variety of cases predicated on school affinity suggest, students and their parents and communities have different understandings of their property interests in specific school buildings than school districts and courts. Sociologists Vontrese Deeds and Mary Patillo argue that this is a natural result of schools existing in a pluralistic environment, one where a single attribute of an institution has different meanings to dif-

56. *Mullen v. Thompson*, 31 F. App'x 77, 79 (3d Cir. 2002).

57. *See Swan*, 2013 WL 4401439, at *21.

58. *Spurlock v. Fox*, 716 F.3d 383, 394 (6th Cir. 2013) (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745 (2007)).

59. 42 U.S.C. § 2000e-2(a) (2012).

60. 42 U.S.C. § 2000d; *Guardians Ass'n v. Civil Serv. Comm'n of City of N.Y.*, 463 U.S. 582, 588 (1983) (confirming SCOTUS's view that opinions in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978), which require discriminatory intent as an essential element of a claim based solely on Title VI, implicitly overruled the earlier decision in *Lau v. Nichols*, 414 U.S. 563 (1974), which had allowed proof of discriminatory impact to establish a Title VI violation).

61. *See, e.g., Gulino v. N.Y. State Educ. Dept.*, 460 F.3d 361, 382 (2d Cir. 2006); *Taxman v. Bd. of Educ. of Twp. of Piscataway*, 91 F.3d 1547 (3d Cir. 1996).

62. *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 584 (1979).

63. *See Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Guardians*, 463 U.S. 582 (agency regulations designed to implement Title VI allow claims declaratory and limited injunctive relief despite statutory silence).

ferent stakeholders in different contexts.⁶⁴ Examining differences between districts' and communities' understanding of whether a school is "failing," the authors find not only different definitions of "failure" among different groups, they also find that they draw on different criteria, perspectives, and even competing values to make this determination.⁶⁵ Given these differences, they conclude, a school closure could be understood as "either a successful reform or an unnecessary disruption."⁶⁶

The academic literature is replete with studies establishing the school as a public good: as a public forum for the sharing of ideas,⁶⁷ an ersatz community center,⁶⁸ a venue for providing arts for communities,⁶⁹ a provider of adult educational opportunities,⁷⁰ a facilitator of social and political capital,⁷¹ even as an anchor for improved property valuation.⁷² Notably these positive benefits accrue even for community members without children.⁷³ Often when districts engage with community values of schools, they tend to focus their efforts on these outwardly focused aspects of school-community relations.⁷⁴

These aren't however, the values that emerge from case filings and accounts as motivating communities, particularly those of color, and African Americans chief among them, to oppose school closures. The values they espouse in these moments evoke considerably more intimate, personal attachment to the physical school property.⁷⁵ Jerome Morris studied the role of "Fairview," an all-African-American school in a low-income area of St. Louis, performs in that community.⁷⁶ Similar to Vanessa Siddle-

64. See generally Deeds & Pattillo, *supra* note 1, at 475.

65. *Id.*

66. *Id.*

67. Mark Joseph & Jessica Feldman, *Creating and Sustaining Successful Mixed-Income Communities: Conceptualizing the Role of Schools*, 41 EDUC. & URB. SOC'Y 623, 627 (2009).

68. *Id.* at 646.

69. Zachary P. Neal & Jennifer Watling Neal, *The Public School as a Public Good: Direct and Indirect Pathways to Community Satisfaction*, 34 J. URB. AFFAIRS 469, 473 (2012).

70. JOY G. DRYFOOS & SUE MAGUIRE, *INSIDE FULL SERVICE COMMUNITY SCHOOLS* (2002).

71. Mark Warren, *Communities and Schools: A New View of Urban Education Reform*, 75 HARV. EDUC. REV. 133, 137 (2005).

72. Sandra E. Black, *Do Better Schools Matter?: Parental Valuation of Elementary Education*, 114 Q.J. ECON. 577, 578 (1999).

73. Neal & Neal, *supra* note 69, at 470.

74. See *supra* notes 67, 69–71 and accompanying text.

75. See John Dewey, *The School as Social Center*, in 3 THE ELEMENTARY SCHOOL TEACHER 73, 84 (1902); CHARLES L. ROBBINS, *THE SCHOOL AS A SOCIAL INSTITUTION* 230 (1918).

76. Jerome E. Morris, *A Pillar of Strength: An African American School's Communal Bonds*, 33 URB. EDUC. 584, 584 (1999).

Walker's historical analysis of African-American schools before *Brown*,⁷⁷ Morris finds that schools located in underresourced, often neglected African-American neighborhoods were successful in educating students and serving other community needs because they were seen as the primary institution for developing socioeconomic mobility in the next generation.⁷⁸ While physical proximity was a motivating factor in maintaining strong community-school bonds, Morris finds that "Fairview's" success was rooted in how it intentionally embedded itself in community life.⁷⁹ "Fairview" and its community became interdependent, with long-tenured teachers and principals having taught multiple generations of the same family and the institution being a unifying force in the community.

In what is perhaps the first in-depth qualitative study of community engagement with school closure, Ewing exposes a compelling set of community values which are rooted in the physical school property. History, of the school's founding, of its naming, and of its role in the community, as well as multi-generational legacies of attending the same schools have notable importance to community members.⁸⁰ More than any one or group of families attending a school, the affinity Ewing uncovers is of a network of families who have developed a reliance on each other as well as a network of educators for educational growth, physical and psychological safety, and preservation of limited economic opportunities.⁸¹

She, like Morris, suggests the school is a source of community autonomy, particularly in Bronzeville, which was geographically and politically isolated as a result of intentionally racist pre-Civil Rights era Chicago policies.⁸² One resident Ewing interviewed understood the neighborhood school as a source of "personal strength and resources"; as a second home.⁸³ Having converted decades of political neglect into a source of strength, the Bronzeville schools Ewing studies face new threats due to gentrification creep and new interest in their neighborhoods by the Chicago government.⁸⁴ Similar to Morris's "Fairview," community members in Ewing's study described the then last open-enrollment high school in Bronzeville, Walter E. Dyett High School, as a community "institution,"

77. See generally E. VANESSA SIDDLER-WALKER, *THEIR HIGHEST POTENTIAL: AN AFRICAN AMERICAN SCHOOL COMMUNITY IN THE SEGREGATED SOUTH* (1996).

78. Morris, *supra* note 76, at 587.

79. *Id.* at 593, 597-98.

80. Ewing, *supra* note 6, at 69, 75-76.

81. *Id.* at 84-85.

82. *Id.* at 29, 65.

83. *Id.* at 158.

84. *Id.* at 65.

informing Ewing’s analysis of its closure as a form of racialized social death inflicted on the community by CPS and the community’s response thereto as a process of “institutional mourning.”⁸⁵

III. A CASE STUDY IN CPS SCHOOL CLOSURE

A. The School-Closure Hearing

Despite laws that give students no legally protected interest in a school building, because of cases like *Zamora*,⁸⁶ that protect students from assignment to “substantially inferior” schools, Illinois law and CPS policy require a properly announced public hearing moderated by an independent hearing officer, a non-interested party, often a former judge or licensed arbiter. The hearing proceedings are transcribed and support the report the independent hearing officer must file within days of the hearing.⁸⁷ A hearing must take place at least sixty days before engaging in any proposed school action.⁸⁸ At the conclusion of the hearing, an independent hearing officer prepares a summary report and offers a non-binding recommendation.⁸⁹ One may understand the independent hearing officer’s report as akin to a report-and-recommendation of a special master or magistrate judge—ostensibly impartial, familiar with the facts to an intimate detail, and persuasive, but not binding. The “criteria for school closure” on which a hearing officer must review and report states that the CPS chief executive officer “may only propose closure if:

- (a) [t]he students impacted by the closure or boundary change have the option to enroll in a higher performing school; and (b) the resulting space utilization and boundary change will not exceed the facility’s enrollment efficiency range⁹⁰

“[S]afety and security, school culture and climate . . . family and community feedback received throughout the school year” are among addi-

85. *Id.* at 154–56.

86. *See generally* *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981).

87. *See* CHI. PUB. SCH., PROCEDURES FOR HEARINGS ON PROPOSED SCHOOL CLOSINGS, CONSOLIDATIONS, ATTENDANCE AREA BOUNDARY CHANGES, OR RESOLUTIONS 11 (2012).

88. 105 ILL. COMP. STAT. ANN. 5/34-230(a)(5) (West 2016)

89. *Id.* 5/34-230(f).

90. *See, e.g.*, BERNETTA D. BUSH, IN RE: THE MATTER OF THE PROPOSAL TO CLOSE WILLIAM H. KING ELEMENTARY SCHOOL, CHICAGO, IL: HEARING OFFICER REPORT AND RECOMMENDATIONS 4 (2013), <http://schoolinfo.cps.edu/SchoolActions/Download.aspx?fid=2763> [<https://perma.cc/Y8EP-JE7Q>]; CHERYL A. STARKS, INDEPENDENT HEARING OFFICER’S REPORT RE: PROPOSED CLOSURE OF JOHN CALHOUN NORTH ELEMENTARY SCHOOL 12 (2013), https://archive.org/stream/697018-calhoun-north-elementary-school-hearing-officer/697018-calhoun-north-elementary-school-hearing-officer_djvu.txt [<https://perma.cc/24EU-7N7R>].

tional information a CEO may consider.⁹¹ CPS administrators have an opportunity to review the report and recommendation and adjust their decision accordingly before conducting a final hearing after which the Board votes.⁹²

B. School-Closure Hearings as an Opportunity to Observe Competing Narratives in Dialogue

Despite the intended formalism and distance, these hearings, as Ewing has observed, offer a unique opportunity to observe power and political dynamics in action.⁹³ A treasure trove of data has been collected on CPS hearings by: the “Wayback Machine” digital archive,⁹⁴ which preserved many of the independent hearing officer’s reports as they appeared on CPS’s website in 2013; and the Chicago National Public Radio affiliate WBEZ, which recorded meetings and public hearings CPS held between April 6 and May 2, 2013 to decide the fates of 54 schools scheduled for closure. WBEZ has made 169 audio files containing these recordings freely available for public listening via SoundCloud and direct download.⁹⁵ For this article, I transcribed recordings for the April 9 and 11, 2013 meetings and the April 26, 2013 formal hearing discussing the proposed closure of King Elementary and the merger of its student population into Jensen Elementary Scholastic Academy (Jensen). I analyzed the hearing transcripts using a critical discourse analysis (CDA) method.⁹⁶

91. BUSH, *supra* note 90.

92. See, e.g., BARBARA BYRD-BENNETT, CHI. PUB. SCH., CLOSE JOHN CALHOUN NORTH ELEMENTARY SCHOOL AND ADJUST THE ATTENDANCE AREA OF WILLA CATHER ELEMENTARY SCHOOL 1 (2013), http://www.cpsboe.org/content/actions/2013_05/13-0522-EX13.pdf [<https://perma.cc/A8EZ-C24L>].

93. Ewing, *supra* note 6, at 63.

94. *Wayback Machine*, INTERNET ARCHIVE, <https://archive.org/web/> [<https://perma.cc/5CA7-QNS8>].

95. *CPS Public Meetings on School Closings, Turnarounds, Co-Locations 2013*, WBEZ CHI., <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings> [<https://perma.cc/QX2E-N6XJ>].

96. See Teun A. van Dijk, *Principles of Critical Discourse Analysis*, 4 DISCOURSE & SOC’Y 249, 250–51, 252, 254 (1993). Critical discourse analysis builds on semiotic (or meaning-making), thematic, and grounded theory methods by requiring the analyst to adopt and apply an explicitly sociopolitical frame one *must* search for power, dominance, and inequality within discursive moments. To the extent any such themes emerge from data, they may in fact signal cultural values, a social contract, or social cognition of inequality. CDA requires one to question the legitimacy of conditions which yield inequality, particularly exercises of power by institutions on vulnerable members or groups of society. By showing how discourse, power, and social cognition work together to yield inequality, CDA seeks to offer insight into how communications themselves contribute to reproduction of dominance and inequality. See Lilie Chouliaraki & Norman Fairclough, *Critical Discourse Analysis in Organizational Studies: Towards an Integrationist Methodology*, 47 J. MGMT. STUD. 1213, 1214 (2010). These methodological features have a unique appeal to critical legal studies, which rejects the idea that law represents a set of neutral principles in favor of a belief that law reflects the norms and interests of powerful persons in society. Compare Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73

C. Misrecognition through the Formal Hearing Process

According to the CPS procedures manual, school-action hearings are intended to proceed in a fairly formulaic fashion. The independent hearing officer begins by discussing the purpose of the hearing and introducing the CPS official scheduled to present the district's school-action recommendation and rationale. After the CPS official speaks, he or she offers members of the community opportunities to speak—for no longer than two minutes.⁹⁷ The parties are expected not to engage with each other directly. That is, the CPS official is not expected to speak directly to a community member's concern and the community member is not expected to address the CPS official in his or her personal capacity.⁹⁸ Rather, both parties are expected to engage as if it were a trial and the independent hearing officer were the fact-finding judge making an ultimate determination on the merits.

Given the legalistic nature of the meetings and hearing, there were few opportunities for community members to genuinely dialog with either CPS officials or the hearing officer,⁹⁹ an observation which frustrated Joy Clendenning, a CPS parent from another school who spoke at the April 9 meeting in support of King parents' efforts to keep their school open:

So I was at a hearing Wednesday morning downtown, and the CPS who were very high up said that these community meetings would be a chance for dialogue and conversation. Perhaps you should talk to them about that: this doesn't really feel like a dialogue or conversation.¹⁰⁰

CPS transportation director Paul Osland, who moderated the April 9 meeting, offered perfunctory thanks, never substantively addressing the community's need to be heard. In fact, other than Osland's occasional comments that the transportation plan provided busing to Jensen for currently enrolled King students, CPS's sole contribution to both meetings and hearing was providing its two-minute-long pre-packaged position on the

HARV. L. REV. 1, 9–10 (1959) (the archetypical legal scholarship understanding law as embodying a set of transcendent, content neutral principles which may and should be applied evenly), with Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1515 (1991) (describing critical legal studies as a “political location” that understands law as reflecting societal power dynamics and its mission as the decoupling of law from said norms).

97. CHI. PUB. SCH., *supra* note 87; Ewing, *supra* note 6, at 63.

98. CHI. PUB. SCH., *supra* note 87.

99. *Accord* Ewing, *supra* note 6, at 64 (April 9, 2013 Meeting; April 11, 2013 Meeting; April 26, 2013 Hearing).

100. See, e.g., *Testimony of Joy Clendenning, CPS Proposed Closing: King-Jensen Community Meeting*, SOUNDCLOUD (Apr. 11, 2013), <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings> [<https://perma.cc/3N7F-ENTN>].



district's proffered justification for closure: underutilization and underperformance.

Together with the remarks of community members, many of whom spoke multiple times to convey the same messages, each time with greater emphasis and passion, suggest that the King community felt increasingly less heard with each speaker; that the dispassion from CPS in the face of their growing passion. Perhaps the apogee of their feeling unheard is exemplified best in the late-in-meeting testimony of King parent Marlene Edwards. Edwards, who earlier had spoken briefly—and uncomfortably—about safety issues, rose to ask with urgency, “are y’all really listening to what we are saying? Is it going in one ear out the other? Are we up here for show? I just want to know.”¹⁰¹

As Edwards's and Clendenning's comments example, community members sought first for CPS to recognize them. This plea for institutional recognition, Fraser (2008) and Fay (2015) might argue, emerges from the power positions the actors occupy—Illinois law vests CPS with the sole decision-making power in school actions¹⁰²—and showcases the unnecessary of CPS to consider either the speakers or their positions in reaching its decision. Osland's perfunctory responses, and his repeated comment, almost in mantra, that his job is to “receive input and take it back,” to “take the question back and document it”¹⁰³ misrecognizes community speakers in two ways. First, by not engaging them in the substance of their opposition to the proposed school action, Osland signals that their comments do not warrant real-time response. Second, his inability to answer community speakers underscores the absence at these meetings of decision-makers, a signal that the proposed school actions, which are so important to the community, are of relatively lesser importance to CPS's day-to-day operations as board members and CEO Byrd-Bennett might understand them.

Further supporting this analysis, speaker after speaker—parents, students, teachers, and community leaders—spoke of safety issues; that the proposed reassignment of King students to Jensen would require elementary school students to walk into rival gang territory past abandoned build-

101. See, e.g., *Testimony of Marlene Edwards, CPS Proposed Closing: King-Jensen Community Meeting*, SOUND CLOUD (Apr. 11, 2013), <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings> [<https://perma.cc/3N7F-ENTN>] [hereinafter *Edwards*].

102. 105 ILL. COMP. STAT. ANN. 5/34-3.3 (West 2016).

103. *Comments of CPS Director of Transportation Paul Osland, CPS Proposed Closing: King-Jensen Community Meeting*, SOUND CLOUD (Apr. 11, 2013), <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings>, [<https://perma.cc/3N7F-ENTN>].

ings, halfway houses, homeless shelters, and vagrant homeless people.¹⁰⁴ It was during King parent Nancy Alvarez's testimony that Osland engaged in the only back-and-forth exchange to take place during the April 9 meeting:

Alvarez: We did take the walk [between King and Jensen]. It makes me nervous. I just think they [CPS decision makers] really need to consider (pause) taking a walk before they close it [King].

Osland: There will be a bus provided to every child that is currently at King until the last child enrolled at King graduates

Adult in Audience #1: For how long? For how many years?

Osland: Until every child

Adult in Audience #2: How many years will you provide a bus?

Osland: The commitment

Adult #1: Do you have a copy of that commitment in writing for the parents?

Following this exchange, Martin Ritter, a teacher, member of the Young High School local school council (LSC)¹⁰⁵ and of the Chicago Teachers Union, made the most direct challenge to CPS's legitimacy in the community:

Whether you promise a bus or a shuttle, that doesn't protect kids from everything. So when something negative happens to these children from King, it is on CPS's hands. It's on Mayor Rahm Emanuel's hands. Are

104. *Testimony of Nancy Alvarez, CPS Proposed Closing: King-Jensen Community Meeting*, SOUNDCLOUD (Apr. 9, 2013), <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings> [<https://perma.cc/3N7F-ENTN>] [hereinafter *Alvarez*]; *Testimony of Lakecha Green, CPS Proposed Closing: King-Jensen Community Meeting*, SOUNDCLOUD (Apr. 9, 2013), <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings> [<https://perma.cc/3N7F-ENTN>]; *Edwards, supra* note 101; *Testimony of Omari Edwards, CPS Proposed Closing: King-Jensen Community Meeting*, SOUNDCLOUD (Apr. 9, 2013), <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings> [<https://perma.cc/3N7F-ENTN>]; *Testimony of Alison Eichorn, CPS Proposed Closing: King-Jensen Community Meeting*, SOUNDCLOUD (Apr. 9, 2013), <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings> [<https://perma.cc/3N7F-ENTN>] [hereinafter *Eichorn*]; *Testimony of Nakia Pearce, CPS Proposed Closing: King-Jensen Community Meeting*, SOUNDCLOUD (Apr. 9, 2013), <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings> [<https://perma.cc/3N7F-ENTN>] [hereinafter *Pearce*]; *Testimony of Martin Ritter, CPS Proposed Closing: King-Jensen Community Meeting*, SOUNDCLOUD (Apr. 9, 2013), <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings> [<https://perma.cc/3N7F-ENTN>] [hereinafter *Ritter*].

105. In 1988, the Illinois General Assembly passed the Chicago School Reform Act, 105 ILL. COMP. STAT. ANN. 5/34-2.3 [hereinafter CSRA] (partially repealed in 1995). The CSRA created local school councils (LCSs) in all Chicago Public Schools. LCSs have the authority to: (1) approve how school funds and resources are allocated; (2) develop and monitor the annual school improvement plan; and (3) evaluate and select the school's principal. A standard LSC is composed of: six parents, two community members, two teachers, the school's principal, one non-teacher staff member or two advocates, and, for high schools, a student representative. The 1988 law also created a nominating commission which was empowered to name twelve of fifteen board of education members and influence the mayor's nomination of the remaining three. These portions, not the ones creating LCSs, were rescinded by the Chicago School Reform Amendatory Act of 1995, *id.* 5/34-1, 34-3, 34-A.

any members of the Board of Education here today? Any CPS leadership here today? Any decision-maker here today?¹⁰⁶

Earlier, when she was the second speaker to offer comment, Marlene Edwards poignantly asked: “If you say it’s good for our children, why won’t you come [here] and see what’s really good for our children?” Impeaching CPS to recognize the King school community and the people, most specifically the students it serves, she ended with, “do you know my child’s name?”¹⁰⁷

D. Misrepresentation through the Underutilization and Underperformance Narratives

Concurrent with CPS’s misrecognizing the King school community was its advancing narratives that King was both an “underutilized” school¹⁰⁸ and a Level 3 school, suggesting it was among the “lowest performing” in the district. In his April 26 presentation, CPS portfolio planner Patrick Payne walked through CPS’ utilization formula, a deterministic model that counts 77% of available classrooms as the number of home-rooms and multiplies that number by 30 to determine its “ideal enrollment.”¹⁰⁹ The “enrollment efficiency range” is the ideal enrollment plus or minus 20%.¹¹⁰ I present both model for illustrative purposes below:

$$IDEAL\ ENROLLMENT = [(ALL\ CLASSROOMS) * 0.77] * 30\ STUDENTS$$

$$ENROLLMENT\ RANGE: IDEAL\ ENROLLMENT * 1.20, IDEAL\ ENROLLMENT * 0.80$$

From the very first speaker, King school community members challenged these narratives. These challenges took two forms. Exemplifying the first, King parent Nakia Pearce referred to CPS’s own reports:

Our school is supposed to be closed because they say we are underutilized. But that is so not the truth. I have a utilization report if you guys would like to go over it . . . our building is being utilized 100%.¹¹¹

. . . .

106. Ritter, *supra* note 104.

107. Edwards, *supra* note 101.

108. BUSH, *supra* note 90, at 2.

109. Testimony of Patrick Payne, *Public Hearing on King-Jensen*, SOUND CLOUD (Apr. 26, 2013), <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings> [https://perma.cc/3N7F-ENTN] [hereinafter Payne].

110. *Id.*

111. Pearce, *supra* note 104.

Academic-wise, the new common-core test, the NWEA, we're number one in reading, number five in math. So I was wondering why our school would be closed because academically we're fine¹¹²

By challenging CPS to support their narrative using their own facts, Pearce, the first speaker, calls into question the legitimacy of the school action. If CPS's own data suggest full utilization and high performance, then there would be no justifiable means to close the school under state law. In a legal sense, what Pearce is doing is attacking CPS's proffer as pre-textual, begging the question of whether King's closure would be predicated on some other factor unrelated to students' performance. Whether her comments persuaded CPS, they do provide the foundation for a stream of comments that shift away from misrepresentation to maldistribution as the meetings continue.

Nancy Alvarez's comments exemplify the second type of challenge—that CPS is not looking at the entire picture when evaluating utilization or performance:

King school offers a lot of programs. They only bring up the negative. They offer a lot of things like preschool programs, full-day kindergarten programs, morning and afterschool programs for kids who need help. My daughter actually has a bilingual program.¹¹³

Parents, particularly those with experience on the King LSC, spoke in increasingly greater detail during the hearing about what utilization and performance *actually* means on the ground at King and how the community, and not CPS, has a better understanding of how to configure local school property to best benefit their children. An unidentified parent stated that King has 100% parental involvement (compared to Jensen, which has only 93.4%):

That means you have active parents that are involved with the school. Why would you close a school that is performing better than a receiving school? This school has been jamming with no resources.¹¹⁴

112. *Id.*

113. Alvarez, *supra* note 104.

114. *Testimony of Unidentified Parent, CPS Proposed Closing: King-Jensen Community Meeting*, SOUNDCLOUD (Apr. 9, 2013), <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings> [<https://perma.cc/3N7F-ENTN>].

E. Maldistribution through Abandonment and Divestment

The dovetailing of the misrepresentation narrative into the maldistribution narrative should not be overlooked. Taken at their face, these comments converge at King and its community thriving despite not having been provided with resources CPS provides other schools. It is here, at this convergence, that one most clearly understands the level of community investment in King and how the experience of school closure is a tangible property loss. In his comments during the April 11 meeting, 2nd Ward Alderman Robert Fioretti remarked: “King has worked with limited resources but . . . has obtained huge support and donations from the corporate community and donors who want to support the great work at the school.”¹¹⁵ Further underscoring the property interests of the community in the school, King principal Sheldon Flowers begins his remarks by saying, “I am here to speak as far as I was hired by the Local School Council to take care of their students”¹¹⁶ Here we have a CPS employee—paid by CPS—situating school ownership and his authority to do his job with the community and not with CPS. Flowers extends a CPS abandonment narrative to attack not only CPS’s authority to close the school, but also its ability to determine utilization, stating:

No one from CPS, no officials from CPS, has come and talked to the principal about the school, about the closing of the school. I mean to go around the building and look at what is utilized and what is not utilized. The conversation has never taken place.¹¹⁷

This framing of CPS as having abandoned King sounds in inchoate ways like a claim of abandonment necessary for a second agent to begin adversely possessing real property. Like adverse possession, I argue that framing CPS as having abandoned King and the community as having taken ownership during this abandonment period is necessary to shift, within the community, notions of property ownership in the school from the district to the community.

As the Court in *Parents United for Responsible Education v. Board of Education of City of Chicago* explained, “LSCs are designed to operate largely independently, and the overarching goal of the legislature in creat-

115. *Testimony of Second Ward Alderman Robert Fioretti, CPS Proposed Closing: King-Jensen Community Meeting*, SOUND CLOUD (Apr. 11, 2013), <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings> [<https://perma.cc/3N7F-ENTN>].

116. *Testimony of Principal Sheldon Flowers, CPS Proposed Closing: King-Jensen Community Meeting*, SOUND CLOUD (Apr. 11, 2013), <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings> [<https://perma.cc/3N7F-ENTN>] [hereinafter *Flowers*].

117. *Id.*

ing LSCs is to ‘make the individual local school the essential unit for educational governance and improvement and to establish a process for placing the primary responsibility for school governance and improvement . . . in furtherance of [priority] goals in the hands of parents, community residents, teachers, and the school principal at the school level.’”¹¹⁸ This semi-autonomous structure might suggest LSCs and the communities they represent to have independent property interests in a school apart from those of a district. However, the CSRA clarifies that district-level decisions, including the opening and closing of schools remains with the board of education¹¹⁹ Thus, the adversarial nature of the community’s would-be possession claim is made difficult by the CSRA creating LSCs as, effectively, local agents of possessory, but not dispositional authority.¹²⁰ Further, to the extent LSCs operate to manage district-allocated funds, one might find it difficult to understand the community as adverse to CPS. However, as Alderman Fioretti eluded and parent Nakia Pearce detail with respect to the school library, the King LSC and community have sought independent funding to make improvements to the school:

We actually were funded by American Girl to redo our entire library: \$50,000. CPS decided that they couldn’t do it; we couldn’t get it done. They actually stopped the process when they didn’t have to pay a dime for anything. We’ll start there. Our computer lab was redone, but we have the oldest computers that were first made. We are a well-performing school and we have things that the kids can’t utilize the proper way. You guys funded new computers in many other schools. We’re still working with the ones that came out in 1989. We don’t have iPads, tablets, or anything for our children, but our performance level is where it should be. And I don’t understand why you guys want to close our school.¹²¹

Former King student Yesenia Ortiz makes, perhaps, the most compelling thesis statement on this point:

If you want something to fail, you neglect it. That’s precisely what has been done to many Chicago Public Schools. They have been neglected. Although CPS has neglected King Elementary over the years, parent’s teachers, staff families of the students, residents in the area and students themselves have done an excellent job in maintaining morale, education

118. *Parents United for Responsible Educ. v. Bd. of Educ. of City of Chi.*, 956 N.E.2d 10, 12 (Ill. App. Ct. 2011) (alteration in original) (quoting 105 ILL. COMP. STAT. ANN. 5/34– 1.01 (West 2008)).

119. *See* 1988 Ill. Legis. Serv. P.A. 85-1418, ch. 122, para. 34–18 (West).

120. *Clarke v. Cmty. Unit Sch. Dist.* 303, 36 N.E.3d 838, 844 (Ill. App. Ct. 2014).

121. *Pearce*, *supra* note 104.

and teaching the children discipline, respect for authority, also never accepting failure.¹²²

Complementary to the abandonment narrative, and perhaps more easily isolated from the CPS–LSC relationship, emerges a divestment narrative. Alison Eichorn and Martin Ritter, both CPS teachers not assigned to King, raise in opposition to *any* CPS schools closing. Eichorn critiques CPS’s history of divestment:

What’s most alarming about this process—I’m a fifth-year teacher and it’s disgusting for me—that CPS wants to claim in this sheet (on the third page) there’s going to be air-conditioning, there’s going to be [a] library, there’s going to be technology, there’s going to be iPads. Why is this new? It’s 2013! Why is this new? Why is this something that you’re pitting parents against whether or not to keep their community or get an education that their child deserves? Why is this a fight between getting community or you’re going to get these brand new things that the district should have funded for years now.¹²³

For his part, Ritter asks, “why are [Learn Charter Schools, which has a campus near King] getting money, and input, and investments when you’re proposing to divest from King and move those kids to Jensen?”¹²⁴ In so doing, he makes a claim that the maldistribution effected by closing King is the end goal; the misrepresentation of King’s utilization and misrecognition of community stake in the school are only means to this end. Indicting the entire process, Ritter finally calls the question of whether CPS has apparent authority—irrespective of its legal authority—to close King, asking: “Does anybody who’s making any decisions or facilitating this process live anywhere near King or know of its community? You see, this is why there is such distrust between the City of Chicago, its children, its parents, its students, and definitely its teachers to this whole process.”¹²⁵

Taken together, my findings echo Ewing’s and Morris’s separate findings that a belief exists within certain African American communities that their neighborhood schools belong to the community.¹²⁶ These schools are unique institutions which have been carefully curated and cultivated through sustained investment of resources—educational, financial, and socioemotional. According to these communities these schools are not, as

122. *Testimony of Yesenia Ortiz, Public Hearing on King-Jensen*, SOUNDCLOUD (April 26, 2013), <https://soundcloud.com/wbez/sets/cps-public-meetings-hearings> [<https://perma.cc/3N7F-ENTN>] [hereinafter *Ortiz*].

123. *Eichorn*, *supra* note 104.

124. *Ritter*, *supra* note 104.

125. *Id.*

126. *See generally* Ewing, *supra* note 6; Morris, *supra* note 76, at 599.

the law understands them, sub-entities of a larger CPS system which may be opened, closed, or changed by the whim of distant, unaffected, disinterested board. I find this belief informs an expectation that a community school should not be closed—by social outsiders—without a good reason, a reason which must be situated within a logic that understands the school as fundamentally “good.”¹²⁷ This is the representation the King school community sought, and their right to express this belief and to be taken seriously is the recognition they sought. In the absence of this recognition and representation, any such school closing would be understood by affected communities as a maldistributive property taking, a deprivation of access rights to an institution they understand as one they own. When district leaders ignore community property interests and close a school asserting quantitative metrics that both ignore the fundamental goodness of the school being discussed and, as many students, teachers, and parents argue, inaccurately depict students’ learning,¹²⁸ the school-property taking becomes unjust and illegitimate as experienced by community members, and is, thus, an abnormal justice moment.¹²⁹

IV. CPS SCHOOL CLOSURE AS A DIGNITY TAKING AND COMMUNITY DESTRUCTION

Atuahene defines dignity taking as a property dispossession rooted in “a larger strategy of dehumanization and infantilization.”¹³⁰ Atuahene describes a dignity taking as involving an involuntary property loss concurrent with either dehumanization or infantilization.¹³¹ She further defines “infantilization” as “the restriction of an individual or group’s autonomy based on the failure to recognize and respect their full capacity to reason.”¹³² Atuahene extends dignity taking to “community destruction,” “when a community of people of people is dehumanized or infantilized, involuntarily uprooted, and deprived of the social and emotional ties that define and sustain them.”¹³³ In her seminal work, Atuahene used the exam-

127. See generally Ewing, *supra* note 6; Morris, *supra* note 76, at 586; SIDDLE-WALKER, *supra* note 77.

128. Accord Ewing, *supra* note 6.

129. Cf. Fay, *supra* note 15.

130. Atuahene, *supra* note 16, at 911.

131. *Id.*; see also Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework to Understanding Involuntary Property Loss and the Remedies Required*, 41 LAW & SOC. INQUIRY 796, 817 (2016).

132. Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. L. & SOC. SCI., 171, 178 (2016).

133. *Id.*



ple of South African land dispossessions to illustrate how a dignity taking is more than an unjust property taking. She identifies how apartheid-era South Africa targeted for takings land known to have psychic worth to communities.¹³⁴ More than an economic asset more easily defined as a property interest, Atuahene shows how social investments, particularly those made by multiple actors across generations, infuse land with dignity, a property interest largely unrecognized by legal systems derived from English common law.¹³⁵

I argue here that the abnormal justice moments effected by CPS closing schools in the manner it did constitute a dignity taking, with community destruction being a consequence. Though required to hold hearings by state law,¹³⁶ CPS has unconstrained, unregulated authority to set the terms of hearings. It is CPS, not Illinois state law, that devise the report-and-recommendation scheme that gives the appearance, but not the experience of due process.¹³⁷ Further, there are neither administrative nor judicial measures to appeal CPS's conduct of the hearing or its decisions.¹³⁸ It is against this backdrop that CPS officials were able to misrecognize and ignore community concerns with impunity. This disregard, the refusal to engage substantively with speakers' concerns—Marlene Edwards's plea that she be heard was most poignant in this regard—is a type of infantilization. CPS devised and adhered to a process that denied the King school community the autonomy it sought in determining their school's future, the opportunity to actively participate in the decision-making process, and even the ability to engage with decision makers regarding how they might arrive at their decisions.

The only person with quasi-decision-making authority community leaders engaged with was Judge Bernetta D. Bush, the retired Cook County district judge who conducted the April 26, 2013 formal hearing. Though in preparing her report, Judge Bush remarked to have reviewed transcripts from all three meetings, she accepted CPS's utilization and performance claims as stated without acknowledging the community's alternate proffer.¹³⁹ This failure even to acknowledge the King school community as having plausible reasons for maintaining their school serves to reinforce the infantilization the community experienced during the hearings.

134. ATUAHENE, *supra* note 16, at 42–43.

135. *See id.* at 43.

136. *See Flowers*, *supra* note 116.

137. CHI. PUB. SCH., *supra* note 87.

138. *See* Swan v. Bd. of Educ. of City of Chi., No. 13-C-3623, 2013 WL 4401439, at *4 (N.D. Ill. Aug. 15, 2013).

139. *See, e.g.*, BUSH, *supra* note 90.

Judge Bush, however, recommended that King remain open after considering the numerous safety issues raised by community members and political leaders. Specifically, she found that CPS's plan was generic and improperly tailored to the specific issues the community raised.¹⁴⁰ It was on those grounds—that one might recognize students as having an interest in safety—and not the community investment in King Elementary that she based her recommendation against closure.¹⁴¹ CEO Byrd-Bennett responded to Judge Bush's report and recommendation in a two-page order containing, most notably, the following conclusory sentence unsupported by any allegation or statement of fact: "The hearing officer exceeded the scope of her authority by failing to apply the law and Guidelines as promulgated."¹⁴² By this declaration, Byrd-Bennett added a third layer of infantilization on the King school-closure proceedings. The infantilization the King school community experienced during the meetings and hearing already having been compounded by their dismissal by omission in Judge Bush's order is further compounded by the second-derivative infantilization experienced by the CPS CEO's refusal to recognize a judicial officer's capacity to reason.

It is important to note that the subsequent closure of King Elementary caused by Byrd-Bennett's action might have been harder to accomplish had she not addressed Judge Bush's report and recommendation.¹⁴³ In a real sense, Judge Bush had to be infantilized, and in her turn, Judge Bush had to infantilize the King school community, to accomplish the school closure. Having closed the school, Byrd-Bennett order required that "King's Local School Council . . . be dissolved . . . upon the closing of King."¹⁴⁴ And so, as a last order of business, the LSC through which the community exercised its property interests—through physical property improvements and self-governance—is the last property to be lost through the order.

140. *Id.* at 25.

141. *Id.* at 25–26.

142. BARBARA BYRD-BENNETT, CHI. PUB. SCH., CLOSE WILLIAM H. KING ELEMENTARY SCHOOL AND ASSIGN THE ATTENDANCE AREA OF WILLIAM H. KING ELEMENTARY SCHOOL TO JENSEN ELEMENTARY SCHOLASTIC ACADEMY (2013), http://www.cpsboe.org/content/actions/2013_05/13-0522-EX29.pdf [<https://perma.cc/SXC4-LNSH>].

143. Any such difficulty would have arisen from the appearance of not adhering to agreed-upon procedures under which CEO Byrd-Bennett was required to address Judge Bush's report. To be clear, she was under no *legal* obligation to do so. Illinois courts have adopted a position taken by Oklahoma courts in the late 1930s that a board of education "may act within its powers *without the need of making any finding of the reason or necessity*," *Tyska ex rel Tyska v. Bd. of Educ. Twp. High Sch. Dist. 214, Cook Cty.*, 453 N.E.2d 1344, 1354 (Ill. App. Ct. 1983) (emphasis added) (citing *Brooks v. Shannon*, 86 P.2d 792 (Okla. 1939)), so long as the decision-making process is arguably plausible. *See also infra* note 150.

144. BYRD-BENNETT, *supra* note 142.

Stepping away from this admittedly abstract construct of community as property, emerging reports suggest the King school community, as well as others affected by school closures, are experiencing destruction. The King school site remains shuttered and the community which once enjoyed access to the physical and meta-physical property of the school can no longer access it. The King school closure phenomenon has ravaged the south, west, and south-west sides of Chicago which experienced the 2013 school closures. None of the former community schools have re-opened; forty of the buildings remain shuttered and for sale. The generational infusion of talent, concern, and care for educational spaces was taken in an instant by governmental action leaving behind an educational desert in many of Chicago's Black and Latinx communities, the effects of which we have yet to fully observe.

V. CONCLUSION

The sum of this article raises the question: what should be done? Are there ways in which the law might adjust to recognize community property interests in school buildings? *Should* the law adjust to recognize these interests, and with what consequences? Setting aside the idea that the right to education might eventually prove to be fundamental under the Due Process Clause of the Fourteenth Amendment, there are avenues under current legal frameworks which, if developed, might prove beneficial to school communities.

In *Swan*, parents from the forty-nine schools which CPS approved for closure filed suit in federal court.¹⁴⁵ Though ultimately denying parents' requests to keep open the forty-nine Chicago schools for lack of dispositive evidence, the *Swan* court did provide an elaborate analysis of the evidentiary standards it would require parents to meet in order to successfully win a Title VI disparate-impact¹⁴⁶ injunction:

Establish whether the utilization criterion is a plausible reason for a district to have closed a school. The Court suggested one do this by controlling for school-level maintenance costs and distance between open-enrollment schools;

“Show a statistical imbalance” between the racial composition of all schools eligible for closure under the utilization criterion and the racial composition of the schools chosen for closure;

145. *Swan v. Bd. of Educ. of City of Chi.*, No. 13-C-3623, 2013 WL 4401439, at *4 (N.D. Ill. Aug. 15, 2013).

146. *Contra* 42 U.S.C. §§ 2000d, 2000e-2(a) (2012).



Establish a statistical imbalance between students of color and white students who experienced school closures, all things considered; and
Establish a link between experiencing school closure and adverse outcomes, including lowered school performance, greater distance traveled from home to school, and greater risk of personal safety.¹⁴⁷

As one might observe, the first criterion, in particular, echoes strategies King parents used in their attempts to persuade Judge King against recommending closure. The value of statistical controls, which might improve the mathematical comparisons, is raised, though, not one which identifies differences in utility among classrooms or one that accounts for prior CPS approval of what it would later term “underutilization.” The fourth criterion, which somewhat mirrors community attempts to shift how one measures performance and school value to the community, has received a fair amount of attention recently.¹⁴⁸ The judge in *Swan* relied on findings from closure-opposing plaintiffs’ expert which could not conclusively establish that closures would yield negative academic outcomes to deny the injunction.¹⁴⁹ Empirical studies exploring the relationship between school closure and academic outcomes might prove beneficial in this regard.

Appeals to state-court options seems to be the most logical next step, but procedural hurdles there are nearly impossible. State courts are generally reluctant to interfere with school-board actions unless they are found “palpably arbitrary, unreasonable, or capricious.”¹⁵⁰ The most expansive reading of arbitrary, unreasonable and capricious would review an action “which lacks a rational basis or which was made in bad faith.”¹⁵¹ Where there are any facts which could possibly support a school board’s action, state courts are unlikely to even consider review. Some states, like Minnesota, allow for extraordinary writs to challenge school-board decisions.¹⁵² Even then, higher standards of evidence—in Minnesota, the “substantial evidence” standard—appear to apply in review of administrative actions such as school closures.¹⁵³ Illinois law does not currently adopt a Minnesota-like procedural framework for appealing school closures in the

147. *Swan*, 2013 WL 4401439, at *20, *24.

148. See generally de la Torre et al., *supra* note 21.

149. *Swan*, 2013 WL 4401439, at *29.

150. *Tyska ex rel Tyska v. Bd. of Educ. Twp. High Sch. Dist. 214, Cook Cty.*, 453 N.E.2d 1344, 1350 (Ill. App. Ct. 1983); see also *Cty. Sch. Bd. of Spotsylvania Cty. v. McConnell*, 212 S.E.2d 264, 267–268 (Va. 1975); *Schaefer v. Tea Area Sch. Dist.* 41–5, 871 N.W.2d 838, 842–43 (S.D. 2015).

151. *Lunsford v. Fairfax Cty. Sch. Bd.*, 3 Va. Cir. 389, 389 (1985) (quoting *Gen. Research Corp. v. United States*, 541 F. Supp. 442, 447 (E.D. Va. 1982)).

152. *Moberg v. Indep. Sch. Dist. No. 281*, 336 N.W.2d 510, 519 (Minn. 1983) (citing *W. Area Bus. & Civic Club v. Duluth Sch. Bd. Indep. Dist. No. 708*, 324 N.W.2d 361, 365 (Minn. 1982)).

153. *Id.* at 519 (citing *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 414 (Minn. 1981)).

courts;¹⁵⁴ its administrative review procedures do not allow for action by a collective—as only *individual* parties who have objected to or spoken at an administrative hearing have standing to seek judicial review of a school-board decision.¹⁵⁵ Advocates for empowering school communities might consider lobbying for changes in the Chicago School Reform Act which recognize the interests of an LSC (or other collective groups) in judicial review of administrative school actions.

Substantively, Chicagoans currently have the skeletal framework for what could be expanded to legal recognition of community property interests in a school, which, in turn, might imbue certain powers against property alienation. The CSRA already invests in local school councils a considerable amount of self-governance similar parent- and community-groups (think parent-teacher associations) do not enjoy.¹⁵⁶ If Chicagoans and those concerned about public education were to push for changes in state law that invested the LSC with co-ownership rights in a school, the power dynamics undergirding the 2013 school closures would shift considerably. In such a scenario, one might imagine an LSC similarly situated to voters in a Kansas high-school district slated for consolidation with a neighboring district. The state supreme court in *Welch v. Board of Education of Unified School District, No. 495* allowed their application for writ of mandamus to reopen their closed high school to proceed because these voters had a clearly articulated property interest in the school which they had preserved by maintaining the facility.¹⁵⁷ One might imagine an LSC with the bargaining power to pursue equitable funding and resources allocation as well as negotiate the terms of school actions, if not prevent them from happening.

In the most likely event that laws constituting LSCs or defining community property interests in schools do not change, *Parents Involved* offers some hope.¹⁵⁸ Though often discussed as the death knell for court-enforced school desegregation, *Parents Involved* might also be understood as the Court's restoring the primacy of neighborhood schools in school law. The law has never been entirely unsympathetic to community affinity for a public school building, in particular for a neighborhood school. While stu-

154. Cf. *Good Sch. Missoula, Inc. v. Missoula Cty. Pub. Sch. Dist. No. 1*, 188 P.3d 1013, 1018 (Mont. 2008).

155. 105 ILL. COMP. STAT. ANN. 5/3-10 (West 2016); *Robinson v. Reg'l Bd. of Sch. Trustees, Randolph Cty.*, 474 N.E.2d 708, 710 (Ill. App. Ct. 1985).

156. *Ortiz*, *supra* note 122.

157. *Welch v. Bd. of Educ. of Unified Sch. Dist., No. 495, Pawnee Cty.*, 512 P.2d 358, 359 (Kan. 1973).

158. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745 (2007).

dents and their families and communities have, as of late, no legally recognized property interest in a school, federal courts have long recognized that:

The phrase “neighborhood school” evokes more than geographical proximity to a student body. It prompts thoughts of a community center; a facility which represents the characteristics and qualities of the people that surround it.¹⁵⁹

Eventually, it might bear to reason that district decisions to divest certain neighborhoods of local schools while providing them more readily to others would violate guarantees of equal protection. I remind that the U.S. Supreme Court has not yet weighed in on this question or what might constitute satisfactory evidence of discriminatory impact or intent in district school-closure decisions should a Title VII-style claim ever prove cognizable in such a case.¹⁶⁰ The Sixth Circuit Court of Appeals is the only federal court to date to have evaluated school closures on the merits.¹⁶¹ In *Spurlock*, the Sixth Circuit found that disparate impact evidence *might* also evidence discriminatory intent if the policy’s effect is “overwhelmingly or suspiciously concentrated upon [minority] citizens,”¹⁶² which offers a small doorway, even if ever-so-slight, through which to begin charting a legal path.

159. *Mitchell v. McCunney*, 651 F.2d 183, 187–88 (3d Cir. 1981); Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 (1974) (establishing as “the policy of the United States that . . . the neighborhood is the appropriate basis for determining public school assignments”); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 491 (1982) (Powell, J., dissenting) (“[I]n particular, a neighborhood school policy and a decision *not* to assign students on the basis of their race, does not offend the Fourteenth Amendment.”).

160. *See Parents Involved*, 551 U.S. at 701 (SCOTUS’s most recent ruling on K-12 school assignment involved racial preferences in school assignments).

161. *Compare Spurlock v. Fox*, 716 F.3d 383, 394 (6th Cir. 2013), *with Smith v. Henderson*, No. 14-7120, 2015 WL 5237333, at *1 (D.C. Cir. Aug. 19, 2015) (D.C. Circuit dismissing appeal without substantive review of the merits).

162. *Spurlock*, 716 F.3d at 402. *But see* *L.E.A. v. Bedford Cty. Sch. Bd.*, No. 6:15-CV-00014, 2015 WL 4460352, at *3 (W.D. Va. July 21, 2015) (applying the *Spurlock* standard, but rejecting plaintiffs’ disparate impact claims despite there being “a more significant amount of minorities” affected because the school to be closed was nearly seventy percent white).

